STATE OF WISCONSIN
IN THE SUPREME COURT

Appeal No. 2018AP203-W

STATE ex rel. Ezequiel Lopez-Quintero,

Plaintiff-Appellant-Petitioner,

v.

Michael A. Dittmann,
Warden of Columbia Correctional Institution,

Defendant-Respondent.

PETITION FOR REVIEW

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PETITION FOR REVIEW

Ezequiel Lopez-Quintero, through undersigned counsel, asks this Court, pursuant to Wis. Stat. § 809.62, to review the April 1, 2022 decision of the Wisconsin Court of Appeals, District II, denying his petition for writ of habeas corpus.

STATEMENT OF THE ISSUES

1. May the State breach the attorney-client privilege because the State asserts that it needs former counsel's testimony to prove the affirmative defense of laches?

The circuit court held that former counsel must be allowed to testify in a postconviction hearing on a claim of ineffective assistance of counsel. App. 9 at 78–79.

The Wisconsin Court of Appeals held that the State must be allowed to call former counsel as a witness, because Ezequiel Lopez-Quintero's habeas petition raised a claim of ineffective assistance of counsel. App. 1 at 3 n.2.

2. May a court take a negative inference from a witness's refusal to testify because the witness invokes the attorney-client privilege when the State asserts that it needs the protected information to prove the affirmative defense of laches?

The circuit court held that it could take a negative inference based on Ezequiel Lopez-Quintero's refusal to testify at the laches hearing. App. 3 at 7–8.

The Court of Appeals did not address whether the circuit court could take a negative inference from Ezequiel Lopez-Quintero's refusal to testify.

CRITERIA FOR REVIEW

Review by this Court would clarify the law on a novel issue with statewide impact: whether the State is allowed to breach the attorney-client privilege to obtain evidence to prove the affirmative defense of laches.

Nearly 60 years ago, this Court explained the vital purpose served by maintaining the secrecy of communications between a client and an attorney:

> [The attorney-client privilege] is based upon the recognition of the value of legal advice and assistance based upon full information of the facts and the corollary that full disclosure to counsel will often be unlikely if there is fear that others will be able to compel a breach of the confidence.

Jacobi v. Podevels, 23 Wis. 2d 152, 156–57, 127 N.W.2d 73 (1964). In Ezequiel Lopez-Quintero's case, the State advanced—and the circuit court and the Court of Appeals adopted—a test for compelling a breach of the attorney-client privilege that balances the privilege "against the State's right to have access to evidence in order to have a meaningful [laches] hearing." App. 4 at 4. But such a justification for breaching the attorney-client privilege conflicts with Wis. Stat. § 905.03 and an earlier decision of the Wisconsin Court of Appeals.

In *State v. Hydrite Chemical Co.*, 220 Wis. 2d 51, 582 N.W.2d 411 (Ct. App. 1998), the Court of Appeals adopted a restrictive view of the "at issue" exception to the attorney-client privilege. The court held that the privilege is waived only "when the privilege holder attempts to prove a claim or defense by disclosing or describing an attorney-client communication." *Id.* at 68. *Hydrite* expressly rejected the expansive view of the exception that focused on the relevance of the protected information. *Id.* at 69; *see id.* at 67 n.2 ("Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue.") (internal quotation marks and citation omitted).

Exceptions to the attorney-client privilege are narrow and well-defined. While *State v. Flores*, 170 Wis. 2d 272, 277–78, 488 N.W.2d 116 (Ct. App. 1992), has been extended to require a defendant to waive the attorney-client privilege to a claim similar to ineffective assistance of counsel (such as a motion to withdraw a plea), no case law allows the State to bootstrap a breach of the privilege through its conscious choice of litigation strategy—for example, by pursuing an entirely discretionary affirmative defense like laches—and the rationale of *Flores* does not support one.

This case presents a novel issue of law about the inviolability of the attorney-client privilege in the context of the State's assertion of the affirmative defense of laches. The decisions below thwart the purpose of the attorney-client privilege and conflict with the restrictive view of the "at issue" exception to the privilege that the Wisconsin Court of Appeals has previously adopted. Moreover, the refusal of the circuit court to address the issue in advance of the laches hearing and the denial by the Court of Appeals for leave to seek an interlocutory appeal left Ezequiel Lopez-Quintero in an untenable position and at a severe disadvantage at the hearing. This important issue demands clarification by the Court.

STATEMENT OF THE CASE

After a six-day trial, Ezequiel Lopez-Quintero, a Mexican national and monolingual Spanish speaker, was convicted of first-degree intentional homicide with the use of a dangerous weapon and carrying a concealed weapon. On April 9, 2008, he was sentenced to life in prison without the possibility of release on

extended supervision. That same day, Ezequiel Lopez-Quintero signed a Notice of Right to Seek Postconviction Relief indicating that he planned to seek postconviction relief. But his trial attorneys never filed a Notice of Intent to Seek Postconviction Relief.

