STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP1720-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ROBERT JAMES POPE, JR.,

Defendant-Respondent-Petitioner.

ON PETITION TO REVIEW A DECISION OF THE COURT OF APPEALS REVERSING AN ORDER GRANTING A NEW TRIAL, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. CONEN, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-APPELLANT

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ISSUES PRESENTED

1. Did the circuit court err when it ordered a new trial because, after the passage of 21 years from Robert James Pope Jr.'s conviction to his filing for direct postconviction relief, the transcripts of Pope's 1996 double-homicide trial could no longer be produced?

The circuit court ordered a new trial because the trial transcripts 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 arguably reversible trial error(s) occurred that the transcripts would have supported.

The State appealed. The court of appeals reversed the new trial order and reinstated Pope's conviction. It held that the circuit court's decision was directly contrary to *Perry*.

This Court should affirm.

2. If this Court agrees with Pope that *Perry* does not apply to a situation where most or all of the trial transcripts are missing, making reversal automatic, should this Court vacate the parties' stipulation to reinstatement of Pope's right to direct review to allow the State to raise the laches affirmative defense to his habeas corpus petition?

The trial court held that the State waived its laches defense by stipulating to reinstatement of Pope's right to direct review.

The court of appeals did not reach the State's laches argument, having already reversed the trial court on the ground that Pope failed to make the threshold showing required by *Perry*.

If it reaches this issue, this Court should vacate the stipulation and remand to the court of appeals directing it to address the State's laches argument.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This Court has already scheduled oral argument. The State assumes that this Court will publish its decision because the issues presented are significant.

STATEMENT OF THE CASE

On May 31, 1996, a Milwaukee County jury found Pope guilty of two counts of first-degree intentional homicide while armed, as a party to the crime. (R. 18.) According to the complaint, Pope and four others—Derek Kramer, Israel Gross, Dax Reed, and Jennifer Radler (Pope's girlfriend at the time)—plotted to murder Joshua Viehland for supposedly threatening a friend (Cristina Chapman). 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 Street 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 Street address. (R. 3, A-App. 109–15.)

Gross and Pope were the only ones to go to trial. A jury took 25 minutes to find Gross guilty. (A-App. 149–53.)[1] 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 sentenced

[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. (A-App. 140–163.)

to life with parole eligibility after 25 years. (A-App. 154–55, 161.) Reed pled guilty to one count of murder and was sentenced to life with parole eligibility set at 13 years and 4 months. (A-App. 145–46, 161.) Pope was still at large when the criminal complaint was filed in January 1996. (A-App. 156–58.) He was finally arrested on January 29, 1996. (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 on July 2, 1996. (R. 26; 80:39; A-App. 162–63.)[2]

Pope and his trial 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. 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 ordering the trial transcripts and for the appointment of counsel. Wis. Stat. § 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 trial counsel." (R. 25.) Trial counsel assured the court that he would file the notice of intent. (R. 80:40.) The notice had to be filed by July 22, 1996. The notice was never filed.

Nothing happened for 14.5 months.

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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.)

On September 16, 1997, Pope filed in the court of appeals a pro se motion to extend the time to file his notice of intent to pursue postconviction relief. (A-App. 116–17.) He offered no excuse for the delay. On September 25, 1997, the court denied the motion because Pope failed to show good cause for not filing the notice of intent within 20 days of sentencing, or at any point in the intervening 14.5 months. (R. 27, A-App. 120–21.)[3] In so holding, the 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 his trial attorney, Michael Backes, was ineffective for not filing a notice of intent to pursue postconviction relief. (R. 28.) The court denied the motion on October 20, 1997 (R. 29), and Pope filed a notice of appeal on November 5, 1997 (R. 33). In an order issued on December 8, 1997, the court of appeals remanded to the circuit court to determine whether Pope was entitled to waiver of transcript preparation fees. (R. 30.) On December 15, 1997, the circuit court held on remand that Pope was not entitled to free transcripts because he "has not set forth an arguably meritorious claim for relief." (R. 31:1.)

On December 23, 1997, the court of appeals 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 on January 2,

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[3] The court of appeals 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) (the court may extend the deadline "for doing any act" either "upon its own motion or upon good cause shown by motion").

1998, advising the court 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 on January 20, 1998, stating: "All transcripts necessary are already on file." (A-App. 123.) The circuit court clerk transmitted the trial record including the transcripts of the preliminary and sentencing hearings. (R. 35:2; 78; 80.)

Pope argued on appeal that the circuit court erred in denying his motion to reinstate his direct appeal. Pope notified the court that he would voluntarily dismiss his appeal if it would reinstate his direct appeal rights. (R. 40:2, A-App. 125.) On February 3, 1999, the court issued an order denying Pope 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 1997 for his failure to show good cause, the court stated:

> 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.) The 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.

On March 5, 1999, the court affirmed the circuit court's order denying Pope's section 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 did not provide any explanation for his failure to file the notice of intent after having "been properly informed 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 did 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. On March 10, 1999, this Court dismissed the petition as untimely. (R. 37, A-App. 131.) This Court held the petition was nothing more than Pope's belated challenge to the court of appeals' September 25, 1997, order denying his 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. This Court again denied review on June 7, 1999. (*See* R. 42:2.)

Nothing happened for four years.

On June 20, 2003, Pope filed another Wis. Stat. § 974.06 motion in the court of appeals 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 [State Public Defender]." (R. 41:2.) The 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.)

Nothing happened for 11 years.

On July 21, 2014, Pope filed a *Knight* petition for a writ of habeas corpus in the court of appeals[4] to reinstate his right to direct review of his conviction on the ground that trial counsel was ineffective for not filing a notice of intent to pursue postconviction relief. (R. 43.) On March 9, 2015, the court ordered the State to respond. (R. 45.)

