STATE OF WISCONSIN
IN THE SUPREME COURT

Appeal No. 2018AP000203-W

STATE EX REL.
EZEQUIEL LOPEZ-QUINTERO,

Petitioner,

v.

MICHAEL A. DITTMAN,
Warden of Columbia Correctional Institution,

Respondent.

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

REPLY BRIEF OF PETITIONER

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Smalley untethered habeas corpus from its common-law equitable moorings. *Smalley* required the petitioner to prove timeliness and presumed prejudice if the Court of Appeals found the petition untimely. Barry Lee Smalley was a *pro se* prisoner who filed a four-page habeas petition. The State filed no response. None of the issues regarding unreasonable delay, the application of laches, common-law equitable principles, imposing a prompt and speedy filing requirement, or the use of the *ex parte* summary dismissal procedure on untimely habeas petitions was subjected to an adversarial airing. In other words, *Smalley*'s interpretation of Wis. Stat § 809.51 was the product of judicial decree.

The State constructs an elaborate argument that *Smalley*'s interpretation of Wis. Stat. § 809.51 simply incorporated common-law equitable principles into habeas. But the State gets the principles wrong. It ignores the common law's refusal to apply its equitable discretion to dismiss habeas petitions solely for untimeliness. Furthermore, the State fails to account for courts' misconstruing *Smalley* as a laches decision for nearly a decade, until this Court's ruling in *Coleman*. The State also overlooks the historical record in *Coleman*, which undermines its efforts to distinguish that decision from *Smalley*. Finally, the State does not discern the incongruity of importing the "prompt and speedy" requirement for supervisory writs into habeas. *Smalley*'s interpretation of Wis. Stat. § 809.51 is "objectively wrong." *Wenke v. Gehl Co.*, 2004 WI 103, ¶ 21, 274 Wis. 2d 220, 682 N.W.2d 405. This Court should overrule it.

A. The common law did not apply the doctrine of laches to bar untimely habeas corpus petitions.

Contrary to the State's assertion that *Smalley*'s interpretation of Wis. Stat. § 809.51 merely applied the common law's traditional principles of equity to habeas corpus jurisprudence, *Smalley* removed equity from habeas corpus and replaced it with a procedure unfairly burdensome to petitioners. Moreover, the application of laches to delayed habeas petitions is a relatively recent statutory creation—itself a radical departure from the common law's traditional use of equitable principles to govern habeas corpus proceedings.

The common law did not bar a petition for writ of habeas corpus due to the passage of time. *See United States v. Smith*, 331 U.S. 469, 475 (1947) ("[H]abeas corpus provides a remedy for jurisdictional and constitutional errors at the trial without limit of time."); *Heflin v. United States*, 358 U.S. 415, 420 (1959) (Stewart, J., speaking for five justices) (noting that provision permitting federal prisoner to file motion under 28 U.S.C. § 2255 at any time "simply means that, as in habeas corpus, there is no statute of limitations, no *res judicata*, and that the doctrine of laches is inapplicable"); *Sanders v. United States*, 373 U.S. 1, 8 (1963) ("Conventional notions of finality of litigation have no place where life and liberty is at stake and infringement of a constitutional right is alleged."); *see generally* 17B C. Wright, A. Miller, & E. Cooper, *Fed. Prac. & Proc.* § 4268.2 (3d ed. 2018); Robert N. Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 Iowa L. Rev. 15, 31–35 (1977) [hereinafter "Clinton, *Rule 9*"]; Christine Burt, *Rule 9(a) and Its Impact on Habeas Corpus Litigation*, 11 N. Eng. J. Crim. & Civ. Confinement 363, 380–84 (1985).

The United States Supreme Court repeatedly held that delay in the filing of a petition could not terminate the habeas corpus rights of a person seeking relief from an unconstitutional conviction or sentence. *See*, *e.g.*, *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 123 (1956) (reaching merits of habeas petition filed eight years after conviction, listing cases that the Court did not bar from review in which many years had passed, and noting that "[t]he sound premise upon which these holdings rested is that men incarcerated in flagrant violation of their

constitutional rights have a remedy") (citing *Palmer v. Ashe*, 342 U.S. 134 (1952) (18 years), and *Uveges v. Pennsylvania*, 335 U.S. 437 (1948) (seven years)). In *Chessman v. Teets*, 354 U.S. 156 (1957), the Supreme Court explained that:

> [T]he overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States.

