STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2024AP2239

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JENNIFER R. SMART,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING A WIS. STAT. § 974.06 MOTION ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE RALPH M. RAMIREZ, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Are Defendant-Appellant Jennifer R. Smart's claims precluded from consideration because she is no longer in custody, had long been out of custody when she filed her Wis. Stat. § 974.06 motion, and did not appeal the denial of her two previous motions for a writ of coram nobis?

Case law holds that defendants cannot pursue postconviction relief under Wis. Stat. § 974.06 if they are no longer in custody under a sentence of a court. Old criminal judgments can only be reviewed via a writ of coram nobis. Smart filed two of them, both of which raised the same issues that she is currently pursuing. But she did not file a timely notice of appeal from the denial of her first petition raising these issues, meaning even if these issues were raised according to the correct procedural mechanism, this Court lacks jurisdiction to review them.

2. If the petition is construed as a petition for a writ of coram nobis, are Smart's claims barred both by laches and because she did not present any error of fact the circuit court has not already passed upon?

Smart raises legal claims, not facts previously unknown to the circuit court that would have prevented it from entering judgment. She had other adequate remedies at law to raise them and inordinately delayed 22 years in bringing them, and the State would be substantially prejudiced if it had to address their substance or attempt to try the case now, meaning the claims are barred by laches.

This Court should hold that the writ of coram nobis does not lie, and that even if it did, the doctrine of laches bars Smart's claims.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case deals with application of settled law to the facts and is adequately addressed on briefs.

STATEMENT OF THE FACTS

In 1998, when she was 19 years old, Smart entered a romantic relationship with then-13-year-old John, which progressed from "necking" to Smart touching John's genitals.[1] (R. 1:2–3.) She twice assisted him in running away from his mother's home and participated in the burglary of a McDonald's with him. (R. 1:2–3.) The State charged Smart with two counts of abduction of another's child, one count of causing a child to expose genitals, and two counts of sexual contact with a child who has not attained the age of 16 in Waukesha County Case No. 1998CF761. (R. 1:2.) It additionally charged her with burglary as a party to a crime and contributing to the delinquency of a minor in Waukesha County Case No. 1998CF762. (R. 1:2.)

Smart reached a plea agreement with the State and pleaded no contest to the two abduction charges and the misdemeanor causing a child to expose genitals charge, and the other charges in both cases were dismissed and read in. (R. 1:1–2.) The court sentenced her to a total sentence of two years of prison, imposed and stayed, with nine years of probation, and one year of conditional jail time with Huber privileges. (R. 5:1.) She learned that she had to register on the sex offender registry in 2002 and did so, but she did not appeal or otherwise challenge her convictions or sentence and was discharged from probation in 2008. (R. 8:2; 29.)

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[1] The State uses a pseudonym for the victim pursuant to Wis. Stat. § (Rule) 809.86.

In 2021, Smart began filing letters with the circuit court requesting that she be removed from the sex offender registry and to have her plea agreement "reviewed." (R. 7; 8.) The State responded that there was no legal basis stated for the requested relief. (R. 11.) Smart then filed a "Motion to Vacate" her 1998 Waukesha County convictions on November 11, 2021, challenging the factual basis for all of the charges—not just those to which she pleaded guilty—on the ground that she never received sexual arousal or gratification from touching the victim's penis, and that rather than abducting him, she was helping him escape domestic violence. (R. 20.) The circuit court[2] held a "review hearing" and informed Smart that these were challenges to her conviction, not a means to remove her from the sex offender registry, and her avenue for challenging those things was to pursue postconviction relief within 20 days of sentencing back in 1998. (R. 22:1–13.) No written order was entered on this motion.

