

FILED
05-06-2024
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2022AP1076

ARTILLIS MITCHELL,

Petitioner-Appellant-Petitioner,

v.

CHRIS S. BUESGEN and
KEVIN A. CARR,

Respondents-Respondents.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

KARLA Z. KECKHAVER
Assistant Attorney General
State Bar #1028242

Attorneys for Respondents-Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6365
(608) 294-2907 (Fax)
keckhaverkz@doj.state.wi.us

TABLE OF CONTENTS

INTRODUCTION	3
STATEMENT OF THE CASE	4
I. Nature of the case.	4
II. The circuit court decision.	4
III. The court of appeals decision.	5
REASONS THE PETITION SHOULD BE DENIED	6
I. Tolling rules are clear: an incomplete mailing does not toll the 45-day time limit under Wis. Stat. § 893.735(2).	6
A. The court of appeals applied established tolling rules to the facts of this particular case.	7
B. Mitchell was not entitled to tolling on the facts presented here.	10
II. There is nothing novel about the conclusion that the circuit court is responsible for determining whether a certiorari action is timely.	14
III. It is well-settled that dismissal is the appropriate remedy for an untimely filing.	15
A. Dismissal is the appropriate remedy when failure to submit administrative documents results in an untimely filing.	15
B. Failure to timely file a certiorari action is not subject to harmless error analysis.	18
ALTERNATIVE GROUND SUPPORTING RESULT	18
CONCLUSION.....	20

INTRODUCTION

Petitioner Artillis Mitchell asks this Court to review a published court of appeals decision affirming the circuit court's dismissal of Mitchell's 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.

The court of appeals concluded that Mitchell was not entitled to the benefit of tolling here. He mailed his petition for writ of certiorari within 45 days, but his initial mailing was missing statutorily required documents that were under his control. Because his initial submission was incomplete, Mitchell was not entitled to tolling from the time of mailing and his petition was untimely. The court of appeals also rejected Mitchell's alternative arguments that the clerk of court was responsible for the untimely filing because the clerk did not file the action immediately upon receipt and that dismissal was not the proper remedy.

In reaching its decision, the court of appeals applied well-settled case law and plain language statutory interpretation to the particular facts of this case. The court of appeals decision was correct, and a decision by this Court will not help develop, clarify, or harmonize the law. The petition for review should be denied.

STATEMENT OF THE CASE

I. Nature of the case.

Mitchell asks this Court to review a published court of appeals opinion, *Mitchell v. Buesgen*, 2024 WI App 14, ___ Wis. 2d ___, 4 N.W.3d 596. That opinion affirmed a circuit court decision, dismissing Mitchell's petition for writ of certiorari as untimely filed pursuant to Wis. Stat. § 893.735.

II. The circuit court decision.

Mitchell's underlying challenge is to a prison disciplinary decision. He pursued administrative remedies, and the final agency decision was issued on March 16, 2022. (R. 6:7, 10.)

Mitchell sought certiorari review in the Dane County Circuit Court. On April 26, 2022, he placed some of the documents required for his certiorari action and fee waiver request in the prison mailbox. (R. 2–5; 6:1–10; 8:2; 22:2.) He also filed an affidavit attesting to placing the documents in the prison mailbox and explaining 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.)

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 documents relating to the administrative review of his complaint. (R. 21:4–5; 22:5–6.) On May 5 and 10, 2022, Mitchell mailed the missing administrative review documents. (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.) Mitchell appealed. (R. 17.)

III. The court of appeals decision.

On February 22, 2024, the court of appeals issued an opinion, affirming the circuit court's dismissal of Mitchell's petition for writ of certiorari as untimely. *Mitchell*, 2024 WI App 14, ¶¶ 2–5. The court of appeals concluded that Mitchell was not entitled to tolling of the 45-day period when he placed his documents in the prison mailbox because his submission did not include all the documents under his control, namely numerous documents relating to the administrative process. *Id.* ¶¶ 20–34.