Id. at 165.

Following the Supreme Court's lead, lower federal courts consistently reached the merits of habeas petitions filed even after extraordinary delays. *See*, *e.g.*, *Hamilton v. Watkins*, 436 F.2d 1323, 1325–26 (5th Cir. 1970) (36 years); *United States v. Cariola*, 323 F.2d 180, 183 (3d Cir. 1963) (24 years); *see also* Clinton, *Rule 9*, at 33 n.135 (listing cases); Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 Nw. U. L. Rev. 139, 147 n.57 (2013) (recognizing that, prior to the 1977 adoption of Habeas Rule 9(a), "lower courts regularly entertained petitions filed after even extraordinary delays," including delays of 24, 36, and 40 years) (citation and internal quotation marks omitted).

Hawkins v. Bennett, 423 F.2d 948 (8th Cir. 1970), typifies the federal courts' equitable tradition in adjudicating habeas petitions. In *Hawkins*, the petitioner sought habeas corpus relief over 40 years after his conviction for murder. *Id.* at 949. He alleged that he had been denied the effective assistance of counsel and that African-Americans had been systematically excluded from the grand jury that indicted him. *Id.* The Eighth Circuit recognized that the passage of time would "render[ ] the gathering of evidence difficult." *Id.* at 951. Nevertheless, the court emphasized that, "if appellant's constitutional rights were violated in 1926, the passage of 44 years does not serve to cure the wrong. And he, just as the man recently convicted, must be afforded a meaningful opportunity to prove his claims." *Id.* (footnote omitted).

Instead of dismissing outright an untimely petition—as the State argues—courts considered the passage of time in weighing the credibility of the petitioner's evidence and the merits of the claims, thereby increasing the burden of proof. *See*, *e.g.*, *Bradley v. Cowan*, 500 F.2d 380, 381 (6th Cir. 1974); *Cariola*, 323 F.2d at 183; *United States v. Morgan*, 222 F.2d 673, 675 (10th Cir. 1955); *Farnsworth v. United States*, 232 F.2d 59, 63 (D.C. Cir. 1956). Consequently, even without a laches defense, courts could still account for faded memories, lost records, and deceased witnesses in a way that did not leave the state defenseless against stale claims. *See McConnell v. Estelle*, 666 F.2d 246, 251 (5th Cir. 1982) ("If the petitioner had delayed unreasonably in filing his claim and the delay resulted in prejudice to the state his case was not automatically lost but was weakened. The proof he offered, as well as his good faith and credibility, would be given less weight than if the claim

had been timely filed.").

Smalley's interpretation of Wis. Stat. § 809.51 displaced a long and unbroken line of United States Supreme Court and lower federal court cases that addressed stale-claim problems by means other than the affirmative defense of laches, which precludes courts from reaching the merits. The United States Supreme Court has emphasized that it "will not construe a statute to displace courts' traditional equitable authority absent the clearest command," because "equitable principles have traditionally governed the substantive law of habeas corpus." *Holland v. Florida*, 560 U.S. 631, 646 (2010) (internal quotation marks and citations omitted); *see State v. Knight*, 168 Wis. 2d 509, 520–21, 484 N.W.2d 540 (1992) ("Habeas corpus is essentially an equitable doctrine, and a court of equity has authority to tailor a remedy for the particular facts.") (internal quotation marks omitted); *Davis v. Adult Parole Authority*, 610 F.2d 410, 413–14 (5th Cir. 1979) ("Any statute which might tend to weaken [habeas corpus's] efficiency or delay its availability or makes its use more difficult should be carefully considered and construed liberally in the light of its history and its benign purposes.") (citation omitted). Nothing in Wis. Stat. § 809.51 provided the *Smalley* court with "the clearest command" to dispense with this common law heritage and replace it with a procedure that shifts the burden of proving timeliness to the petitioner and presumes prejudice if the court finds unreasonable delay.