The State filed its response on May 21, 2015. (R. 44.) On September 23, 2015, Pope's trial attorney, Michael Backes, submitted an affidavit. (R. 47.) Backes stated that he could not recall much of his representation of Pope and was unable to locate his file. (R. 47:1.) Backes insisted it has always been his practice to respond to every letter written by a client, or by anyone else regarding a client. Backes added it was "inconceivable" he would not have responded to a letter from Pope. (R. 47:2.) Backes located one letter he wrote to Pope on December 28, 2006, in response to a letter from Pope, discussing a visit they had at Green Bay Correctional Institution. During that visit, Backes advised Pope he had "no specific recollection" of an issue Pope raised and the "case was so old that the file was shredded" recently. (R. 47:1, 3.) Backes also explained that had Pope raised the issue closer to sentencing, "I would have had a much better memory of the

[4] In *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), this Court established the procedure for challenging the effectiveness of appellate counsel by filing a habeas corpus petition in the court of appeals. This procedure is used to challenge the effectiveness of trial counsel for not filing the notice of intent. *State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶¶ 38–44, 354 Wis. 2d 626, 847 N.W.2d 805.

entire matter and, again, would have cooperated fully with insuring that your appellate rights were preserved." (R. 47:4.)

Backes stated in his 2006 letter that he could not recall if 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.)

On November 13, 2015, the court of appeals remanded to the circuit court for a fact-finding hearing to determine why a notice of intent was not filed. Counsel was appointed for Pope. (R. 48.) The hearing, at which Backes and Pope testified, was held on April 1, 2016. (R. 79.) Backes could not recall much about the case and shredded his file years earlier. Backes said his usual practice was to immediately file a notice of intent with the clerk either in person or by mail; 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 a motion for postconviction relief and he unsuccessfully tried to contact Backes after sentencing to pursue direct review. (R. 79:36–44.)

The circuit court (Honorable J.D. Watts, presiding) issued findings of facts on 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. (*Id.*)

Based on those findings, counsel for the State and Pope stipulated on August 16, 2016, that Pope's right to direct review should be reinstated. (R. 60, A-App. 135–37.) On September 29, 2016 (misdated 2015), the court of appeals ordered that Pope's right to direct review be reinstated. (R. 62; 63; A-App. 138–39.)

On March 7, 2017, Pope filed his motion for direct postconviction relief under Wis. Stat. § (Rule) 809.30. (R. 64.) Pope's appointed counsel discovered for the first time that: (a) no trial transcripts had ever been ordered or prepared; and (b) the court reporters destroyed their notes in 2006. (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, opposed the motion. It argued that Pope failed to allege any colorable claim of reversible trial error that the missing transcripts would have supported. (R. 68:1–2.) The State also argued that the new trial motion was barred by laches. (R. 68:2.)

The circuit court, the Honorable Jeffrey A. Conen presiding, ordered a new trial at a hearing held on July 19, 2017. (R. 81:19–24, A-App. 102–07.) It held that the State waived the laches defense when it stipulated to reinstatement of Pope's right to direct review. (R. 81:21–22, A-App. 104–05.) The court issued a written order on July 21, 2017. (R. 74, A-App. 101.) The State appealed. (R. 75.)

On November 13, 2018, the court of appeals, District I, reversed and reinstated Pope's conviction. It held that Pope's new trial motion was deficient on its face because it did not allege any colorable claim of reversible trial error that the

[5] Although 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).

missing transcript would have supported. *State v. Pope*, No. 2017AP1720-CR, 2018 WL 5920615, ¶¶ 25–38 (Wis. Ct. App. Nov 13, 2018) (unpublished). The court did not address the State's laches argument. *Id*. ¶ 5 n.9.

This Court granted Pope's petition for review.

SUMMARY OF ARGUMENT

1. The court of appeals correctly reversed the new trial order because the circuit court erred as a matter of law in granting automatic reversal based only on the absence of trial transcripts. Pope failed to make the threshold showing that he has one or more colorable claims of reversible error that the transcripts would have supported. *Perry*, 136 Wis. 2d at 101, 103, 108.

a. Pope asks this Court to carve out an exception to its *Perry* rule when most or all of the trial transcripts are missing. This Court should decline Pope's invitation. This case shows why an automatic reversal rule is unjust and patently unfair to the State, who was entirely blameless.

b. The substantial record compiled so far shows beyond a reasonable doubt that Pope has no conceivable claim(s) of reversible error.

2. If this Court adopts Pope's proposed exception to the *Perry* pleading requirements, the State should be relieved of its waiver of the laches defense when it stipulated in 2016 to reinstatement of Pope's right to direct review.

a. The stipulation was an invalid contract because both parties entered into it with mutual and material misunderstandings of fact and law. Both parties entered into the stipulation unaware that the trial transcripts could no longer be produced. Both parties entered into the stipulation under a legal regime governed by *Perry*. The State did not anticipate that this Court would adopt an exception to *Perry*

allowing for automatic reversal without having to allege, let alone prove, reversible trial error.

b. This Court should remand for the court of appeals to address the State's laches argument.

STANDARDS FOR REVIEW

1. The circuit court's discretionary decision whether to grant a new trial due to the lack of a transcript will be upheld, "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 circuit 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. Construing the terms of a stipulation presents a question of law to be reviewed de novo. *Duhame v. Duhame*, 154 Wis. 2d 258, 262, 453 N.W.2d 149 (Ct. App. 1989). Whether a stipulation was validly entered into is a question of law to be reviewed de novo. *Cavanaugh v. Andrade*, 191 Wis. 2d 244, 264, 528 N.W.2d 492 (Ct. App. 1995), *rev'd on other grounds*, 202 Wis. 2d 290, 550 N.W.2d 103 (1996).

3. This Court independently reviews the legal issues arising out of a habeas corpus action. *State ex rel. Lopez-Quintero v. Dittmann*, 2019 WI 58, ¶ 11.