On February 1, 2018, Ezequiel Lopez-Quintero filed a Petition for Writ of Habeas Corpus asking the Wisconsin Court of Appeals to reinstate his appellate deadlines. He alleged that his trial lawyers were ineffective for failing to file a Notice of Intent. The Court of Appeals denied the petition *ex parte* as untimely under *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. This Court granted Ezequiel Lopez-Quintero's Petition for Review. On May 29, 2019, this Court overruled *Smalley*'s timeliness requirement, remanded the case to the Court of Appeals, and ordered the State to respond to the habeas petition. *State ex rel. Lopez-Quintero v. Dittmann*, 2019 WI 58, 387 Wis. 2d 50, 928 N.W.2d 480.

On remand, the State raised the affirmative defense of laches. On August 14, 2019, the Court of Appeals ordered the Kenosha County Circuit Court to hold an evidentiary hearing and make findings of fact on the State's affirmative defense of laches.

On January 28, 2020, the Deputy District Attorney of Kenosha County sent a letter to Attorney Gregory W. Wiercioch, undersigned Remington Center counsel for Ezequiel Lopez-Quintero, informally requesting production of documents related to the State's affirmative defense of laches. It included:

- any letters, notes, records, or documentation from [former trial counsel] Cohen's file regarding Petitioner Lopez-Quintero's right to a direct appeal.

- any and all documents, in paper or electronic form, from the Remington Center's file regarding Respondent Dittmann's defense of laches.

- any and all documentation predating February 1, 2018, reflecting communications between the Remington Center and Petitioner Lopez-Quintero about the option of trying to reinstate Petitioner Lopez-Quintero's direct appeal rights, whether with or without the Remington Center's assistance.

- any and all documentation related to (1) the Remington Center's efforts to pursue postconviction relief for Petitioner Lopez-Quintero between July 2012 and February 1, 2018, and (2) communications between the Remington Center and Petitioner Lopez-Quintero about the status of his case during this time period.

- a stipulation concerning the facts of the Remington Center's representation of Petitioner Lopez-Quintero from July 2012 to February 1, 2018, to avoid [Attorney Wiercioch] being a necessary witness.

On February 13, 2020, Attorney Wiercioch responded to the Deputy DA's request:

> Unless the Court of Appeals orders a *Machner* hearing, there is no basis to order early disclosure of

> any privileged documents. The hearing scheduled on March 2, 2020, deals solely with the State's affirmative defense of laches. It is not a *Machner* hearing….
>
> I am aware of no authority that allows the State to obtain privileged information, confidential communications, or work product in advance of a hearing on its affirmative defense of laches…
>
> Although pursuing an ineffective assistance of counsel claim at a *Machner* hearing constitutes a limited waiver of the attorney-client privilege, that limited waiver applies only to former counsel to establish a defense or respond to allegations. No authority extends the waiver to current counsel against whom no ineffective assistance of counsel claim has been raised.

On February 25, 2020, the parties sought an adjournment of the laches hearing so that they could litigate the discovery dispute. The parties jointly proposed a briefing schedule, which the presiding judge, the Honorable Bruce E. Schroeder, adopted.[1]

On September 21, 2020, the circuit court issued its discovery ruling. App. 5. The court reproached Ezequiel Lopez-Quintero's counsel for "denouncing" trial counsel's "ignorance" and "heap[ing]" "condemnations" on trial counsel in the habeas petition. *Id.* at 1, 2. The circuit court then used that characterization as grounds for finding Ezequiel Lopez-Quintero's response to the State's discovery motion "particularly unpersuasive." *Id.* at 2. Although

[1] Over the next two weeks, with shocking swiftness, COVID-19 became a global pandemic.

the circuit court called the State's request for discovery "an expansive list" that "explicitly does not attempt to limit the materials sought," the court ordered Ezequiel Lopez-Quintero to produce at the laches hearing all the materials the State sought. *Id.* At that time, the court said that it would "consider claims and objections (*in camera* if necessary) as they arise." *Id.*

Ezequiel Lopez-Quintero asked the circuit court to compel the State to file a formal motion for *in camera* review in advance of the laches hearing so that he would have a meaningful opportunity to appeal the decision. The State opposed the motion. On January 18, 2021, the circuit court denied the motion to compel, "[f]or reasons to be discussed at the hearing." App. 6.

Ezequiel Lopez-Quintero sought an emergency petition for a supervisory writ from the Court of Appeals, pursuant to Wis. Stat. § 809.51. Under Wis. Stat. § 809.52, he also sought an emergency temporary stay of the lower court proceedings pending disposition of the petition.

On January 22, 2021, the Court of Appeals denied the petition for supervisory writ. App. 7. The Court of Appeals held that the circuit court had no plain duty "to provide an explanation for its rulings in a time to a litigant's liking." *Id.* at 2. The Court of Appeals added, "[T]he court's promise to provide an explanation within days of its rulings is good enough." *Id.*

On January 22, 2021, Ezequiel Lopez-Quintero asked this Court to grant a petition for supervisory writ and motion for temporary stay of the circuit court proceedings. On January 25, 2021, this Court denied the petition *ex parte*. App. 8. With one justice not

participating, three justices would deny the petition and the motion, and three justices would grant the motion for a temporary stay and order the State to respond to the writ petition. *Id.* at 1. Because a majority of the Court did not vote to grant the motion, order a response to the petition, or grant the writ petition; the motion and the petition were denied. *Id.* at 2.

