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STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT IV

Case No. 2022AP1076

ARTILLIS MITCHELL,

Petitioner-Appellant,

v.

CHRIS S. BUESGEN and
KEVIN A. CARR,

Respondents-Respondents.

APPEAL FROM A DECISION
OF THE DANE COUNTY CIRCUIT COURT,
THE HONORABLE SUSAN M. CRAWFORD, PRESIDING

BRIEF OF RESPONDENTS-RESPONDENTS

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INTRODUCTION

Petitioner-Appellant Artillis Mitchell, a Wisconsin prisoner, challenges the circuit court's dismissal of his petition for writ of certiorari as untimely pursuant to Wis. Stat. § 893.735(2). Under that statute, prisoners have 45 days after agency action to file a certiorari action. That time limit may be equitably tolled in certain circumstances, including when the prisoner mails all the documents under his control to the court, and requests all the documents not under his control from the government entities that can provide them.

Mitchell was not entitled to the benefit tolling here. He mailed his petition for writ of certiorari within 45 days, but his initial mailing was missing two sets of required documents: (1) documents showing proof of exhaustion of administrative remedies—documents over which he had control; and (2) a certified copy of his trust account statement—a document over which he had no control. Mitchell was not entitled to tolling from the date of his initial mailing for two reasons. First, he did not mail all the required documents under his control before the deadline. And second, he waited until the last minute to request his trust account statement from the prison business office, so any delay in the court's receipt of that document was of Mitchell's own making.

The record unequivocally demonstrates that Mitchell failed to commence this certiorari action within the 45-day limitation period. The circuit court concluded as much and dismissed the case. That decision was correct and should be affirmed.

ISSUES PRESENTED

1. Pursuant to Wis. Stat. § 893.735(2), a prisoner certiorari action "is barred unless commenced within 45 days after the cause of action accrues." That statutory time limit may be 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, ¶ 18, 244 Wis. 2d 177, 629 N.W.2d 17. Here, Mitchell mailed his petition for writ of certiorari within 45 days, but his submission did not include all the documents over which he had control, and he requested a document over which he did not have control just days before the statutory deadline. Under these circumstances, did the circuit court properly conclude that Mitchell’s petition for writ of certiorari was untimely under Wis. Stat. § 893.735(2)?

Yes, the circuit court properly concluded that Mitchell’s petition was untimely under Wis. Stat. § 893.735(2).

2. Under Wisconsin law, after a circuit court has granted a fee waiver and allowed the case to be filed, it may review and dismiss the case if it was untimely filed. Was dismissal of Mitchell’s certiorari action the appropriate remedy for his untimely filing?

Yes, dismissal was the appropriate remedy.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are unnecessary because the issues presented are fully briefed and may be resolved by applying well-established legal principles to undisputed facts.

STATEMENT OF THE CASE

Mitchell is a prisoner at the Stanley Correctional Institution. (R. 6:2.) On September 6, 2021, Mitchell was issued a conduct report for allegedly violating prison rules. (R. 6:2, 21–22.) The prison disciplinary committee found Mitchell guilty, and Mitchell appealed the substance of the decision to Warden Chris Buesgen. (R. 6:3–5, 17, 24–25.) On

October 5, 2021, Warden Buesgen affirmed the decision of the disciplinary committee. (R. 6:5, 17.) Mitchell then appealed procedural issues via the Inmate Complaint Review System. (R. 6:5, 9–29.) The Department of Corrections (DOC) Office of Secretary Kevin Carr issued a final decision dismissing Mitchell's complaint on March 16, 2022. (R. 6:7, 10.)

Mitchell sought certiorari review in the Dane County Circuit Court. On April 26, 2022, he placed the following documents in the prison mailbox for submission to the court:

- a petition for writ of certiorari and proposed writ;
- a petition for fee waiver and 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.

(R. 2–5; 6:1–10; 8:2; 22:2; Appellant's Br. 12–13.) Mitchell filed an affidavit attesting to placing these documents in the prison mailbox. (R. 8.) In his affidavit, he also stated that he requested a copy of his prison trust account statement from the prison business office on April 25, 2022, but had not yet received that document. (R. 8:2.)

