STATE OF WISCONSIN
IN THE SUPREME COURT

Appeal No. 2018AP000203-W

STATE ex rel. Ezequiel Lopez-Quintero,

Plaintiff-Appellant-Petitioner,

v.

Michael A. Dittman,
Warden of Columbia Correctional Institution,

Defendant-Respondent.

On Appeal from an *Ex Parte* Denial of Petition for Writ of Habeas Corpus by the Court of Appeals, District II

OPENING BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER

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ISSUE PRESENTED

Can the Court of Appeals apply an irrebuttable presumption of prejudice and deny *ex parte* a sufficiently pled petition for writ of habeas corpus solely for untimeliness, under Wis. Stat. § 809.51(2)?

Ezequiel Lopez-Quintero filed a Petition for Writ of Habeas Corpus in the Court of Appeals, asking that court to reinstate his appellate deadlines based on trial counsel's ineffectiveness in failing to file a Notice of Intent to Pursue Postconviction Relief.

Relying on *State ex rel. Smalley v. Morgan*, 211 Wis. 2d 795, 565 N.W.2d 805 (Ct. App. 1997), *abrogated on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900, the Court of Appeals found Mr. Lopez-Quintero's petition untimely, presumed prejudice based on the untimeliness, and denied the petition *ex parte* without reaching the merits of his claim. App. 1.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court's decision to accept review reflects that oral argument and publication are warranted.

STATEMENT OF THE CASE

On March 7, 2008, after a six-day trial, Ezequiel Lopez-Quintero was convicted of First-Degree Intentional Homicide with a Dangerous Weapon. On April 9, 2008, the circuit court sentenced him to life in prison without release to extended supervision. App. 3 (Habeas Petition, Ex. A: Judgment of Conviction). That same day, Mr. Lopez-Quintero filed a Notice of Right to Seek Postconviction Relief (Notice of Right), on which he unequivocally indicated that he wanted to seek postconviction relief. App. 3 (Habeas Petition, Ex. B: Notice of Right).

Mr. Lopez-Quintero's trial attorneys, Frederick Cohn and Christopher Cohen, did not file a Notice of Intent to Seek Postconviction Relief (Notice of Intent) within the 20-day statutory deadline following sentencing. *See* Wis. Stat. § 809.30(2)(b). Nor did trial counsel request an extension of time to file the Notice of Intent. *See* Wis. Stat. § 809.82(2)(a).

Mr. Lopez-Quintero had hired Cohn and Cohen, private lawyers based in Illinois. Attorney Cohen had been a member of the Wisconsin Bar since 1986. Attorney Cohn, who was not a member of the Wisconsin Bar, appeared *pro hac vice*.

At the conclusion of the sentencing hearing, Attorney Cohn asked the circuit court for clarification regarding postconviction procedures:

> Mr. Cohn: [W]e have filed a motion for a new trial already.
>
> The Court: Yes, sir.
>
> Mr. Cohn: Would that relieve us of filing the notice of intent to proceed to appeal?
>
> The Court: No. I think you still have to file that.
>
> Mr. Cohn: Within 20 days?
>
> The Court: Right.

App. 3 (Habeas Petition, Ex. C: Sentencing Transcript at 57). The circuit court then provided Attorney Cohn with the Notice of Right form and asked counsel to review the form with Mr. Lopez-Quintero in the courtroom immediately after the sentencing hearing. *Id*. (Sentencing Transcript at 58). Attorney Cohn assured the court that he would get the Notice of Intent "filed within 20 days." *Id*. (Sentencing Transcript at 60).

Two months later, at the conclusion of the hearing on the motion for new trial on June 10, 2008, Attorney Cohn sought to represent Mr. Lopez-Quintero on appeal. Attorney Cohn stated that, given the difficulty of the case and his familiarity with it, he should be appointed to handle the appeal. App. 3 (Habeas Petition, Ex. D: Motion for New Trial Hearing Transcript at 46). Notably, the 20-day deadline to file the Notice of Intent had expired on April 29, 2008, nearly a month-and-a-half earlier. The circuit court ordered Attorney Cohn to continue to represent Mr. Lopez-Quintero "until the time a decision whether to appeal is made." *Id*. (Motion for New Trial Hearing at 47); *see* App. 3 (Habeas Petition, Ex. E: Affidavit of Indigency) (Court's handwritten order: "Atty Frederick Cohn appointed to initiate appeal if desired."). Because Mr. Lopez-Quintero could no longer afford to retain Attorney Cohn as counsel, the circuit court found that Mr. Lopez-Quintero was indigent and waived the payment of service and filing fees, including the preparation of the trial transcript. *Id*. (Habeas Petition, Ex. E: Affidavit of Indigency); *see id*. (Habeas Petition, Ex. D: Motion for New Trial Hearing at 47–48) ("[S]o if he is indigent, the court certainly would provide a copy of the transcript to you without cost, and then a decision as to whether he should appeal or not can be made."). Trial counsel never filed a Notice of Intent or sought an extension to file one.