On January 26, 2021, with the pandemic raging and vaccines unavailable to most of the population (including Ezequiel Lopez-Quintero and Attorney Wiercioch), the circuit court held an all-day in-person hearing on the State's affirmative defense of laches. Despite the court's order that Attorney Wiercioch bring former counsel's files and the Remington Center's files to the courtroom, the State abandoned—without explanation—its previous demands to examine the files. In addition, the State made no attempt to call Attorney Wiercioch to the witness stand.

The circuit court issued its findings of fact on May 10, 2021. App. 3.

On April 1, 2022, the Court of Appeals denied the petition for writ of habeas corpus. App. 1. On April 21, 2022, the Court of Appeals denied Ezequiel Lopez-Quintero's motion for reconsideration. App. 2.

DISPOSITION BELOW

The circuit court overruled Ezequiel Lopez-Quintero's objections that his former counsel could not testify at the laches hearing about protected information, because Ezequiel Lopez-Quintero had not waived the attorney-client privilege. Quoting at length

from *State v. Machner*, 92 Wis. 2d 797, 803–04, 285 N.W.2d 905 (1979), the circuit court held that former trial counsel must testify in a postconviction hearing on a claim of ineffective assistance of counsel. App. 9 at 78–79.

The circuit court ruled that the "absent-witness" instruction, Wisconsin Civil Jury Instruction 410, allowed it to take a negative inference from Ezequiel Lopez-Quintero's refusal to testify. App. 9 at 111–12, 124–25. The circuit court expanded on this reasoning in its written findings of fact. The circuit court noted that this Court has set out three threshold requirements to justify a fact finder's drawing a negative inference against a party withholding testimony: (1) materiality, (2) control, and (3) reasonableness of the inference. App. 3 at 7 (citing *Konchanski v. Speedway SuperAmerica, LLC*, 2014 WI 72, 356 Wis. 2d 1, 850 N.W.2d 160). Applying *Konchanski*, the circuit court concluded that:

> Although Mr. Lopez-Quintero was not required to call any witnesses or present any evidence at the evidentiary hearing, he was plainly a material witness for the State as it relates to the unreasonable-delay aspect of the laches defense. Further, he was not equally available to both parties, because he refused to testify after the State called him. And since he offered no legal authority to support his claim that the State had no right to call him as a witness, it is reasonable to conclude that he was unwilling to allow the court to have the full truth.

App. 3 at 7–8 (internal quotation marks, bracket, citations, and footnote omitted).

Regarding former counsel's testimony at the

laches hearing, the Court of Appeals held (in a footnote) that, because Ezequiel Lopez-Quintero's habeas petition called into question the performance of counsel:

> He should not be allowed to hide behind attorney-client privilege to prevent the respondent from calling counsel to defend against the petition. *See State v. Simpson*, 200 Wis. 2d 798, 805–06, 548 N.W.2d 105 (Ct. App. 1996). *See also State ex rel. Coleman v. McCaughtry*, 2006 WI 49, 36, 290 Wis. 2d 352, 714 N.W.2d 900 (contemplating that an evidentiary hearing on laches would include testimony from counsel).

App. 1 at 3 n.2.

The Court of Appeals did not address whether the circuit court could take a negative inference from Ezequiel Lopez-Quintero's refusal to testify. However, the Court of Appeals did note that the circuit court drew a negative inference. *Id.* at 2. Moreover, the Court of Appeals weighed Ezequiel Lopez-Quintero's refusal against him in deciding whether laches should apply. *See id.* at 5 ("Lopez-Quintero waited nearly ten years to act—for no reason that he was willing to share at the evidentiary hearing.").

STATEMENT OF FACTS

1. The State calls former trial counsel Christopher Cohen to the witness stand at the laches hearing.

Ezequiel Lopez-Quintero repeatedly objected to Attorney Christopher Cohen's testimony about privileged and confidential matters. *See*, *e.g.*, App. 9 at

49–77. Ezequiel Lopez-Quintero argued that Attorney Cohen's testimony violated Wis. Stat. § 905.03 and SCR 20:1.6.[2] The circuit court overruled Ezequiel Lopez-Quintero's numerous objections to Attorney Cohen's testimony.

The circuit court based its ruling on its conclusion that Ezequiel Lopez-Quintero had "accuse[d] this lawyer of malpractice." App. 9 at 76; *see id.* at 90–91 ("You accused this man who has been practicing law for 51 years, 52 years, of incompetence, of being ignorant of the law in a murder case. Where does he go to challenge that, by the way? … You tell me where does he go to exonerate himself?"). In support of its decision, the circuit court quoted at length from *Machner*:

> We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. We cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies. In such situations, then, it is the better rule, and in the client's best interests, to require trial counsel to explain the reasons underlying his handling of a case.

App. 9 at 78–79 (quoting *Machner*, 92 Wis. 2d at 803–

[2] Under Wis. Stat. § 905.03(2), "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client…." Under SCR 20:1.6(a), "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent…." In *State v. Boyd*, 2011 WI App 25, 331 Wis. 2d 697, 797 N.W.2d 546, this Court "engrafted on Wis. Stat. Rule 905.03, the lawyers' ethical duties set out in SCR 20:1.6." *Id.* at ¶ 23 (citing *State v. Meeks*, 2003 WI 104, ¶ 60, 263 Wis. 2d 794, 666 N.W.2d 859).