B. *Smalley*'s application of laches to habeas petitions rests on a false foundation.

The United States Supreme Court, in the exercise of its traditional equitable discretion, created numerous preclusive defenses to vindicate the interests of comity and finality on federal habeas review. *See*, *e.g.*, *McCleskey v. Zant*, 499 U.S. 467, 489–91 (1991) (abuse of the writ); *Wainwright v. Sykes*, 433 U.S. 72, 80–81 (1977) (procedural default); *Teague v. Lane*, 489 U.S. 288, 308 (1989) (nonretroactivity); *Rose v. Lundy*, 455 U.S. 509, 515 (1982) (exhaustion of state remedies). In stark contrast to the creation of these procedural defenses, the Supreme Court (and the lower federal courts) did not apply the equitable defense of laches to habeas petitions. Consequently, the State's argument in defense of *Smalley* requires this Court to ignore that the use of laches in habeas corpus proceedings is a relatively recent creation of *statute*—not the common law—that applied only to *federal* habeas corpus petitions.

Not until 1977 did Congress enact Habeas Rule 9(a), which "introduce[d] for the first time an element of laches into habeas corpus" by creating a rule against prejudicial delay. 17B Wright & Miller, § 4268.2. In adopting the laches doctrine, Habeas Rule 9(a) upended the common law's refusal to apply such a preclusive defense to habeas proceedings. *See* Part A, *supra*.

Nine years after Habeas Rule 9(a) took effect, the Wisconsin Court of Appeals relied on the rule in support of applying laches to state habeas petitions. In *State ex rel. McMillian v. Dickey*, 132 Wis. 2d 266, 392

N.W.2d 453 (Ct. App. 1986), the court "recognize[d] that a habeas proceeding may be dismissed under the equitable doctrine of laches." *Id.* at 281 (footnote omitted). In support of this proposition, the court cited *Mayola v. Alabama*, 623 F.2d 992, 999 (5th Cir. 1980), a decision from the United States Court of Appeals for the Fifth Circuit that expressly applied the recently-minted Habeas Rule 9(a) to find prejudicial delay. *Id.* at 281 n.13. *McMillian* also relied on a second case from the Fifth Circuit, *Baxter v. Estelle*, 614 F.2d 1030 (5th Cir. 1980). *Baxter* completely misconstrued the common law's refusal to apply laches to habeas. *Baxter* said that:

> A petition for habeas corpus may be dismissed if the petitioner's unreasonable delay in filing the petition has prejudiced the state in its ability to respond. This rule has traditionally been applied to habeas corpus petitions under the equitable doctrine of laches, and it continues to apply under the provisions of Rule 9(a) of the Rules Governing § 2254 Cases. Although the § 2254 Rules probably do not apply to this case, we need not determine to what extent, if at all, Rule 9(a) did more than embody preexisting law, for we find that the facts of this case demonstrate prejudice so great caused by such unreasonable delay that the claim is barred under either formulation of the rule.

Id. at 1032–33 (footnotes omitted); *but cf. Davis*, 610 F.2d at 415; *McConnell*, 666 F.2d at 251. Despite its erroneous understanding of the common-law tradition, *Baxter* mentioned several pre-Habeas Rule 9(a) cases that upheld equity's refusal to dismiss habeas petitions despite lengthy delays. *Id.* at 1034–35 (citing *Hamilton v. Watkins*, 436 F.2d 1323 (5th Cir.

1970); *Jackson v. Estelle*, 570 F.2d 546 (5th Cir. 1978); and *Hudson v. Alabama*, 493 F.2d 171 (5th Cir. 1974)). *Baxter* even quoted *Hamilton*, noting that "'[d]elay alone is no bar to federal habeas relief to correct jurisdictional and constitutional trial errors.'" *Baxter*, 614 F.2d at 1034–35. Ultimately, *McMillian* found that the delay was not attributable to the petitioner and addressed the merits of his claim. *McMillian*, 132 Wis. 2d at 283–87.

In short, *McMillian* "recogniz[ed]" that laches applies to state habeas petitions even though the federal rules governing habeas proceedings are not applicable to the states, the decisions of the federal courts of appeals are not binding on the Wisconsin state courts, and the cases *McMillian* relied on were based on an inaccurate understanding of the common law's application of equitable principles in habeas.

