STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP203-W

STATE OF WISCONSIN EX REL.
EZEQUIEL LOPEZ-QUINTERO,

Petitioner,

v.

MICHAEL A. DITTMANN,

Respondent.

ON APPEAL FROM A DENIAL OF A
PETITION FOR A WRIT OF HABEAS CORPUS,
THE WISCONSIN COURT OF APPEALS, DISTRICT II,
PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF RESPONDENT

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ISSUE PRESENTED

A petitioner seeking a writ of habeas corpus under Wis. Stat. § (Rule) 809.51 must show a prompt and speedy request for relief. *State ex rel. Smalley v. Morgan*, 211 Wis. 2d 795, 802, 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. Petitioner Ezequiel Lopez-Quintero waited over nine years to seek this relief. The court of appeals denied his petition ex parte, reasoning that he unreasonably delayed his filing under *Smalley*. Has Lopez-Quintero established that the *Smalley* court's decision is objectively wrong, such that the court of appeals erred in denying his petition?

The court of appeals did not answer this question.

This Court should answer, "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

INTRODUCTION

Following his conviction for first-degree intentional homicide in 2008, Lopez-Quintero was advised of his right to seek postconviction relief. He indicated on a form that he wished to pursue such relief, but his trial attorneys did not properly initiate his appeal. Still, he litigated a motion for a new trial with the assistance of counsel. Following the circuit court's denial of that motion, Lopez-Quintero learned that he would receive a copy of the trial transcripts free of charge to assist him with any further appeal. He then waited over nine years to seek the intervention of a court to help him exercise his direct appeal rights.

The court of appeals denied Lopez-Quintero's petition for a writ of habeas corpus ex parte. It relied on *Smalley*, which holds that a person seeking a writ of habeas corpus under Wis. Stat. § (Rule) 809.51—the statute setting forth the procedure for obtaining an extraordinary writ from the court of appeals—must show a prompt and speedy request for relief. *Smalley*, 211 Wis. 2d at 802.

On appeal, Lopez-Quintero argues that *Smalley* is bad law. Though he does not recognize it, he has the high burden of showing this Court that the *Smalley* court's interpretation of Wis. Stat. § (Rule) 809.51 is objectively wrong. Since canons of statutory construction and case law support *Smalley*'s holding permitting courts to deny a habeas petition ex parte for failing to show a prompt and speedy request for relief, this Court should uphold 21 years of precedent and affirm.

Further, the court of appeals soundly applied *Smalley* in denying Lopez-Quintero's petition. While Lopez-Quintero identified some limitations that led him to rely on his trial attorneys to initiate his appeal, he did not explain his minimal effort to pursue his direct appeal rights in the nine plus years that he waited to seek a writ of habeas corpus. This Court should therefore affirm.

STATEMENT OF THE CASE

In March 2008, a jury convicted Lopez-Quintero of (1) first-degree intentional homicide with the use of a dangerous weapon, and (2) carrying a concealed weapon. (R-App. 101–02.)[1] In April, the circuit court sentenced him to life in prison

[1] The State takes the following facts from CCAP reports for Kenosha County case number 2007CF535 and 2018AP203-W, as

without the possibility for release on extended supervision. (R-App. 102.)

At sentencing, both the circuit court and trial counsel notified Lopez-Quintero of his right to appeal through the use of the Notice of Right to Seek Postconviction Relief form. (Pet-App. Exs. B; C.) Lopez-Quintero acknowledged that he had a right to appeal and that he needed to file a notice of intent to pursue postconviction relief within 20 days after sentencing to exercise his right. (Pet-App. Ex. B.) He checked a box on the form indicating that he planned to seek relief. (Pet-App. Ex. B.) He also confirmed that he received a copy of the form. (Pet-App. Ex. B.)

During a discussion of Lopez-Quintero's appeal rights at sentencing, trial counsel indicated that he already filed a motion for a new trial. (Pet-App. Ex. C.) The circuit court told him that he still needed to file a notice of intent within 20 days after sentencing to preserve Lopez-Quintero's appeal rights. (Pet-App. Ex. C.) Trial counsel never filed the notice of intent. (R-App. 110–11.)

Two months after sentencing, in June 2008, the circuit court held a hearing on Lopez-Quintero's motion for a new trial. (R-App. 108.) Lopez-Quintero appeared in person with counsel. (R-App. 108.) The court denied his motion, including his challenges to the constitutionality of the first-degree intentional homicide statutes; to the jury instructions; and to the prosecutor's closing argument. (R-App. 108.)

At the conclusion of the motion hearing, Lopez-Quintero sought and received a fee waiver for the jury trial transcripts because he was indigent. (Pet-App. Exs. D; E.)

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well as Lopez-Quintero's habeas petition, which he included in his appendix to his brief.

The circuit court appointed one of Lopez-Quintero's previously retained lawyers to remain counsel "until the time a decision as to whether to appeal is made." (Pet-App. Ex. D.)

Nothing happened for over nine years. On February 1, 2018, Lopez-Quintero filed a petition for a writ of habeas corpus in the court of appeals seeking reinstatement of his direct appeal rights. (R-App. 114.)

In his petition, Lopez-Quintero argued that his trial attorneys were ineffective for failing to file the notice of intent when he checked the box on the "Notice of Right" form stating the he wished to appeal. (Pet-App. 3:1–2.) He alleged that he relied on his trial attorneys to explain the appellate process to him due to "his lack of English fluency, limited education, and unfamiliarity with the criminal justice system in the United States." (Pet-App. 3:5.) He claimed that he "remained uninformed about what would happen after he indicated his desire to appeal his conviction and sentence on the Notice of Right." (Pet-App. 3:6.) He further stated that he "did not know about trial counsel's failure to file a Notice of Intent and the deleterious consequences of such inaction." (Pet-App. 3:4.) Lopez-Quintero also noted that one of his trial attorneys was deceased and the other could not recall why he did not file the notice of intent. (Pet-App. 3:3.)