04).

2. The State calls Ezequiel Lopez-Quintero to the witness stand at the laches hearing.

Without notice, the State called Ezequiel Lopez-Quintero as a witness at the laches hearing. App. 9 at 108.[3] The State argued that he had implicitly waived the privilege by "waiting ten years to bring this claim," *id.* at 73, and was "obstructing [the State's] ability to develop a record on unreasonable delay." *Id.* at 127. Once again asserting that a laches hearing is not analogous to a *Machner* hearing, Ezequiel Lopez-Quintero objected, based on the State's attempt to breach the attorney-client privilege in an effort to obtain evidence about protected communications to prove the elements of its affirmative defense. *Id.* at 126.

The circuit court ruled that the "absent-witness" instruction, Wisconsin Civil Jury Instruction 410, allowed it to take a negative inference from Ezequiel Lopez-Quintero's refusal to testify. *Id.* at 111–12, 124–25.

[3] The State ambushed counsel for Ezequiel Lopez-Quintero at the laches hearing. The State provided no notice that it intended to call Ezequiel Lopez-Quintero as a witness. Although undersigned counsel did object under the Fifth Amendment (as well as the Sixth and Fourteenth Amendments), App. 9 at 112, counsel also objected on the basis of the inviolability of the attorney-client privilege. *Id.* at 126. The circuit court's finding to the contrary is clearly erroneous. *See* App. 3 at 7–8.

3. Ezequiel Lopez-Quintero's introduces only non-privileged evidence at the laches hearing.

Ezequiel Lopez-Quintero did not rely on a single privileged communication or document to show that the State suffered no prejudice based on an allegedly unreasonable delay in bringing the habeas petition. Ezequiel Lopez-Quintero introduced the following six non-privileged exhibits:

1. **Notice of Right (Pet. Ex. 1).** On the day he was sentenced, Ezequiel Lopez-Quintero signed the Notice of Right, after checking the box that reads: "I plan to seek postconviction relief." Attorney Christopher Cohen also signed the Notice of Right, under the Attorney Certification, which states, in part: "I understand that it is my duty to file the Notice of Intent to Pursue Postconviction relief on behalf of the defendant if that intent is timely communicated to me."

2. **Sentencing Transcript (Pet. Ex. 2).** The trial court corrected defense counsel's misunderstanding at sentencing that they would not need to file a Notice of Intent if they filed a motion for new trial instead. Attorney Frederick Cohn assured the trial court that they would get the Notice of Intent "filed within 20 days."

3. **Motion for New Trial Transcript (Pet. Ex. 3).** Six weeks after the deadline for filing the Notice of Intent had expired, the trial court heard argument on the motion for new trial. Attorney Frederick Cohn asked the court to appoint him to represent Ezequiel Lopez-Quintero on appeal.

The court said that Ezequiel Lopez-Quintero should complete the affidavit of indigency and petition for waiver of fees to proceed on appeal. The court explained that if it found Ezequiel Lopez-Quintero indigent, the court would provide a copy of the trial transcripts free of charge to Attorney Frederick Cohn.

4. **Petition for Waiver of Filing and Service Fees – Affidavit of Indigency and Order (Pet. Ex. 4).** The trial court found Ezequiel Lopez-Quintero indigent and granted the petition for waiver of costs. In addition, the court appointed Attorney Frederick Cohn "to initiate the appeal if desired" and authorized him to obtain the trial transcripts without payment.

5. **Court Reporter Transcript Preparation Invoices (Pet. Ex. 5).** The dates of the invoices (Aug. 14, 2008; Sept. 26, 2008; Oct. 1, 2008) show that the court reporters were transcribing proceedings for the appeal months after the court appointed Attorney Frederick Cohn to initiate the appeal.

6. **CCAP Docket Sheet Entry of Court Reporter's Motion for Extension (Pet. Ex. 6).** On August 18, 2008, a court reporter filed a motion for extension of the deadline for filing the transcripts for the appeal.

REASONS FOR GRANTING REVIEW

I. This Court should grant review to address the "at issue" exception to the attorney-client privilege and clarify whether the State can breach the privilege by raising the affirmative defense of laches.

The circuit court transformed the laches hearing into a *Machner* hearing. Despite Ezequiel Lopez-Quintero's refusal to waive the attorney-client privilege, the court allowed the State to examine his former counsel about protected communications. In addition, the court drew an adverse inference based on Ezequiel Lopez-Quintero's refusal to testify when called by the State, despite his reliance on the attorney-client privilege as the foundation for his refusal to testify.

The State contends that it was forced to raise laches as an affirmative defense because Ezequiel Lopez-Quintero raised an ineffective assistance of counsel claim in his habeas petition. But the Wisconsin Court of Appeals has previously rejected the notion that a party waives the attorney-client privilege merely by bringing suit. Moreover, the State has not shown that Ezequiel Lopez-Quintero used any privileged communication to rebut the State's affirmative defense of laches. Ezequiel Lopez-Quintero introduced only publicly available court records and transcripts at the laches hearing to challenge the State's contention that an unreasonable delay caused prejudice.