The court of appeals rejected Mitchell's alternative argument that the clerk was responsible for the untimely filing because the clerk did not file the action immediately upon receipt. *Id.* ¶¶ 35–36. The court of appeals concluded that the circuit court alone was responsible for deciding whether the submission was timely, regardless of anything the clerk did or did not do. *Id.*

Finally, the court of appeals concluded that the proper consequence of the untimely filing was dismissal of the action,

not simply denial of the fee waiver, as Mitchell argued. *Id.* ¶¶ 37–47.

Mitchell filed a petition for review with this Court on March 22, 2024.

REASONS THE PETITION SHOULD BE DENIED

Mitchell’s petition for review does not present “special and important reasons” sufficient to warrant this Court’s review. Wis. Stat. § (Rule) 809.62(1r).

Mitchell proposes three questions for review: (1) whether Mitchell’s petition for writ of certiorari was timely under Wisconsin’s tolling rules, when he requested documents outside his control and mailed his petition to the circuit court before the 45-day deadline; (2) whether, if tolling does not apply in those circumstances, Mitchell’s petition was timely when the clerk of court did not file the petition upon receipt; and (3) whether, if Mitchell’s petition was untimely, dismissal was the appropriate remedy. (Pet. 6.) Mitchell contends that these are novel and recurring issues of statewide importance and that review by this Court is necessary to clarify the law. (Pet. 7 (citing Wis. Stat. § 809.62(1r)(c)2., 3.).)

The issues Mitchell presents do not satisfy the criteria for this Court’s review. The court of appeals correctly decided all three issues based on the application of well-settled case law and plain language statutory interpretation to the particular facts of this case. There is no reason for the Court to clarify the law under these circumstances. The petition for review should be denied.

I. Tolling rules are clear: an incomplete mailing does not toll the 45-day time limit under Wis. Stat. § 893.735(2).

The court of appeals correctly concluded that Mitchell was not entitled to the benefit of equitable tolling and that his

petition was untimely as a result. In reaching that conclusion, the court applied well-settled tolling principles to the factual situation presented here. No clarification of the law is necessary under these circumstances.

A. The court of appeals applied established tolling rules to the facts of this particular case.

The court of appeals was asked to decide whether the circuit court properly dismissed Mitchell's petition for writ of certiorari as untimely under Wis. Stat. § 893.735(2). That statute provides: "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).

The 45-day time limit may be equitably tolled in certain circumstances. In concluding that Mitchell's certiorari action was untimely, the court of appeals applied three established tolling rules to the particular facts presented in this case.

First, the court relied on the mailbox tolling rule. *Mitchell*, 2024 WI App 14, ¶ 22. Under that rule, the 45-day period 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*, 2000 WI App 238, ¶ 14, 239 Wis. 2d 327, 620 N.W.2d 409.

Second, the court relied on the fee waiver tolling rule. *Mitchell*, 2024 WI App 14, ¶ 30. Under that rule, if a prisoner seeks a waiver of prepayment of the filing fee on the grounds

of indigency,¹ the 45-day period is tolled from the date of mailing until the court rules on the fee waiver request. *State ex rel. Steldt v. McCaughtry*, 2000 WI App 176, ¶ 17, 238 Wis. 2d 393, 617 N.W.2d 201. “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.

And finally, the court relied on the complete submission tolling rule. *Mitchell*, 2024 WI App 14, ¶¶ 27, 31. That rule is based on the concept that 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).

There are several documents a prisoner must submit with his petition for writ of certiorari. 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 administrative 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

¹ 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).

related to that administrative proceeding. The documentation shall also include all written 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.” *State ex rel. Walker, v. McCaughtry*, 2001 WI App 110, ¶ 12, 244 Wis. 2d 177, 629 N.W.2d 17; *see also* Wis. Stat. § 814.29(1m). A prisoner seeking a fee waiver also must submit a certification from the Department of Justice that he has not brought a frivolous or otherwise improper action or appeal on three or more prior occasions.² *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

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

prisoner is treated equitably and the legislative intent is fulfilled.” *Id.*

B. Mitchell was not entitled to tolling on the facts presented here.

Applying these tolling rules to the facts of the case, the court of appeals correctly concluded that Mitchell’s certiorari action was untimely. That decision does not conflict with existing cases but rather turns on the particular circumstances presented here.