Mr. Lopez-Quintero did not know about trial counsel's fundamental procedural error or the deleterious consequences of such inaction. He thought that by indicating his desire to pursue postconviction relief on the Notice of Right, trial counsel would initiate the process.

On May 1, 2010, less than two years after the circuit court denied the motion for new trial, Mr. Lopez-Quintero submitted an application for assistance to the Frank J. Remington Center at the University of Wisconsin Law School. The Remington Center rejected his application on October 13, 2011.

Two years later, on July 23, 2012, Mr. Lopez-Quintero submitted a second application to the Remington Center. The Remington Center accepted his case, but was unable to assign a law student to work on it until July 26, 2013. For the next several years, a series of law students, supervised by a clinical professor, looked into Mr. Lopez-Quintero's case. Their efforts were hampered by their inability to obtain the court reporter's transcripts. Because trial counsel did not file a Notice of Intent, copies of the transcripts were not in the hands of any appellate attorneys.[1] Reviewing the court reporter's voluminous transcripts on file at the Kenosha County Courthouse proved inadequate and time-consuming. The Remington Center eventually attempted to obtain a copy of the transcripts at no cost. Those efforts were unsuccessful.

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[1] Of note, the court reporters prepared transcripts of the trial, apparently in anticipation of an appeal. *See* https://wcca.wicourts.gov/caseDetail.html;jsessionid=20A3258A2AB4A8EE49D4C0DDC5A60BE8.render4?caseNo=2007CF000535&countyNo=30&mode=details (last visited July 5, 2018); *see also* https://wscca.wicourts.gov/appealHistory.xsl;jsessionid=81A3479D20340A2A9A91E696570289ED?caseNo=2008XX000997&cacheId=092528492F575359FE9AC6BE612C23A0&recordCount=2&offset=1&linkOnlyToForm=false&sortDirection=DESC (last visited July 5, 2018) (court's reporter's motion for extension to file transcripts).

On February 1, 2018, the Remington Center filed a Petition for Writ of Habeas Corpus asking the Court of Appeals to reinstate Mr. Lopez-Quintero's appellate deadlines. *See* App. 3 (Habeas Petition). The petition explained the passage of time in filing by noting that Mr. Lopez-Quintero is a monolingual Spanish speaker, has a limited education (completing the equivalent of only one year of middle school in Mexico), and was unfamiliar with the criminal justice system in the United States. *Id.* at 5–6. Consequently, Mr. Lopez-Quintero relied entirely on trial counsel, who did not speak Spanish, to explain—through interpreters—the legal process to him. *Id.* His previous encounters with the justice system did not expose him to postconviction procedure. *Id.* at 6. Mr. Lopez-Quintero remained uninformed about what would happen after he indicated his desire to appeal his conviction and sentence on the Notice of Right. *Id.*

The Court of Appeals denied *ex parte* Mr. Lopez-Quintero's habeas petition on February 12, 2018. App. 1. Focusing solely on the untimeliness of the filing, the Court of Appeals found that, "[a]lthough Lopez-Quintero's stated limitations can account for some delay in this case, it [*sic*] cannot account for over nine years of delay." *Id.* at 2–3. The Court of Appeals denied a motion for reconsideration on March 6, 2018. App. 2. On June 11, 2018, this Court granted Mr. Lopez-Quintero's Petition for Review.

SUMMARY OF ARGUMENT

In *State ex rel. Smalley v. Morgan*, 211 Wis. 2d 795, 565 N.W.2d 805 (Ct. App. 1997), *abrogated on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900, the Court of Appeals grafted a "prompt and speedy" pleading requirement onto Wis. Stat. § 809.51(1) and then created an *irrebuttable* presumption by denying the petition without ordering the State to respond. Wis. Stat. § 809.51(1) expressly sets out four pleading requirements that a petition for writ of habeas corpus must contain. *Smalley* found that the petitioner did not allege facts demonstrating that he "sought prompt and speedy relief," nor did he allege any disability preventing him from making such a showing sooner. *Smalley*, 211 Wis. 2d at 802. *Smalley* justified the *ex parte* denial of the petition by presuming the State would be prejudiced in responding after an eight-year filing delay. *Id*. at 803.

Smalley grants the Court of Appeals unbridled discretion to deny habeas petitions *ex parte* under Wis. Stat. § 809.51(2) for perceived untimeliness alone. The Court of Appeals applies a presumption that the length of the delay prejudices the State's ability to respond. The *ex parte* nature of the process makes the presumption irrebuttable and renders laches obsolete.