A. Wisconsin has rejected an expansive interpretation of the "at issue" exception to the attorney-client privilege.

The circuit court's reliance on *Machner* to allow the State to breach the attorney-client privilege is contrary to Wisconsin's restrictive interpretation of the "at issue" exception to the privilege. By its terms, the exception cannot apply to a claim or defense in which the holder of the privilege has no burden. Nevertheless, the State argued that, by raising a claim of ineffective assistance of counsel, Ezequiel Lopez-Quintero forced the State to assert the affirmative defense of laches. Under these circumstances, the courts below held that Ezequiel Lopez-Quintero implicitly waived the attorney-client privilege—an expansive interpretation of the "at issue" exception to the attorney-client privilege in conflict with controlling law.

Under an expansive interpretation of the "at issue" exception, three conditions trigger a party's implied waiver of the attorney-client privilege:

> (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party;
>
> (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and
>
> (3) application of the privilege would have denied the opposing party access to information vital to his defense.

State v. Hydrite Chemical Co., 220 Wis. 2d 51, 66, 582 N.W.2d 411 (Ct. App. 1998) (quoting *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975)). But the Court of Appeals explicitly disavowed this expansive interpretation of the "at issue" exception. *Hydrite* recognized that "[c]ourts have generally rejected the notion that a party waives the attorney-client privilege *merely by bringing suit*." *Id.* at 67–68 (emphasis added). Instead, the Court of Appeals adopted the restrictive view. *Id.* at 68.

Under the restrictive view of the "at issue" exception, the holder of the attorney-client privilege does not waive the privilege when a protected document or testimony becomes relevant to an asserted claim or defense—if the privilege holder does not intend to use the evidence to prove the claim or defense. *Id.* at 69. *Hydrite* explained that:

> Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue. As the attorney-client privilege is intended to assure a client that he or she can consult with counsel in confidence, finding that confidentiality may be waived depending on the relevance of the communication completely undermines the interest to be served.

Id. at 67 n.2 (quoting *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.,* 32 F.3d 851 (3d Cir. 1994)).

The Court of Appeals found the restrictive view of the "at issue" exception consistent with the statutory formulation of the attorney-client privilege set out in Wis. Stat. § 905.03. *Hydrite*, 220 Wis. 2d at 68. Wis. Stat. § 905.03 provides that a communication is no longer "confidential," and therefore no longer privileged, when the privilege holder intends to disclose the information to third persons. Wis. Stat. § 905.03(1)(d).

Ezequiel Lopez-Quintero did not implicitly waive the attorney-client privilege at the laches hearing because he did not use protected communications or documents to prove a claim or defense. Indeed, he made no "claim" or "defense" at the laches hearing that protected communications were material to an alleged breach of his former lawyer's duties to him. Nonetheless, the State repeatedly protested that it must be allowed to breach the privilege. *See*, *e.g.*, State's Supplemental Response at 27 ("Equally perplexing to the State is how it could ever prove unreasonable delay if it has no right to call the petitioner at a laches hearing."); *id.* at 28 ([U]nder Lopez-Quintero's view of the law, the State has no right to call the petitioner to testify about unreasonable delay at a laches hearing. Surely when the supreme court struck down the pleading requirement for habeas petitioners in *Lopez-Quintero*, it did not intend to create a situation where the timelines [sic] of a habeas petition may only be addressed if the petitioner feels like testifying at an evidentiary hearing on laches."); *id.* at 38 ([T]he inequity in asserting that a habeas petitioner bringing a decade-old claim can torpedo a laches defense by refusing to testify on unreasonable delay is obvious."). But the State cited no case creating an exception to the

attorney-client privilege that requires the client or former counsel to reveal privileged information because an adversary needs the evidence—no matter how relevant—to prove a claim or defense.

B. Cases extending implicit waiver beyond claims of ineffective assistance of counsel are inapt.

Only by choosing to pursue an ineffective assistance of counsel claim at a *Machner* hearing does the defendant waive the attorney-client privilege (and presumably the confidentiality requirement of SCR 20: 1.6) to the limited extent that "counsel must answer questions relevant to the charge of ineffective assistance." *State v. Flores*, 170 Wis. 2d 272, 277–78, 488 N.W.2d 116 (Ct. App. 1992). *Flores* has been extended to claims similar to ineffective assistance of counsel that call into question counsel's performance or working relationship with the client. But reliance on cases like *Simpson*, *Boyd*, and *Bangert* are not analogous to the State's discretionary decision to raise an affirmative defense like laches. Each of those cases involved a claim *raised by the defendant* where privileged communications between the attorney and the defendant formed the heart of the complaint.

In *Simpson*, the defendant sought to withdraw his plea before sentencing. *State v. Simpson*, 200 Wis. 2d 798, 802, 548 N.W.2d 105 (Ct. App. 1996). *Simpson* held that the defendant waived the attorney-client privilege by alleging that his attorneys failed to properly advise him when entering his plea. *Id.* at 806. The Court of Appeals explained that:

> Simpson's motion to withdraw his plea on the grounds that it was not knowingly, voluntarily and intelligently made, necessarily draws into question the performance of his attorneys' duty to provide proper advice about the nature and consequences of the plea. In so doing, Simpson should not be allowed to hide behind the attorney-client privilege to prevent the State from calling his former attorneys to testify regarding communications relevant to the entry of the plea.

