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**COURT OF APPEALS**

**No. 22AP1076**

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IN THE  
**Wisconsin Court of Appeals**  
**DISTRICT IV**

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ARTILLIS MITCHELL,  
Petitioner-Appellant,

v.

CHRIS S. BUESGEN AND KEVIN A. CARR,  
Respondents-Respondents,

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On Appeal from the Dane County Circuit Court,  
The Honorable Susan M. Crawford, Presiding, Case No.  
22CV1204

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**APPELLANT'S BRIEF**

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## STATEMENT OF THE ISSUES

### Introduction

Artillis Mitchell mailed to the Circuit Court a petition for writ of certiorari six days before the 45-day statutory deadline, but the Circuit Court dismissed Mitchell's petition as untimely because the Clerk of Court held his petition and refused to file it until after the 45-day period had elapsed.<sup>1</sup> The Clerk did so because, in the Clerk's view, Mitchell's petition did not initially include all documentation related to his exhaustion of administrative remedies.

This Court should reverse for two reasons: (1) Mitchell's petition was timely; and (2) even if the petition were untimely, the statutory remedy in these circumstances is not dismissal, but denial of Mitchell's request for a fee waiver. Wis. Stat. § 801.02(7)(c).

The Clerk filed Mitchell's petition after the statutory deadline even though Mitchell timely placed his petition in the mail. Specifically, on April 26, 2022—six days before the 45-day deadline—Mitchell placed his petition in the mail for delivery to the Circuit Court. In addition, the previous day—April 25—Mitchell requested from the Stanley Correctional Institution (“SCI”) a certified copy of his trust account statement, a document over which he had no control, but was necessary to include for the Circuit Court to rule on his request for a fee waiver. Under common-law tolling, the timing of Mitchell's request to SCI, combined with the timing of his mailing of the petition, tolled the 45-day deadline. Such tolling rendered his petition timely when the Clerk filed

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<sup>1</sup> The forty-five day statutory time period was triggered on March 16, 2022. Forty-five days later was April 30, 2022. But, because April 30, 2022, fell on a Saturday, the deadline rolled to the following Monday, May 2, 2022. Wis. Stats. §§ 801.15(1)(b), 990.001(4)(c). Accordingly, the statutory window for Mitchell actually was 47 days.

Mitchell's petition on May 17, 2022, and the Circuit Court granted his request for fee waiver on the same date.

Even if tolling somehow does not apply, however, Mitchell's petition still was timely. This is so because, instead of filing Mitchell's petition upon receipt, the Clerk usurped the Circuit Court's authority by assessing the sufficiency of Mitchell's petition and holding it until after the deadline had passed. In contravention of statutes prescribing his/her authority, the Clerk declined to file Mitchell's petition because the Clerk—exercising a function reserved for the Circuit Court alone—determined Mitchell had not included all documents showing he had exhausted his administrative remedies. One day after receiving a letter from the Clerk to that effect, Mitchell mailed to the Clerk the requested documents. The Clerk finally filed Mitchell's petition on May 17, 2022—15 days after the 45-day deadline had passed (assuming, *arguendo*, tolling somehow does not apply).

The Circuit Court deemed Mitchell's petition untimely and, as a result, dismissed it. However, the statutory remedy in these circumstances is not dismissal, but denial of Mitchell's request for a fee waiver. Wis. Stat. § 801.02(7)(c). Such remedy particularly should be applied where, as here, the perceived omission of certain exhaustion documents was a harmless omission because the documentation shows Mitchell in fact exhausted his administrative remedies before filing his petition for writ of certiorari.

### **Issue I.**

Whether Mitchell's petition for writ of certiorari was timely, when he both requested documents outside his control and mailed his petition to the Clerk of Court days before the 45-day statutory deadline, but the Clerk declined to file his petition until after the deadline, because the Clerk deemed his petition to be lacking certain documents

demonstrating Mitchell had exhausted his administrative remedies.

**Answer by the Circuit Court:** The Circuit Court answered “no” and ruled Mitchell’s petition was untimely.

This Court should answer “yes.”

### **Issue II.**

If Mitchell’s petition was not timely, whether dismissal was the appropriate remedy in these circumstances where Mitchell timely mailed his petition but the Clerk of Court did not file it upon receipt and, instead, filed the petition after the 45-day deadline because the Clerk believed Mitchell had initially omitted certain exhaustion documents, and Mitchell later mailed documents the Clerk requested that showed he had, in fact, exhausted his administrative remedies.

**Answer by the Circuit Court:** The Circuit Court answered “yes” and dismissed Mitchell’s petition.

This Court should answer “no.”

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary. The parties' briefs should fully present the issues and arguments.

The Court should publish its opinion in this case because the issue of timeliness of a petition for writ of certiorari when it is mailed within the 45-day statutory deadline but the Clerk files it after the deadline, as well as the remedy in such circumstances, are issues of statewide importance and satisfy the criteria for publication.