Nowhere in his petition did Lopez-Quintero allege that in 2010, he contacted the Frank J. Remington Center at the University of Wisconsin Law School for assistance. (Lopez-Quintero's Br. 5.) Nor did he allege that he again contacted the Remington Center in 2012. (Lopez-Quintero's Br. 5.) Nor did he allege that after agreeing to represent him in 2012, the Remington Center took roughly five and one-half years to file his petition. (Lopez-Quintero's Br. 5.)

The court of appeals denied Lopez-Quintero's petition ex parte. (Pet-App. 1.) Relying on Wis. Stat. § (Rule) 809.51 and its decision in *Smalley*, the court of appeals decided that Lopez-Quintero failed to meet his burden of proof to show that he timely filed his petition. (Pet-App. 1.) Specifically, it reasoned: "[a]lthough Lopez-Quintero's stated limitations can account for some delay in this case, it cannot account for over nine years of delay." (Pet-App. 1:2–3.) Lopez-Quintero filed a motion to reconsider and the court of appeals denied it. (Pet-App. 2.)

Lopez-Quintero then filed a petition for review, which this Court granted.

STANDARD OF REVIEW

This case requires the Court to interpret Wis. Stat. § (Rule) 809.51. Typically, statutory interpretation is an issue of law that this Court reviews de novo. *State v. Reyes Fuerte*, 2017 WI 104, ¶ 18, 378 Wis. 2d 504, 904 N.W.2d 773. But when a party asks this Court to overrule precedent interpreting a statute, review is not de novo. *Id.*; *see also Wenke v. Gehl Co.*, 2004 WI 103, ¶ 21, 274 Wis. 2d 220, 682 N.W.2d 405. "Rather, the party seeking [that this Court] overturn a prior statutory interpretation must show that the prior interpretation was 'objectively wrong' and thus the court has a 'compelling reason to overrule it.'" *Reyes Fuerte*, 378 Wis. 2d 504, ¶ 18 (quoting *Wenke*, 274 Wis. 2d 220, ¶ 21).

If this Court chooses to decide whether Lopez-Quintero timely filed his petition, the issue involves reasonableness, which presents a question of law subject to de novo review. *Smalley*, 211 Wis. 2d at 800.

ARGUMENT

Lopez-Quintero has not met his high burden of showing that the court of appeals' decision in *Smalley* is objectively wrong.

Lopez-Quintero does not argue that he made a prompt and speedy request for relief under Wis. Stat. § (Rule) 809.51 when he sought reinstatement of his direct appeal rights over nine years after his conviction for first-degree intentional homicide. Instead, he contends that the prompt and speedy filing requirement for habeas petitioners should not exist. His appeal thus entirely depends on his ability to show this Court that *Smalley*'s interpretation of Wis. Stat. § (Rule) 809.51 is objectively wrong—a burden he fails to recognize. (Lopez-Quintero's Br. 9.) Since canons of statutory construction and case law support the court of appeals' decision in *Smalley*, this Court should affirm.

Moreover, if this Court chooses to determine whether Lopez-Quintero made a prompt and speedy request for relief despite his forfeiture of the issue, it should conclude that he did not and likewise affirm.

Finally, despite what Lopez-Quintero contends, he still has avenues for postconviction relief.

A. Relevant law

1. Appellate procedure

"Upon conviction, a defendant has a statutory right to seek postconviction relief through a postconviction motion or an appeal." *State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶ 21, 354 Wis. 2d 626, 847 N.W.2d 805. To ensure a meaningful opportunity to exercise that right, "[e]very convicted criminal defendant must be properly informed of the right to appeal." *State ex rel. Flores v. State*, 183 Wis. 2d 587, 603, 516 N.W.2d 362 (1994). At sentencing, both the circuit court

and trial counsel have a duty to inform the defendant of this right. *Id.*; Wis. Stat. § 973.18. Proper notice includes guidance on how to initiate postconviction relief. Specifically, the court must direct the defendant and trial counsel to sign a form stating that the "defendant understands that a notice of intent to pursue postconviction relief must be filed in the trial court within 20 days after sentencing for [the right to appeal] to be preserved." Wis. Stat. § 973.18(3).

If the defendant wishes to appeal, it is trial counsel's duty to file the notice of intent. *Kyles*, 354 Wis. 2d 626, ¶¶ 21–22 (citing Wis. Stat. § (Rule) 809.30(2)(b)). Trial counsel's failure to do so constitutes ineffective assistance. *Flores*, 183 Wis. 2d at 615.

The procedures for filing a postconviction motion and a direct appeal—set forth in Wis. Stat. §§ 974.02 and (Rule) 809.30—contemplate a timely filed notice of intent to pursue postconviction relief. Where that does not occur, two options exist to remedy the failure to timely file the notice of intent by reinstating the defendant's direct appeal rights.

First, the defendant may file a motion to extend time to file a postconviction motion or appeal with the court of appeals under Wis. Stat. § (Rule) 809.82(2). *Kyles*, 354 Wis. 2d 626, ¶ 22. The defendant must show good cause for the motion. Wis. Stat. § (Rule) 809.82(2). The court of appeals is generally lenient about granting these extensions. *State v. Quakenbush*, 2005 WI App 2, ¶ 11, 278 Wis. 2d 611, 692 N.W.2d 340. But the longer the defendant waits to request one, the more difficult it becomes to show good cause. *Id.* Also, if the defendant's alleged good cause is ineffective assistance, he usually must avail himself of the next option, which is a procedure more conducive to deciding substantive rights. *Kyles*, 354 Wis. 2d 626, ¶¶ 39–46.