The relevant facts are undisputed. There is no dispute that Mitchell’s filing deadline was May 2, 2022,³ and that he mailed some of the required documents for his certiorari action and fee waiver before that deadline, on April 26, 2022. *Mitchell*, 2024 WI App 14, ¶¶ 8–9, 25. There is also no dispute that Mitchell’s initial submission did not include all the documents under his control—it was missing most of the administrative documents required by Wis. Stat. § 801.02(7)(c).

Applying the tolling rules to the particular facts, the court of appeals concluded that Mitchell was not entitled to tolling of the 45-day period when he placed his documents in the prison mailbox because his submission did not include all the documents under his control, namely numerous documents relating to the administrative process. *Mitchell*, 2024 WI App 14, ¶¶ 20–34. That decision was correct and requires no clarification.

³ The 45-day limitations period began to run on March 16, 2022 (the date of the final administrative decision). *Mitchell*, 2024 WI App 14, ¶¶ 7–8. 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).

Mitchell argues that his omission of certain administrative documents from his initial mailing was “inconsequential” because he “mailed documents sufficient to evidence exhaustion on April 26, 2022, and he later mailed additional exhaustion documents” and because he “had *in fact* exhausted all administrative remedies.” (Pet. 17.)

The court of appeals rejected this argument, reasoning that “the pertinent statutes unambiguously require more.” *Mitchell*, 2024 WI App 14, ¶¶ 20–34. Wisconsin Stat. § 801.02(7)(c) specifically prescribes both the documentation that must be included and the timing for filing that documentation. The documents that must be submitted are “copies of *all* of the written materials” provided to or from the agency as part of the administrative process and any administrative appeal. Wis. Stat. § 801.02(7)(c). And those documents must be submitted “[a]t the time of filing the initial pleading.” *Id.*

The court explained that the “expansive, unqualified language” of the statute “on its face represents a legislative determination that a submission must timely include all such documents, not only those proving exhaustion-in-fact.” *Mitchell*, 2024 WI App 14, ¶ 34. The court further explained that “[t]he apparent legislative intent is to require prisoners to provide the court with a complete picture of what occurred in the administrative process when a writ action is commenced and before a response is required from the respondent.” *Id.*

While that is correct, there is another reason for requiring prisoners to submit “*all* of the written materials” from the administrative proceedings. Wis. Stat. § 801.02(7)(c). Prisoners are required to exhaust *each* issue raised in their petition for writ of certiorari at *every* available administrative

level to obtain certiorari review of that issue.⁴ The court, therefore, must review the documents from every level of administrative review—not only the final administrative decision—to determine whether a prisoner properly exhausted his administrative remedies as to each issue raised.

Mitchell next argues that the court of appeals improperly relied on *Tyler*. (Pet. 18–19.) But as the court of appeals recognized, the facts in *Tyler* are a “close[] match to the facts here.” *Mitchell*, 2024 WI App 14, ¶ 31. Tyler, like Mitchell, sought to file a petition for certiorari review of a prison disciplinary decision. *Tyler*, 257 Wis. 2d 606, ¶ 3. He mailed his petition before the 45-day time limit, but his submission did not include the full filing fee and “all documents provided by the administrative agency.” *Id.* ¶ 5 (citation omitted). The court of appeals concluded that Tyler was not entitled to tolling from the date he mailed his petition because the documents he mailed “did not constitute a complete and proper submission to the court.” *Id.* ¶ 15. To hold otherwise, according to the 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

⁴ “[A] prisoner may not obtain certiorari review of [a prison disciplinary action] until the [agency] completes review of *any* claimed procedural errors.” *State ex rel. Smith v. McCaughtry*, 222 Wis. 2d 68, 70, 586 N.W.2d 63 (Ct. App. 1998) (emphasis added), *modified in pt.*, *State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶ 13, 245 Wis. 2d 607, 629 N.W.2d 686; *see also Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002) (To exhaust administrative remedies, the inmate must “properly” pursue “each step within the administrative process.”).

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.