## STATEMENT OF THE CASE

This case concerns whether a prisoner's petition for writ of certiorari was timely filed. A prisoner may seek a writ of certiorari related to prison or jail conditions if commenced within 45 days after the cause of action accrues. Wis. Stat. § 893.735(2).

Forty-one days after exhausting his administrative appeals of a prison disciplinary decision, Mitchell mailed a petition for writ of certiorari for filing. Mitchell included with his petition a request for fee waiver, which required him to include certain additional documents. Among the additional documents required to be filed if a prisoner requests a fee waiver is a certified copy of his or her trust account statement. But Mitchell did not possess a certified copy of that statement. He had to request that certified document from SCI, which he did seven days before the 45-day deadline. In these circumstances, common-law tolling applies, and Mitchell's 45-day deadline was tolled as of April 26, 2022, when he mailed his petition. *State ex rel. Steldt v. McCaughtry*, 2000 WI App 176, ¶ 17, 238 Wis. 2d 393, 617 N.W.2d 201; *State ex rel. Walker v. McCaughtry*, 2001 WI App 110, ¶ 16, 244 Wis. 2d 177, 629 N.W.2d 17. The 45-day

deadline remained tolled on May 17, 2022, when the Clerk filed his petition and the Circuit Court granted his request for fee waiver. *Id.* Accordingly, Mitchell's petition was timely.

However, even if the tolling rules of *Steldt* and *Walker* somehow do not apply, Mitchell's petition still was timely. This is so because the Dane County Clerk of Courts held the petition and refused to file it upon receipt. The Clerk did so because, in the Clerk's view, Mitchell's petition omitted certain documents showing he had exhausted his administrative remedies. Mitchell sent the additional documents to the Clerk of Courts one day after the Clerk informed him his petition required further documentation. By the time the Clerk received those documents and filed Mitchell's petition, however, the 45-day statutory time period had elapsed (if the original deadline was not tolled).

The Circuit Court dismissed Mitchell's petition as untimely.

Mitchell now appeals dismissal of his petition. Under *Steldt* and *Walker*, the 45-day deadline was tolled at the time the Clerk of Courts filed the petition on May 17, 2022. Moreover, Mitchell mailed his petition timely and its filing otherwise would have satisfied the 45-day statutory deadline under Wis. Stat. § 893.735(2)—even absent tolling—had the Clerk not usurped the Circuit Court's authority. The statutes do not grant the Clerk authority to refuse to accept any paper for filing on the basis that the Clerk believes not all papers have been received. *See* Wis. Stat. § 59.40(2)(a). Rather, the determination of whether the required documents have been submitted with a petition belongs exclusively to the Circuit Court. *State ex rel. Locklear v. Schwarz*, 2001 WI App 74, ¶ 22, 242 Wis. 2d 327, 629 N.W.2d 30. The Clerk improperly held Mitchell's petition and filed it after the statutory deadline when he or she assumed the judicial role

of determining whether Mitchell's petition included all documents pertaining to exhaustion of remedies. *Id.*; Wis. Stat. § 59.40(2)(a).

In addition, the Clerk's error was compounded by the Circuit Court's error of imposing the statutorily-impermissible remedy of dismissal. In these circumstances, the correct statutory remedy is denial of Mitchell's request for a fee waiver, not dismissal. Wis. Stat. § 801.02(7)(c).

This Court should reverse and remand with instructions that Mitchell's petition be deemed timely. Alternatively, if this Court concludes the petition was untimely, this Court should nevertheless reverse and remand with instructions that the remedy for untimeliness is denial of Mitchell's request for fee waiver.

### STATEMENT OF FACTS

Mitchell's petition for writ of certiorari relates to his challenge of a prison disciplinary determination. In September 2021, Mitchell was issued an Adult Conduct Report for violating the Wisconsin Department of Corrections ("DOC") inmate conduct rules DOC 303.43, DOC 303.44, and DOC 303.60. (R.6, p. 2 of 29; Appx.006.) Following a hearing, Mitchell was deemed guilty of two of the violations. (*Id.*, p. 3 of 29; Appx.007.)

Mitchell pursued every administrative remedy challenging the decision. He appealed the decision to Warden Chris S. Buesgen. (*Id.*, p. 17 of 29; Appx.021.) Buesgen affirmed the disciplinary committee's decision. (*Id.*, p. 20 of 29; Appx.024.) Mitchell then filed an Inmate Complaint with the Institution Complaint Examiner's Office challenging Buesgen's decision. (*Id.*, p. 11 of 29; Appx.015.) The same day, the Examiner's Office recommended the complaint be dismissed. (*Id.*, p. 9 of 29; Appx.013.) Mitchell appealed that recommendation to the Corrections Complaint Examiner.