Second, the defendant could try to reinstate his direct appeal rights by filing a petition for a writ of habeas corpus in the court of appeals alleging ineffective assistance for the failure to timely file the notice of intent. *Kyles*, 354 Wis. 2d 626, ¶¶ 38–39. This is known as a *Knight*[2] petition. The court of appeals may hear these petitions because "[h]abeas corpus is a prerogative writ" and "[t]he court of appeals has original jurisdiction to issue prerogative writs." *State ex rel. McCaffrey v. Shanks*, 124 Wis. 2d 216, 219, 369 N.W.2d 743 (Ct. App. 1985) (citing Wis. Const. art. VII, § 5(3)). And since the procedure for obtaining a prerogative writ in the court of appeals is set forth in Wis. Stat. § (Rule) 809.51, the defendant files a *Knight* petition under that statute. *See, e.g.*, *Smalley*, 211 Wis. 2d at 796. *See also* Michael S. Heffernan, *Appellate Practice & Procedure in Wisconsin* § 19.25, at 30 (6th ed. 2014) (citing *State ex rel. LeFebre v. Abrahamson*, 103 Wis. 2d 197, 202, 307 N.W.2d 186 (1981)) ("When a petition for habeas corpus is filed in an appellate court, the procedure for supervisory[3] writ is followed.").

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[2] In *State v. Knight*, this Court held that the appropriate vehicle of relief for a criminal defendant to claim ineffective assistance of appellate counsel is to file a petition for a writ of habeas corpus with the appellate court that considered the appeal. *State v. Knight*, 168 Wis. 2d 509, 512–13, 484 N.W.2d 540 (1992). Although a defendant claiming ineffective assistance for failure to file a notice of intent alleges an error that occurred at the circuit court, not the court of appeals, this Court has held that a *Knight* petition is nevertheless proper because only the court of appeals can remedy the error by extending the relevant deadline. *State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶¶ 36–38, 354 Wis. 2d 626, 847 N.W.2d 805.

[3] Wisconsin Stat. § (Rule) 809.51 sets forth the procedure for obtaining both supervisory and prerogative writs.

As discussed in greater detail below, the court of appeals has discretion to deny a *Knight* petition ex parte or to order a response from the State before deciding whether to issue the writ, which is an extraordinary remedy in Wisconsin. Wis. Stat. § (Rule) 809.51(2); *State v. Pozo*, 2002 WI App 279, ¶ 8, 258 Wis. 2d 796, 654 N.W.2d 12.

2. Habeas corpus

"Writ of *habeas corpus* is an equitable remedy that protects a person's right to personal liberty by freeing him or her from illegal confinement." *Pozo*, 258 Wis. 2d 796, ¶ 8. "It arises in common law and is guaranteed by the state and federal constitutions, as well as by statute." *Id*. (footnotes omitted). "Although a habeas corpus petition normally arises out of criminal proceedings, it is a separate civil action founded upon principles of equity." *State ex rel. Fuentes v. Wis. Ct. of App., Dist. IV*, 225 Wis. 2d 446, 450, 593 N.W.2d 48 (1999).

Habeas corpus exists "to provide a prompt and effective judicial remedy" for illegal confinement. *Smalley*, 211 Wis. 2d at 802 (citation omitted). *See also State ex rel. Haas v. McReynolds*, 2002 WI 43, ¶ 11, 252 Wis. 2d 133, 643 N.W.2d 771 (habeas corpus "is available to a petitioner when there is a pressing need for relief or where the process or judgment by which a petitioner is held is void"). Because it grants extraordinary relief, it "is only available where specific factual circumstances are present." *Fuentes*, 225 Wis. 2d at 451. The petitioner must show "(1) restraint of his or her liberty, (2) which restraint was imposed[4] contrary to

[4] As noted, the defendant may use the writ procedure to raise issues not directly related to the imposition of sentence. *Knight*, 168 Wis. 2d at 512–13; *Kyles*, 354 Wis. 2d 626, ¶¶ 38–39.

constitutional protections or by a body lacking jurisdiction and (3) no other adequate remedy available at law." *Pozo*, 258 Wis. 2d 796, ¶ 8. *See also Coleman*, 290 Wis. 2d 352, ¶ 18.

In Wisconsin, there are no strict time limits for when a person can petition for a writ of habeas corpus. Historically, there were no strict time limits on federal habeas petitioners, either. *United States v. Smith*, 331 U.S. 469, 475 (1947) ("habeas corpus provides a remedy for jurisdictional and constitutional errors at the trial without limit of time"). *But cf. Collins v. Byrd*, 510 U.S. 1185, 1288 (1994) (Scalia, J., dissenting) (citing *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)) (arguing that because a court has broad equitable discretion to assert jurisdiction over a habeas petition, "the petitioner's delay in filing is a factor the court may consider"). Eventually, federal "[c]ourts invoked the doctrine of 'prejudicial delay' to screen out unreasonably late filings." *Day v. McDonough*, 547 U.S. 198, 202 n.1 (2006). In other words, federal courts dismissed habeas petitions for untimeliness where the government could prove laches—an inability to defend against the claims raised in the habeas petition. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Wisconsin courts have likewise utilized the doctrine of laches to dismiss habeas petitions. *See State ex rel. McMillian v. Dickey*, 132 Wis. 2d 266, 281, 392 N.W.2d 453

Federal law is in accord. *See Thompson v. United States*, 536 F.2d 459 (1976) (proper vehicle for attacking execution of sentence is writ of habeas corpus under 28 U.S.C. § 2241). Thus, it seems more appropriate to say that, "[i]n Wisconsin, the writ of habeas corpus may be employed to review violations of substantial constitutional rights." *State ex rel. Kelley v. Posner*, 91 Wis. 2d 301, 303, 282 N.W.2d 633 (Ct. App. 1979).

(Ct. App. 1986), *abrogated on other grounds by Coleman*, 290 Wis. 2d 352.

Notably, the lack of a time limit on federal habeas petitions was not without criticism, *see Lonchar v. Thomas*, 517 U.S. 314, 328 (1996), in part because "the well-recognized interest in the finality of state court judgments" has always been a guiding principle of habeas corpus jurisprudence. *Duncan v. Walker*, 533 U.S. 167, 179 (2001). *See also McCleskey*, 499 U.S. at 491. This interest led Congress, through the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), to pass a one-year statute of limitations for state prisoners to file federal habeas corpus petitions, which "reduces the potential for delay on the road to finality by restricting the time that a federal habeas petitioner has in which to seek federal habeas review." *Duncan*, 533 U.S. at 179. *See also* 28 U.S.C. § 2244(d)(1).

