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SUPREME COURT

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.

**REPLY TO STATE'S RESPONSE
TO PETITION FOR REVIEW**

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**A. Relevance of the protected
information is not an exception
to the attorney-client privilege.**

In its Response to Ezequiel Lopez-Quintero's Petition for Review, the State continues to minimize the extraordinary nature of the position it advances: that a party may breach the attorney-client privilege simply by raising the affirmative defense of laches. In other words, the State seeks the right to breach the privilege that *State v. Flores*, 170 Wis. 2d 272, 277–78, 488 N.W.2d 116 (Ct. App. 1992), permits only at a *Machner* hearing by insisting that it is entitled to breach the privilege to prove a laches defense that, if successful, would prevent the *Machner* hearing from ever taking place. The State anchors this right in a

balancing test that weighs the attorney-client privilege against the State's right to have access to relevant evidence to ensure a meaningful opportunity to prove its affirmative defense of laches. *See* Petition at 3 (citing App. 4). The State cuts its balancing test from whole cloth. It cites no precedent for its test, except for inapt comparisons to *Bangert*, *Simpson*, and *Boyd*. Response at 4–5.

Wisconsin has rejected the State's broad interpretation of the "at issue" exception to the attorney-client privilege—that a party waives the privilege "merely by bringing suit." *State v. Hydrite Chemical Co.*, 220 Wis. 2d 51, 67–68, 582 N.W.2d 411 (Ct. App. 1998). The State's position drives a gaping hole through the attorney-client privilege by finding a waiver if the confidential communication is relevant to the resolution of the issue. But "[r]elevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged." *Id.* at 67 n.2 (internal quotation marks and citation omitted).

B. Ezequiel Lopez-Quintero directly challenged the State's proof of prejudice.

The State makes the perplexing argument that Ezequiel Lopez-Quintero did not dispute that the State proved its laches defense. Response at 3. But Ezequiel Lopez-Quintero could not have been more explicit when he stated that "[he] 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." Petition at 14; *see id.* at 16 ("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."). Ezequiel Lopez-Quintero listed the six documents he introduced at the laches hearing and described their evidentiary significance in refuting the State's allegation that the death of Attorney Frederick Cohn and the loss of his trial file resulted in prejudice. *Id.* at 14–15.

C. The State caused the additional delay by making unprecedented requests for discovery.

Finally, the State blames Ezequiel Lopez-Quintero for the delay in resolving the laches issue, Response at 5–6, but ignores the dominant role that it played by making unprecedented demands for discovery. It is troubling, to say the least, that the State appears to take Ezequiel Lopez-Quintero's counsel to task for abiding by his professional and ethical duty to provide his client with zealous representation. *See id.*

With its discovery requests, the State sought to breach the attorney-client privilege between former counsel and Ezequiel Lopez-Quintero, allegedly to obtain evidence relevant to its laches defense. Undersigned counsel had ample grounds for challenging the State's astonishing efforts to breach the privilege outside the context of a *Machner* hearing. But even more stunning, the State sought to breach the privilege between Ezequiel Lopez-Quintero and *current* counsel. The State asked the circuit court to order undersigned counsel to disclose all communications between Ezequiel Lopez-Quintero

and the Remington Center related to their efforts to reinstate his direct appeal rights. Petition at 5–6 (quoting State’s discovery demands). Moreover, the State demanded stipulations about the Remington Center’s representation of Ezequiel Lopez-Quintero so that undersigned counsel would not need to appear as a witness at the laches hearing. *Id.* at 6. Undersigned counsel forcefully resisted the State’s brazen attempt to breach the privilege between himself and Ezequiel Lopez-Quintero. At the laches hearing, the State abandoned without explanation its groundless efforts to obtain the Remington Center’s files or call undersigned counsel to the witness stand. The State, not Ezequiel Lopez-Quintero, is at fault for any delay since this Court ordered a remand.

This Court should grant review of Ezequiel Lopez-Quintero’s case.

Dated this 27th day of June 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 714 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