Mitchell argues that because he, “unlike Tyler, did not submit a partial fee with his petition” and instead “sought a waiver of the filing fee,” Mitchell “did not display the ‘carelessness’ that Tyler displayed and which the court in *Tyler* was rightly loathe to reward.” (Pet. 18–19.) That does not distinguish *Tyler* from this case. What the court was concerned about was not Tyler’s failure to submit a full filing fee on its own, but rather the fact that he failed to submit items that were “within his control,” including administrative documents. *Tyler*, 257 Wis. 2d 606, ¶ 16.

Mitchell has no way around *Tyler*. The petition Mitchell mailed on April 26, 2022—like the petition Tyler mailed—did not include all the administrative 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” for the purposes of tolling. (Pet. 17.) 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). The court of appeals’ decision was correct and requires no clarification by this Court.

II. There is nothing novel about the conclusion that the circuit court is responsible for determining whether a certiorari action is timely.

Mitchell alternatively argues that “[e]ven if tolling somehow does not apply, [his] petition still was timely” because “[t]he Clerk exceeded his or her statutory authority by holding his petition instead of filing it upon receipt.” (Pet. 19.) Mitchell contends that 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.” (*Id.*)

The court of appeals appropriately rejected this argument. *Mitchell*, 2024 WI App 14, ¶¶ 35–36. The clerk did not cause the dismissal. 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,⁵ the court still must review the case and determine if it was timely under Wis. Stat. § 893.735(2), which requires application of the various tolling rules to the facts of the case. Here, the circuit 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

⁵ 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*, 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.”).

not received until after the statutory deadline. Filing the case immediately could not have cured that defect.

As the court of appeals succinctly put it: “Mitchell fails to come to grips with the dispositive point in this case: the circuit court had the responsibility, under Wis. Stat. § 893.735(2), to decide whether the submissions were timely—regardless of anything the clerk did or did not do.” *Mitchell*, 2024 WI App 14, ¶ 36. That is not novel, and Mitchell does not even disagree with the point. (Pet. 21.) He simply disagrees with the circuit court’s (and court of appeals’) conclusion that his petition was untimely. Nothing about this issue warrants this Court’s review.

III. It is well-settled that dismissal is the appropriate remedy for an 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 administrative documents was denial of his fee waiver request, not dismissal of his certiorari action. (*Id.* at 22–24.) Mitchell further argues any such omission was harmless error because he had in fact exhausted his administrative remedies. (*Id.* at 24.) The court of appeals properly rejected both arguments, and neither argument merits supreme court review.

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

Mitchell focuses on the last sentence of the paragraph requiring submission of administrative documents, 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.” He contends that this language means that denial of his fee waiver request was the exclusive remedy for his failure to submit the required administrative documents. (Pet. 22–23.)

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).” (*Id.* at 23.) 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. (Pet. 23.)

The court of appeals rejected this argument, explaining that “Mitchell’s argument is plausible if one’s attention is limited to the two sentences that he highlights,” but his “narrow focus . . . misses the mark” when viewed in the context of “controlling precedent” and “closely related statutes.” *Mitchell*, 2024 WI App 14, ¶¶ 37, 40.

Starting with the statutory language, the court of appeals explained that the last sentence of Wis. Stat. § 801.02(7)(c) does not state that denial of the fee waiver is the only consequence for failing to submit administrative documents with the initial pleading. *Id.* ¶ 42. “Instead, when properly construed, that sentence merely identifies dismissal of a petition for prepayment waiver as one consequence because additional remedies are understood from context.” *Id.*

Under Wis. Stat. § 801.02(7)(c), prisoners are required to submit administrative documents *whether they seek a fee waiver or not*. In other words, if a prisoner pays the filing fee, the administrative documents are the *only* documents he is required to submit with his petition. Because administrative

documents are required whether the prisoner seeks a fee waiver or not, subsection (7)(c) explicitly states that denial of the fee waiver request is an appropriate penalty.

The three strikes certification under Wis. Stat. § 801.02(7)(d), in contrast, is required only if the prisoner seeks a fee waiver. It follows that subsection (7)(d) does not explicitly state that denial of the fee waiver request is the penalty for failure to provide those documents because that penalty is axiomatic.