On April 29, 2022, a prisoner litigation staff attorney from the Dane County Clerk of Circuit Court's office sent Mitchell a letter notifying him that his mailing was received but had not been filed because it did not include all documents required by law. (R. 22:5.) Specifically, it was missing a certified copy of Mitchell's trust account statement and

numerous exhaustion documents.¹ (R. 21:4–5; 22:5–6.) The letter included the following disclaimer:

Please note that this letter is a courtesy and not a legal obligation of either the Prisoner Litigation Staff Attorney or the Dane County Clerk of Courts. We are not responsible for failing to notify you of any specific defects in your submission. It is your responsibility to comply with any and all statutes of limitations, time limits, or any other legal requirements that may apply to your particular lawsuit.

(R. 22:5.)

On May 5, 2022, Mitchell mailed additional documents relating to exhaustion of administrative remedies. (R. 22:2.) Those documents included his inmate complaint, documents he provided to DOC as part of the administrative proceeding, and decisions from the various levels of administrative review. (R. 6:11–29; 22:2.) On May 10, 2022, Mitchell submitted more documents relating to exhaustion of administrative remedies. (R. 9.)

On May 17, 2022, the circuit court reviewed the documents Mitchell submitted over the course of the previous two weeks. (R. 1:1.) The court found that Mitchell had, by that time, submitted all required documents, exhausted available administrative remedies, and had not accumulated three or more dismissals under Wis. Stat. § 801.02(7)(d). (R. 1.) The court then granted Mitchell's petition for a fee waiver and allowed the case to be filed that same day. (R. 1; 6.)

¹ The letter referred to an enclosed checklist that indicated which documents were missing. That checklist is not included in the appellate record, but Mitchell states that the checklist indicated exactly which documents were missing from his submission. (R. 21:4–5; 22:5–6.)

Three days later, on May 20, 2022, the court conducted its initial review of the case pursuant to Wis. Stat. § 802.05(4). (R. 16.) The court dismissed the case, without requiring a responsive pleading, because Mitchell failed to commence the case within the 45-day statute of limitations in Wis. Stat. § 893.735(2). (R. 16.) The court further ordered that the dismissal did not relieve Mitchell of his obligation to pay the filing fee pursuant to the fee waiver:

If the prisoner commenced this action without prepayment of filing fees or costs or security for costs, the custodian at the prisoner's facility is directed to collect and transmit the filing fees and costs to the clerk of this court pursuant to § 814.29(3)(b), Wis. Stats.

(R. 16:2.)

Mitchell timely filed a notice of appeal on June 28, 2022.² (R. 17.)

STANDARD OF REVIEW

This Court reviews de novo whether the circuit court properly dismissed the petition for writ of certiorari as untimely. *State ex rel. Johnson v. Litscher*, 2001 WI App 47, ¶ 4, 241 Wis. 2d 407, 625 N.W.2d 887. Issues of statutory interpretation are also reviewed de novo. *State ex rel. Steldt v. McCaughtry*, 2000 WI App 176, ¶ 11, 238 Wis. 2d 393, 617 N.W.2d 201.

² Mitchell subsequently filed a motion for reconsideration, which the circuit court did not decide. (R. 21.)

ARGUMENT

I. The circuit court properly concluded that Mitchell’s petition for writ of certiorari was untimely pursuant to Wis. Stat. § 893.735(2).

A. A prisoner certiorari action is barred unless commenced within 45 days, but that time limit may be equitably tolled in certain circumstances.

“An 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). A certiorari 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). “Failure to timely file a petition for certiorari . . . may result in dismissal.” *Johnson*, 241 Wis. 2d 407, ¶ 5.

The 45-day time limit may be equitably tolled in certain circumstances, several of which are relevant here.

First, a certiorari cause of action does not accrue until all available administrative remedies are exhausted. *See* Wis. Stat. §§ 893.23, 801.02(7)(b). In prison discipline cases, the 45-day limitations period is tolled on non-procedural issues to allow exhaustion on procedural issues. *State ex rel. Smith v. McCaughtry*, 222 Wis. 2d 68, 78–79, 586 N.W.2d 63 (Ct. App. 1998) (abrogated in part as to futility exception to exhaustion requirement by *State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶ 13, 245 Wis. 2d 607, 629 N.W.2d 686).

Second, the 45-day period also is tolled “when a prison inmate places a certiorari petition in the institution’s mailbox for forwarding to the circuit court.” *State ex rel. Shimkus v. Sondalle* (“*Shimkus I*”), 2000 WI App 238, ¶ 14, 239 Wis. 2d 327, 620 N.W.2d 409. The inmate must establish by affidavit or otherwise the date on which he placed the petition in the institution mailbox for mailing

to the circuit court. *State ex rel. Shimkus v. Sondalle*, 2000 WI App 262, ¶ 15, 240 Wis. 2d 310, 622 N.W.2d 763.