4. The State bears the burden of proving the affirmative defense of laches. *Lopez-Quintero*, 2019 WI 58, ¶ 16; *State ex rel. Coleman v. McCaughtry,* 2006 WI 49, ¶¶ 2, 25 n.10, 290 Wis. 2d 352, 714 N.W.2d 900. Whether the delay was unreasonable, whether the State acquiesced in the delay, and whether the State suffered actual prejudice are issues of law reviewed de novo but in light of the facts as found by the

circuit court. *Coleman*, 290 Wis. 2d 352, ¶ 17. If the State proves laches, the decision whether to deny habeas relief rests in the discretion of the court of appeals. *Id.*; *State ex rel. Washington v. State*, 2012 WI App 74, ¶ 20, 343 Wis. 2d 434, 819 N.W2d 305; *see Lopez-Quintero*, 2019 WI 58, ¶ 27.

ARGUMENT

I. The court of appeals correctly held that *Perry* required Pope to make a threshold showing of arguably reversible trial error before he could be awarded a new trial due to the lack of transcripts.

A. The threshold showing required by *Perry*

In *Perry*, 136 Wis. 2d at 97, this Court in the exercise of its "procedural and supervisory jurisdiction" over the lower courts established the methodology for determining whether a missing transcript requires a new trial.

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 of reversible trial error that the transcript would support. *Perry*, 136 Wis. 2d at 101, 103, 108; *State v. DeLeon*, 127 Wis. 2d 74, 80, 377 N.W.2d 635 (Ct. App. 1985). 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.* (quoting *DeLeon*, 127 Wis. 2d at 80).

"[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. "He does not need to demonstrate or assume the burden of showing that the error alleged is prejudicial. Yet, it must be clear that the error cannot be of such a trivial nature that it is clearly harmless. . . . 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." (citation omitted)). He must show "there is some likelihood that the missing portion would have shown an error that was arguably prejudicial." *Perry*, 136 Wis. 2d at 103.

Reversal is not automatic. "Error in transcript preparation or production, like error in trial procedure, is subject to the harmless-error rule." *Perry*, 136 Wis. 2d at 100.

Only after this threshold showing of "reviewable" or "colorable" error is made does the court next determine whether the proceedings can be reconstructed without the transcript. *Id*. at 101. 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, 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.

Once he alleges colorable claims of error, the burden is on Pope "to summarize the record and prepare an affidavit incorporating the evidence as reconstructed by the appellant, to which summary the state . . . may propose amendments

and make objections." *Id*. at 102. "The trial court ultimately resolves disputes . . . based on the appellant's and the appellee's submissions and, presumably, whatever resources or recollections are available to the court." 5 Am. Jur. 2d. *Appellate Review* § 424 (2019).

If the parties agree on the reconstruction of what occurred at trial, they may proceed with an agreed upon statement of facts. *Perry*, 136 Wis. 2d at 102. If they disagree, the circuit court may approve the record, "based on its own recollection, trial notes, consultation with counsel, affidavits, or recall of witnesses, to 'settle and approve' the state of the record." *Id*. (citation omitted). If after doing so the circuit court cannot find beyond a reasonable doubt that the missing portion can be reconstructed, it must order a new trial. *Id*.

B. The court of appeals correctly held that Pope is not entitled to automatic reversal and his motion was deficient.

Pope alleged in his postconviction motion that the court reporters destroyed their notes, therefore he is entitled to automatic reversal. (R. 64:5–9.)

The circuit court erroneously read *Perry* to require automatic reversal when the entire transcript is missing. "I mean, it's impossible to make that claim with specificity if you don't have a transcript." (R. 81:23, A-App. 107.) There is no such exception. In *Perry*, the "colorable claim" requirement applied even when "significant portions" of the trial transcripts were missing. 136 Wis. 2d at 96.[6]

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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). On his 1998 appeal, Pope twice told the court of

The court of appeals reviewed Pope's efforts to reinstate his right to direct review, *Pope*, 2018 WL 5920615, ¶¶ 1–24, before holding that Pope failed to allege a colorable claim of reversible trial error. *Id.* ¶¶ 30–38. "The burden is not substantial, but it must be met. Here, Pope did not allege any facially valid claim of error in his postconviction motion." *Id.* ¶ 32.

This Court's rejection of an automatic reversal rule in *Perry*, requiring the defendant to allege that arguably reversible trial error occurred, is consistent with the rule in most jurisdictions. *E.g., Knoll v. Allstate Fire & Cas. Ins.*, 216 P.3d 615, 617–18 (Colo. App. 2009) (and cases cited therein); *Bradley v. Hazard Tech. Co.*, 665 A.2d 1050, 1054–55 (Md. 1995) (and cases cited therein).

> An appellant seeking a new trial because of a missing or incomplete transcript must (1) make a specific allegation of error, (2) show that the defect in the record materially affects the ability of the appeals court to review the alleged error, and (3) show that a proceeding to settle the record has failed or would fail to produce an adequate substitute for the evidence.

5 Am. Jur. 2d. *Appellate Review* § 428 (2019).

The defendant must "assert specifically what errors occurred at" trial. *Hazard Tech.*, 665 A.2d. at 1055. He must "demonstrate to the circuit court that the missing portion" of the transcript is relevant to the specific errors identified. *Id.* If the circuit court determines that the missing portions of the transcript are "material to" 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. See*

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appeals that only those transcripts were necessary. (R. 34, A-App. 122.)

Herndon v. City of Massillon, 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 that the trial court erroneously received a document into evidence without foundation).

Instructive is *Roberts v. Ferman*, 826 F.3d 117 (3rd Cir. 2016). The court held that Federal Rule of Appellate Procedure 10(c) allows the appellant, when the trial transcript is missing, to "prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection." *Id.* at 123 (citation omitted). The appellee may then file "objections or proposed amendments." *Id.* In the event of disagreements, the statement is submitted to the district court "for settlement and approval." This provision "clearly places the responsibility for initially creating the record on the appellant." *Id.* at 123.

> Courts of appeals have consistently held that when an appellant chooses not to avail him or herself of the procedure available in Rule 10(c) for recreating the trial record, he or she cannot then claim on appeal that the loss of the trial records, without more, necessitates a new trial. This is so primarily because the appellant is responsible for ensuring that the record is sufficiently complete on appeal.

Id. at 124. This procedure enables the reviewing court to "properly assess whether we could in fact grant meaningful review of the appellant's claims without the actual trial transcript available to us." *Id.* at 125.