Eighteen months later, Smart filed a petition for a writ of coram nobis on May 9, 2023, and the circuit court[3] denied it on May 25, 2023, considering the issues raised in it addressed by the circuit court's November 15, 2021, denial of her motion to vacate her conviction. (R. 31; 32.) She filed a second petition for a writ of coram nobis August 24, 2023, and the court[4] again denied it on the same grounds. (R. 36; 39.) She then filed the petition in this Court, which advised her that it lacks original jurisdiction over writs of coram nobis and denied it on September 26, 2023. (R. 40.) She moved for reconsideration of that order, and this Court denied that as well. (R. 41.)

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[2] The Honorable Laura F. Lau presided over this hearing.

[3] The Honorable Frederick J. Strampe denied this motion.

[4] The Honorable Lee S. Dreyfus, Jr. denied this motion.

Almost a year later, on August 5, 2024—24 years, 11 months, and 3 days too late—Smart filed a "notice of intent to pursue postconviction" relief and a two-page motion challenging her attorney's performance at the preliminary hearing, the information he relayed to her about the dismissed charges, the adequacy of the plea colloquy, and that her attorney "made no attempt to alleviate the requirement for Smart to register as a sex offender." (R. 43; 45; 46.)

The circuit court[5] held a non-evidentiary hearing and asked Smart what she was requesting. (R. 55:2.) Smart's reply was unclear, but she seemed to argue that her attorney in 1998 did not explain the elements of the offenses or that she would have to register as a sex offender for life, and the sex offender registry had made life difficult. (R. 55:5–15.) The circuit court looked to the plea hearing transcript and determined that Smart had knowingly, intelligently, and voluntarily entered her plea. (R. 55:16–21.) It recognized that she was really requesting some kind of equitable relief in removing her from the sex offender registry, which is a collateral consequence of a plea, and found that equitable relief was not warranted on the facts. (R. 55:17–19.) Finally, it found that "[s]he had decades to address the issue she talks about, the ineffective assistance of counsel" and it found "the time frame for requesting those remedies, has long been exhausted. I will find there isn't any equitable reason for this Court to take any action or to consider the post conviction relief that she is alleging resulted in a wrongful conviction." (R. 55:20; 49.) Smart appeals.

[5] The Honorable Ralph M. Ramirez presided over this hearing and denied this motion.

ARGUMENT

I. This Court lacks jurisdiction to review Smart's claims because she has not been in custody for many years, and she did not timely appeal from the circuit court's 2023 orders denying her petitions for writs of coram nobis.

Wisconsin Stat. § 974.06 requires the person filing the motion to be "a prisoner in custody under sentence of a court." Wis. Stat. § 974.06(1). This statute "was 'taken directly from Title 28, USC, s. 2255," the federal habeas corpus statute. *State v. Mentzel*, 218 Wis. 2d 734, 743, 581 N.W.2d 581 (Ct. App. 1998). "When seeking guidance as to the proper application of a state statute copied from federal law, [this Court] may look to federal cases." *Id.*

As with a motion under Wis. Stat. § 974.06, "[a]lthough a § 2255 may be brought 'at any time,' that section imposes the requirement that the movant be 'in custody.'" *United States v. Darnell*, 716 F.2d 479, 480 (7th Cir. 1983). When the sentence based upon the conviction and, as here, the underlying plea of guilty that the petitioner seeks to challenge has expired, he or she "is no longer 'in custody' for the purpose of pursuing a § 2255 challenge." *Id.*; *State v. Bell*, 122 Wis. 2d 427, 362 N.W.2d 443 (Ct. App. 1984) (same as related to Wis. Stat. § 974.06).

Smart completed her probation terms in 2008. (R. 8:2.) She is therefore not "a prisoner in custody under sentence of a court" and has not been for nearly two decades. (R. 3:1); Wis. Stat. § 974.06(1). The circuit court should have dismissed this action for lack of competency to proceed. *Bell*, 122 Wis. 2d 428–29.