The *Smalley* presumption relieves the State of its unremarkable burden to prove prejudice attributable to an unreasonable delay as an element of the affirmative defense of laches. This practice squarely contradicts this Court's holding in *Coleman* that the Court of Appeal may not presume prejudice based on the length of the delay. This Court must

order the Court of Appeals to disavow this *ex parte* practice as inconsistent with *Coleman* and incompatible with the plain language of Wis. Stat. § 809.51(1).

In *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900, decided nearly a decade after *Smalley*, this Court held that the Court of Appeals had erred when it presumed the State was prejudiced by the petitioner's 17-year delay in filing his habeas petition. *Id.* at ¶ 37. *Coleman* explained that *Smalley* had based its *ex parte* denial on the petition's untimeliness under equitable principles of habeas, rather than on the affirmative defense of laches. *Id.* at ¶ 25. However, *Coleman* never explained why the Court of Appeals could presume prejudice in the former, but not in the latter, context.

Mr. Lopez-Quintero, an inmate sentenced to life without parole for first-degree murder, filed a habeas petition to reinstate the appellate deadlines waived by his trial counsel's ineffectiveness. The petition clearly met the four pleading requirements expressly set out in Wis. Stat. § 809.51(1). Nevertheless, the Court of Appeals dismissed the petition for untimeliness without addressing the merits or ordering the State to respond. The Court of Appeals applied the *Smalley* presumption of prejudice because of a nine-year delay in filing. App. 1.

Nothing material distinguishes Mr. Lopez-Quintero's habeas petition from Coleman's. Nevertheless, the Court of Appeals did not require Coleman to prove timeliness—despite a 17-year delay in filing. The Court of Appeals ordered the State to respond, and the State affirmatively raised the

defense of laches. *Coleman* left the *Smalley* presumption intact because the State did not argue that Coleman's petition was untimely based on habeas principles. *Coleman*, 290 Wis. 2d 352, ¶ 25 n.6.

Smalley created a "prompt and speedy" pleading requirement that is not found in the plain language of Wis. Stat. § 809.51(1). The Court of Appeals arbitrarily applied the "prompt and speedy" requirement and the irrebuttable presumption of prejudice to Mr. Lopez-Quintero's habeas petition. The denial of a habeas petition *ex parte* for untimeliness alone if the petition meets the express pleading requirements of Wis. Stat. § 809.51(1) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 (Clause 4) of the Wisconsin Constitution. To avoid these constitutional issues, this Court should find *Smalley*'s interpretation of § 809.51(1) insupportable.

STANDARD OF REVIEW

This case requires the Court to interpret Wis. Stats. §§ 809.51(1) and 809.51(2). Statutory interpretation presents a question of law that this Court reviews *de novo*, while benefitting from the analyses of the court of appeals and circuit court. *State v. Ziegler*, 2012 WI 73, ¶ 37, 342 Wis. 2d 256, 816 N.W.2d 238; *In re Commitment of Alger*, 2015 WI 3, ¶ 21, 360 Wis. 2d 193, 858 N.W.2d 346 (citing *Ziegler*). This Court applies a *de novo* standard of review to legal issues arising in the context of a petition for writ of habeas corpus. *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶ 8, 262 Wis. 2d 720, 665 N.W.2d 155.

ARGUMENT

THE COURT OF APPEALS MAY NOT APPLY AN IRREBUTTABLE PRESUMPTION OF PREJUDICE AND DENY *EX PARTE* A SUFFICIENTLY PLED HABEAS PETITION FOR UNTIMELINESS; INSTEAD, THE COURT OF APPEALS MUST ORDER A RESPONSE FROM THE STATE, WHICH MAY RAISE THE AFFIRMATIVE DEFENSE OF LACHES IF IT CONCLUDES THE DELAY IS UNREASONABLE AND PREJUDICIAL.

A. The plain language of Wis. Stat. § 809.51(1) does not contain a "prompt and speedy" pleading requirement.

In interpreting a statute, courts primarily focus on the statutory language. *State ex rel. Kalal v. Circuit Ct. for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. As this Court explained:

> [S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.

Id. at ¶ 46. When the statutory language manifests a clear meaning, the court's inquiry ceases and the court applies that meaning. *Lincoln Sav. Bank, S.A. v. DOR*, 215 Wis. 2d 430, 443, 573 N.W.2d 522 (1998).

Subsection (1) of Wis. Stat. § 809.51 sets out four specific elements that a petition for writ of habeas corpus must contain:

> (a) A statement of the issues presented by the controversy;
> (b) A statement of the facts necessary to an understanding of the issues;
> (c) The relief sought; and
> (d) The reasons why the court should take jurisdiction.