Pope merely wants to review the transcript now to see whether he might find error after not having found one in over two decades. The defendant in *Perry* wanted to do the same on his direct appeal after only one year, 136 Wis. 2d at 97, but this 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.

The court of appeals also correctly held that "Pope has not done everything that reasonably could be expected in order to perfect his appeal." *Pope*, 2018 WL 5920615, ¶ 35. Pope was aware in July 1996 of the need for trial transcripts. Yet, when the court of appeals told Pope in a December 1997 order regarding transcript fees "that he needed to set forth an arguably meritorious claim for relief," he did not do so. *Id.* ¶ 36. The court of appeals again advised Pope in a December 1999 order denying his motion for an extension of time to file the notice of intent that he "failed to indicate, in even a cursory manner, what issue he believed should be raised in a WIS. STAT. RULE 809.30 proceeding." *Id.* Instead, when he tried to initiate an appeal in January 1998, Pope twice filed statements on transcripts in which he advised the court of appeals that all transcripts necessary for the appeal were already on file (the preliminary hearing and sentencing transcripts). *Id.* ¶¶ 33–34, 37. Pope has made no effort to reconstruct what happened at trial. "Pope had the initial burden in his postconviction motion of claiming some facially valid claim of error. He failed to do so." *Id.* ¶ 38. Pope has not identified any "facially valid claim of error" in the 23 years since his trial.

C. The substantial record as it exists shows that there are no colorable claims of trial error.

Because Pope refuses to do what *Perry* requires him to do, the State has taken it upon itself to review the record and

other sources of information to ascertain whether there are colorable claims of reversible error. Beyond a reasonable doubt, there are none.

Even without a transcript, it is relatively easy to demonstrate how the trial testimony likely unfolded and why there are no colorable claims of error that a partial or full transcript would have supported.

1. The record shows that there are no colorable challenges to the sufficiency of the evidence or to Pope's sentence.

Potential challenges to the sufficiency of the evidence and to the trial court's exercise of sentencing discretion are routinely taken up and considered by the court of appeals on direct no-merit appeals under Wis. Stat. § (Rule) 809.32.

Beyond a reasonable doubt, the evidence was sufficient to convict Pope. Two of Pope's cohorts (his girlfriend, Jennifer Radler, and Dax Reed) confessed and at trial pointed the finger at Pope as a key participant in the planning and execution of the murders, and in the disposal of evidence. Pope could not overturn the jury's verdict unless he proved that his cohorts' 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). One does not need a transcript to conclude from this record that the 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).

The record is sufficient for Pope to challenge his sentence and preliminary hearing as those transcripts have always been in the record. Pope does not claim that error occurred at either proceeding. The sentencing court properly

exercised its discretion after considering relevant factors on the record before sentencing Pope to life without parole. (R. 80:26–39.)

2. The overwhelming evidence of Pope's guilt, apparent from the record even without a transcript, shows that Pope has no colorable claims of reversible error.

The witnesses who testified at trial are all listed on the trial docket sheet prepared in 1996. (R. 1:5–7.) Detectives Timothy Koceja and Michael Dubis both testified for the State. According to the criminal complaint filed in 1995, and sworn to by the complainant, Milwaukee Detective Michael Lewandowski (R. 3:1, 7, A-App. 109, 115), both Koceja and Dubis responded to the scene of the shooting (R. 3:2, A-App. 110). 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. (*Id.*)

Detective Koceja testified at the preliminary hearing regarding 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 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 shell casings to the State Crime Laboratory. (R. 3:2, A-App. 110.) State Crime Laboratory firearms and toolmark expert

Reginald Templin testified at trial. According to the complaint, Templin determined that the spent 12-gauge shotgun shell casing recovered by Detective Koceja at the scene had been fired from the same shotgun recovered by Deputy Sheriff Davis from the river. (*Id.*)

Milwaukee County Medical Examiner Jeffrey Jentzen testified at trial. According to the complaint, he pronounced both victims dead at the scene. (*Id.*) Jentzen performed the autopsy on 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." (*Id.*)

Assistant Milwaukee County Medical Examiner K. Alan Stormo testified 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. (*Id.*) 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, A-App. 110.)

Pope's accomplice and girlfriend, Jennifer Radler, testified at trial. The complaint sets forth her lengthy statement to Milwaukee Detective Lewandowski, who testified at trial, and to Detective Spingola, who did not, implicating Pope in the planning and execution of the murders. (R. 3:5–7, A-App. 113–15.)

Radler explained that she was angry with Viehland who supposedly threatened her friend. She said that Dax Reed 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, A-App. 113–14.) When the men returned to her car, she described how Pope "was all excited and was breathing very heavily." Pope said his gun "jammed after he fired the first shot into the chest of one of the people." Pope thought they had "killed them." (R. 3:6, A-App. 114.)

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." (*Id.*) 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 said he might have to "take care of" Reed. (R. 3:6–7, A-App. 114–15.) Radler described how Pope re-enacted his role in the shootings. She said Pope was "glad" the victims were 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, A-App. 115.)

Radler said in her statement that Dax Reed set up this ambush with a telephone call luring the unsuspecting victims to the Astor Street address. Reed telephoned Jessie Letendre, who they all thought would accompany Viehland, and their shared intent was to kill both Viehland and Letendre. (R. 3:5–6, A-App. 113–14.)[7]

[7] Accomplices Israel Gross and Derek Kramer, who did not testify, confirmed Radler's account. Their statements to police are also fully set out in the complaint. (R. 3:3–4, A-App. 111–12.) Jailhouse informant Roderick McGinnis testified at the

Dax Reed testified at trial. He confirmed his role and Pope's involvement in the planning as described by the others.

Pope testified in his own defense. (R. 1:7.) He put on no other witnesses. In his new trial motion, Pope did not reveal the substance of his trial testimony.

As the above summary shows, Pope could not allege and prove reversible error even with a transcript. If Pope could imagine one or more colorable claims of error, the State would have a compelling argument that any error was harmless beyond a reasonable doubt in light of the overwhelming evidence of his guilt.