Because "'[e]quitable principles' have traditionally 'governed' the substantive law of habeas corpus,"[5] the United States Supreme Court has stated that it "will 'not construe a statute to displace courts' traditional equitable authority absent the "clearest command."'" *Holland v. Florida*, 560 U.S. 631, 646 (2010) (citations omitted). Thus, the Court has held that the one-year statute of limitations for federal habeas petitions is subject to equitable tolling, even though the statute contains no such exception to its general rule. *Id.* at 649. Equitable tolling requires the petitioner to show that

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[5] "Throughout the Seventeenth and Eighteenth centuries, prisoners in England sought the Great Writ primarily from a common law court—the Court of King's Bench—but that court's exercise of power to issue the writ was built around equitable principles." Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 Nw. U. L. Rev. 139 (2013).

he pursued his rights diligently and that some extraordinary circumstance prevented the timely filing of his petition. *Id.*

The statute of limitations for federal habeas petitions thus focuses on the petitioner's conduct, "a factor that traditionally has been an equitable consideration." Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 Nw. U. L. Rev. 139, 155–162 (2013). *See also McClesky*, 499 U.S. at 490 (citation omitted) ("In habeas, equity recognizes that 'a suitor's conduct in relation to the matter at hand may disentitle him to the relief that he seeks.'"). In fact, most of the procedural limitations on federal habeas petitions—created by courts and later codified by Congress—center on the petitioner's conduct. Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 Nw. U. L. Rev. at 145–57.

While "Wisconsin's rules on when a state habeas may be filed are more liberal than those applicable to federal habeas" because there is no statute of limitations, *Coleman*, 290 Wis. 2d 352, ¶¶ 24 n.5, 25, Wisconsin courts of equity still focus on a petitioner's conduct in deciding whether to grant relief. *Visser v. Koenders*, 6 Wis. 2d 535, 538, 95 N.W.2d 363 (1959) ("Equity has a well-known maxim that equitable relief will be denied to a complainant who has slept on his rights."); *Coleman*, 290 Wis. 2d 352, ¶ 25 ("equitable remedies are not available to one whose own inaction results in the harm"). This principle plays out in a variety of contexts and calls for a balancing of the competing goals of fairness and finality. *See, e.g.*, *Smalley*, 211 Wis. 2d at 800–03 (denying habeas petition as untimely because of inexcusable delay); *Edland v. Wis. Phys. Serv. Ins. Co.*, 210 Wis. 2d 638, 644–48, 563 N.W.2d 519 (1997) (circuit court properly extended deadline to civil appeal due to excusable delay).

The takeaway is that, like federal courts, Wisconsin courts resort to common-law equitable principles to decide whether to grant habeas relief. The petitioner's conduct is an important factor in the analysis, along with considerations of fairness and finality.

3. Wisconsin Stat. § (Rule) 809.51

As noted, a defendant seeking a writ of habeas corpus from the court of appeals proceeds under Wis. Stat. § (Rule) 809.51, governing supervisory and prerogative writs. *See Coleman*, 290 Wis. 2d 352, ¶ 18. The petition must contain: (1) a "statement of the issues presented by the controversy," (2) a "statement of the facts necessary to an understanding of the issues," (3) the "relief sought," and (4) the "reasons why the court should take jurisdiction." Wis. Stat. § (Rule) 809.51(1).

The statute gives the appellate court broad discretion to issue the writ. *See State ex rel. Dressler v. Cir. Ct. for Racine Cty.,* 163 Wis. 2d 622, 630, 472 N.W.2d 532 (Ct. App. 1991). Under Wis. Stat. § (Rule) 809.51(2), "[t]he court may deny the petition ex parte or may order the defendants to file a response." If the court orders a response, the respondent "may file a letter stating that he or she does not intend to file a response, but the petition is not thereby admitted." Wis. Stat. § (Rule) 809.51(2). After considering the petition and any other submissions, the appellate court "may grant or deny the petition or order such additional proceedings as it considers appropriate." Wis. Stat. § (Rule) 809.51(3).

The statute does not state what grounds are necessary for the issuance of a supervisory or prerogative writ. But case law informs the appellate court's decision. Because a petitioner under Wis. Stat. § (Rule) 809.51 seeks equitable relief, the decision whether to issue the extraordinary writ is governed by equitable principles. *State ex rel. Kalal v. Cir.*

Ct. for Dane Cty., 2004 WI 58, ¶ 17, 271 Wis. 2d 633, 681 N.W.2d 110. Different standards apply depending on the type of writ at issue.

For supervisory writs, the petitioner must show that "(1) an appeal is an inadequate remedy; (2) grave hardship or irreparable harm will result; (3) the duty of the trial court is plain and it must have acted or intends to act in violation of that duty; and (4) *the request for relief is made promptly and speedily*." *Kalal*, 271 Wis. 2d 633, ¶ 17 (emphasis added). *See also State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶ 80, 363 Wis. 2d 1, 866 N.W.2d 165. Regarding the latter requirement, "[t]he more time that elapses after the action complained of, the less likely the court will be to hear the claim." Heffernan, *Appellate Practice & Procedure in Wisconsin* § 10.3, at 4.

For prerogative writs—specifically, the writ of habeas corpus—the petitioner must show the three requirements noted above. *Coleman*, 290 Wis. 2d 352, ¶ 18. And, like supervisory writs, a petitioner seeking a writ of habeas corpus must show a prompt and speedy request for relief. *Smalley*, 211 Wis. 2d at 802.