Finally, if the prisoner seeks a waiver of prepayment of the filing fee on the grounds of indigency,³ the 45-day period is tolled from the date of mailing until the court rules on the fee waiver request. *Steldt*, 238 Wis. 2d 393, ¶ 17. “If the court orders that the prisoner be allowed to proceed without prepayment of the fees, then the certiorari action should be considered filed on the date of that order.” *Id.* ¶ 18.

Importantly, the tolling rules cannot “cure defects in a prisoner’s submissions.” *State ex rel. Tyler v. Bett*, 2002 WI App 234, ¶ 14, 257 Wis. 2d 606, 652 N.W.2d 800. To obtain the benefit of tolling, “a prisoner must submit *proper* documents and comply with statutory fee or fee-waiver requirements.” *Id.* ¶ 15 (emphasis added).

For example, “[a]t the time of filing the initial pleading,” a prisoner is required to submit proof of exhaustion of administrative remedies. Wis. Stat. § 801.02(7)(c); *Tyler*, 257 Wis. 2d 606, ¶ 15. The statute is specific as to what exhaustion documents must be included:

The documentation shall include copies of all of the written materials that he or she provided to the administrative agency as part of the administrative proceeding and all of the written materials the administrative agency provided to him or her related to that administrative proceeding. The documentation shall also include all written

³ Wisconsin Stat. § 814.29(1m) provides the procedure for prisoners to obtain a waiver of prepayment of the filing fee on the grounds of indigency. A waiver does not mean the filing fee is completely forgiven; the prisoner is simply relieved of the duty to *prepay* the fee. If the court grants a fee waiver, the prisoner must make incremental payments until the fee is paid in full. *See* Wis. Stat. § 814.29(1m)(d), (e). If the court dismisses the action, the prisoner is still responsible for paying the balance of the filing fee. *See* Wis. Stat. § 814.29(1m)(e), (3)(b).

materials included as part of any administrative appeal.

Wis. Stat. § 801.02(7)(c).

Additional documents are required if the prisoner seeks a fee waiver. The prisoner must submit “a request for a fee waiver and affidavit of indigency, a certified copy of the prisoner’s trust account statement, and authorization for the prison to make any appropriate payments toward the filing fees from the prisoner’s accounts.” *Walker*, 244 Wis. 2d 177, ¶ 12; *see also* Wis. Stat. § 814.29(1m). A prisoner seeking a fee waiver also must submit a certification from DOJ that he has not brought a frivolous or otherwise improper action or appeal on three or more prior occasions.⁴ *Walker*, 244 Wis. 2d 177, ¶ 12; *see also* Wis. Stat. § 801.02(7)(d).

Some of the required documents—like the petition and “documentary proof of exhaustion of administrative remedies”—are under the prisoner’s control. *Walker*, 244 Wis. 2d 177, ¶ 20. Others—like the trust account statement and three-strikes certification—are not. *Id.* ¶ 16; *State ex rel. Locklear v. Schwarz*, 2001 WI App 74, ¶ 28, 242 Wis. 2d 327, 629 N.W.2d 30. Because prisoners must contend with these two types of documents, “tolling begins 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.” *Walker*, 244 Wis. 2d 177, ¶ 18. “By requiring prisoners to submit documents under their control within a designated period, the prisoner is treated equitably and the legislative intent is fulfilled.” *Id.*

⁴ This certification is colloquially referred to as a “three-strikes certification.” *Tyler*, 257 Wis. 2d 606, ¶ 12.

B. Mitchell's certiorari action was untimely.

The parties agree that the 45-day limitation period began to run on March 16, 2022 (the date of the final administrative decision) and that the filing deadline was May 2, 2022.⁵ (Appellant's Br. 12.) The parties also agree that Mitchell mailed, at least, some of the required documents for his certiorari action and fee waiver on April 26, 2022, before the expiration of the statutory time limit. (*Id.* at 12–13.) The question is whether that mailing tolled the time limit until the court granted the fee waiver and filed the case on May 17, 2022. Based on the relevant tolling rules, it did not.

Mitchell mailed *some* of the required documents to the court on April 26, 2022, but that submission did not include two sets of required documents: (1) proof of exhaustion of administrative remedies as required by Wis. Stat. § 801.02(7)(c); and (2) a certified copy of Mitchell's trust account statement as required by Wis. Stat. § 814.29(1m)(b)2. Mitchell's omission of those documents, together and separately, meant he could not obtain the benefit of tolling.