3. The ineffective assistance challenges in the *Knight* petition would fail because the record conclusively shows that Pope can no longer prove deficient performance and prejudice.

The only time in the past 23 years that Pope articulated any colorable claim of error was when he mentioned two possible ineffective assistance of trial counsel challenges in his 2014 *Knight* petition that he believes postconviction counsel could have raised: Attorney Backes was ineffective for not calling alibi witnesses from Pope's family and for letting Pope reveal to the jury during his own testimony that he was a gang member. (R. 43:18–24.)[8]

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preliminary hearing that Pope confessed that he, two "white guys," and a girl named "Jennifer" planned and executed the murders in September 1995. Pope said he used a .9 millimeter handgun and another guy had a 12-gauge shotgun. They ran to the car and threw the gun into the river. (R. 78:11–14.) It is uncertain whether those three witnesses would be available to testify at a retrial or at a hearing to reconstruct what happened at trial.

[8] Radler apparently testified that she recruited Pope because he was a gang member. As shown at sentencing, Pope had been

These claims are non-starters. Pope did not renew them in his 2017 section 809.30 new trial motion. (R. 64.) They also are conclusory. Pope did not specify in his *Knight* petition what counsel did wrong and why it was prejudicial. *See State v. Balliette*, 2011 WI 79, ¶¶ 40, 59, 67–70, 336 Wis. 2d 358, 805 N.W.2d 334.

More important, Pope would no longer be able to prove deficient performance with or without a transcript. A trial transcript also would be of little assistance. Pope and his attorney presumably discussed trial strategy in general, and the specific strategic decisions regarding whether to call alibi witnesses and reveal his gang membership, outside of the courtroom and not on the record during trial. A trial transcript would not, therefore, have revealed anything regarding the nature of those discussions, why those strategic decisions were made, and whether they were reasonable.

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affiliated with gangs for 10 years. (R. 80:5–6; *see* A-App. 159, 162–63.) Pope presumably admitted at trial (or would admit at a retrial) that he had multiple prior convictions. (R. 80:5.); Wis. Stat. § 906.09(1). Had Pope denied that he was a gang member, the outcome would have been the same. Radler's testimony identifying Pope as a gang member and Pope's admission to multiple prior convictions would have rendered any deficient performance by counsel non-prejudicial.

An alibi defense would have gone nowhere. Both Radler and Reed included Pope in the planning and execution of the murders, and in the disposal of evidence. Pope offers no reason for them to falsely accuse him after they admitted their own guilt and truthfully accused everyone else, accusations that were all strongly corroborated by the physical evidence and independent witnesses. Also, the State would show at a retrial that Pope had plenty of time in the four months he remained at large to concoct a phony alibi.

Pope also would not be able to prove deficient performance even with a transcript because Attorney Backes no longer recalls anything about the case and he shredded his case file long ago. *See State v. Lukasik*, 115 Wis. 2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983) (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 due to the destruction of the court reporters' notes ten years after trial. Pope's uncorroborated challenges to counsel's performance would not carry the day on remand. *See State v. Robinson*, No. 2008AP2107-CR, 2009 WL 2498297, ¶ 24 (Wis. Ct. App. Aug. 18, 2009) (unpublished) ("Here, however, no *Machner* hearing was possible because Robinson's trial attorney had passed away before Robinson's postconviction and appellate rights were reinstated."). Trial counsel's strategic decisions are strongly presumed to have been reasonable. *E.g., State v. Maloney*, 2005 WI 74, ¶ 43, 281 Wis. 2d 595, 698 N.W.2d 583. Pope can no longer rebut that presumption with or without trial transcripts.

Pope also will not be able to prove prejudice because, as shown above, the evidence of his guilt was overwhelming. Alibi testimony from family members biased in his favor and Pope's silence about, or denial of, gang membership would not have created a reasonable probability of a different outcome in light of his two cohorts' testimony as corroborated by the physical evidence and independent witnesses.

D. Requiring Pope to show a colorable claim of reversible error does not deny him the right to a meaningful direct appeal.

Pope had the right under the United States and Wisconsin Constitutions 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 was granted that right. Pope had the right under the United States Constitution to the effective assistance of counsel on direct appeal. *Flores*, 183 Wis. 2d at 605. Pope was granted that right. Pope had the right to free transcripts on direct review. Pope's foot-dragging in ordering trial transcripts *he had the right to receive since 1996* renders inapposite the Supreme Court cases cited in his brief where indigent defendants were unconstitutionally *denied* free transcripts for their appeals. (Pope's Br. 11–12.) The State did not deny Pope his right to a direct appeal or to free transcripts.

Pope argues that requiring him to articulate one or more colorable claims of reversible error when most or all of the trial transcripts are missing denies him the right to a "meaningful" direct appeal. (Pope's Br. 17–18.) Pope complains that since he is represented by an attorney who did not represent him at trial, he is excused from articulating colorable claims of error because new counsel cannot possibly know what went on at trial without a transcript. (Pope's Br. 20.) That fact alone does not warrant automatic reversal because such a rule "would lend itself to manipulation." *Perry*, 136 Wis. 2d at 105 n.5. It is but one factor the court considers when exercising its discretion whether to order a new trial. *Id.*

Pope complains that it "defies common sense" to require him to assert colorable claims of error when most or all of the transcripts are missing. (Pope's Br. 20.) What defies common sense is to award Pope a new trial 23 years after it took place

without requiring him to prove that any error occurred. Pope's invocation of common sense also ignores the following: (1) he is solely responsible for the lack of transcripts; and (2) there is a substantial record, and additional information from other readily available sources including from Pope himself, that appellate counsel could use to realistically assess whether specific arguably reversible error(s) occurred at trial.