In *Smalley*, Smalley filed a *Knight* petition eight years after his conviction, alleging that his appellate counsel was ineffective for failing to pursue an appeal or file a no-merit report. *Smalley*, 211 Wis. 2d at 796–801. He alleged that appellate counsel never "officially" informed him of her withdrawal and that he did not have an "opportunity to consent in writing to counsel's withdrawal." *Id.* at 797. He sought reinstatement of his direct appeal rights. *Id.*

The court of appeals denied Smalley's petition ex parte under Wis. Stat. § (Rule) 809.51(2). *Smalley*, 211 Wis. 2d at 796. It drew on habeas principles to conclude that Smalley needed to show that he timely filed his petition. *Id.* at 800–

02. First, it recognized the well-known rule that a petitioner's conduct may disentitle him to equitable relief. *Id.* at 800. Second, it stressed the importance of finality of convictions, stating that "[t]he right to claim ineffective assistance of counsel for failure to commence an appeal does not exist indefinitely." *Id.* at 802. Third, it emphasized the soundness of a rule requiring the expeditious handling of habeas petitions, while "everyone's memory is still fresh" and "the witnesses and records are usually still available." *Id.* at 802–03 (citing *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 186, 517 N.W.2d 157 (1994)). And fourth, it acknowledged that courts of equity must have flexibility in deciding whether to grant relief: "[w]hether a defendant's claim is made within a reasonable time must be evaluated on a case-by-case basis." *Id.* at 802. These principles—coupled with Smalley's failure to explain why it took him eight years to seek reinstatement of his direct appeal rights—led the court of appeals to determine that Smalley did not timely file his petition. *Id.* at 800–03. *See also Coleman*, 290 Wis. 2d 352, ¶ 25.

Since *Smalley*, this Court has acknowledged that a petitioner seeking a writ of habeas corpus under Wis. Stat. § (Rule) 809.51 has the burden of proof to show the timeliness of his petition. *Coleman*, 290 Wis. 2d 352, ¶ 25 n.6.

4. Stare decisis

The principle of stare decisis applies to the court of appeals' decision in *Smalley*. *Wenke*, 274 Wis. 2d 220, ¶ 21 (stare decisis "applies to the published decisions of the court of appeals"). "This court follows the doctrine of stare decisis scrupulously because of [its] abiding respect for the rule of law." *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257. As

noted, a party asking this Court to overturn court of appeals precedent must show that a compelling reason exists to overturn it. *Wenke*, 274 Wis. 2d 220, ¶ 21. Here, that means Lopez-Quintero must show that *Smalley*'s interpretation of Wis. Stat. § (Rule) 809.51 is objectively wrong—not just mistaken. *Wenke*, 274 Wis. 2d 220, ¶ 21.

B. Canons of statutory construction and case law support the *Smalley* court's reading of Wis. Stat. § (Rule) 809.51.

Lopez-Quintero has the high burden of showing this Court that *Smalley*'s interpretation of Wis. Stat. § (Rule) 809.51—that a petitioner seeking a writ of habeas corpus must show a prompt and speedy request for relief—is objectively wrong. *See Reyes Fuerte*, 378 Wis. 2d 504, ¶¶ 18, 30. His attack on *Smalley* is unavailing.

The crux of Lopez-Quintero's position on appeal is that because Wis. Stat. § (Rule) 809.51 does not prescribe a prompt and speedy filing requirement, the court of appeals in *Smalley* erred in applying one. (Lopez-Quintero's Br. 10–13.) His argument appears to rely on the "omitted-case" statutory canon, which provides that "[n]othing is to be added to what the text states or reasonably implies." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* at 93 (1st ed. 2012). Under his reading of the statute, if a petitioner (1) states the issues presented by the controversy, (2) states the facts necessary to decide the issues, (3) states the relief sought, and (4) states the reasons why the court should take jurisdiction, the court of appeals *must* order a response, at which point he believes it becomes the State's burden to show untimeliness through laches. (Lopez-Quintero's Br. 8–12, 24–25.) There are multiple problems with this argument.

First, there is a difference between a court filling a gap in a statute and its continuing exercise of its common-law powers, the latter of which is proper as long as the statute does not "purport[ ] to provide a comprehensive treatment of the issue it addresses." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at 96. Relatedly, under the "presumption against change in common law" statutory canon, "[a] statute will be construed to alter the common law only when that disposition is clear." *Id.* at 318. *Holland* is a perfect example of these principles at work: since AEDPA's statute of limitations does not clearly displace federal "courts' traditional equitable authority" to resolve habeas petitions, the United States Supreme Court determined that the one-year time limit is subject to equitable tolling—even though the statute is silent on the subject. *See Holland*, 560 U.S. at 646–49; *accord Day*, 547 U.S. at 208–10 (permitting district courts to dismiss habeas petitions for untimeliness even if the government does not assert the defense in its answer because no habeas rule, statute, or constitutional provision demands otherwise).

Here, Wis. Stat. § (Rule) 809.51 does not purport to provide a comprehensive treatment of the issue of extraordinary writs. It simply sets forth the procedural mechanism for obtaining one. As noted, the statute does not even say what the court should consider in deciding whether to grant the writ. And like *Holland*, there is no text suggesting—let alone clearly stating—that common-law equitable principles do not govern the appellate court's decision to issue the writ. *See Holland*, 560 U.S. at 646–49. Thus, when the court of appeals in *Smalley* held that a habeas petitioner must show a prompt and speedy request for relief under Wis. Stat. § (Rule) 809.51(1), it properly drew on its traditional equitable authority to deny relief to a petitioner who had slept on his rights. *See Smalley*, 211

Wis. 2d at 800–02; *Visser*, 6 Wis. 2d at 538; *Coleman*, 290 Wis. 2d 352, ¶ 25; *McCleskey*, 499 U.S. at 490. It also appropriately factored into its decision principles of finality, efficiency, and flexibility—cornerstone principles for courts of equity. *See Smalley*, 211 Wis. 2d at 802–03; *McCleskey*, 499 U.S. at 491 (finality); *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000) (efficiency); *Holland*, 560 U.S. at 650 (flexibility). *See also Munaf v. Green*, 553 U.S. 674, 693 (2008) (citations omitted) ("prudential concerns" like the "orderly administration of criminal justice" "may require a federal court to forgo the exercise of its habeas corpus power").