(*Id.*, p. 13 of 29; Appx.017.) The Corrections Complaint Examiner recommended dismissal of the complaint. (*Id.*, p. 29 of 29; Appx.033.) Finally, on March 16, 2022, the Secretary of the DOC dismissed the complaint. (*Id.*, p. 10 of 29; Appx.014.)

The March 16, 2022, date of dismissal of Mitchell's administrative claim—which constituted a final administrative decision—triggered the 45-day statutory deadline within which to file a petition for writ of certiorari in the circuit court. Wis. Stat. § 893.735(2).

Under the 45-day statutory deadline, Mitchell had until May 2, 2022, to file a petition for certiorari review: The 45th day fell on Saturday, April 30, so the deadline rolled to the following Monday, May 2, giving Mitchell a 47-day window within which to timely file his petition. Wis. Stats. §§ 801.15(1)(b), 990.001(4)(c).

On April 25, 2022, Mitchell requested from SCI a certified copy of his trust account statement, which is a document required for a circuit court's assessment of a prisoner's request for fee waiver due to indigency. (R.8, p. 2 of 3; Appx.035.)

On April 26, 2022—41 days after the Secretary dismissed his complaint, and six days before the May 2, 2022, deadline—Mitchell mailed to the Dane County Circuit Court his petition for writ of certiorari of the Secretary's decision, along with the following other documents:

- A proposed writ of certiorari;
- A petition for fee waiver;
- An affidavit of indigency;
- An authorization to withhold money from his trust account;

- A Department of Justice (DOJ) certification indicating that he had not had three or more dismissals under Wis. Stat. § 801.02(7)(d); and
- Two exhaustion documents: the reviewing authority's decision and the Secretary's decision.

(*Id.*; see also R.11, p. 1 of 5; Appx.042.)

In his April 26, 2022 letter to the Clerk enclosing such documents, Mitchell informed the Clerk that he had requested a certified copy of his trust account statement, but that it “[might] arrive later than [sic] my filed certiorari and supporting document, due to the fact that it has to be sent out by the records office at Stanley Corr. Inst.” (R.11, p. 3 of 5; Appx.044.)

On April 28, 2022, Stanley Correctional processed Mitchell's request for a certified copy of his trust account statement. (R.4, pp. 1-2 of 2; Appx.003-Appx.004.)

On May 4, 2022—two days after the 45-day statutory deadline had elapsed—Mitchell received a letter from Dane County Clerk of Courts, stating that, in the Clerk's view, Mitchell had not included all the necessary exhaustion documents in his April 26, 2022, mailing. (R.21, p. 2 of 8; Appx.050; R.22, p. 5 of 14; Appx.061.) The Clerk's letter also stated that, due to the perceived omission, the Clerk refused to file Mitchell's petition for writ of certiorari. (R.22, p. 5 of 14; Appx.061.)

Mitchell responded immediately. On May 5, 2022, he mailed to the Clerk the requested documents showing he had exhausted his administrative remedies. (R.11, p. 4 of 5, Appx.045; R.22, p. 2 of 14; Appx.058.)

On May 17, 2022—fifteen days after the 45-day statutory deadline had elapsed—the Clerk filed Mitchell's petition for writ of certiorari. (See R.6, p. 1 of 29; Appx.005 (stamped “FILED May 17 2022”).) The same date, the

Circuit Court granted Mitchell's petition for a fee waiver. (See R.1, pp. 1-2 of 2; Appx.047-Appx.048.)

On May 20, 2022, the Circuit Court dismissed Mitchell's petition, reasoning that its filing on May 17, 2022, was untimely. (R.16, pp. 1-2 of 2; Appx.001-Appx.002 (stamped "FILED May 17 2022").)

## STANDARD OF REVIEW

This appeal presents two issues: (1) whether Mitchell's petition for writ of certiorari was filed timely; and (2) whether the Circuit Court's dismissal of Mitchell petition was proper in these circumstances.

These issues are ones of statutory interpretation. The first issue involves interpretation of Wis. Stats. §§ 893.735, 59.40(2) and (3), and the second issue involves interpretation of Wis. Stat. § 801.02(7)(c). Issues of statutory interpretation are questions of law reviewed *de novo*. *Steldt*, 238 Wis. 2d 393, ¶ 11.

## ARGUMENT

The Circuit Court improperly dismissed Mitchell's petition for writ of certiorari. First, Mitchell's petition was timely: he mailed it to the Clerk six days before the 45-day deadline, and under these circumstances—in which Mitchell sought a fee waiver and had to request a certified copy of his trust account from SCI because Mitchell did not possess that document—the 45-day deadline was tolled at the time the Clerk filed Mitchell's petition on May 17, 2022. Even so, the Clerk usurped the Circuit Court's authority by holding Mitchell's petition instead of filing it upon receipt.