Over a decade later, *Smalley* relied on *McMillian* to hold that "habeas corpus is subject to the doctrine of laches." *State ex rel. Smalley v. Morgan*, 211 Wis. 2d 795, 800, 565 N.W.2d 805 (Ct. App. 1997). In the 11 years between the rulings in *McMillian* and *Smalley*, not a single published Wisconsin decision cited *McMillian* for the proposition that laches applies in habeas. *Smalley* appears to be the first case to do so, and the first case in Wisconsin to dismiss a habeas petition for laches.

C. But *Smalley* is not a laches decision.

The irony, of course, is that *Smalley* is *not* a laches decision. Nine years after *Smalley*, this Court declared in *Coleman* that, "[w]hile the analysis of Smalley's delay was prefaced with an explanation of laches principles, the *Smalley* 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 (footnote omitted); *see id.* at ¶ 47 (Butler, J., concurring, joined by Abrahamson and Ann Walsh Bradley, JJ.) (agreeing with majority that *Smalley* is not a laches decision). *Coleman* found that *Smalley* "conflated" a habeas petition's timeliness with the unreasonable delay element of laches. *Id.* at ¶ 25. This Court explained that the habeas petition in *Smalley* was insufficient because the petitioner did not carry his burden of proving timeliness. *Id.* Laches, on the other hand, this Court emphasized, places the burden of proof on the party raising the defense. *Id.* at ¶ 25 n.10.

Coleman's characterization of *Smalley* must have been a revelation to a number of courts—including this Court and the Court of Appeals—that cited *Smalley* as the leading laches-applies-to-habeas decision. *Cf. State v. Evans*, 2004 WI 84, ¶ 35, 273 Wis. 2d 192, 682 N.W.2d 784 (citing *Smalley* for proposition that "a habeas petition under *Knight* is subject to the doctrine of laches because a petition for habeas corpus seeks an equitable remedy"); *State ex rel. Panama v. Hepp*, 314 Wis. 2d 112, 123, 758 N.W.2d 806 (Ct. App. 2008) (same, citing *Smalley*); *State ex rel. Santana v. Endicott*, 2006 WI App 13, ¶ 9, 288 Wis. 2d 707, 709 N.W.2d 515 (same, citing *Smalley*); *see also State v. Sutphin*, 164 P.3d 72,

76 (N.M. 2007) ("The only case the State cites which actually stands for the proposition that laches is recognized in habeas proceedings is [*Smalley*].").

Coleman's disavowal of *Smalley* as a laches decision less than two years after this Court in *Evans* cited *Smalley* as a laches decision means that *Coleman* marks the first time this Court held that laches applies to habeas proceedings in Wisconsin. *See State ex rel. Washington v. State*, 2012 WI App 74, ¶19, 343 Wis. 2d 434, 819 N.W.2d 305 (citing *Coleman* for proposition that "laches [is] an available defense to a habeas petition"). Notably, *Coleman* found *McMillian*'s analysis unconvincing, because that case had relied on *Baxter*, which "involved federal habeas that differs from the circumstances in which state habeas will lie…." *Coleman*, 290 Wis. 2d 352, ¶ 24 (footnote omitted).

The State is unable to articulate any meaningful reason why one petitioner (Smalley) was subject to the demanding procedure *Smalley* found in Wis. Stat. § 809.51 under "habeas principles," while laches applied to a second petitioner (Coleman) who waited nearly twice as long before filing his habeas petition. Ultimately, the State resorts to conclusory reasoning: "Simply stated, *Coleman* is a laches case; *Smalley* is not." State's Response at 21; *see id.* ("[T]he 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.* at 26 ("In its response in *Coleman*, the State argued laches, which is why the court of appeals and this Court focused on laches.").

The State contends that "nothing about this Court's decision in *Coleman* undermines *Smalley*'s

interpretation of Wis. Stat. § (Rule) 809.51," and that, therefore, Mr. Lopez-Quintero "errs in relying on the procedural posture of [*Coleman*] to argue that the court of appeals here wrongly denied his petition *ex parte*." *Id.* at 21. The State's position is at odds with the historical record. It reveals that the parties and the Court of Appeals in *Coleman* expressly relied on *Smalley*, but viewed it as a laches decision.