Lopez-Quintero maintains that *Smalley*'s reliance on such equitable principles to deny relief runs afoul of the United States Supreme Court's decision in *Lonchar*. (Lopez-Quintero's Br. 19.) But *Lonchar* only supports the *Smalley* court's interpretation of Wis. Stat. § (Rule) 809.51. There, the Court held that the lower court erred in relying on general equitable principles to dismiss a habeas petition for delay since a *specific habeas rule directly addressed delay*. *Lonchar*, 517 U.S. at 316, 326. The rule required prejudicial delay, and the note to the rule indicated that the "maxim which the Court of Appeals relied as authority for acting outside the Rules—the equitable maxim that 'the petitioner's conduct may . . . disentitle him to relief,' was taken into account when the Rules framer's drafted Rule 9(a) and included its prejudice requirement." *Id.* at 327 (citations omitted). Thus, since the rule clearly displaced the lower court's traditional equitable authority in this regard, the lower court erred in acting outside the rule. *Id.* at 316. As noted above, that is simply not the case here, and Lopez-Quintero does not attempt to show otherwise—he cites no rule dealing with the appellate court's authority to dismiss petitions based on delay, such that the court of appeals in

Smalley erred in acting outside the rule. (Lopez-Quintero's Br. 19.)

Accordingly, despite what Lopez-Quintero suggests (Lopez-Quintero's Br. 12–13), rules of statutory construction support *Smalley*'s reading of Wis. Stat. § (Rule) 809.51. *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at 96, 318. *See also In Interest of J.A.L.*, 162 Wis. 2d 940, 962, 471 N.W.2d 493 (1991) (when a statute is silent on a subject, this Court looks to "sources outside of the language of the statute itself," including the statute's subject matter).[6]

Moreover, the *Smalley* court's interpretation of Wis. Stat. § (Rule) 809.51 was hardly radical, as Lopez-Quintero insists. (Lopez-Quintero's Br. 12.) For starters, the maxim that "equitable relief will be denied to a complainant who has slept on his rights" long existed before *Smalley*. *Visser*, 6 Wis. 2d at 538. *See also* Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 Nw. U. L. Rev. at 155–62 (petitioner's conduct a traditional equitable consideration). And at the time of *Smalley*, considerations of finality and the expeditious handling of habeas petitions had recently taken center stage in federal court with the passage of AEDPA's statute of limitations. *See Acosta*, 221 F.3d at 120, 123. Also, when the court of appeals decided *Smalley*, it had already

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[6] The idea that a petitioner may need to satisfy a requirement not expressly listed in a statute to obtain relief is neither novel nor "absurd," as Lopez-Quintero argues. (Lopez-Quintero's Br. 12.) For example, Wis. Stat. § 808.03(2), governing permissive appeals, enumerates three criteria for determining whether an appeal should be granted. But case law requires a fourth criterion: the petitioner must show a substantial likelihood of success on the merits. *State v. Webb*, 160 Wis. 2d 622, 632, 467 N.W.2d 108 (1991).

recognized that (1) equitable principles govern the appellate court's decision to issue a writ under Wis. Stat. § (Rule) 809.51, and (2) a petitioner seeking a supervisory writ under the statute must demonstrate a prompt and speedy request for relief. *See, e.g.*, *Dressler*, 163 Wis. 2d at 630.

This Court has recently acknowledged the prompt and speedy filing requirement for supervisory writs under Wis. Stat. § (Rule) 809.51 even though the statute contains no language to that effect. *See Two Unnamed Petitioners*, 363 Wis. 2d 1, ¶ 80. And, despite what Lopez-Quintero claims (Lopez-Quintero's Br. 7–9, 15–16), this Court's decision in *Coleman* does not cast doubt on the propriety of that requirement for habeas petitions.

In *Coleman*, Coleman filed a *Knight* petition 17 years after his conviction alleging that his appellate counsel was ineffective for failing to pursue a direct appeal. *Coleman*, 290 Wis. 2d 352, ¶ 3. The court of appeals ordered the State to respond to the petition, and the State raised the affirmative defense of laches instead of arguing that Coleman failed to meet his burden to show the timeliness of his petition. *Id.* ¶¶ 13, 25 n.6. The court of appeals agreed with the State that Coleman unreasonably delayed bringing his petition. *Id.* ¶ 15. It then presumed that the delay prejudiced the State and dismissed Coleman's petition on the basis of laches. *Id.*

This Court limited its review in *Coleman* to the court of appeals' decision on laches. *Coleman*, 290 Wis. 2d 352, ¶ 15. It noted that like a petitioner filing a habeas petition, a party asserting laches seeks equitable relief. *Id.* ¶ 25. Thus, a party asserting laches must prove certain elements to obtain relief: (1) unreasonable delay by the claimant in making his claim, (2) lack of knowledge that the claimant would assert his claim, and (3) prejudice. *Id.* ¶ 19. Applying this test to the facts of Coleman's case, this Court

determined that while the State proved that Coleman unreasonably delayed filing his petition, the record was insufficiently developed to decide whether the delay prejudiced the State. *Id.* ¶¶ 33, 37. This Court therefore reversed and remanded for an evidentiary hearing on the matter. *Id.* ¶ 37.