Id. at 805.

Boyd dealt with a defendant's request for a new attorney because of a breakdown in communications with his trial counsel. *State v. Boyd*, 2011 WI App 25, ¶ 9, 331 Wis. 2d 697, 797 N.W.2d 546. The defendant complained on appeal that the trial court violated the attorney-client privilege when the court asked his counsel to address the alleged communication breakdown. *Id.* at ¶ 19. Comparing the claim to an ineffective assistance of counsel claim, the Court of Appeals explained that, without an implicit waiver of the attorney-client privilege, "courts would be bound by a defendant's sheer assertion" about a total lack of communication. *Id.* at ¶ 21. The Court of Appeals characterized its application of the attorney-client privilege under these circumstances as "commonsense." *Id.*

Finally, in *Bangert*, this Court set out the procedures a judge must follow in accepting a plea. *State v. Bangert*, 131 Wis. 2d 246, 267–72, 389 N.W.2d 12 (1986). If the defendant makes a *prima facie* case that the plea procedures were inadequate, then the burden shifts to the State. *Id.* at 274. *Bangert* held that

the State may call the defendant or the defendant's counsel to show that the defendant's plea was knowing, voluntary, and intelligent. *Id.* at 275; *see State v. Nichelson*, 220 Wis. 2d 214, 228 n.8, 582 N.W.2d 460 (Ct. App. 1998) (recognizing that the defendant is considered to have waived the attorney-client privilege when alleging that counsel failed to properly inform the defendant before entering a plea).

In *Simpson*, *Boyd*, and *Bangert*, the defendant raised a claim that questioned the adequacy of counsel's performance. In each of those cases, the courts held that the defendant could not use the attorney-client privilege to prevent the State from responding to the allegations. In each of those cases, the courts found that the defendant implicitly waived the privilege by raising the claim. In none of those cases did the State trigger an implicit waiver by raising an affirmative defense. The State need not raise a laches defense. But raising it does not allow the State to bootstrap a breach of the attorney-client privilege.

Laches requires a showing of prejudice caused by unreasonable delay. It does not involve proving ineffective assistance of counsel. If the State fails to prove laches, or the court finds that it is inequitable to apply laches, only then must the petitioner waive the attorney-client privilege at a *Machner* hearing and allow his former attorney to testify.

State v. Meeks, 2003 WI 104, 263 Wis. 2d 794, 666 N.W.2d 859, exposes the weakness of imposing the implicit-waiver doctrine to the affirmative defense of laches. In *Meeks*, the circuit court held a competency hearing at which the prosecution subpoenaed a public

defender who had represented the defendant in a number of unrelated cases several years earlier. *Id.* at ¶ 7. The trial court overruled the defendant's objections to the public defender's testimony based on the attorney-client privilege. *Id.* On appeal, the Court of Appeals held that "the duty of an attorney, as an officer of the court, in determining competency supersedes the duty to the client in protecting the attorney-client privilege." *Id.* at ¶ 15.

This Court disagreed. *Meeks* recognized the tension between counsel's compulsory duty, under *State v. Johnson*, 133 Wis. 2d 207, 395 N.W.2d 176 (1986), to inform the court of doubts about a client's competency, and the need for "a very narrow and limited breach" of the attorney-client privilege. *Id.* at ¶ 46. Because trying an incompetent defendant violates the constitutional right to a fair trial, *Drope v. Missouri*, 420 U.S. 162, 172 (1975), counsel may not make a strategic decision to refuse to raise concerns about a client's competence. *Johnson*, 133 Wis. 2d at 219–20. But counsel's "duty as an officer of the court does not … trump the attorney-client privilege." *Id.* at ¶ 43. *Johnson* requires only that counsel raise the issue of competency with the trial court; it does not demand that counsel testify about their opinions, perceptions, or impressions that form their reasons to doubt the client's competence. *Id.* at 46. As *Meeks* explained, counsel's impressions about a client's mental state are necessarily based on counsel's privileged and confidential relationship with the client. *Id.* at ¶ 54. A close examination of counsel's impressions would clearly violate the attorney-client privilege. *Id.* Therefore, *Meeks* held that former counsel cannot reveal such information without the consent of the client. *Id.* at ¶ 61.

Meeks is instructive because it recognizes that no broad or implicit waiver of the attorney-client privilege occurs even when counsel *must* bring a claim to the court's attention. Nor does the State have the right to breach the attorney-client privilege because it then bears the burden of proving that the defendant is competent. The grounds for finding no implicit waiver are even stronger when the State raises a discretionary defense. The State, not Ezequiel Lopez-Quintero, raised the affirmative defense of laches. The State, not Ezequiel Lopez-Quintero, had the burden of proof. Ezequiel Lopez-Quintero did not trigger an implicit waiver of the attorney-client privilege by filing a habeas petition raising an ineffective assistance of counsel claim. He did not force the State to raise the affirmative defense of laches.