"At this late date," Smart's potential avenue for relief was via a writ of coram nobis. *Darnell*, 716 F.2d at 480; *State v. Heimermann*, 205 Wis. 2d 376, 380, 556 N.W.2d 756 (Ct. App. 1996). That raises a jurisdictional question here, because

Smart filed two separate petitions for writs of coram nobis in the circuit court in 2023, and she did not appeal the circuit court's denial of either of them. (R. 31; 32; 36; 39.)

"It has frequently been held that an order entered on a motion to modify or vacate a judgment or order is not appealable where, as here, the only issues raised by the motion were disposed of by the original judgment or order." *Marsh v. City of Milwaukee*, 104 Wis. 2d 44, 47, 310 N.W.2d 615 (1981) (citation omitted). "Since neither the consent of parties nor action of the court can extend the statutory time for the taking of an appeal . . . such a result cannot be reached by the indirect method of again moving for the same relief that was refused in the prior order." *Id.* (citation omitted.) Smart raised the same issues in her coram nobis petitions that she raised in the motion at issue in this appeal,[6] meaning the second petition for a writ of coram nobis and the current motion at issue here were essentially motions for reconsideration in the circuit court. (R. 31; 36; 45; 46.) Smart's remedy was to appeal the first coram nobis decision, and a notice of appeal from that order was due August 23, 2023. Wis. Stat. § 808.04(1). This Court thus lacks jurisdiction to hear her current appeal.

II. The circuit court appropriately determined that Smart's motion was untimely because laches bars Smart's claims.

Wisconsin construes pleadings in civil cases liberally according "to the facts pleaded, not to the label given the papers filed." *bin-Rilla v. Israel*, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983). Should this Court determine that it has jurisdiction to address Smart's claims, it should nevertheless

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[6] Technically, Smart raised these same issues in her 2021 "Motion to Vacate" her convictions and could have appealed years ago, but the circuit court never entered a written order denying that motion. (R. 20.)

affirm because even when construed as a petition for a writ of coram nobis, the circuit court correctly denied Smart's motion as untimely. She also independently did not meet the criteria for the writ to issue.

A writ of coram nobis is a discretionary writ addressed to the circuit court, and this Court reviews a decision denying such a writ for an erroneous exercise of discretion. *Jessen v. State*, 95 Wis. 2d 207, 213, 290 N.W.2d 685 (1980). "The writ of *coram nobis* is a common law remedy which empowers the trial court to correct its own record." *Heimermann*, 205 Wis. 2d at 381–82. "A person seeking a writ of *coram nobis* must pass over two hurdles." *Id.* at 384. "First, he or she must establish that no other remedy is available." *Id.* "Second, the factual error that the petitioner wishes to correct must be crucial to the ultimate judgment *and* the factual finding to which the alleged factual error is directed must not have been previously . . . 'passed on' by the trial court." *Id.*

Smart had another remedy available for these issues via either a direct appeal or a Wis. Stat. § 974.06 motion and simply opted not to use them. Everything of which she complains relates to how her attorney performed at her preliminary hearing, plea hearing, and sentencing and does not depend on any error of fact during those proceedings that does not appear in the record and crucial to accepting her plea.[7] (R. 46; 55:5–15.) Most of what she relayed at the hearing had to do only with her own understanding of the sexual assault charges—that were dismissed as part of the plea and therefore cannot have mattered to her underlying conviction—and how being on the sex offender registry has

[7] It is not clear what Smart believes her attorney could have done to "alleviate" the requirement that she register as a sex offender given that registration was statutorily mandated for the two child abduction charges to which she pleaded no contest. (R. 1:1); Wis. Stat. § 301.45(1)(a) (1997–98).

impacted her life. (R. 55:5–10.) Otherwise, she merely offered her version of events to contest the facts stated in the complaint to one of the abduction charges, of which the court was aware through the presentence investigation. (R. 55:7–10; 1:4; 18:4–5.) All of those challenges could have been made on direct appeal or via a Wis. Stat. § 974.06 motion, and none is the type of material error of fact appropriate for a grant of a writ of coram nobis.