1. Mitchell did not submit the required exhaustion documents with his initial pleading on April 26, 2022, and, therefore, was not entitled to tolling from that date.

Prisoners seeking to file a certiorari action—whether they seek a fee waiver or not—are statutorily required to submit certain documents showing proof of administrative

⁵ Forty-five days after March 16 is April 30, which was a Saturday, a day the clerk's office is closed, so the deadline moved to the following Monday, May 2. *See* Wis. Stat. § 801.15(1)(b); (Appellant's Br. 12).

exhaustion “[a]t the time of filing the initial pleading.” Wis. Stat. § 801.02(7)(c). Mitchell did not do so and was, therefore, not entitled to tolling from the date he mailed his petition.

There is no dispute that Mitchell did not submit all the required exhaustion documents with his initial pleading mailed to the court on April 26, 2022. (Appellant’s Br. 13.) He submitted two of the statutorily required documents on that date but did not submit the remaining documents until *after* the May 2, 2022, deadline. (R. 6:11–29; 9; 22:2.)

Mitchell was not entitled to equitable tolling when he mailed his petition without the required exhaustion documents. His exhaustion documents, like his petition, were documents over which he had control. *Walker*, 244 Wis. 2d 177, ¶ 20 (characterizing documentary proof of exhaustion as documents over which a prisoner has control for purposes of equitable tolling). He was, therefore, required to mail those documents with his initial filing to obtain the benefit of tolling. *Id.* ¶ 18.

Mitchell argues that his “omission of any exhaustion documents from his initial mailing on April 26, 2022, is inconsequential” because he “mailed documents sufficient to evidence exhaustion on April 26, 2022, and he later mailed additional exhaustion documents immediately upon being prompted by the Clerk.” (Appellant’s Br. 18.) This argument is unsupported by both the statutory text and the relevant case law.

Wisconsin Stat. § 801.02(7)(c) specifically prescribes both the documentation that must be included and the timing for filing that documentation. The statute provides that “[a]t the time of filing the initial pleading . . . a prisoner *shall* include, *as part of the initial pleading*, documentation showing that he or she has exhausted all available administrative remedies.” Wis. Stat. § 801.02(7)(c). The statute then dictates exactly which documents must be

included. *Id.* Mitchell has no answer for this. His submission on April 26, 2022, was incomplete and that is not “inconsequential” for the purposes of tolling.

This Court’s decision in *Tyler* illustrates this point. Tyler, like Mitchell, sought to file a petition for certiorari review of a prison disciplinary decision. *Tyler*, 257 Wis. 2d 606, ¶ 3. The last day for filing his certiorari action, absent any tolling, was July 2, 2001. *Id.* ¶ 4. Tyler averred that he placed his petition and a disbursement request for the filing fee in the prison mailbox on June 16, 2001. *Id.* ¶ 5. On June 29, 2001, a staff attorney for the Dane County Clerk of Circuit Court notified Tyler that he had not sent the filing fee or included “all documents provided by the administrative agency” as proof of administrative exhaustion. *Id.* Tyler received the letter on July 5, 2001. *Id.*

This Court concluded that Tyler was not entitled to tolling from June 16, 2001 (the date he mailed his petition) until July 5, 2001 (the date he received the letter from the staff attorney) because the documents he mailed “did not constitute a complete and proper submission to the court.” *Id.* ¶ 15. To hold otherwise, according to this Court, would be contrary to the purpose of the tolling rule and would incentivize incomplete pleadings:

[T]o allow Tyler the benefit of tolling for the period after he submitted an incomplete petition and an insufficient fee, would be to reward his carelessness by giving him extra time to remedy matters that were within his control, which is contrary to the rationale for the tolling rule. Indeed, if the rule were that tolling applies to any submission, no matter how inadequate, an incentive would be created for prisoners to intentionally submit insufficient materials in order to gain additional time to submit proper petitions, thereby circumventing the forty-five-day deadline the legislature deemed adequate to accomplish the task.

Id. ¶ 16.

That is exactly what happened here. The petition Mitchell mailed on April 26, 2022—like the petition Tyler mailed—did not include all the exhaustion documents required under Wis. Stat. § 801.02(7)(c). He later submitted the missing documents, but that cannot “cure defects” in his initial submission. *Tyler*, 257 Wis. 2d 606, ¶ 14.