Pope argues that the existing record and any other available information outside the record is irrelevant; if the trial transcript is missing, nothing else matters. That position is directly contrary to *Perry*. Moreover, Pope, like any other appellant, was responsible for the content of the appellate record. *State v. Smith*, 55 Wis. 2d 451, 459, 198 N.W.2d 588 (1972). It was Pope's responsibility to make sure that the appellate record was complete. *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26–27, 496 N.W.2d 266 (Ct. App. 1993). It was Pope's responsibility to *timely* order the trial transcripts. Wis. Stat. § (Rule) 809.11(4)(a). Pope did not order the transcripts until late 2016 or early 2017, a decade after the court reporters lawfully destroyed their notes because there was no direct appeal.

Pope's right to direct postconviction review has been reinstated, but his appeal must proceed with the appellate record as it exists and with the transcripts that are in the record. Counsel can use relevant documents that are available, confer with any witnesses who are still available, confer with trial counsel, and confer with Pope who sat through the entire trial and interacted with trial counsel. Pope may proceed with out-of-time direct review but, like any other appellant, he must identify colorable claim(s) of trial error that the missing transcripts would support based on the record as it exists.

No one guaranteed Pope that the record would be complete. No one guaranteed Pope that he would prevail on

his challenge to his murder conviction when his right to direct review was reinstated. *See Lopez-Quintero*, 2019 WI 58, ¶ 30 ("Our decision is a narrow one and we make no assessment of the merits of Lopez-Quintero's petition, *much less the merits of his appeal*[,] should the court of appeals reinstate his appellate deadlines." (emphasis added)).

It is manifestly unfair to the State, to the victims' families, and to the interest in finality of criminal convictions to let Pope walk free without having to allege or prove that any error occurred at his trial. *See Hazard Tech.*, 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.").

Pope loses because he is to blame for the deficiencies in the record and he has alleged nothing to overcome the presumption that his trial was fair and free of reversible error.

E. This Court should not carve out the exception to the *Perry* rule espoused by Pope.

Pope argues that the *Perry* rule "is unworkable" when a transcript "is so deficient" because his new attorney cannot possibly identify any arguably meritorious issue(s). (Pope's Br. 17, heading "2.") Pope argues that the *Perry* standard, "while feasible in a situation where only a *portion* of the trial transcript is missing, becomes insurmountable in the unusual case where the *entire* transcript of the trial is missing." (Pope's Br. 9.) Pope asks this Court to create an exception to the *Perry* rule for the situation when most or all of the transcripts are missing. (Pope's Br. 21–23.) This Court should decline his invitation.

Pope complains that requiring him to articulate a colorable claim of error without the transcript creates an ethical dilemma by inviting frivolous arguments. It also renders counsel unable to utilize the no-merit procedure under Wis. Stat. § (Rule) 809.32 because the record is too deficient to assess whether there are any arguably meritorious claims. (Pope's Br. 23–25.) Again, there is much in this record and there are other readily available sources of information outside the record for counsel to realistically assess what happened and whether arguably *reversible* error occurred. Counsel also still has access to her client and to trial counsel, as well as to other trial witnesses. The fact that memories have faded is due to the passage of time caused by Pope's waiting 18 years to make a serious effort to pursue direct review. As with any timely direct appeal, counsel must use the information available from within and without the record to zealously advocate for her client by divining arguably meritorious claims of error as *Perry* requires. There also is enough here for an attorney and the reviewing court to engage in the no-merit review process under Wis. Stat. § (Rule) 809.32. Obviously, the task is made more difficult 21 years after conviction than on a normal appeal, but Pope has only himself to blame for putting his attorney in that difficult position. The State, trial court and court reporters are blameless.

Pope's proposed rule would ignore whatever else is in the record and whatever other information is readily available. It would excuse Pope from having to prove reversible trial error. It would deny the State and the trial court the opportunity to reconstruct what happened at trial. It would absolve Pope of any responsibility for the state of the appellate record.

Pope's proposed rule is arbitrarily limited to missing *trial* transcripts, although sentencing proceedings and "all

testimony in all courts of record shall be recorded verbatim." *Perry*, 136 Wis. 2d at 99. This Court has applied the *Perry* framework even when the entire proceeding in question was not transcribed. *See, e.g.*, *Raflik*, 248 Wis. 2d 593, ¶¶ 40–42 (applying *Perry* "[e]ven though the entire [telephonic warrant] application was unrecorded"). Regardless of how much of the transcript is missing, the circuit court must determine whether the record can be reconstructed and only after a defendant has shown a colorable need for the missing transcript. *Perry*, 136 Wis. 2d at 101. Pope's proposed rule would require automatic reversal even in a case where the transcript of a recent, short trial is missing but the record is sufficient to reconstruct what happened.

Pope's automatic reversal rule leads down a slippery slope. It could be used to get around *Perry* when only some of the transcripts are missing. Pope's distinction between an entire transcript and a portion of a transcript is unworkable and illusory. Whenever a portion of a transcript is missing, that portion is missing in its entirety. If, for example, only the sentencing transcript is missing, new appellate counsel will argue it is impossible to assess whether the court erroneously exercised sentencing discretion. If the suppression hearing transcript is missing, new appellate counsel will argue it is impossible to assess whether the search was illegal or the confession was involuntary. If one day's testimony from a three-week trial is missing, new appellate counsel will argue it is impossible to assess whether witnesses who testified only on that day were erroneously allowed to give prejudicial hearsay or "bad character" testimony, or whether the defendant was denied the opportunity to cross-examine them. If the transcript of the entire voir dire is missing, new appellate counsel will argue it is impossible to assess whether error occurred in jury selection that might have impacted the fairness of the trial. In those situations, *Perry* requires new

counsel to be resourceful and ascertain from the record and other available sources whether arguably reversible error occurred. The same should hold true here. "The burden is not substantial, but it must be met." *Pope*, 2018 WL 5920615, ¶ 32.

Available information from inside and outside the existing record—which includes the sworn criminal complaint, the daily trial docket entries, the preliminary hearing and sentencing transcripts, the *Knight* proceedings, along with other sources of information such as the contemporaneous news articles about the proceedings relating to Pope and his cohorts, as well as Pope's and the trial prosecutor's recollections of what occurred[9]—enables counsel for both Pope and the State to meaningfully assess whether arguably reversible trial error occurred.