This Court has recognized that this provision "governs the contents of the petition and supporting memorandum…." *State ex rel. Universal Processing Servs. of Wisconsin, LLC v. Circuit Court of Milwaukee Cty.*, 2017 WI 26, ¶ 39, 374 Wis. 2d 26, 892 N.W.2d 267. To satisfy these elements, "[a] habeas petition must contain a statement of the legal issues and a sufficient statement of facts that bear on those legal issues, which if found to be true, would entitle the petitioner to relief." *Coleman*, 290 Wis. 2d 352, ¶ 18. These pleading requirements are clear and unremarkable; the language of § 809.51(1) unambiguous. Under these circumstances, this Court need not consult "extrinsic sources of interpretation, such as legislative history," *Kalal*, 271 Wis. 2d 633, ¶ 46, nor conduct "a search for ambiguity." *Id.* at ¶ 47 (internal quotation marks omitted).

Subsection (1) of Wis. Stat. § 809.51 must be read in conjunction with subsection (2). Context is important in determining the meaning of a statute. *Id.* at ¶ 46. The relevant portion of subsection (2) of § 809.51 states: "The court may deny the petition *ex parte* or may order the respondents to file a response

with a supporting memorandum…." Subsection (1) places limits on the authority of the Court of Appeals to deny *ex parte* a habeas petition that fails to contain the listed pleading requirements. It would produce absurd and unreasonable results to allow a court to summarily deny a petition under subsection (2) because the petitioner did not include a pleading requirement that is not expressly listed as a requirement in subsection (1). The Wisconsin Legislature would have listed a "prompt and speedy" pleading requirement as the fifth element of a habeas petition if it intended to include it.

The *Smalley* court applied no principles of statutory construction before it held that Wis. Stat. § 809.51(1) requires a habeas petitioner to show that he or she sought "prompt and speedy" relief. Instead, the *Smalley* court reached this interpretation of the statute through a convoluted analysis that began with a discussion of laches, segued into the purpose of habeas corpus, and ended with an analogy based on *Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and restrictions on motions filed under Wis. Stat. § 974.06. *See Smalley*, 211 Wis. 2d at 800–03.

After finding the petitioner's delay in filing his petition unreasonable, *id.* at 800–01, the *Smalley* court quoted *State ex rel. Wohlfahrt v. Bodette*, 95 Wis. 2d 130, 133, 289 N.W.2d 366, 367 (Ct. App. 1980), for the proposition that "the purpose of habeas corpus 'is to provide a prompt and effective judicial remedy to those who are illegally restrained of their personal liberty.'" *Id.* at 801.

Smalley then radically transformed the "prompt and effective judicial remedy" of habeas corpus—

intended to be liberally construed as a shield against unconstitutional government oppression—into a burden of proof for timeliness imposed on the petitioner, who must demonstrate that he or she sought "prompt and *speedy* relief." *Smalley*, 211 Wis. 2d at 802 (emphasis added). *Smalley* did no more than cite Wis. Stat. § 809.51(1) in support of its conclusion that "[s]uch a showing is required." *Id.* In a footnote, the Court of Appeals explained:

> RULE 809.51(1), STATS., states that a petition must contain a statement of the issues and facts of the controversy, the relief sought and the reasons why the court should take jurisdiction. Smalley's petition does not convince us that further proceedings are necessary on the petition. *See* RULE 809.51(2).

Id. at 802 n.7. Beyond this conclusory statement, *Smalley* provided no statutory interpretation that would explain where the court found the "prompt and speedy" requirement in the plain language of § 809.51(1).

By restricting habeas corpus to "prompt and speedy" filers, *Smalley* ignored the noble purpose and broad design of habeas corpus that *Wohlfarht* and the United States Supreme Court have recognized. A portion of the paragraph in *Wohlfarht* that contains the language *Smalley* quoted reads:

> Habeas corpus comes from our common law. It is a great constitutional privilege. Its function is to provide a prompt and effective judicial remedy to those who are illegally restrained of their personal

> liberty. As a remedial statute, it is to be liberally construed.

Wohlfahrt, 95 Wis. 2d at 133 (footnotes omitted).

Wohlfarht itself cited *Peyton v. Rowe*, 391 U.S. 54 (1968), for the quoted passage *Smalley* relied on. *Wohlfarht*, 95 Wis. 2d at 133 n.10. *Peyton* recognized that:

> [The writ of habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.

Id. at 66 (internal quotation marks omitted). *Wohlfarht* also cited *Fay v. Noia*, 372 U.S. 391 (1963), in support of the same passage *Smalley* quoted. *Wohlfarht*, 95 Wis. 2d at 133 n.10. In *Fay*, the Supreme Court extolled the importance of the writ of habeas corpus, noting that:

> [I]ts history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.

Fay, 372 U.S. at 401-02.