In its response to Coleman's habeas petition, the State cited *Smalley* and asserted that laches barred consideration of the merits of the petition. App. 6 (State's Response to Coleman's Petition) at 6. The State argued that:

> As was the case in *Smalley*, 211 Wis. 2d at 801, there is no indication Coleman was under any disability that precluded him from learning about his options under *Knight* and seeking *pro se* a review of appellate counsel's performance before 2004. Like the petitioner in *Smalley*, Coleman has not demonstrated that he sought prompt, speedy relief as required by Wis. Rule § 809.51(1). *See Smalley*, 211 Wis. 2d at 802.

App. 6 at 6–7 (footnote omitted). The State also argued that the unreasonable delay would likely prejudice the State in responding to the merits of the petition. *Id.* at 7.

Relying on *Smalley*, the Court of Appeals in *Coleman* dismissed the petition based on laches. App. 7 (*State ex rel. Coleman v. McCaughtry*, No. 2004AP548-W (Wis. Ct. App. Dec. 13, 2004)) at 1. The court explained that, "[w]here a *Knight* petitioner unreasonably delays in petitioning for relief, and the delay prejudices the State in its ability to respond to the petition, dismissal on laches may be warranted.

Smalley, 211 Wis. 2d at 800." *Id.* at 2. The court then concluded that Coleman's 17-year delay was unreasonable as a matter of law. *Id.* The court also held that the unreasonable delay "greatly prejudices" the State. *Id.*

This Court viewed the lower court's decision in *Coleman* as founded on laches principles, even though the decision below clearly relied on *Smalley*. *See*, *e.g.*, *Coleman*, 290 Wis. 2d 352, ¶ 15. In fact, this Court specifically noted that:

> The State has not argued that Coleman's habeas petition was untimely under the principles that we have set for evaluating habeas petitions. Therefore, we do not address whether Coleman has met his burden of proof in that regard.

Id. at ¶ 25 n.6.

Adding to the uncertainty surrounding the basis of the appellate court's ruling, the *Coleman* concurrence complained that the State's response "shift[ed] the burden to the petitioner that laches should not apply, instead of leaving the burden on the party asserting the defense of laches, the State." *Id.* at ¶ 44 (Butler, J., concurring) (footnote omitted); *see id.* at ¶ 44 n.3 (noting that the State's argument "would also relieve the State of its burden with respect to the affirmative defense of laches, as its position does not clearly establish who has to prove what, so that the inference is that the petitioner did not present enough here"). Similarly, the concurrence took the majority to task for repeatedly "plac[ing] the burden on Coleman as opposed to the State" and "appl[ying] the timeliness factor under habeas principles in the same manner as

the court of appeals in *Smalley*." *Id.* at ¶ 48 (footnote omitted); *see id.* ("[T]he majority conflates in exactly the same manner as the *Smalley* court its analysis of the habeas petitioner's timeliness with the unreasonable delay element of laches."). It is beyond question that the State would have prevailed if *Coleman* had applied the *Smalley* analysis: this Court found that Coleman's 16-year delay was unreasonable as a matter of law. *Id.* at ¶ 33.

Coleman's belated and unanticipated explanation of *Smalley*'s holding leads to a disconcerting conclusion: that the Court of Appeals likely did not begin applying *Smalley*'s timeliness burden shift and presumption of prejudice—based on "habeas principles," rather than laches—to summarily dismiss delayed habeas petitions until *after* this Court's decision in *Coleman*. The State's *post hoc* effort to justify *Smalley*'s unprecedented procedure that renders laches obsolete fails to account for the historical reality that the Court of Appeals believed for nearly a decade that *Smalley* was a laches decision.

D. The "prompt and speedy" common-law requirement for seeking a supervisory writ has no application to habeas proceedings.

The State argues that applying a "prompt and speedy" requirement to habeas petitions is consistent with the common law's equitable principles, which imposed such a requirement on petitioners invoking the supervisory jurisdiction of the Court of Appeals. State's Response at 19–22. *Smalley*'s wholesale adoption of this requirement into habeas ignores the material differences between a supervisory writ and

the writ of habeas corpus, and overlooks that Wis. Stat. § 809.51 originally applied exclusively to supervisory writs.