This Court should reject Pope's invitation to create an automatic reversal exception to *Perry*, and it should affirm the decision of the court of appeals correctly applying *Perry* to the facts presented.

II. If the Court adopts Pope's exception to the *Perry* rule, it should vacate the stipulation reinstating Pope's right to direct review and remand to the court of appeals to consider the State's laches defense.

Counsel for the State and Pope stipulated in 2016 to reinstate Pope's right to pursue direct review of his conviction. By doing so, the State also arguably waived the laches affirmative defense to his *Knight* habeas corpus petition. Both

[9] The trial prosecutor, former Milwaukee County Assistant District Attorney Mark Williams, though retired, is available for any postconviction proceedings and perhaps a retrial. Williams successfully prosecuted Pope and his four cohorts. The trial Judge, Honorable John Franke, though retired, also may be available.

parties, however, operated under mutual misunderstandings of a material fact and the controlling law. If this Court carves out an exception to *Perry*, it should vacate the stipulation and remand to the court of appeals to allow the State to prove laches.

A. The stipulation is governed by contract principles, and Pope's *Knight* petition is governed by habeas corpus principles including the laches affirmative defense.

Stipulations like the one entered into by Pope and the State are contractual in nature and the principles of contract law apply. *Cummings v. Klawitter*, 179 Wis. 2d 408, 415, 506 N.W.2d 750 (Ct. App. 1993), *overruled on other grounds by Johnson v. ABC Ins. Co.*, 193 Wis. 2d 35, 532 N.W.2d 130 (1995). "Stipulations should be construed consistent with the apparent intention of the parties, the spirit of justice, and the furtherance of fair trials upon the merits, and should not be construed technically so as to defeat the purposes for which they were made." *Milwaukee & Suburban Transp. Corp. v. Milwaukee Cty.*, 82 Wis. 2d 420, 442, 263 N.W.2d 503 (1978). "[T]he language of the stipulation should not be construed so as to effect the waiver of a right not plainly intended to be relinquished." *Id.*

For a contract to be valid, there must be mutual assent as to the parties' intent. *See Cummings*, 179 Wis. 2d at 417 ("Just as no contract exists without the so-called 'meeting of the minds,' we conclude that there is no stipulation to enforce with respect to distribution of the settlement proceeds."). The parties' intent is determined objectively by looking to the words in the contract and the surrounding circumstances. *Metro. Ventures, LLC v. GEA Assocs.'*, 2006 WI 71, ¶ 24, 291 Wis. 2d 393, 717 N.W.2d 58. Each party to the agreement has the duty of good faith and fair dealing with the other party. *Id.* ¶¶ 35–36.

Pope's *Knight* petition alleging ineffective assistance of appellate counsel commenced a civil habeas corpus action. *Knight*, 168 Wis. 2d at 520–21. The purpose of habeas corpus is to enable the prisoner to challenge his custody on the ground that his conviction was obtained either unconstitutionally or without jurisdiction, and he has no other legal recourse. *See Lopez-Quintero*, 2019 WI 58, ¶ 14.

The equitable defense of laches applies to a *Knight* habeas corpus action alleging ineffective assistance of counsel for failing to file a notice of intent to pursue postconviction relief. *Lopez-Quintero*, 2019 WI 58, ¶¶ 7, 10. Laches applies when the habeas petitioner unreasonable delayed bringing the action under circumstances where the delay was prejudicial to the party asserting laches. *Id.* ¶¶ 16, 27; *Washington*, 343 Wis. 2d 434, ¶¶ 18–19.

B. Neither party to the stipulation anticipated that trial transcripts could not be produced, and the State was unaware that Pope would seek a change in the law requiring automatic reversal without having to allege trial error.

The stipulation provided that the parties agreed to "reinstatement of Mr. Pope's direct appeal deadlines under Wis. Stat. § 809.30, and for an order extending the deadline for filing a notice of intent to pursue postconviction relief to 20 days following issuance of the court's order with concomitant dismissal of the petition for writ of habeas corpus as moot." (R. 60, A-App. 136.)

The trial court's findings that trial counsel failed to file the notice of intent and that Pope intended to pursue direct review foreclosed any further litigation over whether counsel was ineffective and whether Pope's right to direct review should be reinstated because prejudice is presumed. *See Lopez-Quintero*, 2019 WI 58, ¶ 17. Pope is entitled to a new

appeal regardless of its merit. *Id*. The State stipulated to reinstatement of Pope's right to direct review.

The State argued in circuit court and again in the court of appeals that the stipulation did not also foreclose its right to prove laches; it only allowed Pope to pursue out-of-time direct review. The circuit court rejected the State's argument. (R. 68:2; 81:21–22, A-App. 105–06.)

The State stipulated that Pope could pursue out-of-time direct review so he could endeavor to allege and prove reversible trial error. No one anticipated at the time that the trial transcripts could not be produced. No one anticipated that the lack of transcripts would enable Pope to win automatic reversal without ever having to allege or prove reversible trial error. No one anticipated that the responsibility for supplying the transcripts on direct review shifted from Pope to the State. That is why the Assistant District Attorney argued in response to Pope's new trial motion that the stipulation "doesn't operate as a valid waiver of the laches defense." (*Id.*) Assuming that the stipulation also foreclosed the State's laches defense, it is invalid because of mutual and material misunderstandings of fact and law.

1. Mutual misunderstanding of a material fact.

To void a contract based on a mistake of fact, the mistake must be mutual. *Admiral Ins. Co. v. Paper Converting Mach. Co.*, 2012 WI 30, ¶ 57, 339 Wis. 2d 291, 811 N.W.2d 351. A mistake of fact "goes to the 'unconscious ignorance or forgetfulness of . . . a fact . . . material to the contract.'" *Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship*, 2002 WI 108, ¶ 19 n.6, 255 Wis. 2d 447, 649 N.W.2d 626 (alterations in original) (quoting *Kowalke v. Milwaukee Elec. Ry. & Light Co.*, 103 Wis. 472, 476, 79 N.W. 762 (1899)).

