STATE OF WISCONSIN

IN SUPREME COURT

No. 2018AP203-W

STATE OF WISCONSIN EX REL.
EZEQUIEL LOPEZ-QUINTERO,

Petitioner-Petitioner,

v.

MICHAEL A. DITTMANN,

Respondent.

RESPONSE TO PETITION FOR REVIEW

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Respondent Michael A. Dittmann opposes Petitioner Ezequiel Lopez-Quintero's petition for review on the following grounds:

1. The petition fails to satisfy any criteria for review under Wis. Stat. § (Rule) 809.62(1r).

Despite Lopez-Quintero's litigation strategy, the court of appeals saw this case for what it is: a classic example of when it's equitable to apply laches to bar a habeas petition.

Lopez-Quintero waited nearly ten years to bring his habeas petition seeking reinstatement of his direct-appeal rights, claiming that his trial attorneys were ineffective for failing to file the notice of intent to pursue postconviction relief. (Order, April 1, 2022 at 2.) During that near ten-year delay, Warden Dittmann did not receive notice that Lopez-Quintero would be bringing a habeas petition. *Id.* at 3, 5. And in that timeframe, an essential witness to Lopez-Quintero's claim—his trial counsel who handled the decision-making about his potential appeal—died, and his case file was destroyed. *Id.* As this Court recently observed, these are classic elements of prejudice in a laches defense. *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶ 34, 389 Wis. 2d 516, 936 N.W.2d 587 ("The loss of key records and the unavailability of essential witnesses are 'classic elements' of prejudice in a laches defense." (citation omitted)).

After finding that Warden Dittmann proved all three elements of laches as a matter of law, the court of appeals made a discretionary call: applying laches to bar Lopez-Quintero's habeas petition was equitable because of his lengthy, unexplained delay, the severe prejudice to Warden Dittmann ("Without Cohn's case file or testimony, it will be nearly impossible to reconstruct the circumstances that led to the non-filing of the notice of intent. . ."), and the victims' interest in finality. (Order, April 1, 2022 at 5–6.)

In his petition, Lopez-Quintero doesn't dispute that Warden Dittmann proved his laches defense, or that it's equitable to apply laches to bar his petition. (Pet. 23–38.) Rather, he asks this Court to accept review to hold that after sleeping on his rights to the clear detriment of Warden Dittmann, he should have been allowed to hide behind attorney-client privilege to undermine Dittmann's ability to prove laches. (Pet. 9–11.) In a proceeding that's all about the equities, *see Wren*, 389 Wis. 2d 516, ¶ 14, the court of appeals had no trouble rejecting this inequitable position. It took a single footnote with citation to binding authority—including this Court's own—to refute Lopez-Quintero's insistence that "[o]nly by choosing to pursue an ineffective assistance of counsel claim at a *Machner* hearing does the defendant waive the attorney-client privilege." (Pet. 27); (Order, April 1, 2022 at 3.) That's simply inaccurate, as Lopez-Quintero's petition ultimately acknowledges. (Pet. 27–29.)

In a straightforward laches case, Lopez-Quintero attempts to manufacture confusion where there's none. He identifies no other case where a habeas petitioner invoked attorney-client privilege to prevent the respondent from proving a laches defense—he doesn't claim that lower courts are struggling with this concept. (Pet. 9–11, 23–34.) They aren't: 16 years ago, this Court contemplated that an evidentiary hearing on laches would include testimony from defense counsel. *See State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 36, 290 Wis. 2d 352, 714 N.W.2d 900. Yet, the civil case (involving a dispute between an insured and its insurer) that Lopez-Quintero claims throws a wrench into everything was on the books when this Court decided *Coleman*. (Pet. 10–11, 24–26 (discussing *State v. Hydrite Chemical Co.*, 220 Wis. 2d 51, 582 N.W.2d 411 (Ct. App. 1998)).) Other laches cases are in accord with *Coleman*. *See, e.g.*, *State ex rel. Washington v. State*, 2012 WI App 74, ¶¶ 13–14, 25, 343 Wis. 2d 434, 819 N.W.2d 305

(postconviction counsel provided testimony relevant to laches).

The idea that a criminal defendant impliedly waives attorney-client privilege by bringing a claim that calls into question his counsel's performance is not a novel concept. For 36 years, it's been understood that a defendant impliedly waives attorney-client privilege when he brings a *Bangert* claim—regardless of whether the defendant discloses privileged communications in meeting his initial burden. *See State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986); *see also State v. Nichelson*, 220 Wis. 2d 214, 228 n.8, 582 N.W.2d 460 (Ct. App. 1998). When the burden shifts to the State, this Court explained that the State may "utilize any evidence" to meet its burden of proof, including trial counsel's testimony. *Bangert*, 131 Wis. 2d at 274.