Because it is an "extraordinary and drastic remedy" for the Court of Appeals to compel a lower court to perform a non-discretionary act or prohibit a lower court from acting when it is without the power to do so, this Court has created stringent standards for petitioners seeking a supervisory writ. *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 17, 271 Wis. 2d 633, 681 N.W.2d 110. The Court of Appeals will not issue a supervisory writ unless: "(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." *Id.*

A "prompt and speedy" request requirement is appropriate for a petition seeking a supervisory writ, because the Court of Appeals may issue the writ only upon some "grievous exigency." *Id.* Usually, a petitioner is in the midst of litigation in the circuit court when he or she invokes the supervisory jurisdiction of the Court of Appeals. It is this exigency that renders a supervisory writ "a proper means of correcting trial court error when an appeal will come too late for effective redress." *State ex rel. Bohren v. Milwaukee Cty. Cir. Ct.*, 192 Wis. 2d 407, 425, 532 N.W.2d 135 (Ct. App. 1995) (internal quotation marks omitted). Consequently, "[t]he more time that elapses after the action complained of, the less likely the court will be to hear the claim." Michael S. Heffernan, *Appellate Practice & Procedure in Wisconsin*, § 10.3, at 4 (6th ed. 2014). For example, the Court of Appeals

denied a petition for a supervisory writ as untimely, even though only *nine months* had passed before the petitioner sought relief. *State ex rel. Nowak v. Waukesha Cty. Cir. Ct.*, 169 Wis. 2d 395, 397–98, 485 N.W.2d 419 (Ct. App. 1992).

The Court of Appeals can deal with petitions for a supervisory writ efficiently and quickly, because the stringent requirements for issuing the writ limit the court's exercise of its jurisdiction. The underlying facts are rarely in dispute, and the Court of Appeals will not invoke its supervisory writ jurisdiction to compel a discretionary act or if it finds that other adequate remedies are available. *State ex rel. Dressler v. Cir. Ct. for Racine Cty.*, 163 Wis. 2d 622, 640, 472 N.W.2d 532 (Ct. App. 1991). For these reasons, this Court specifically designed the non-adversarial, *ex parte* procedure in Wis. Stat. § 809.51(2) "to facilitate a speedy denial of the majority of such petitions." Heffernan, *supra*, § 10.3, at 5; *see id.* (noting that provision in Wis. Stat. § 809.51(2) allowing respondent to file letter stating that no response will be filed, but the petition is not thereby admitted, is designed "to discourage the use of supervisory writs for harassment purposes").

Imposing the supervisory writ requirements and procedure on habeas petitions is wholly inappropriate. First, because the writ of habeas corpus "strikes at finality," *McCleskey*, 499 U.S. at 491, *Smalley*'s determination that Wis. Stat. § 809.51(1) incorporates a "prompt and speedy" pleading requirement on habeas petitioners is incongruous with the common law's refusal to dismiss habeas petitions for untimeliness. *See* Part A, *supra*. Second, when this Court originally drafted and adopted Wis. Stat. §

809.51 in 1978, the rule dealt solely with supervisory writs. *See* S. Ct. Order, 83 Wis. 2d xiii (1978) (section entitled "Supervisory Writ"). Amending the rule in 1981, this Court changed the title to "Supervisory writ and original jurisdiction to issue prerogative writ," and added the words "or its original jurisdiction to issue a prerogative writ" after the term "supervisory jurisdiction" in the first sentence of subsection (1). S. Ct. Order, 151 Wis. 2d xix (1981) (attached as App. 8). The Court amended no other provisions of the rule.

Applying to habeas petitions a procedure exclusively designed to handle supervisory writs is imprudent. Habeas petitions often raise fact-intensive claims that require evidentiary hearings and, ultimately, the court's exercise of discretion. Similarly, factual disputes may hamper the court's ability to a find, as a matter of law, that a habeas petition is untimely. *Cf. Sawyer v. Midelfort*, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999) ("Where the facts are undisputed and there is only one reasonable inference, the court may conclude as a matter of law that the elements are met. If the material facts or reasonable inferences are disputed, however, summary judgment will be improper.") (citation omitted).[1] Moreover, the Court of Appeals does not have the power to make findings of fact where the evidence is controverted, *Wurtz v. Fleishman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980), so the court would need to order a circuit court or special master to hold a hearing.