Mitchell’s submission on April 26, 2022, was incomplete and that is not “inconsequential,” (Appellant’s Br. 18), for the purposes of tolling.⁶ Mitchell was not entitled to tolling from the time he mailed his petition until the case was filed, and his petition was, therefore, untimely under Wis. Stat. § 893.735(2). This Court should affirm the circuit court’s decision on that basis alone and no further analysis is required.

2. Mitchell did not request a certified copy of this trust account statement until April 25, 2022, just days before the statutory deadline and, therefore, was not entitled to tolling from that date.

Mitchell’s certiorari action was untimely for another reason. He did not request a certified copy of this trust account statement from the prison until April 25, 2022, just days before the statutory deadline and, therefore, was not entitled to tolling while the prison processed his request.

First, Mitchell was not entitled to tolling while he awaited his trust account statement (documents over which

⁶ In addition to his argument that his omission of the required exhaustion documents was “inconsequential,” Mitchell also argues that his error was harmless because he had in fact exhausted all administrative remedies, and because the clerk should have filed the petition immediately upon receipt. (Appellant’s Br. 18–19.) Respondent addresses those arguments in sections I.C. and II.B., *infra* at 20–23, 26–27.

he had no control) because at that time he had not mailed all the required exhaustion documents (documents over which he *had* control). *Walker* does not permit that scenario: “tolling begins 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.” *Walker*, 244 Wis. 2d 177, ¶ 18. That alone made Mitchell’s certiorari action untimely.

Second, even if his April 26, 2022, mailing included all the documents over which he had control, he still was not entitled to tolling while he awaited his trust account statement because the record shows he missed the filing deadline due to his own conduct. *See id.* ¶ 24 (explaining that tolling does not apply when prisoner misses the filing deadline due to his own dilatory conduct). Mitchell waited until April 25, 2022, just a few days before the 45-day deadline, to request his trust account statement. (R. 8:2.) The prison promptly processed the request on April 28, 2022, (R. 4:1), and the court received the document sometime after that.⁷ Assuming the court received the document after the 45-day deadline, any delay was the result of Mitchell’s last-minute request for the document. Based on *Walker*, Mitchell was not entitled to tolling while he awaited that document.

To conclude otherwise, that is, to give Mitchell the benefit of tolling when he was responsible for the delay, would be contrary to the purpose of equitable tolling, which is to remedy situations when a prisoner’s certiorari action is untimely because of a government authority’s failure to

⁷ The record does not reflect when the court received Mitchell’s trust account statement, but apparently it was received because the court considered it in granting the fee waiver on May 17, 2022, and filed it that same day, along with the petition and other required documents. (R. 1:1; 4.)

promptly mail or provide documents. *See State ex rel. Nichols v. Litscher*, 2001 WI 119, ¶ 26, 247 Wis. 2d 1013, 635 N.W.2d 292. Tolling “addresses only the disability inmates are under in meeting statutory filing deadlines because they must rely on the actions of others, who are beyond their control, in submitting necessary documents to the court.” *Tyler*, 257 Wis. 2d 606, ¶ 20. Thus, tolling does not apply to a litigant who is responsible for his own untimely action. If tolling applied under the circumstances presented here, for example, prisoners could simply wait until the 45th day to request *all* the documents not under their control in order to gain additional time to submit those documents. This is not how tolling is intended to operate. *See Walker*, 244 Wis. 2d 177, ¶ 18.

Equitable tolling is “typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights.” 51 Am. Jur. 2d *Limitation of Actions* § 155; *see also Arellano v. McDonough*, 143 S. Ct. 543, 547 (2023) (tolling applies when a litigant has pursued his rights but an extraordinary circumstance prevented him from timely filing). Mitchell faced no extraordinary circumstance beyond his control that prevented him from bringing a timely certiorari action. Nothing prevented him from submitting all his exhaustion documents with his initial mailing or requesting his trust account statement in enough time for the prison to process and mail it before his statutory deadline to commence his certiorari action. Allowing Mitchell the benefit of tolling on these facts would be to give him an advantage over all other litigants.

Mitchell’s certiorari action was untimely under Wis. Stat. § 893.735(2), and the circuit court properly dismissed his petition for that reason.

C. The clerk of court had no authority to file Mitchell's petition until the court granted the fee waiver.

Mitchell alternatively argues that “[e]ven if tolling somehow does not apply, [his] petition still was timely” because “the Clerk exceeded his or her statutory authority by holding his petition instead of filing it upon receipt.” (Appellant’s Br. 19.) That is incorrect. The clerk of court had no authority to file Mitchell’s certiorari action upon receipt of his April 26, 2022, mailing, and filing would not have cured the defects in Mitchell’s initial mailing anyway.