Second, even if Mitchell's petition somehow were deemed untimely, dismissal of his petition is not the appropriate remedy. Instead, in these circumstances—in which

the Clerk refused to file Mitchell's petition before the 45-day deadline because the Clerk believed Mitchell initially omitted certain documents related to exhaustion of administrative remedies—the statutory remedy is denial of Mitchell's request for fee waiver. Wis. Stat. § 801.02(7)(c). Denial of his request for fee waiver—or another remedy short of the drastic remedy of dismissal—is particularly appropriate where, as here, the petitioner, in fact, exhausted his administrative remedies before filing his petition for writ of certiorari.

**I. Mitchell timely submitted his petition for writ of certiorari.**

The Circuit Court erred in finding Mitchell's petition for writ of certiorari untimely under Wis. Stat. § 893.735(2). Mitchell's petition was timely, and the Clerk usurped the Circuit Court's exclusive authority by holding Mitchell's petition until after the 45-day statutory deadline.

**A. At the time Mitchell mailed his petition, the deadline was tolled due to Mitchell's request for documentation outside his control, and the deadline remained tolled at the time the Clerk filed the petition.**

Wisconsin Stat. § 893.735 “governs the time within which a prisoner may begin an action challenging a governmental decision or disposition.” *State ex rel. Johnson v. Litscher*, 2001 WI App 47, ¶ 5, 241 Wis. 2d 407, 625 N.W.2d 887. This statute instructs that “[a]n action seeking a remedy available by certiorari made on behalf of a prisoner is barred unless commenced within 45 days after the cause of action accrues.” Wis. Stat. § 893.735(2). Such action “is commenced at the time that the prisoner files a petition seeking a writ of certiorari with a court.” Wis. Stat. § 893.735(3).

The 45-day deadline may be equitably tolled in certain circumstances. Three rules of tolling, applied in conjunction with each other, render Mitchell's petition timely. These tolling rules pertain to: (a) the documents required when a prisoner seeks a fee waiver due to indigency, as Mitchell did here; (b) documents the prisoner has no control over and does not possess and, therefore, must request from prison authorities, as Mitchell did here; and (c) the time a circuit court takes to determine whether a prisoner is eligible for a fee waiver.

The first applicable tolling rule pertains to the documents required to be filed with a request for a fee waiver. Where, as here, a prisoner seeks to file a certiorari action without payment of ordinary filing fees due to indigency, the 45-day deadline is tolled upon the clerk's receipt of the following documents: the petition for writ of certiorari, the request for a fee waiver, the affidavit of indigency, and a certified copy of the prisoner's trust account statement. *Steldt*, 238 Wis. 2d 393, ¶ 17.

Here, on April 26, 2022, Mitchell sent to the Circuit Court all documents required for tolling under the *Steldt* tolling rule for fee-waiver requests, except one such document: a certified copy of his trust account statement. *Id.*; (R.8; Appx.034-Appx.036). But at that time Mitchell ***did not have*** a certified copy of his trust account statement. Rather, Mitchell had to request that document from SCI. As such, the previous day—April 25, 2022—Mitchell requested a certified copy of his trust account statement from SCI's business office. (*Id.*; R.11; Appx.042-Appx.046.)

SCI's control over the certified copy of Mitchell's trust account statement invokes the second applicable tolling rule: The 45-deadline is tolled "when the documents over which prisoners have control have been mailed, and ***all of the documents over which prisoners have no control have been***

***requested.***” *State ex rel. Walker v. McCaughtry*, 2001 WI App 110, ¶ 16, 244 Wis. 2d 177, 629 N.W.2d 17 (emphasis added).

Thus, taken together, under the *Steldt* and *Walker* tolling rules, the 45-day deadline for Mitchell’s petition for writ of certiorari was tolled on April 26, 2022—six days prior to the May 2 deadline. This is because, as of April 26, 2022, Mitchell had mailed the documents in his control and had requested a certified copy of his trust account statement, which was a document outside his control. (R.8, p. 3 of 5; Appx.036; R.11, p. 3 of 5; Appx.044.) Moreover, in his letter to the Clerk of Court dated April 26, 2022, Mitchell specifically informed the Clerk that the certified copy of this trust account statement might “arrive later then [sic] my filed certiorari and supporting document, ***due to the fact that it has to be sent out by the records office at Stanley Corr. Inst.***” (R.11, p. 3 of 5; Appx.044 (emphasis added).)

On April 28, 2022, SCI processed Mitchell’s request for a certified copy of his trust account statement. (R:4, p. 1 of 2; Appx.004.) Thereafter, SCI sent the certified copy to the Circuit Court. The record does not reflect the date the Circuit Court then received that certified copy, but it is known that the Circuit Court, in fact, received that document from SCI because the docket reflects it was filed on May 17, 2022. (R.16; Appx.001-Appx.002.) The Circuit Court granted Mitchell’s request for a fee waiver the same date. (R.1, pp. 1-2 of 2; Appx.047-Appx.048.)