When it entered into the stipulation, the State only agreed that Pope had the right to pursue direct review because, as the circuit court found, trial counsel dropped the ball in 1996. *See Lopez-Quintero*, 2019 WI 58, ¶ 17. Both Pope and the State anticipated full postconviction review and an appeal in which Pope would directly challenge his conviction by alleging and proving trial errors, erroneous exercise of sentencing discretion, or ineffective assistance of trial counsel. Or, appellate counsel might file a no-merit report explaining why no arguably meritorious issues exist.

Both parties to the stipulation were mutually unaware of the material fact that the trial transcripts could not be produced. Pope's attorney did not learn that the transcripts were unavailable until after she entered into the stipulation and began the direct review process. (R. 64:4–5.) Counsel for the State obviously did not learn that the transcripts were unavailable until Pope so stated in his 2017 new trial motion. In short, both parties entered into the stipulation blind regarding the unavailability of trial transcripts and its impact on direct review.[10]

The trial court put all of the blame for this mutual mistake on counsel for the State. (R. 81:20–22, A-App. 104–06.) Pope and his attorney were at least equally at fault. They, too, entered into the stipulation without knowing whether trial transcripts were available. As the appellant, Pope was responsible for the content of the appellate record. Pope was responsible for ordering the transcripts. Pope did not order the transcripts until *after* he entered into the stipulation. Until then, the State had no responsibility for preserving or

[10] If Pope and his attorney knew that the transcripts were not available when they entered into the stipulation, and did not inform counsel for the State, they violated their contractual duty of good faith and fair dealing. *See Metro. Ventures, LLC v. GEA Assocs.'*, 2006 WI 71, ¶¶ 35–36, 291 Wis. 2d 393, 717 N.W.2d 58.

ordering the transcripts. This was also only after Pope, years earlier, had assured the court of appeals (and indirectly the court reporters) that only the preliminary and sentencing hearing transcripts already in the record were necessary for an appeal. Also, the trial court accepted the stipulation without questioning the parties regarding the availability of transcripts.

Had this been a timely direct appeal, and had Pope failed to order the trial transcripts to support his claim(s) of trial error, he would lose because he is responsible for the contents of the record and for supporting his claims with evidence in the record. Now, according to Pope, the reverse is true; assuming this Court adopts his proposed exception to *Perry*, *the State loses* if *it* cannot produce the transcripts to support claims of error never made by Pope. Neither party foresaw this diametric shift in responsibilities and burdens when they stipulated only to reinstatement of Pope's right to pursue direct review.

Both parties entered into the stipulation believing that mistakenly the appellate record would be sufficient to enable Pope to argue that trial error(s) occurred; and enable the State to argue that no error occurred or, if it did, that any error was harmless. The lack of a transcript changed everything. This Court should vacate the stipulation due to the parties' mutual and material mistake regarding the availability of transcripts. It should then remand to the court of appeals to allow the State to prove the affirmative defense of laches.

2. Material change in the law

The State did not intend to relinquish its laches defense to an unforeseen new rule of law that Pope need not allege or prove trial error and that the burden shifted from Pope to the

State to suffer the consequences of missing transcripts on a direct appeal.

The law in existence at the time of the contract is incorporated into the contract. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 60, 295 Wis. 2d 1, 719 N.W.2d 408. Subsequent changes in the law will not interfere with an existing contract. *Id.* A mistake as to the legal effect of an agreement may justify a court's granting relief from it. *Farmers Auto. Ins. Ass'n v. Union Pac. Ry. Co.*, 2008 WI App 116, ¶ 12, 313 Wis. 2d 93, 756 N.W.2d 461. A party's ignorance of existing case law, however, is not sufficient to void the agreement. *Id.*; *Admiral Ins. Co.*, 339 Wis. 2d 291, ¶ 56.

The State did not intend to bind itself to an unanticipated material change in case law years after it entered into the stipulation. Because neither party anticipated the unavailability of transcripts, it is safe to say that neither party anticipated that this case might evolve into a *Perry* situation. That said, *Perry* was the law at the time of the stipulation, and it controls here. The State did not intend to stipulate away its ability to rely on *Perry* if it should come into play.

On the other hand, if this Court adopts Pope's proposed exception to the *Perry* requirements, then the State stipulated away its laches defense unaware of such a significant change in the law that effectively extinguished its right to defend Pope's conviction on appeal. That was not the State's intent. The State only stipulated to let Pope do what he would have done on timely direct review over two decades ago: endeavor to prove that reversible trial error occurred. It never intended to let Pope do what he ended up doing: seek automatic reversal of his conviction without alleging any trial error. The State was not mistaken as to *existing* case law. Rather, the State did not anticipate a *change in the existing case law* creating an automatic reversal rule that shifted the onus for

failing to produce trial transcripts from Pope to the State. *See Milwaukee & Suburban Transp. Co.*, 82 Wis. 2d at 442 (a stipulation should not be construed technically to waive a right not plainly intended to be relinquished).

If this Court adopts Pope's exception to the *Perry* pleading requirements, it should vacate the stipulation and remand to the court of appeals to allow the State to assert laches as an affirmative defense to his *Knight* habeas petition. *See Lopez-Quintero*, 2019 WI 58, ¶¶ 10, 16.

This Court should direct the court of appeals to consider the laches defense "on any potential issues, such as ineffective assistance of counsel, suppression or a retrial of the crimes of which [Pope] stands convicted." *Coleman*, 290 Wis. 2d 352, ¶ 38 n.13. The State would bear the burden of proving the three elements of laches: (1) Pope's unreasonable delay; (2) its lack of knowledge of or acquiescence in the course of events; and (3) prejudice to the State. *Lopez-Quintero*, 2019 WI 58, ¶ 16.

CONCLUSION

This Court should affirm the decision of the court of appeals.

Dated this 16th day of July, 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 11,000 words.

Dated this 16th day of July, 2019.

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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 16th day of July, 2019.

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DANIEL J. O'BRIEN
Assistant Attorney General

Supplemental 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 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
Assistant Attorney General

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