[1] The Court of Appeals held that Mr. Lopez-Quintero's limitations could account for some delay, but not for over nine years of delay. App. 1 at 2–3. The court's conclusion begs questions: How many years of delay did his inability to speak or read English account for? His lack of education? How did the court make these determinations? Certainly, a court could reach more than one reasonable inference from these facts.

Finally, it is worth noting that *Smalley* itself did not cite any cases listing the "prompt and speedy" supervisory writ requirement in support of its conclusion that the requirement applied to habeas petitions. *Smalley* referred only to Wis. Stat. § 809.51(1), which contains no such language. 211 Wis. 2d at 802 & n.7. Moreover, post-*Smalley* decisions have not added the "prompt and speedy" element to the list of requirements for habeas petitions. *See*, *e.g.*, *Coleman*, 290 Wis. 2d 352, ¶ 18; *State ex rel. Haas v. McReynolds*, 2002 WI 43, ¶ 12, 252 Wis. 2d 133, 643 N.W.2d 771; *State v. Pozo*, 2002 WI App 279, ¶ 8, 258 Wis. 2d 796, 654 N.W.2d 12.

E. *Smalley*'s interpretation of Wis. Stat. § 809.51 raises serious constitutional issues.

In his Opening Brief, Mr. Lopez-Quintero described numerous problems with the *Smalley* procedure: that it gives the Court of Appeals unbounded discretion to dismiss a habeas petition for untimeliness; that it denies the petitioner an opportunity to respond; that it relieves the State of its burden of proving prejudicial delay, leading to an irrebuttable presumption of prejudice; that it is incompatible with *Coleman*; and that it deprives habeas petitioners like Mr. Lopez-Quintero from having a court reach the merits of substantial constitutional claims. Petitioner's Opening Brief at 7–8, 15–17, 26. The problems plaguing *Smalley*'s interpretation of Wis. Stat. § 809.51 raise substantial constitutional concerns.

"The fundamental requisite of due process of law is the opportunity to be heard." *Ford v. Wainwright*,

477 U.S. 399, 413 (1986) (plurality) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). The *Smalley* procedure has a devastating impact on a habeas petitioner like Mr. Lopez-Quintero, who was denied the right to direct appeal because of a violation of his Sixth and Fourteenth Amendment rights to the effective assistance of counsel. Seeking a writ of habeas corpus is his only means of vindicating his constitutional right to counsel. *State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶¶ 38–39, 354 Wis. 2d 626, 847 N.W.2d 805. *Smalley* violates the bedrock principle of procedural due process, because the Court of Appeals may summarily dismiss petitions as untimely, without giving the petitioners notice or the opportunity to respond. Moreover, it is the State's failure to provide Mr. Lopez-Quintero with effective assistance of counsel that ultimately caused the untimely request for habeas relief. Under these circumstances, the delay must be imputed to the State, not Mr. Lopez-Quintero. *Coleman v. Thompson*, 501 U.S. 722, 754 (1991); *see Betts v. Litscher*, 241 F.3d 594, 598 (7th Cir. 2001) ("The Constitution does not permit a state to ensnare an unrepresented defendant in his own errors and thus foreclose access to counsel."); *see generally Nonparty Brief of Wisconsin Ass'n of Crim. Defense Lawyers* at 2–7. This Court should avoid these troubling constitutional issues by overruling *Smalley*.

CONCLUSION

This Court should overrule *Smalley* because of its "objectively wrong" interpretation of Wis. Stat. § 809.51. Before remanding the case to the Court of Appeals with instructions to order the State to respond to Mr. Lopez-Quintero's habeas petition, this Court should re-examine the application of the doctrine of laches to habeas petitions.

Dated this 28th day of September 2018.

Respectfully Submitted,

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Law Student

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 4,966 words.

Dated this 28th day of September 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 28th day of September 2018.

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INDEX TO APPENDIX