Smalley paid no heed to these considerations. Upon finding that the petitioner did not carry his burden of proving timeliness in seeking relief, the Court of Appeals presumed the petition's untimeliness would prejudice the State. *Smalley*, 211 Wis. 2d at 802–03. The Court of Appeals denied the petition *ex parte* under Wis. Stat. § 809.51(2). *Id.* at 802 n.7.

Ex parte denial of a habeas petition renders the *Smalley* presumption of prejudice *irrebuttable*, because the petitioner has no opportunity to respond as he or she would if the Court of Appeals required the State to answer the petition. Moreover, because a petitioner seeking extension of appellate deadlines based on counsel's failure to file a Notice of Intent has no alternative remedy available, *Kyles v. Pollard*, 2014 WI 38, ¶¶ 3, 58, 354 Wis. 2d 626, 847 N.W.2d 805, *Smalley* arbitrarily and irrevocably deprives such a petitioner of the protection of the Great Writ in violation of the Due Process Clause of the Fourteenth Amendment and Article I, Section 8 (Clause 4) of the Wisconsin Constitution. This Court should find *Smalley*'s interpretation of Wis. Stat. § 809.51(1) untenable.

B. *Smalley*'s timeliness burden of proof and irrebuttable presumption of prejudice are unprecedented.

Although *Smalley* addressed the habeas petition's timeliness in the context of the affirmative defense of laches, this Court in *Coleman* recognized that *Smalley* "conflated its analysis of the habeas petition's timeliness with the unreasonable delay

element of laches." *Coleman*, 290 Wis. 2d 352, ¶ 25. *Coleman* explained that *Smalley* ultimately rested its decision on equitable "habeas principles." *Id.* Specifically, this Court noted that, because the Court of Appeals placed the burden of proof for timeliness on the petitioner, "Smalley's claim was precluded by the insufficiency of the habeas petition itself." *Id.*

This Court did not address *Smalley*'s interpretation of Wis. Stat. § 809.51(1) or its imposition of a timeliness burden of proof on petitioners, because the State in *Coleman* never argued that Coleman's habeas petition was untimely under habeas principles. *Id.* at ¶ 25 n.6. More troubling, neither *Smalley* nor this Court explained the material difference between the equitable remedies of laches and habeas corpus that permitted widely contrasting approaches. The party raising the affirmative defense of laches must carry the burden of proving the petitioner's unreasonable delay; yet *Smalley* requires the habeas petitioner to prove that the delay was *not* unreasonable. *Coleman* prohibits the Court of Appeals from presuming prejudice based on unreasonable delay in the laches context; yet *Smalley* applies an irrebuttable presumption of prejudice under "habeas principles" if the petitioner fails to show timeliness in filing.

Smalley's *ex parte* denial of habeas petitions based on untimeliness alone is unprecedented. Until the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA), the writ of habeas corpus in the federal system provided a remedy for constitutional violations regardless of the length of delay—unless the State proved laches: that delay attributable to the petitioner was unreasonable and prejudiced the State

in its ability to respond to the petition. Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* (6th ed. 2011) § 24.2 n.5.

Prior to the passage of the AEDPA, which created a one-year statute of limitations for filing a federal petition for writ of habeas corpus, the federal courts had separate procedures for addressing insufficiently pled petitions and delayed petitions. The federal system's restrained approach gave courts the flexibility to address preliminary issues surrounding the merits and prejudicial delay, while simultaneously recognizing the important role the Great Writ plays in protecting prisoners' constitutional rights.

The Rules Governing 28 U.S.C § 2254 Cases in the United States District Courts ("Habeas Rules") provided district courts "with ample discretionary authority to tailor the proceedings to dispose quickly, efficiently, and fairly of first habeas petitions that lack substantial merit, while preserving more extensive proceedings for those petitions raising serious questions." *Lonchar v. Thomas*, 517 U.S. 314, 325 (1996). Habeas Rule 4 and former Habeas Rule 9(a) stand in stark contrast to the procedure the Court of Appeals adopted in *Smalley*.

1. Habeas Rule 4

Habeas Rule 4 imposes a substantive pleading burden. It permits a district court to dismiss summarily a first petition without waiting for the State's response if "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief." Habeas Rule 4. However, Habeas Rule 4 supports a cautious approach

to dismissal. A district court should order a summary dismissal only when the petition is "frivolous." Advisory Committee Note to Habeas Rule 4.