Mitchell misunderstands the statutory procedure for filing prisoner civil actions. The process has two steps.

The first step involves payment of the filing fee. Prisoners, like all litigants, must either pay the filing fee or be granted a fee waiver to commence a civil action. *See* Wis. Stat. § 801.02(6) (“Fees payable upon commencement of a civil action shall be paid to the clerk at the time of filing.”); Wis. Stat. § 814.29(1m) (prisoner fee waiver); *Shimkus I*, 239 Wis. 2d 327, ¶ 9 (“In Wisconsin, however, civil actions are not commenced until the applicable filing fee is paid . . . unless payment is waived by the court for cause shown.”). When a prisoner seeks to commence an action without prepayment of the filing fee, he must file a fee waiver petition and supporting documents, along with his initial pleading. *See* Wis. Stat. § 814.29(1m)(b). The court then reviews the documents and determines whether the prisoner is entitled to commence the action without prepayment of the filing fee. *See* Wis. Stat. § 814.29(1m)(c), (d). At this first stage, “the court does not evaluate the substantive merits of the prisoner’s claim but only examines the submissions to determine if the prisoner has submitted all required documentation.” *State ex rel. Adell v. Smith*, 2001 WI App 168, ¶ 4 n.3, 247 Wis. 2d 260, 633 N.W.2d 231.

If the court grants the fee waiver, *then* the clerk files the case. *See* Wis. Stat. § 59.40(3)(a) (“The clerk may 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.”); *Shimkus I*, 239 Wis. 2d 327, ¶ 9.

The second step occurs after the case is filed, either because the filing fee was paid or a waiver was granted. *Adell*, 247 Wis. 2d 260, ¶ 4 n.3. At this second step, the court must review the prisoner’s pleadings and may dismiss the case without requiring a responsive pleading. *See* Wis. Stat. § 802.05(4). It is then that the court considers whether the prisoner’s certiorari action was timely filed under Wis. Stat. § 893.735(2). If the court dismisses the action, the prisoner is still responsible for paying the balance of the filing fee, if a fee waiver was granted. *See* Wis. Stat. § 814.29(1m)(e), (3)(b).

That is precisely the process that was followed here. Mitchell mailed his certiorari petition, a request for fee waiver, and some of the required documents on April 26, 2022. (R. 2–5; 6:1–10; 8:2; 22:2; Appellant’s Br. 12–13.) On April 29, 2022, a prisoner litigation staff attorney from the clerk’s office sent Mitchell a letter notifying him, *as a courtesy*, that his submission was received but had not been filed because it did not include all documents required by law. (R. 22:5.) Mitchell then submitted the missing documents to the court in two separate mailings on May 5 and 10, 2022. (R. 6:11–29; 9; 22:2.)

On May 17, 2022, the circuit court reviewed the documents Mitchell submitted over the course of the previous two weeks. (R. 1:1.) The court found that Mitchell had, by that time, submitted all required documents, exhausted available administrative remedies, and had not accumulated three or more dismissals under Wis. Stat. § 801.02(7)(d). (R. 1.) The court then granted Mitchell’s petition for a fee waiver and allowed the case to be filed that same day. (R. 1; 6.)

Three days later, on May 20, 2022, the court conducted its initial review of the case pursuant to Wis. Stat. § 802.05(4). (R. 16.) The court dismissed the case, without requiring a responsive pleading, because Mitchell failed to commence the case within the 45-day statute of limitations in Wis. Stat. § 893.735(2). (R. 16.) The court further ordered that the dismissal did not relieve Mitchell of his obligation to pay the filing fee. (R. 16:2.)

This statutory filing procedure did not permit the clerk to file Mitchell's certiorari action upon receipt of his April 26, 2022, mailing. At that time, Mitchell had not paid the filing fee, nor had he been granted a fee waiver, as required to commence the action. The clerk, therefore, had no authority to file Mitchell's case.