In short, because SCI exclusively controlled the certified copy of Mitchell’s trust account statement, Mitchell’s request for that document on April 25, 2022, together with his mailing of his petition and accompanying documents the following day, tolled the 45-day deadline on April 26, 2022, under *Steldt* and *Walker*.

Finally, the question of the duration of the tolling period and whether Mitchell's petition was timely filed invokes the third applicable tolling rule. The third applicable tolling rule is the following: When a prisoner requests a filing-fee waiver on the grounds of indigency, as Mitchell did here, the 45-day deadline is tolled during the time the circuit court takes to determine the prisoner's eligibility for a fee waiver. *Steldt*, 238 Wis. 2d 393, ¶ 17; *Walker*, 244 Wis. 2d 177, ¶ 13.

Here, the Circuit Court granted Mitchell's request for a fee waiver on the same date the Clerk filed his petition for writ of certiorari—May 17, 2022. (R.16; Appx.001-Appx.002; R.1, pp. 1-2 of 2, Appx.047-Appx.048.) Because the three tolling rules addressed here applied and tolled Mitchell's 45-day deadline from April 26 to May 17, when the Clerk filed his petition and the Circuit Court approved his petition for fee waiver, Mitchell's petition was timely.

The State previously contended Mitchell should not receive the benefit of tolling for two reasons: (1) he did not mail all documents within his control on April 26, 2022, because he did not mail all documents pertaining to exhaustion of remedies at that time; and (2) he waited too long to request a certified copy of his trust account statement. Neither contention is persuasive.

As to the first contention, Mitchell's omission of any exhaustion documents from his initial mailing on April 26, 2022, is inconsequential. Mitchell mailed documents sufficient to evidence exhaustion on April 26, 2022, and he later mailed additional exhaustion documents immediately upon being prompted by the Clerk. (R.8, p. 2 of 3; Appx. 035; R.11, p. 4 of 5; Appx.045.) Moreover, such oversight on Mitchell's part was harmless because, as the record shows, he had *in fact* exhausted all administrative remedies. (R.1, p. 1 of 2; Appx.047.) Additionally, as discussed more fully in Part I.B.

below, the Clerk usurped the Circuit Court's authority by holding Mitchell's petition instead of filing it upon receipt.

The State's second contention should be rejected because it contravenes the purpose of the tolling rule. In the State's view, Mitchell should not benefit from tolling because he waited until the fortieth day of the limitations period to request a certified copy of his trust account statement. But protection for the prisoner's lack of control over this document is precisely what the tolling rule is designed to grant: "The rationale behind tolling a statute of limitations is to create an equitable solution for prisoners seeking to comply with the forty-five-day deadline. This rationale requires that prisoners comply with the deadline to the extent they have control over the relevant documents." *Walker*, 244 Wis. 2d 177, ¶ 17. Thus, Mitchell's efforts to comply with the 45-day deadline should avail him of the *Steldt* and *Walker* tolling rules.

In sum, Mitchell was entitled to benefit from three tolling rules, and those rules, taken together, demonstrate that he timely filed his petition. The Circuit Court erred in disregarding these rules, and this Court should reverse with instructions that the Circuit Court reinstate Mitchell's petition.

**B. The Dane County Clerk of Court usurped the Circuit Court's authority by refusing to file Mitchell's petition until the Clerk had determined all required documents had been received.**

Even if tolling somehow does not apply, Mitchell's petition still was timely. Mitchell mailed his petition to the Dane County Clerk of Courts six days before the 45-day statutory deadline, but the Clerk exceeded his or her statutory authority by holding his petition instead of filing it upon receipt. The Clerk's unauthorized action in this regard—and

not any act or omission by Mitchell—caused Mitchell’s petition to be filed after the May 2, 2022, 45-day statutory deadline (if tolling somehow does not apply).

The Clerk impermissibly determined that Mitchell had omitted certain documents required to support his petition. The determination of the sufficiency of documents supporting a prisoner’s petition belongs exclusively to the Circuit Court, not the Clerk: “The *circuit court* must determine . . . *whether all the proper papers have been submitted.*” *Schwarz*, 242 Wis. 2d 327, ¶ 14 (emphasis added). “If all conditions are met, *the circuit court* must issue an order allowing the prisoner to commence the action without prepayment of the fees.” *Id.* (emphasis added).

The scope of the Clerk’s authority is set forth by statute. Under Wis. Stat. § 59.40(2)(a), “[t]he clerk of circuit court shall: (a) File and keep all papers properly deposited with him or her in every action or proceeding unless required to transmit the papers.” Papers “deposited with the clerk during usual business hours and at the county provided office are properly deposited for purposes of the time and place of filing.” *Granado v. Sentry Ins.*, 228 Wis. 2d 794, 805, 599 N.W.2d 62 (Ct. App. 1999).