Habeas Rule 4 does not contemplate that the court will—without requiring a response from the State or otherwise ordering some supplementation of the record—decide a petition on the merits if, given the facts in the pleading, the petition sets out a constitutional claim of arguable merit. *See*, *e.g.*, *Williams v. Kullman*, 722 F.2d 1048, 1050–51 (2d Cir. 1983) (ruling that summary dismissal of a habeas petition prior to requiring a response is appropriate only where the pleading indicates "that petitioner can prove no set of facts to support a claim entitling him to relief"). The critical question is whether the allegations, "when viewed against the record, [are] so palpably incredible, so patently frivolous or false, as to warrant summary dismissal." *Blackledge v. Allison*, 431 U.S. 63, 75–76 (1977) (internal quotation marks and citations omitted).

Habeas Rule 4 can instruct this Court in formulating a standard for permitting summary dismissals under Wis. Stat. § 809.51(2). Such dismissals should be predicated solely on a preliminary examination of the merits of the constitutional claims, viewed through the lens of the express pleading requirements set out in Wis. Stat. § 809.51(1).

By relying on general habeas principles to create a "prompt and speedy" filing requirement not found in the plain language of § 809.51(1) and deny a petition *ex parte* solely for untimeliness, *Smalley* did precisely what the United States Supreme Court prohibited in

Lonchar. *Lonchar* held that a federal court may not dismiss a first federal habeas petition for general "equitable" reasons beyond those embodied in the relevant statutes, Habeas Rules, and prior precedents. 517 U.S. at 316. *Lonchar* found that the United States Court of Appeals, in vacating a stay of execution, should have applied Habeas Rule 9(a), specifically dealing with prejudicial delay, instead of relying on *ad hoc* "equitable doctrines" independent of the Rule. *Id.* at 319, 322; *see id.* at 323 ("[T]he fact that the writ has been called an "equitable" remedy does not authorize a court to ignore this body of statutes, rules, and precedents." (citation omitted)). *Lonchar* recognized that the "[d]ismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Id.* at 324 (emphasis in original).

2. Habeas Rule 9(a)

To deal with untimely filed petitions, the pre-AEDPA version of Habeas Rule 9(a) provided that "[a] petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing." Habeas Rule 9(a) is based upon the equitable doctrine of laches. Advisory Committee Notes to Habeas Rule 9; *see Davis v. Dugger*, 829 F.2d 1513, 1519 (11th Cir. 1987); *Strahan v. Blackburn*, 750 F.2d 438, 440 (5th Cir. 1985).

Unlike Habeas Rule 4, Habeas Rule 9(a) authorized the summary disposition of petitions on grounds unrelated to the merits of the constitutional claims. Consequently, "to avoid the abrogation of the

very purpose of the writ," Congress limited the application of Habeas Rule 9(a) by imposing the burden of proving laches on the State. *McDonnell v. Estelle*, 666 F.2d 246, 251 (5th Cir. 1982).

The State bore a "heavy burden" under Habeas Rule 9(a). *Rideau v. Whitley*, 237 F.3d 472, 477 (5th Cir. 2000); *Walters v. Scott*, 21 F.3d 683, 686 (5th Cir. 1994). Delay alone was not sufficient to warrant dismissal. *Davis*, 829 F.2d at 1519; *Baxter v. Estelle*, 614 F.2d 1030, 1034 (5th Cir. 1980). In addition to demonstrating unreasonable delay, the State had to: (1) make a "particularized showing of prejudice;" and (2) demonstrate that the prejudice was due to the delay. *Rideau*, 237 F.3d at 477; *Davis*, 829 F.2d at 1519; *Hill v. Linahan*, 697 F.2d 1032, 1035 (11th Cir. 1983). Even if the State proved the elements of laches, Habeas Rule 9(a) gave the petitioner an opportunity to avoid dismissal by demonstrating that the petition was "based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred." Habeas Rule 9(a).

As originally drafted, Habeas Rule 9(a) contained a provision that would have eased the State's burden of proof by presuming prejudice after a delay of five years. *See Lonchar*, 517 U.S. at 327. Congress rejected this approach, finding it "unsound policy to require the defendant to overcome a presumption of prejudice." *Id.* at 328 (quoting H.R. Rep. No. 1471, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Ad. News 2478, 2481); *see* 1976 U.S. Code Cong. & Ad. News at 2482 n.8 ("Those facts which make it difficult for the State to respond to an old claim can readily be discovered by the State. It

is not easy, perhaps in some instances not possible, for a prisoner to discover those facts that he would have to show in order to rebut the presumption of prejudice.").