While this Court in *Coleman* limited its review to the court of appeals' decision on laches, it still (unanimously) noted that a party seeking equitable relief in the form of a habeas petition must show the timeliness of his request under *Smalley*. *Coleman*, 290 Wis. 2d 352, ¶ 25 n.6. Thus, nothing about this Court's decision in *Coleman* undermines *Smalley*'s interpretation of Wis. Stat. § (Rule) 809.51. *Coleman* instead reinforces *Smalley*: "the decision places the burden of proof for timeliness of the petition on Smalley, which is in accord with reviewing timeliness in regard to a habeas petition." *Coleman*, 290 Wis. 2d 352, ¶ 25. Simply stated, *Coleman* is a laches case; *Smalley* is not. *Id.* ¶ 25 n.10.[7] And while Lopez-Quintero criticizes *Coleman* for failing to explain "the material difference between the equitable remedies of laches and habeas corpus that [permits] widely contrasting approaches" (Lopez-Quintero's Br. 16), the opinion makes clear that the burden to address

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[7] For this reason, Lopez-Quintero's repeated assertion that *Smalley* creates an "irrebuttable presumption of prejudice" is misplaced. (Lopez-Quintero's Br. 7–8, 10, 15–16.) As this Court recognized in *Coleman*, while the court of appeals in *Smalley* at times used laches terminology, its "decision actually rests on the application of habeas principles." *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 25, 290 Wis. 2d 352, 714 N.W.2d 900. As shown above, these principles—like finality and efficiency—reflect concerns beyond prejudice to the State in defending an untimely action. *See State ex rel. Smalley v. Morgan*, 211 Wis. 2d 795, 802–03, 565 N.W.2d 805 (Ct. App. 1997).

timeliness is properly attributed to the party requesting equitable relief. *Coleman*, 290 Wis. 2d 352, ¶ 25.

The bottom line is that canons of statutory construction and case law support *Smalley*'s interpretation of Wis. Stat § (Rule) 809.51, which means that Lopez-Quintero cannot prevail in his quest to overturn 21 years of precedent. *See Reyes Fuerte*, 378 Wis. 2d 504, ¶¶ 26–30. He may prefer a different rule that permits dismissal of habeas petitions for delay only if the State proves laches (Lopez-Quintero's Br. 17–22), but that is beside the point. Since Wis. Stat. § (Rule) 809.51 does not displace courts' traditional equitable authority to decide habeas petitions, the court of appeals in *Smalley* was perfectly free to require habeas petitioners to show a prompt and speedy request for relief based on the same equitable principles that led to AEDPA's statute of limitations. "We need finality in our litigation," *Escalona-Naranjo*, 185 Wis. 2d at 185, and *Smalley*'s interpretation of Wis. Stat. § (Rule) 809.51 helps provide it.

While the main issue with Lopez-Quintero's challenge is that it overlooks the canons of statutory construction and case law that support *Smalley*'s interpretation of Wis. Stat. § (Rule) 809.51, there is a second problem: his interpretation of Wis. Stat. § (Rule) 809.51 runs afoul of the very statutory canon that he accuses *Smalley* of violating, and further, it would lead to absurd results. This is impermissible. *See Kalal*, 271 Wis. 2d 633, ¶ 46.

As noted, Lopez-Quintero contends that if a habeas petitioner (1) states the issues presented by the controversy, (2) states the facts necessary to understand the issues, (3) states the relief sought, and (4) states the reasons why the court should take jurisdiction, the court of appeals *must* order a response, at which point he believes it becomes the State's burden to show untimeliness through laches. (Lopez-

Quintero's Br. 8–12, 23–25.) He appears to argue that Wis. Stat. § (Rule) 809.51 limits "the authority of the Court of Appeals to deny ex parte a habeas petition" to situations where the petitioner does not meet the procedural requirements of Wis. Stat. § (Rule) 809.51(1). (Lopez-Quintero's Br. 12.)

Lopez-Quintero adds language to the statute: Wis. Stat. § (Rule) 809.51(2) states that "the court may deny the petition ex parte," not that "the court may deny the petition ex parte if the petitioner fails to meet the procedural requirements of Wis. Stat. § 809.51(1)." Therefore, his interpretation runs afoul of the "omitted-case" statutory canon. *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at 93.

More importantly, however, Lopez-Quintero's reading of Wis. Stat. § (Rule) 809.51 would lead to absurd and unreasonable results. Under his interpretation of the statute, the appellate court must order a response every time a petitioner checks the boxes of subsection (1), regardless of the substance of the petitioner's claim. For example, the appellate court would be required to order a response when a habeas petitioner seeks reinstatement of his direct appeal rights so long as he lists the issue, the facts, the relief sought, and the reason why the court should take jurisdiction—even if the reason is that the petitioner decided 20 years after his conviction that he would like to pursue an appeal. That is absurd since habeas corpus relief is limited to constitutional and jurisdictional errors. *Pozo*, 258 Wis. 2d 796, ¶ 8.

Perhaps in light of this absurdity, Lopez-Quintero later hedges his interpretation of Wis. Stat. § (Rule) 809.51: so long as the petitioner checks the boxes of subsection (1) and lists a *constitutional* claim, the appellate court must order a response. (Lopez-Quintero's Br. 18.) But the plain

language of Wis. Stat. § (Rule) 809.51(1) does not contain a "constitutional claim" requirement—so which is it? Is the court confined by the plain language of the statute or may it resort to traditional equitable principles to decide whether to issue the writ? Lopez-Quintero's interpretation here only undercuts his claim that *Smalley*'s construction of Wis. Stat. § (Rule) 809.51 is objectively wrong, as he too resorts to equitable principles to interpret the statute.

Finally, it bears noting that under Lopez-Quintero's interpretation of the statute, a petitioner could seek a writ of habeas corpus 50 years after his conviction, and if the State elects not to respond—which it has a right to do under the statute—the appellate court has no authority to dismiss the petition for untimeliness. This is so, Lopez-Quintero reasons, despite that the State's failure to respond does not constitute an admission to the petition and the appellate court still retains discretion to grant or deny it. *See* Wis. Stat. § (Rule) 809.51(2)–(3). This, too, is absurd.

For these reasons, this Court should hold that Lopez-Quintero has not met his high burden to show that *Smalley*'s interpretation of Wis. Stat. § (Rule) 809.51 is objectively wrong.[8]

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[8] To the extent that Lopez-Quintero argues that Wis. Stat. § (Rule) 809.51 is unconstitutional, the claim is undeveloped and this Court should not consider it. (Lopez-Quintero's Br. 9, 15, 26.) "Constitutional claims are very complicated from an analytic perspective, both to brief and decide. A one or two paragraph statement that raises the specter of such claims is insufficient to constitute a valid appeal" of the issues. *Cemetery Servs., Inc. v. Wis. Dep't of Reg. and Licensing*, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998).