While denial of the fee waiver petition is an action the circuit court can take when a prisoner fails to submit either type of documentation, the court can also dismiss the case if the prisoner's omission of required documents results in an untimely filing pursuant to Wis. Stat. § 893.735(2). If that were not the case, there would be no remedy when a prisoner who pays the filing fee fails to submit administrative documents, which are required whether the prisoner seeks a fee waiver or not.

Under the relevant statutes, dismissal is an appropriate remedy when a prisoner fails to *timely* submit the required documents, including administrative documents. That conclusion is further supported by case law. In *Tyler*, for example, the court of appeals affirmed the circuit court's dismissal of Tyler's certiorari action as untimely when Tyler failed to submit administrative documents with his initial submission and, therefore, was not entitled to tolling. *Tyler*, 257 Wis. 2d 606, ¶¶ 15, 21. In addition to *Tyler*, the court of appeals cited several other cases where the court reached similar conclusions. *Mitchell*, 2024 WI App 14, ¶ 41 (citing *State ex rel. Locklear v. Schwarz*, 2001 WI App 74, ¶ 22, 242 Wis. 2d 327, 629 N.W.2d 30, and *Walker*, 244 Wis. 2d 177, ¶ 12). This case law "leaves no room for Mitchell's position." *Mitchell*, 2024 WI App 14, ¶ 40.

Just as dismissal was the appropriate remedy in previous cases, so too was it the appropriate remedy here. The court of appeals agreed, based on its reading of the relevant statutes in context and well-settled case law. No clarification of that decision is needed.

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 as harmless error. (Pet. 24–25.) 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 24.) There was no harmless error here, and Mitchell’s argument to the contrary provides no reason to grant review.

Mitchell’s harmless error argument is simply another version of his argument that his omission of administrative documents was “inconsequential,” which Respondents addressed above, *supra* at 11–13. If Mitchell could evade the statutory filing requirements because he “*in fact* exhausted all administrative remedies” (Pet. 24), Wis. Stat. §§ 893.735(2)’s time limit and 801.02(7)(c)’s requirement that prisoners submit “all of the written materials” relating to administrative review “[a]t the time of filing the initial pleading” would be meaningless. Mitchell’s failure to submit documents under his control with his initial mailing resulted in an untimely filing under Wis. Stat. § 893.735(2). That is not harmless and dismissal was the appropriate remedy. This Court should deny the petition for review.

ALTERNATIVE GROUND SUPPORTING RESULT

While it is Respondents’ position that this Court should deny the petition for review, if this Court grants the petition,

it should also address this alternative ground supporting the result in the court of appeals.

In a footnote, the court of appeals rejected the Respondents' argument that Mitchell's petition was untimely for another reason: he did not request his trust account statement from the prison until just days before the statutory deadline and, therefore, he missed the deadline due to his own conduct and was not entitled to tolling. *Mitchell*, 2024 WI App 14, ¶ 34 n.13. The court concluded that Respondents provided no authority for the proposition that a request for documents made before the 45-day deadline can or must be deemed "too late" for the purposes of equitable tolling. *Id.*

That decision is contrary to the purpose of equitable tolling. Tolling is meant to remedy situations when a prisoner's certiorari action is untimely because of a government authority's failure to 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. *See Walker*, 244 Wis. 2d 177, ¶ 24 (explaining that tolling does not apply when prisoner misses the filing deadline "due to his own dilatory conduct" in requesting documents after the deadline). 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 id.* ¶ 18.

The court of appeals conclusion on this issue—while not affecting the outcome of the appeal—was incorrect and warrants review by this Court if the petition is granted.

CONCLUSION

This Court should deny the petition for review.

Dated this 6th day of May 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Karla Z. Keckhaver
KARLA Z. KECKHAVER
Assistant Attorney General
State Bar #1028242

Attorneys for Respondents-Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6365
(608) 294-2907 (Fax)
keckhaverkz@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm), and 809.62(4) for a response produced with a proportional serif font. The length of this response is 4986 words.

Dated this 6th day of May 2024.

Electronically signed by:

Karla Z. Keckhaver
KARLA Z. KECKHAVER
Assistant Attorney General

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 6th day of May 2024.

Electronically signed by:

Karla Z. Keckhaver
KARLA Z. KECKHAVER
Assistant Attorney General