Under the final version of Habeas Rule 9(a), the State retained its burden to prove prejudice, "no matter how lengthy" the petitioner's delay in filing. Hertz & Liebman, *supra*, § 24.2(b); *see Rideau*, 237 F.3d at 478 ("Mere passage of time alone was never sufficient to constitute prejudice."). Indeed, a survey of 14 cases where United States Courts of Appeal had granted dismissals under Habeas Rule 9(a) revealed that the petitioner delayed an average of nearly 17 years before filing. *Strahan*, 750 F.2d at 441 n.4; *see* Hertz & Liebman, *supra*, § 24.2(a) ("[L]apses less than 10 years rarely were *asserted* as a basis for Rule 9(a) dismissal, and those less than a decade and a half rarely *resulted* in dismissal." (emphasis added)); *see*, *e.g.*, *Rideau*, 237 F.3d at 481–83 (refusing to grant Habeas Rule 9(a) dismissal where State did not show particularized prejudice from 27-year delay between finality of conviction and commencement of post-conviction relief efforts); *Bedford v. Attorney General of Alabama*, 934 F.2d 295, 299–300 (11th Cir. 1991) (same, regarding 19-year delay between finality of conviction and start of post-conviction proceedings); *Campas v. Zimmerman*, 876 F.2d 318, 324 (3d Cir. 1989) (same, regarding a 17-year delay between conviction and filing for federal habeas relief); *Hannon v. Maschner*, 845 F.2d 1553, 1557 (10th Cir. 1988) (same, regarding a 25-year delay between finality of conviction and filing for federal habeas relief).[2]

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[2] AEDPA's one-year statute of limitations rendered Habeas Rule 9(a) moot. In 2004, Congress recognized that prejudicial delay

Notably, prior to the enactment of Habeas Rule 9(a) in 1976, courts did not dismiss petitions for laches. *See McDonnell,* 666 F.2d at 250–51. Courts concluded that to do so would "eviscerate" the purpose of the Great Writ to remedy constitutionally defective convictions. *Id.* at 250. Instead, the elements of laches—unreasonable delay and prejudice—were incorporated into a court's consideration of the merits of a petitioner's claim, increasing the burden of proof. *Id.* at 251; *Davis v. Adult Parole Authority*, 610 F.2d 410, 415 (6th Cir. 1979). If the petitioner had delayed unreasonably in filing his or her claim and the delay resulted in prejudice to the State, the petitioner's case was not irretrievably lost but merely weakened. *McDonnell*, 666 F.2d at 251. Courts would give less weight to the evidence the petitioner presented than if the claim had been timely filed. *Id.* Thus, courts denied habeas petitions because the petitioners failed to meet their burden of proof on the underlying merits, *not*

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was no longer likely to occur, and rescinded Habeas Rule 9(a). Advisory Committee Notes to Habeas Rule 9 (2004). Although the purpose of the statute of limitations is to eliminate delays in federal habeas review, it attempts to do so without undermining the importance of the Great Writ. *Holland v. Florida*, 560 U.S. 631, 648 (2010). When Congress codified these new rules, it recognized that the "writ of habeas corpus plays a vital role in protecting constitutional rights." *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). Because Congress did not intend to close the courthouse doors to all petitioners who filed after the expiration of the one-year limitations period, the United States Supreme Court held that AEDPA's statute of limitations is subject to equitable tolling. *Holland*, 560 U.S. at 649. A petitioner is entitled to equitable tolling upon a showing: (1) that he or she has been pursuing his or her rights diligently; and (2) that some extraordinary circumstance prevented timely filing. *Id.*

because the petitions were untimely. *Id.*; *Davis*, 610 F.2d at 415.

C. Mr. Lopez-Quintero's habeas petition meets the express pleading requirements of Wis. Stat. § 809.51(1).

The insufficiency of Smalley's habeas petition is apparent when assessed under the four pleading requirements expressly listed in Wis. Stat. § 809.51(1). Smalley's three-page *pro se* petition presented a rudimentary ineffective assistance of appellate counsel claim. App. 4 (Smalley Habeas Petition). The petition lacked any concrete allegations regarding appellate counsel's withdrawal, except generally stating that counsel withdrew without obtaining Smalley's consent. *Id.* Smalley's petition contained conclusory allegations and offered no reasons explaining his eight-year delay in filing. *Id.*; *see Smalley*, 211 Wis. 2d at 801.

The Court of Appeals found that Smalley's claim was patently frivolous: the court examined the record and specifically noted counsel's "Disposition Summary" that stated "[n]o court action taken as case did not merit any post-conviction proceeding and client agreed to have counsel close the case." *Id.* at 800-01 (internal quotation marks omitted).

The facial sufficiency of the habeas petition at issue in *Coleman* appears to have distinguished it from Smalley's. Coleman's petition, filed with the assistance of counsel, was 17 pages in length and contained 48 pages of exhibits. App. 5 (Coleman Habeas Petition). His petition clearly met the express pleading requirements of Wis. Stat. § 809.51(1) in

setting out his claim that appellate counsel rendered ineffective assistance by not appealing the circuit court's ruling denying his motion for suppression of evidence. *Id.*

Like Smalley, however, Coleman did not allege facts demonstrating that he sought "prompt and speedy relief," as required by *Smalley*'s interpretation of Wis. Stat. § 809.51(1). Coleman explained that he did not attempt to raise the suppression issue sooner because he was indigent and could not afford a "second opinion" until he married and acquired the resources to hire counsel. *Id.* at 15–16. Nevertheless, the Court of Appeals did not deny Coleman's petition *ex parte*. Instead, it ordered the State to respond. The State raised the defense of laches. The Court of Appeals found the petitioner's 17-year delay unreasonable, and presumed prejudice. *Coleman*, 290 Wis. 2d 352, ¶¶ 15, 35.