Even if the clerk had filed the case immediately, that would not have saved Mitchell's case from dismissal. The act of filing cannot cure defects in a prisoner's submission. *Tyler*, 257 Wis. 2d 606, ¶ 14. Whether a prisoner certiorari action is filed immediately because the prisoner paid the fee, or later after the court grants a fee waiver, the court still must review the case and determine if it was timely under Wis. Stat. § 893.735(2). That determination requires application of the various tolling rules to the facts of the case. Here, the court was required to assess whether Mitchell was entitled to tolling from the date of his initial mailing on April 26, 2022, until the date of filing. Mitchell was not entitled to tolling during that time because his initial submission was incomplete, and the missing documents were not received until after the statutory deadline. Filing the case immediately could not have cured that defect.

* * * *

Mitchell was not entitled to tolling from the time he mailed his petition on April 26, 2022, until the case was filed. His initial mailing was missing required documents over

which he had control, and he did not request documents over which he had no control until just days before the statutory deadline. The clerk of court had no authority to file Mitchell's case upon receipt of his initial mailing, and the act of filing would not have cured the defects in that mailing anyway. The circuit court properly concluded that Mitchell's certiorari action was untimely under Wis. Stat. § 893.735(2), and this Court should affirm that decision.

II. Dismissal of Mitchell's certiorari action was the appropriate remedy for his untimely filing.

Mitchell argues that even if his certiorari action was untimely, dismissal was not the proper remedy. He contends that the only appropriate penalty for his failure to submit the required exhaustion documents was denial of his fee waiver request, not dismissal of his certiorari action. (Appellant's Br. 23–24.) Mitchell further argues any such omission was harmless error because he had in fact exhausted his administrative remedies. (*Id.* at 24.) Neither argument has merit.

A. Dismissal is the appropriate remedy when failure to submit exhaustion documents results in an untimely filing.

Mitchell argues that the only appropriate penalty for his failure to submit the required exhaustion documents was denial of his fee waiver request, not dismissal of his certiorari action. (*Id.* at 23–24.) While the absence of any of the exhaustion documents listed in Wis. Stat. § 801.02(7)(c) may lead to rejection of the petition for a fee waiver, a failure to *timely* file those documents may also result in dismissal of the action entirely under Wis. Stat. § 893.735. That is what happened here.

This argument requires interpretation of the relevant statutes. “[S]tatutory language is interpreted in the context

in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

In reading the statutes, Mitchell focuses on the last sentence of the paragraph requiring proof of exhaustion, Wis. Stat. § 801.02(7)(c): “The court shall deny a prisoner’s request to proceed without the prepayment of fees and costs under s. 814.29(1m) if the prisoner fails to comply with this paragraph or if the prisoner has failed to exhaust all available administrative remedies.” Read in context and reasonably, that language does not prescribe the only available remedy.

Context is important. Under Wis. Stat. § 801.02(7)(c), prisoners are required to submit proof of exhaustion of administrative remedies *whether they seek a fee waiver or not*. In other words, if a prisoner pays the filing fee, proof of exhaustion is the *only* documentation he is required to submit with his petition. All other documentation—like the three-strikes certification and trust account statement—is required only if the prisoner seeks a fee waiver. *See* Wis. Stat. §§ 801.02(7)(d), 814.29(1m).

The statutes requiring certain documents for a fee waiver request do not explicitly state that denial of the request is the penalty for failure to provide those documents. *See* Wis. Stat. §§ 801.02(7)(d), 814.29(1m). That penalty is axiomatic. Not so for exhaustion documents. Because proof of exhaustion is required whether the prisoner seeks a fee waiver or not, Wis. Stat. § 801.02(7)(c) explicitly states that denial of the fee waiver request is an appropriate penalty. But that is not the only action the court can take. If it were, there would be no remedy when a prisoner who pays the filing fee fails to submit proof of exhaustion. That would be unreasonable. *Kalal*, 271 Wis. 2d 633, ¶ 46.

The only reasonable interpretation of the relevant statutes is that when a prisoner fails to submit proof of exhaustion, a court can deny the prisoner's fee waiver request and require full payment of the filing fee before the case is filed. *See* Wis. Stat. §§ 801.02(7)(c), 814.29(1m). Then, once the case is filed, the court reviews the initial pleading, as required by Wis. Stat. § 802.05(4), and may dismiss the case for several reasons, including failure to timely commence the action under Wis. Stat. § 893.735(2).

Mitchell argues that his reading of the statute is “supported by comparing the alternate remedies authorized by Wis. Stats. §§ 801.02(7)(c) and 801.02(7)(d).” (Appellant's Br. 24–25.) Wisconsin Stat. § 801.02(7)(c) mandates denial of the prisoner's fee waiver request when he fails to include proof of exhaustion with his initial pleading, whereas subsection (7)(d) mandates dismissal of the case when a prisoner seeking a fee waiver has three strikes. Mitchell argues that this is proof that the Legislature intended denial of the fee waiver request to be the exclusive remedy for failing to submit proof of exhaustion. (Appellant's Br. 25.) That is incorrect.