C. The Wisconsin courts have never directly addressed whether former counsel and the defendant must testify at a laches hearing.

The State and the Court of Appeals relied on cases like *Wren*, *Coleman*, and *Washington* to show that former counsel and the defendant must testify at a laches hearing. *See*, *e.g.*, App. 1 at 3 n.2 (citing *Coleman* for proposition that this Court "contemplate[ed] that an evidentiary hearing on laches would include testimony from counsel"); State's Supplemental Response at 32–33 ("[W]hen the supreme court in *Coleman* remanded the case for an evidentiary hearing on laches, it assumed that the State could question appellate counsel to prove its affirmative defense even though no *Machner* hearing was ordered."). However, the facts of those cases are

materially different from the indisputable record-based facts in Ezequiel Lopez-Quintero's case.

In *Wren*, trial counsel timely filed the Notice of Right at sentencing. *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶ 5, 389 Wis. 2d 516, 936 N.W.2d 587. However, the defendant had checked the box on the form indicating that he was undecided about pursuing postconviction relief. *Id.* Consequently, his attorney did not file a Notice of Intent. *Id.* Only after more than a decade had passed and the defendant had filed four *pro se* motions challenging his conviction on other grounds did the defendant finally allege that he and his family had made numerous attempts to contact trial counsel to tell him to preserve his right to appeal. *Id.* at ¶ 6–7. By the time the defendant filed a *Knight* petition raising ineffective assistance of counsel for failing to preserve his right to appeal, trial counsel was dead. *Id.* at ¶ 8. The State had no documentary evidence or witness testimony to present about trial counsel's version of events. *Id.* at ¶ 11. This Court held that the death of trial counsel and the loss of his case files prejudiced the State, especially "where the decedent's knowledge is crucial to a party's defense." *Id.* at ¶ 34 (internal quotation marks omitted).

Unlike the petitioner in *Wren*, Ezequiel Lopez-Quintero indicated without equivocation on the Notice of Right that he wanted to appeal his conviction and sentence. Trial counsel knew he wanted to appeal because trial counsel signed the certification on the Notice of Right. Under these circumstances, trial counsel had a non-discretionary statutory duty to file the Notice of Intent. *See*, *e.g.*, *id.* at ¶ 28 ("Without question, if Wren told [trial counsel] to file an appeal and [trial counsel] failed to do so, that failure would

establish constitutionally deficient performance, and prejudice is presumed."); *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) ("[A] defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice."). But Ezequiel Lopez-Quintero's trial counsel did not file the Notice of Intent. The death of Attorney Frederick Cohn, the diffusion of responsibility by Attorney Christopher Cohen, and the loss of Attorney Cohn's files are irrelevant to the State's defense. The court record contains the documentary proof, and it is incontrovertible.

In *Coleman*, after a suppression motion failed and the defendant pled guilty, appointed counsel represented the defendant on postconviction and appeal. *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶¶ 4–7, 290 Wis. 2d 352, 714 N.W.2d 900. Appellate counsel told the defendant that there were no meritorious issues for appeal, so counsel did not file a direct appeal. *Id.* at ¶ 7. Sixteen years later, the defendant filed a *Knight* petition, alleging that former appellate counsel was ineffective for failing to appeal the denial of the suppression motion. *Id.* at ¶¶ 11, 14. This Court remanded the case so that former appellate counsel could try to reconstruct his communications with the defendant about how they reached the decision not to appeal. *Id.* at ¶¶ 36–37.

In remanding the case, *Coleman* assumed that the defendant would waive the attorney-client privilege to allow former appellate counsel to testify. For if the defendant refused to waive the privilege, then the Court of Appeals would indeed find prejudice, not unlike the situation in *Wren* where former counsel had died, making it impossible to resolve a material

factual dispute. Ezequiel Lopez-Quintero's case presents no comparable material factual dispute that only the testimony of former counsel can resolve. The documentary evidence is irrefutable: counsel was required by statute to file the Notice of Intent within 20 days after Ezequiel Lopez-Quintero expressly indicated his desire to appeal on the Notice of Right. *See* Wis. Stat. § 973.18(5) ("If the defendant desires to pursue postconviction relief, the defendant's trial counsel *shall* file the [Notice of Intent]." (emphasis added)).

In *Washington*, the defendant hired an attorney to pursue postconviction relief after the Notice of Intent was filed. *State ex rel. Washington v. State*, 2012 WI 74, ¶ 5, 343 Wis. 2d 434, 819 N.W.2d 305. Postconviction counsel filed a motion for plea withdrawal, which the trial court denied. *Id.* at ¶ 6. No notice of appeal was filed. *Id.* at ¶ 7. Over the next ten years, the defendant filed five more postconviction motions before filing a *Knight* petition alleging that his initial postconviction counsel was ineffective for failing to preserve his right to appeal. *Id.* at ¶¶ 8–13. By the time the defendant filed the *Knight* petition, former postconviction counsel no longer had any independent recollection of the events and his case file had been destroyed. *Id.* at ¶ 25. This Court found that the State had established prejudice. *Id.*

The defendant in *Washington*, unlike Ezequiel Lopez-Quintero, needed his former counsel to testify at the laches hearing or he would have faced the same situation establishing prejudice in *Wren*: unavailable former counsel and no documentary evidence to resolve a material factual dispute. Ezequiel Lopez-Quintero did not need to allow his former counsel to

testify at the laches hearing, because the court record indisputably showed that former counsel failed to carry out their mandatory statutory duty to file the Notice of Intent.