Like Coleman, Mr. Lopez-Quintero filed a petition, with the assistance of counsel, that clearly satisfied the express pleading requirements of Wis. Stat. § 809.51(1). Sixteen pages in length with five exhibits attached, Mr. Lopez-Quintero's constitutional claim relied on readily available, indisputable record-based evidence, rather than testimonial evidence susceptible to deterioration with the passage of time. Mr. Lopez-Quintero unequivocally indicated his desire to pursue postconviction relief on the Notice of Right. App. 3 (Ex. B). At sentencing, his attorney assured the circuit court that he would file the Notice of Intent within 20 days. App. 3 (Ex. C at 57, 60). At the hearing on the motion for new trial, counsel sought to represent Mr. Lopez-Quintero on appeal. App. 3 (Ex. D at 46). The circuit court ordered counsel to continue

representing Mr. Lopez-Quintero "until the time a decision whether to appeal is made." App. 3 (Ex. E). By that time, however, the 20-day deadline to file the Notice of Intent had expired nearly a month-and-a-half earlier. Counsel never notified Mr. Lopez-Quintero about their failure to file the Notice of Intent. These concrete, record-based facts alone should have warranted a more in-depth review and merited a response from the State, requiring it to raise the defense of laches if it concluded that the delay was unreasonable and prejudicial.

Coleman's explanation for his 17-year delay—lack of funds to hire counsel—is a "disability" that could apply to nearly every prisoner in Wisconsin. In contrast, Mr. Lopez-Quintero made specific allegations about his disabilities to account for his untimely filing. A Mexican national and monolingual Spanish speaker with only a middle-school education and little familiarity with the criminal justice system, Mr. Lopez-Quintero had few resources at his disposal. App. 3 at 2, 5–6.

Unlike *Coleman*, the Court of Appeals summarily denied Mr. Lopez-Quintero's petition. The Court of Appeals ordered no response from the State. It imposed the burden of proof for timeliness on Mr. Lopez-Quintero and applied *Smalley*'s irrebuttable presumption of prejudice (after making the enigmatic pronouncement that Mr. Lopez-Quintero's disabilities could account for "some"—but not all—of the delay). App. 1 at 2–3. It irrevocably closed the courthouse doors on a petitioner sentenced to life in prison without the possibility of parole who never appealed his first-degree murder conviction.

Nothing can account for the disparate treatment between Mr. Lopez-Quintero's petition and Coleman's petition. In fact, Mr. Lopez-Quintero presented a more compelling case because his filing delay spanned only nine years, while Coleman's was 17 years. Moreover, Mr. Lopez-Quintero presented case-specific, individualized reasons for his delay, rather than Coleman's general reasons that apply to the vast majority of prisoners.

CONCLUSION

Application of the *Smalley ex parte* procedure is the death knell for habeas petitioners. It is fraught with constitutional problems because: (1) It is uncabined—applied without judicial limitation or guiding principles; (2) it produces arbitrary and grossly unfair results; (3) it places the burden on the petitioner to prove that the delay was *not* unreasonable while laches places the burden on the party asserting the defense that the delay was unreasonable; (4) it imposes an irrebuttable presumption of prejudice based on general, equitable habeas principles while *Coleman* strictly prohibits such a presumption as an element of laches; (5) it renders the defense of laches obsolete; and (6) because it results in the summary denial of the petition, it forever deprives petitioners with meritorious claims the protection of the Great Writ.

This Court should unequivocally reject *Smalley*'s interpretation of Wis. Stat. § 809.51(1) that allows the Court of Appeals to deny *ex parte* a sufficiently pled habeas petition for untimeliness alone.

This Court should remand Mr. Lopez-Quintero's case to the Court of Appeals and order the State to respond to his petition.

Dated this 11th day of July 2018.

Respectfully Submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 6,142 words.

Dated this 11th day of July 2018.

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CERTIFICATION AS TO COMPLIANCE WITH RULE 809.19(12)

I have submitted an electronic copy of this brief, excluding the appendix, 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 11th day of July 2018.

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CERTIFICATION AS TO APPENDIX

I certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) relevant trial court record entries; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that, if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using 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.

Dated this 11th day of July 2018.

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