Although the statutes grant the clerk certain discretion related to particular functions,<sup>2</sup> the statutes do not grant the clerk authority to refuse to accept any paper for filing on the basis the clerk believes not all papers have been received, as the Clerk did here. *See Steldt*, 238 Wis. 2d 393, ¶ 16 (recognizing that “circuit court clerks have the discretion to refuse to file any paper without payment of the appropriate fees,” but that “*it is unreasonable for that discretion to be*

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<sup>2</sup> For instance, the clerk is authorized to “collect the fees that are prescribed in ss. 814.60 to 814.63” and to “refuse to accept any paper for filing or recording until the fee prescribed in subch. II of ch. 814 or any applicable statute is paid.” Wis. Stat. § 59.40(3)(a).

***exercised in a manner that denies prisoners their ability to bring certiorari actions***” (emphasis added)).

The Clerk improperly refused to file Mitchell’s petition and accompanying documents even though Mitchell timely and “properly deposited” them with the Clerk’s office. Instead, the Clerk delayed filing until it received, in the Clerk’s view, all required exhaustion documents. By waiting to file Mitchell’s petition until the Clerk believed he or she had received all required papers, the Clerk at once exceeded his or her statutory authority and usurped the Circuit Court’s authority. *Schwarz*, 242 Wis. 2d 327, ¶ 14; *see also State v. Dickson*, 53 Wis. 2d 532, 541, 193 N.W.2d 17 (1972) (“[T]he acts of the clerk of the court are ministerial and clerical, and he may not exercise judicial power except in accordance with the strict language of a statute conferring such power upon him.”). In doing so, the Clerk improperly assumed a judicial role and caused Mitchell’s petition to be filed after the May 2, 2022 statutory deadline. *Dickson*, 53 Wis. 2d at 541 (“It is well recognized in Wisconsin that a clerk of court may not exercise any judicial powers.”).

In addition to Wis. Stat. § 59.40(2)(a) and *Schwarz*, there is further indication that the assessment of whether a petition for certiorari is complete belongs solely to the judiciary. The Judicial Conference has adopted Form CV-439, titled “Order on Prisoner’s Petition for Waiver of Prepayment of Fees/Costs.” The court website describes Form CV-439 as an “[o]rder **by the judge** on whether the petition has met the requirements to proceed without prepayment of filing and service fees/costs.” *See* Circuit court forms, Wis. Court System, [https://www.wicourts.gov/forms1/circuit/ccform.jsp?FormName=&Form-Number=&beg\\_date=&end\\_date=&StatuteCite=&Category=6&SubCat=All](https://www.wicourts.gov/forms1/circuit/ccform.jsp?FormName=&Form-Number=&beg_date=&end_date=&StatuteCite=&Category=6&SubCat=All) (last accessed Oct. 4, 2023) (emphasis added); *see also State v. Hemp*, 2014 WI 129, ¶ 7 n.7, 359

Wis. 2d 320, 856 N.W.2d 811 (explaining that the Judicial Conference “adopt[s] standard court forms for use by parties and court officials in all civil and criminal actions and proceedings in the circuit court”).

Completion of Form CV-439 is not a mere exercise in clerical box-checking. Rather, its completion requires an assessment of the statutory components for an indigency determination, which is an assessment that is reserved to the circuit court: “In order to guide *the judge* in making the indigency determination,” the form delineates the steps “*the judge* must consider in the order in which they must be considered.” *See* Form Summary, [https://www.wicourts.gov/formdisplay/CV-439\\_summary.pdf?formNumber=CV-439&formType=Summary&formatId=2&language=en](https://www.wicourts.gov/formdisplay/CV-439_summary.pdf?formNumber=CV-439&formType=Summary&formatId=2&language=en) (last accessed Oct. 4, 2023) (emphasis added).

The form directs the circuit court judge to first make a “Document Review Determination,” which entails “reviewing the documentation that the prisoner has attached for completeness.” *Id.* The circuit court judge can decide either that the prisoner “has submitted all required documentation,” or that “[t]he petition is DENIED because the prisoner failed to provide” the required documentation, such as documents relating to the exhaustion of administrative remedies and the authorization to withhold money from the prisoner trust fund. *Id.* The form then prompts the circuit court judge to make determinations concerning exhaustion of administrative remedies, number of prior dismissals, and economic status. *Id.* The form is to be completed and signed by the circuit court judge or circuit court commissioner, not the clerk of courts. *See id.*

Consistent with Form CV-439 and the express statutory limitations on the clerk’s authority, the determination of whether a prisoner “has submitted all required

documentation” for purposes of a petition for fee waiver lies solely with the circuit court. Indeed, the law contemplates that incomplete submissions may be presented to the circuit court as part of the waiver request. Here, the Clerk interrupted this statutorily-mandated *judicial* procedure, stepping outside the bounds of his or her own authority and invading the exclusive province of the judiciary by reserving for him-/herself the determination of whether Mitchell’s petition was complete. The Clerk’s unlawful usurpation of the judicial function caused the Clerk to delay filing Mitchell’s petition until after the May 2, 2022, 45-day deadline.