Smart's claims are also barred by the doctrine of laches. Laches is an equitable defense, *Sawyer v. Midelfort*, 217 Wis. 2d 795, 806, 579 N.W.2d 268 (Ct. App. 1998), that may be invoked in response to a petition for a writ of error coram nobis. *Darnell*, 716 F.2d at 480. Though the State did not use the precise phrase "laches" below, it argued "[t]hese are all issues that . . . the defendant could have raised a long time ago. . . . Part of the reason for res judicata and some of these time limits that exist for appeals is that everyone is at a disadvantage when time has passed." (R. 55:15–16.) The circuit court agreed and found that "the time frame for requesting those remedies, has long been exhausted," and there was not "any equitable reason for [the court] to take any action or consider the post conviction relief that she is alleging resulted in a wrongful conviction." (R. 55:20.) The circuit court was correct.

Laches requires: "(1) unreasonable delay; (2) lack of knowledge on the part of the party asserting the defense that the other party would assert the right on which he bases his suit; and (3) prejudice to the party asserting the defense." *State v. Prihoda*, 2000 WI 123, ¶ 37, 239 Wis. 2d 244, 618 N.W.2d 857.

It would appear axiomatic that waiting 22 years to challenge one's conviction for the first time, especially when based on allegations that would have been apparent immediately after entry of judgment, is an unreasonable delay. And the State had no way of knowing that Smart would

assert these claims, particularly after her sentence expired in 2008 without her ever once filing anything related to the validity of her conviction.

Finally, Smart's delay has unequivocally prejudiced the State in ways that it would not have if Smart had timely challenged her conviction. This case is "a textbook example of the problems arising from an inordinate delay in seeking relief." *Darnell*, 716 F.2d at 481. Ineffective assistance of counsel claims require testimony from defense counsel to determine whether they met their Sixth Amendment obligations,[8] and it would be beyond absurd to expect a defense attorney to recall what they considered and discussed with a client leading up to a plea nearly a quarter of a century earlier. Additionally, the only transcript that appears to have been prepared following Smart's convictions in 1999 prior to the hearings held in 2021 and 2024 is a transcript of the plea hearing prepared in 2002. (R. 2.) Documents, even any minutes, from the original case file are sparse, and the chance that the court reporters from the rest of the proceedings have retained notes to create transcripts for an additional 14 years beyond the 10-year retention period is almost zero. *See* SCR 72.01(47). As the Seventh Circuit explained, "[t]he cognizable claims that [Smart] raises—ineffective assistance of counsel and an involuntary guilty plea—are troublesome even where a complete record of the proceedings exists." *Darnell*, 716 F.2d at 481. It would be nearly impossible for the State to establish the voluntariness of the proceedings now or to take this case to trial.

Smart additionally has not demonstrated that she could not have timely raised these claims. By her own admission, she became aware of the requirement that she register as a sex offender in 2002. (R. 55:7.) She gives no explanation for

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[8] *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

waiting another 19 years to attempt to challenge her conviction because of that requirement. (R. 55:7–10; 46.)

Lastly, the victim has both a constitutional and a statutory finality interest in Smart's convictions. Wis. Const. art. I § 9m(2)(c), (d); Wis. Stat. § 950.04(1v)(k). The victim was a month shy of his 14th birthday at the time of these offenses. (R. 1:2–3.) To expect him to come relive them 26 years later as a 40-year-old adult who has, hopefully, productively moved on in life simply because Smart feels inconvenienced by having to report to the sex offender registry would be a perversion of justice.

CONCLUSION

This Court should affirm the circuit court.

Dated this 5th day of March 2025.

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 2,647 words.

Dated this 5th day of March 2025.

Electronically signed by:

Lisa E.F. Kumfer
LISA E.F. KUMFER

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.

I further certify that a copy of the above document was mailed on March 5, 2025, to:

Jennifer R. Smart
1226 Coon Hollow Rd.
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Dated this 5th day of March 2025.

Electronically signed by:

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