Wisconsin Stat. § 801.02(7)(d) explicitly mandates dismissal when a prisoner *has* three-strikes; it says nothing about the penalty when a prisoner fails to submit three-strikes *documentation*. Denial of the fee waiver request is the obvious remedy. But, as with subsection (7)(c), that is not the only remedy. The court can still dismiss the case if the prisoner's omission of required documents results in an untimely filing pursuant to Wis. Stat. § 893.735(2).

That is what happened here. The Court first determined whether Mitchell was entitled to a fee waiver. (R. 1.) By that time, Mitchell had submitted all the required documentation for the court to make that assessment, including documentary proof of administrative exhaustion. (R. 1:1.) If the required exhaustion documents, or other documents, had not been submitted by that time, the court

could have denied the fee waiver petition and required full payment of the filing fee. (R. 1:1.)

After the court granted the fee waiver and allowed the case to be filed, it conducted its initial review of the action as required by Wis. Stat. § 802.05(4). (R. 16.) *That* was the appropriate time for the court to assess timeliness and other defects in the pleadings. After reviewing the case, the court concluded it was untimely pursuant to Wis. Stat. § 893.735(2) and dismissed it without requiring a responsive pleading. (R. 16.) The court further ordered that, despite the dismissal, Mitchell was still responsible for paying the remainder of the filing fee. (R. 16:2.)

Under the relevant statutes, dismissal is an appropriate remedy when a prisoner fails to *timely* submit the required documents, including proof of exhaustion. That conclusion is further supported by case law. In *Tyler*, for example, this Court affirmed the circuit court's dismissal of Tyler's certiorari action as untimely when Tyler failed to submit proof of exhaustion with his initial submission and, therefore, was not entitled to tolling. *Tyler*, 257 Wis. 2d 606, ¶¶ 15, 21.

Just as dismissal was the appropriate remedy in *Tyler*, so too was it the appropriate remedy here. The circuit court's dismissal of Mitchell's certiorari action as untimely should be affirmed.

B. Failure to timely file a certiorari action is not subject to harmless error analysis.

Mitchell argues that his failure to timely file his certiorari action should be disregarded under the harmless error statute, Wis. Stat. § 805.18(1). (Appellant's Br. 26–28.) He explains that his “initial omission of certain exhaustion documents [wa]s harmless because [he] *in fact* exhausted all administrative remedies before filing his petition for writ of certiorari.” (*Id.* at 26.) That argument is easily disposed of.

Mitchell's untimely filing is not subject to harmless error analysis. Failure to timely file a petition for writ of certiorari deprives the circuit court of competency to hear the petition. *See Wis. Power & Light Co. v. PSC*, 2006 WI App 221, ¶ 11, 296 Wis. 2d 705, 725 N.W.2d 423 (failure to comply with statutory time limit resulted in loss of circuit court's competency to proceed). Such a defect is not subject to harmless error analysis. *See Jefferson Cnty. v. Joseph S.*, 2010 WI App 160, ¶ 15, 330 Wis. 2d 737, 795 N.W.2d 450 (error not harmless when it deprived the court of competency).

Harmless error analysis does not apply, but even if it did Mitchell's argument is simply another version of his argument that his omission of exhaustion documents was "inconsequential," which Respondent addressed in section I.B.1., *supra* at 14–17. If Mitchell could evade the statutory filing requirements because he "*in fact* exhausted all administrative remedies" (Appellant's Br. 26), section 893.735(2)'s time limit and section 801.02(7)(c)'s requirement that prisoners submit documentary proof of exhaustion "[a]t the time of filing the initial pleading" would be meaningless. Wis. Stat. § 801.02(7)(c). And Mitchell completely ignores the fact that his petition was untimely not only because he failed to timely submit certain exhaustion documents, but also because he failed to timely submit his trust account statement. Mitchell's multiple errors resulted in an untimely filing under Wis. Stat. § 893.735(2). The circuit court properly dismissed Mitchell's certiorari action, and this Court should affirm.

CONCLUSION

This Court should affirm the circuit court's decision dismissing the petition for writ of certiorari.

Dated this 20th day of November 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6492 words.

Dated this 20th day of November 2023.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 20th day of November 2023.

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