The law required the Clerk to file Mitchell’s petition and accompanying documents upon receipt for the Circuit Court to consider Mitchell’s petition for fee waiver, regardless of whether the Clerk deemed Mitchell’s documentation to be incomplete. *Schwarz*, 242 Wis. 2d 327, ¶ 14; Wis. Stat. § 59.40(2)(a). The Clerk’s refusal to comply with its statutory obligation to file Mitchell’s petition upon receipt—and *not* any untimely mailing of the petition on Mitchell’s part—resulted in dismissal.

In sum, because Mitchell complied with the 45-day deadline for mailing his petition for certiorari to the Clerk of Courts, but the Clerk refused to file the petition upon receipt as Wis. Stat. § 59.40(2)(a) requires—and instead improperly held it until after the deadline had passed—Mitchell’s petition was improperly rejected as untimely (even if tolling does not apply).

**II. Even if Mitchell’s petition for writ of certiorari were untimely filed, the appropriate remedy is denial of Mitchell’s fee waiver, not the drastic remedy of dismissal.**

The Circuit Court improperly dismissed Mitchell’s petition for writ of certiorari as untimely. Dismissal was incorrect for two reasons. First, even if Mitchell initially omitted

certain exhaustion documents from his petition at the time he mailed it, the statute directs that the remedy is to deny the petition for fee waiver, not dismiss the petition for writ of certiorari. Wis. Stat. § 801.02(7)(c). Second, any such omission was harmless because the documents show Mitchell, in fact, exhausted his administrative remedies before filing his petition for writ of certiorari.

**A. The statutory remedy for omission of certain documents pertaining to exhaustion of administrative remedies is denial of Mitchell’s fee waiver, not dismissal.**

A prisoner filing his or her initial pleading for writ of certiorari must include, as part of the pleading, “documentation showing he or she has exhausted all available administrative remedies.” Wis. Stat. § 801.02(7)(c). This requires the prisoner to include “copies of all the written materials” provided to him or her by the prison related to the administrative proceedings and all written materials included as part of an administrative appeal. *Id.* The last sentence of Wis. Stat. § 801.02(7)(c) prescribes the remedy for failure to include all exhaustion documents with a petition for fee waiver as part of the initial pleading: the court “shall deny the prisoner’s request to proceed without the prepayment of fees and costs under Wis. Stat. § 814.29(1m).”

Thus, even if this Court were to agree with the Clerk that Mitchell initially omitted certain exhaustion documents when he first mailed his petition, the statutory remedy was for the Circuit Court to deny his request for a fee waiver in accordance with Wis Stat. § 801.02(7)(c)—not to dismiss Mitchell’s petition. *Id.*

That the Legislature intended for the remedy here to be denial of Mitchell’s request for a fee waiver and not dismissal of Mitchell’s petition is further supported by comparing the alternate remedies authorized by Wis. Stats. §§ 801.02(7)(c)

and 801.02(7)(d). Section 801.02(7)(d) mandates dismissing the petition for certiorari of a petitioner-prisoner who seeks to proceed without the payment of fees under Wis. Stat. § 814.29 but has had three or more prior actions dismissed. In contrast, the immediately preceding statutory subsection, § 801.02(7)(c)—which specifically addresses failure to include all exhaustion documents with the initial pleading—does not mandate dismissal. Instead, § 801.02(7)(c) mandates denial of the request to proceed without the prepayment of fees and costs.

The dismissal remedy mandated by Wis. Stat. § 801.02(7)(d) and the denial-of-fee-request remedy mandated by § 801.02(7)(c) is a distinction with a difference: “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2019 WI 24, ¶ 25, 385 Wis. 2d 748, 924 N.W.2d 153. The Legislature chose a different remedy for each circumstance, even though it could have required dismissal of the petition for writ of certiorari if the exhaustion documentation was not included as part of the initial pleading at the time of filing. But “[i]f it had so intended, the legislature would have used the same language in both” § 801.02(7)(c) and (d) to authorize such a remedy. *Donaldson v. Bd. of Comm’rs of Rock-Koshkonong Lake Dist.*, 2004 WI 67, ¶ 58 n.17, 272 Wis. 2d 146, 680 N.W.2d 762.

The Legislature’s intent as expressed by the plain statutory language—*i.e.*, to restrict the remedy for failure to include all exhaustion documents to denial of the request for fee waiver—must be given effect. Should this Court conclude that Mitchell’s request for fee waiver did not comply with Wis. Stat. § 801.02(7)(c)—whether because all required exhaustion documents were not submitted with the petition, or because they were untimely filed—the proper remedy was

not dismissal of Mitchell's petition for writ of certiorari, but denial of Mitchell's request to proceed without the prepayment of fees. Wis. Stat. § 801.02(7)(c).