Rather than recognizing the clear parallel between this case and those like *Bangert*, *Simpson*,[1] and *Boyd*,[2] Lopez-Quintero attempts to distinguish laches cases by claiming they involve a "discretionary" defense. (Pet. 27–29.) He doesn't persuade: no one *forces* the State to defend against a plea-withdrawal motion, or any other claim a defendant may raise that calls into question his counsel's performance. But when the State *elects* to do so, the defendant shouldn't "be allowed to hide behind the attorney-client privilege to prevent the State from calling his former attorneys to testify regarding communications relevant" to its defense. *State v.*

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[1] *State v. Simpson*, 200 Wis. 2d 798, 802, 548 N.W.2d 105 (Ct. App. 1996) (defendant impliedly waived attorney-client privilege by bringing a non-*Bangert* plea-withdrawal motion).

[2] *State v. Boyd*, 2011 WI App 25, ¶ 14, 331 Wis. 2d 697, 797 N.W.2d 546 (defendant impliedly waived attorney-client privilege when he tried to fire his lawyer for a breakdown of communications).

Simpson, 200 Wis. 2d 798, 805, 548 N.W.2d 105 (Ct. App. 1996).

In short, lower courts aren't confused on how to conduct laches hearings. Well-established legal principles exist to help courts reject inequitable litigation strategies like the one employed here. This Court's review is not needed a second time on this case.

2. The victims have constitutional rights to "fairness," to "proceedings free from unreasonable delay," and to "timely disposition of the case, free from unreasonable delay." Wis. Const. art. I, § 9m. In a case where Lopez-Quintero has not identified a critical need for this Court's review a second time, victims' rights should be paramount.

Lopez-Quintero was convicted of killing 48-year-old Kenosha County Deputy Sheriff Frank Fabiano, Jr., during a routine traffic stop in 2007. Lopez-Quintero shot Deputy Fabiano in the head. Deputy Fabiano left behind his wife and young daughter.

The victims thought this case was over roughly 14 years ago, when Lopez-Quintero didn't pursue a direct-appeal of his conviction. Nearly ten years after Lopez-Quintero's conviction, in February 2018, the victims learned that he was attempting to reinstate his direct-appeal rights. Since then, they have endured years of litigation, all the while Lopez-Quintero has never identified a meritorious claim for direct appeal.

After this case was remanded to the circuit court for an evidentiary hearing on laches, the victims experienced a near four-month delay to accommodate a request from Lopez-Quintero's counsel. They have further endured the parties' fight over discovery, as well as Lopez-Quintero's motion to recuse Judge Schroeder. When the recusal motion failed, the victims waited as Lopez-Quintero filed a petition for leave to appeal, and when that proved unsuccessful, a petition for a

supervisory writ on the same grounds. They have also seen Lopez-Quintero file (1) a motion seeking to compel the State to file a motion, (2) an indefinite request to stay the proceedings due to the Covid-19 crisis, (3) a motion to reconsider the denial of the Covid-19 continuance, and (4) two more petitions for a supervisory writ.

When the evidentiary hearing on laches finally occurred on January 26, 2021—531 days since the court of appeals' remand order, and 608 days since this Court's decision in *State ex rel. Lopez-Quintero v. Dittmann*, 2019 WI 58, 387 Wis. 2d 50, 928 N.W.2d 480—the victims watched as Lopez-Quintero again requested a Covid-19 continuance, and when that failed, again moved the circuit court for recusal. And then they witnessed Lopez-Quintero's further attempts to undermine the laches proceeding, discussed above.

The victims' constitutional rights should matter when this Court considers prolonging this case—involving a habeas petition that already has been pending for over four years, and a 14-year-old homicide conviction—for potentially another year.

3. The court of appeals' unpublished order has no precedential value.

For the above reasons, Warden Dittmann urges this Court to deny Lopez-Quintero's petition for review.

Dated this 21st day of June 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b) and 809.62(4) (2019–20) for a response produced with a proportional serif font. The length of this response is 1,372 words.

Dated this 21st day of June 2022.

KARA L. JANSON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULE) 809.19(12) and 809.62(4)(b) (2019–20)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rule) 809.19(12) and 809.62(4)(b) (2019–20).

I further certify that:

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

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

Dated this 21st day of June 2022.

KARA L. JANSON
Assistant Attorney General