C. Lopez-Quintero did not make a prompt and speedy request for relief.

Because Lopez-Quintero does not argue that he made a prompt and speedy request for relief, he forfeited the issue. *See State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612. This Court need not address forfeited issues. *State v. Wilson*, 2017 WI 63, ¶ 51 n.7, 376 Wis. 2d 92, 896 N.W.2d 682. But Respondent addresses the issue in case this Court opts to review it. For the reasons that follow, Lopez-Quintero failed to make a prompt and speedy request for relief under Wis. Stat. § (Rule) 809.51.

The facts show that Lopez-Quintero knew that he had a right to appeal his convictions as long as his trial attorneys filed the notice of intent within 20 days of sentencing. (Pet-App. Exs. B; C.) He indicated that he planned to seek such relief. (Pet-App. Ex. B.) His trial attorneys never filed the notice of intent. (R-App. 110–11.) While Lopez-Quintero may not have known that his lawyers failed to file the notice of intent, he knew that they litigated a motion for a new trial on his behalf. (R-App. 108.) This means that he knew that he had claims of arguable merit for postconviction relief. He also knew that he would receive the trial transcripts free of charge to assist him with any further appeal. (Pet-App. Exs. D; E.) Yet, it took Lopez-Quintero over *nine years* to seek the intervention of a court so that he could exercise his direct appeal rights. Why?

As the court of appeals rightfully concluded, Lopez-Quintero's stated limitations account for some delay in this case, but not all of it. (Pet-App. 1:2–3.) It is reasonable to believe that Lopez-Quintero's lack of English proficiency, lack of education, and lack of familiarity with Wisconsin's criminal justice system might have caused some delay in bringing his *Knight* petition—as he alleged, he relied on trial counsel to initiate his appeal. But at some point, equity

required Lopez-Quintero to start asking questions. *See Visser*, 6 Wis. 2d at 538. And his petition does not reveal that he did: it does not allege that he contacted the court or his trial attorneys to inquire into the status of his appeal, nor does it even allege that he told his trial attorneys to pursue an appeal after the circuit court denied his motion for a new trial. *See Smalley*, 211 Wis. 2d at 801–02. More importantly, Lopez-Quintero's petition does not allege that his stated limitations prevented him from taking any of these actions. Simply stated, Lopez-Quintero slept on his rights.

Lopez-Quintero tries to mask his unreasonable delay by comparing his case to *Coleman* (Lopez-Quintero's Br. 24–25), where Coleman waited 17 years to file his petition and the court of appeals ordered a response from the State instead of dismissing his petition ex parte for untimeliness. *See Coleman*, 290 Wis. 2d 352, ¶¶ 3–15. But just because the court of appeals in *Coleman* ordered a response from the State does not mean that it concluded that Coleman met his burden to show the timeliness of his petition under *Smalley*. As noted, the court of appeals has discretion to either deny a petition ex parte or to order a response from the State. Wis. Stat. § (Rule) 809.51(2). In its response in *Coleman*, the State argued laches, which is why the court of appeals and this Court focused on laches. *See Coleman*, 290 Wis. 2d 352, ¶¶ 15, 25 n.6. Since *Coleman* does not alter the requirement that a petitioner under Wis. Stat. § (Rule) 809.51 show a prompt and speedy request for relief, Lopez-Quintero errs in relying on the procedural posture of that case to argue that the court of appeals here wrongly denied his petition ex parte.

In sum, this Court should conclude that Lopez-Quintero failed to make a prompt and speedy request for

relief under Wis. Stat. § (Rule) 809.51; thus, the court of appeals properly denied his habeas petition ex parte.

D. The courthouse doors are not "irrevocably closed" to Lopez-Quintero.

Finally, the courthouse doors are not "irrevocably closed" to Lopez-Quintero, as he claims. (Lopez-Quintero's Br. 25.) He has at least three options for pursuing postconviction relief even if this Court does not reinstate his direct appeal rights.

First, he may attack his conviction by filing a Wis. Stat. § 974.06 postconviction motion. *Coleman*, 290 Wis. 2d 352, ¶ 16. He can bring this motion at any time, as long as he is "in custody under sentence of a court." Wis. Stat. § 974.06(1)–(2). However, he may only raise jurisdictional or constitutional issues in his motion. Wis. Stat. § 974.06(1). While he has no right to counsel, *State v. Alston*, 92 Wis. 2d 893, 895, 288 N.W.2d 866 (Ct. App. 1979), the circuit court must refer the motion to the State Public Defender if it appears necessary. Wis. Stat. § 974.06(3)(b).

Second, Lopez-Quintero may be able to seek relief through another petition for a writ of habeas corpus if a Wis. Stat. § 974.06 motion "is inadequate or ineffective to test the legality" of his detention. *State v. Johnson*, 101 Wis. 2d 698, 701, 305 N.W.2d 188 (Ct. App. 1981) (citation omitted). This would be appropriate if he sought to "attack[ ] the execution of his sentence rather than its imposition." *Id.* at 702.

Third and finally, Lopez-Quintero may seek sentence modification at any time if it is based on the existence of a "new factor." *State v. Krueger*, 119 Wis. 2d 327, 332, 351 N.W.2d 738 (Ct. App. 1984).

But for the reasons above, overturning *Smalley* is not an option, because Lopez-Quintero cannot satisfy his high burden of showing that that case is objectively wrong.

CONCLUSION

This Court should affirm the court of appeals' decision denying Lopez-Quintero's petition ex parte for untimeliness.

Dated this 30th day of August, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,983 words.

Dated this 30th day of August, 2018.

_____
KARA L. MELE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

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

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

Dated this 30th day of August, 2018.

_____
KARA L. MELE
Assistant Attorney General

Supplemental Appendix
State of Wisconsin ex rel. Ezequiel Lopez-Quintero v. Michael Dittmann
Case No. 2018AP203-W

SUPPLEMENTAL 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.

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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_____

KARA L. MELE
Assistant Attorney General

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