Instead, the Clerk's delay in filing Mitchell's documents contributed to the Circuit Court's erroneous decision to **grant** the fee waiver petition, then **dismiss** the certiorari petition. (R.1, pp. 1-2 of 2; Appx.047-Appx.048; R.16, pp. 1-2 of 2; Appx.001-Appx.002.) This curious result runs counter to the legislative design and the indigent prisoner's interest in having his day in court. A clerk's refusal to file any of the documents submitted with a fee waiver petition until all required documents are received needlessly increases the risk of untimeliness, impedes on the circuit court's statutory duty to determine completeness, and disregards the statutory remedy of **denying** the fee waiver petition. Indeed, granting a prisoner's request to proceed without prepayment of fees is rendered meaningless when the prisoner is subsequently barred from proceeding **at all**.

Consistent with the plain meaning of Wis. Stat. § 801.02(7)(c), this Court should conclude that the proper remedy for omitting required exhaustion documents is denial of the request to proceed without prepayment of fees and costs. Accordingly, this Court should reverse the Circuit Court's dismissal of Mitchell's petition for writ of certiorari.

**B. Dismissal is a particularly inappropriate remedy where, as here, any initial omission of certain exhaustion documents is harmless because the petitioner *in fact* exhausted all administrative remedies before filing his petition for writ of certiorari.**

By statute, a prisoner who files a petition for writ of certiorari must include "all written materials" in his or her possession related to the administrative proceedings and appeal process. Wis. Stat. § 801.02(7)(c). This statutory

requirement exists, no doubt, to ensure the prisoner has first exhausted all administrative remedies before filing with the circuit court a petition for writ of certiorari. Beyond contravening the statutorily-designated remedy, dismissal also is inappropriate here because Mitchell *in fact* exhausted his administrative remedies before he filed his petition.

The Clerk held Mitchell's petition because the Clerk determined that Mitchell had not initially included with his petition all documents showing he had exhausted his administrative remedies. (*See* R.22, p. 5 of 14; Appx.061.) On May 4, 2022—two days after the 45-day deadline for Mitchell's petition—Mitchell received a letter from the Clerk advising as much. (*Id.*; R. 22, p. 2 of 14; Appx.058; R.21, p. 2 of 8; Appx.050.) On May 5, 2022, Mitchell sent additional documentation showing he had exhausted his administrative remedies, which prompted the Clerk to finally file his petition on May 17, 2022. (*Id.*; R.6, p. 1 of 29; Appx.005.)

Even setting aside that the Clerk usurped the judicial function by improperly holding Mitchell's petition, and further setting aside that the statutory remedy here is denial of Mitchell's request for fee waiver, not dismissal, the Circuit Court's dismissal was further inappropriate because Mitchell, in fact, exhausted his administrative remedies. The Clerk held his petition and filed it after the 45-day deadline because the Clerk apparently believed Mitchell had not sufficiently established he had exhausted his administrative remedies. But once Mitchell mailed to the Clerk additional exhaustion documents on May 5, 2022, it should have been apparent that his petition was ripe for consideration by the Circuit Court all along, as § 801.02(7)(c) contemplates.

Thus, any initial omission of certain exhaustion documents with Mitchell's petition was harmless and does not warrant the imposition of the severe—and statutorily impermissible—remedy of dismissal. Wis. Stat. §§ 801.02(7)(c),

805.18(1). In other words, because Mitchell had, in fact, exhausted his administrative remedies, any such omission could not have “affect[ed] the substantial rights” of the opposing parties. Wis. Stat. § 805.18(1) (“The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.”). This consideration serves as an additional basis upon which this Court should reverse dismissal of Mitchell’s petition for writ of certiorari.

### **CONCLUSION**

This Court should reverse and remand with instructions that Mitchell’s petition be deemed timely.

Alternatively, if this Court concludes the petition was untimely, this Court should reverse and remand with instructions that the remedy for untimeliness is denial of Mitchell’s request for fee waiver.

Dated this 6th day of October, 2023.

**Electronically signed by  
Douglas M. Raines**

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### **FORM AND LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes section 809.19(8)(b)–(c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5,511 words.

Dated this 6th day of October, 2023.

**Electronically signed by**  
**Douglas M. Raines**

## APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wisconsin Statutes section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under section 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 6th day of October, 2023.

**Electronically signed by**  
**Douglas M. Raines**

### **CERTIFICATE OF SERVICE**

I certify that on October 6, 2023, I electronically filed this brief and accompanying appendix using the Court's E-filing system, which will provide electronic service to all parties of record.

Dated this 6th day of October, 2023.

**Electronically signed by**  
**Douglas M. Raines**