II. This Court should grant review to address whether a circuit court may take an adverse inference from a witness's invocation of the attorney-client privilege as the basis for refusing to testify at a laches hearing.

No court should have the power to make a negative inference because a witness invokes the attorney-client privilege. A witness should have the right to invoke the attorney-client privilege and maintain the inviolability of confidential communications with counsel without fear of adverse consequences.

The circuit court ruled that the "absent-witness" instruction, Wisconsin Civil Jury Instruction 410, allowed it to take a negative inference from Ezequiel Lopez-Quintero's refusal to testify. Civil Jury Instruction 410 states:

> If a party fails to call a material witness within (his) (her) control, or whom it would be more natural for that party to call than the opposing party, and the party fails to give a satisfactory explanation for not calling the witness, you may infer that the evidence which the witness would give would be unfavorable to the party who failed to call the witness.

The attorney-client privilege is intended to encourage full and frank communications between

clients and counsel. *Jacobi*, 23 Wis. 2d at 156–57. Designed to protect this purpose, Wis. Stat. § 905.03 is a rule of evidence that prohibits a court from compelling answers to inquiries that threaten to reveal the substance of attorney-client communications. This Court explained that:

> Unless one of the few exceptions can be utilized, the protection afforded by the privilege is absolute. No showing of necessity, hardship, or injustice can require an attorney to reveal the protected information if his client does not waive the privilege, no matter how necessary the information is to a resolution of the particular issue on its merits.

State ex rel. Dudek v. Circuit Court for Milwaukee Co., 34 Wis. 2d 559, 581, 150 N.W.2d 387 (1967). Wis. Stat. § 905.13 provides additional protections to evidentiary privilege holders. Subsection (1) prohibits counsel or the court from commenting upon a person's invocation of the attorney-client privilege. In fact, it explicitly states that "no inference may be drawn" from invoking the privilege. Moreover, subsection (3) states that "any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom."

Although the legal system values the societal benefits that the confidential nature of the relationship between a client and attorney fosters, Wis. Stat. § 905.13 recognizes the concern that a privilege holder may lose those benefits if asserting the privilege becomes too costly. Fear of having to waive the attorney-client privilege or suffer an adverse inference would hinder the openness of the client's

communications with the attorney, diluting the legal advice given or rendering it meaningless. *See generally Comments and Instructions on Claims of Privilege*, 7 Wis. Prac., Wis. Evidence § 513.1 (4th ed.).

The circuit court's ruling leaves clients like Ezequiel Lopez-Quintero with a Hobson's choice: preserve the confidentially of the communication and suffer an adverse inference, or waive confidentiality and lose the privilege's protection on the subject. No witness should be penalized for their decision to maintain confidentiality.

The circuit court's reliance on the "missing-witness" doctrine, embodied in Wisconsin Civil Jury Instruction 410, is an inappropriate analogy for a claim of attorney-client privilege. The missing-witness doctrine allows an inference that a party has withheld unfavorable evidence when that party inexplicably fails to call a witness within its control. However, because a party may have a number of valid reasons for choosing to withhold attorney-client communications, it is not logical to infer that a refusal to waive the privilege is intended to shield unfavorable information. The attorney-client privilege shields favorable, as well as unfavorable, information. Moreover, invoking the privilege is a procedural event. It is not an event of evidentiary significance. No facts are established or suggested by invoking the privilege. It reveals only that an attorney-client communication occurred. The fact that a privileged communication took place does not indicate whether the communication consisted of favorable, unfavorable, or even irrelevant information. *See generally* Deborah Bartel, *Drawing Negative Inferences Upon a Claim of*

the Attorney-Client Privilege, 60 Brooklyn L. Rev. 1355, 1400–11 (1995).

The missing-witness doctrine presumes that a party has some duty to respond or refute or offer proof in support of a claim or defense. For example, in a *Machner* hearing, where the petitioner has raised a claim of ineffective assistance of counsel, it is a logical deduction to assume that the failure of former counsel or the petitioner to testify is that they have nothing favorable to offer. But if the holder of the attorney-client privilege bears no burden of proof on the issue to which the privileged communication relates—such as in a laches hearing—no similar logical deduction applies. An adverse inference suggests that Ezequiel Lopez-Quintero has some duty to produce witnesses or that he bears some burden of proof. He does not.

CONCLUSION

This Court should grant review of Ezequiel Lopez-Quintero's case and hold that the State may not breach the attorney-client privilege by raising the affirmative defense of laches.

Dated this 23rd day of May 2022.

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 7,197 words.

/s/ Gregory W. Wiercioch

ELECTRONIC CERTIFICATION

I certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

/s/ Gregory W. Wiercioch

CERTIFICATION AS TO APPENDICES

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: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; 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 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.

/s/ Gregory W. Wiercioch

TABLE OF APPENDICES