STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2018AP203-W

STATE ex rel. EZEQUIEL LOPEZ-QUINTERO,

Plaintiff-Appellant-Petitioner,

v.

MICHAEL A. DITTMAN,
Warden of Columbia Correctional Institution,,

Defendant-Respondent.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Appeal from an Ex Parte Denial of Petition for Writ of Habeas Corpus by the Court of Appeals, District II

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The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits this non-party brief in support of Ezequiel Lopez-Quintero to address the issue of whether delay by an involuntarily unrepresented habeas petitioner may be used to deny the reinstatement of direct appeal rights to which he or she otherwise is entitled.

WACDL is concerned about the state's and the lower court's apparent willingness to deny a right based on a mere technicality by an individual while unconstitutionally denied the assistance of counsel. That willingness conflicts, not only with basic fairness and the purposes of habeas corpus, as explained in Lopez-Quintero's brief, but with controlling United States Supreme Court authority.

ARGUMENT

CONTROLLING AUTHORITY MANDATES THAT, WHEN A DEFENDANT IS INVOLUNTARILY DENIED THE CONSTITUTIONAL RIGHT TO COUNSEL, ANY RESULTING PROCEDURAL DEFAULTS ARE IMPUTED TO THE STATE

Lopez-Quintero is correct that the Court of Appeals' vague "timeliness" requirement here and in *State ex rel. Smalley v. Morgan*, 211 Wis.2d 795, 565 N.W.2d 805 (Ct. App. 1997), *abrogated on other grounds, State ex rel. Coleman v. McCaughtry*, 2006 WI 49, 290 Wis.2d 352, 714 N.W.2d 900, both undermines the very purpose of habeas relief and conflicts with this Court's analysis of the affirmative defense of laches in *State ex rel. Coleman*, 2006 WI 49. Requiring the state to prove the elements of laches - including resulting prejudice - is meaningless if the court may *sua sponte* dismiss a facially valid habeas petition as "untimely" without such a showing.

The courts and the litigants, however, overlook an even more fundamental defect in *Smalley's* analysis, and in *State ex rel. Coleman's* as well. Specifically, using the alleged procedural defaults of a defendant while that defendant has been unconstitutionally denied the assistance of counsel as grounds for denying the relief he or she otherwise is due conflicts with controlling United States Supreme Court authority.

This Court "must indulge every reasonable presumption against the loss of constitutional rights." *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

A criminal defendant is constitutionally entitled to the effective assistance of counsel on his first appeal as of right in the state courts. *Douglas v. California*, 372 U.S. 353 (1963); *Evitts v. Lucey*, 469 U.S. 387 (1985). The right to counsel is intended to help protect a defendant's rights because he cannot be expected

to do so himself. *E.g.*, ***Evitts***, 469 U.S. at 396 ("An unrepresented appellant – like an unrepresented defendant at trial – is unable to protect the vital interests at stake"). The Supreme Court accordingly has recognized that

> the "failure to appoint counsel for an indigent [is] a unique constitutional defect . . . ris[ing] to the level of a jurisdictional defect," which therefore warrants special treatment among alleged constitutional violations.

Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 404 (2001), quoting *Custis v. United States*, 511 U.S. 485, 496 (1994).

While a defendant may waive the right to counsel, *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942), such waiver must be "intelligent and competent." *Faretta v. California*, 422 U.S. 806, 835 (1975). The defendant accordingly must be aware of the dangers and disadvantages of self-representation before choosing to waive the right to counsel. *Id.* Courts indulge every reasonable presumption against waiver of the fundamental right to the assistance of counsel. *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). Waiver of the right to counsel cannot be assumed or presumed from the failure to assert it. *E.g.*, *Carnley v. Cochran*, 369 U.S. 506, 516 (1962). *See also* *Jones v. Berge*, 246 F.Supp.2d 1045 (E.D. Wis. 2003).

Rather, when the right to counsel attaches, as on the direct appeal as of right from a criminal conviction, the state bears the "responsibility to ensure that petitioner was represented by . . . counsel." *Coleman v. Thomson*, 501 U.S. 722, 754 (1991). If the state abdicates that responsibility by improperly denying counsel to a defendant or by failing to take the steps necessary to provide a defendant with counsel, any procedural defaults the *pro se* defendant commits are "'imputed to the State.'" *See id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

Under *Coleman v. Thomson*, "[w]here a petitioner defaults

a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that [collateral] review entails." 501 U.S. at 754. In other words, the state which is legally responsible for ensuring that the defendant has his right to counsel cannot rationally be permitted to benefit from its own failure to satisfy that obligation when any delay is attributable to that failure.

Finally, actual denial of the assistance of counsel altogether is legally presumed to result in prejudice to the defense and can never be treated as harmless error. *Penson v. Ohio*, 488 U.S. 75, 88 (1988). In other words, counsel's abandonment of a client's appeal is a *per se* violation of the right to counsel. *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000); *Betts v. Litscher*, 241 F.3d 594, 597 (7th Cir. 2001). "Mere speculation that counsel would not have made a difference is no substitute for actual appellate advocacy." *Penson*, 488 U.S. at 87.

What all of this means, of course, is that any supposed procedural defaults committed by a defendant who has been denied the constitutional right to the assistance of counsel on appeal are imputed to the state, not the involuntarily unrepresented defendant. *Coleman v. Thomson*, 501 U.S. at 754. Thus, a defendant who is unconstitutionally abandoned by counsel on appeal *cannot* constitutionally be denied habeas relief to which he or she otherwise would be entitled on the grounds of delay - whether in the form of laches or or "untimeliness" under *Smalley*. Because the delay resulting from the abandonment constitutionally is imputed to the state rather than the defendant, neither the "unreasonable delay" nor the "resulting prejudice" elements of *Smalley's* "timeliness" analysis or the laches standard are legally attributable to the defendant.

Coleman v. Thomson, 501 U.S. at 754 (state must bear cost of default and resulting harm).

This Court's recognition that neither habeas remedies nor laches are available "'to one whose own inaction results in the harm,'" *State ex rel. Coleman*, 2006 WI 49, ¶25 (citation omitted), does not change the analysis. It is the *state's* inaction in failing to ensure that Lopez-Quintero was represented by counsel on appeal that caused the delay. *Coleman v. Thomson*, *supra*. As importantly, the delay is part of the harm to Lopez-Quintero caused by the unconstitutional abandonment of counsel. *See, e.g.*, *Betts*, *supra*.

Assuming the factual allegations of his petition are accurate, Lopez-Quintero was constitutionally entitled to the assistance of counsel in initiating and pursuing his appeal, *Roe*, *supra*, and his procedural missteps while involuntarily unrepresented by counsel in his efforts to enforce that right therefore cannot constitutionally be held against him. *Betts* is directly on point:

> Betts was constitutionally entitled to the assistance of counsel on direct appeal, but the state of Wisconsin gave him the runaround. It allowed counsel to withdraw unilaterally, then used the ensuing procedural shortcomings to block all avenues of relief. Yet one principal reason why defendants are entitled to counsel on direct appeal is so that they will not make the kind of procedural errors that unrepresented defendants tend to commit. *The Constitution does not permit a state to ensnare an unrepresented defendant in his own errors and thus foreclose access to counsel.*

241 F.3d at 598 (emphasis added).

Where a defendant is denied the constitutional right to the assistance of counsel, controlling United States Supreme Court authority thus bars using that defendant's procedural defaults

to deny the relief he or she is otherwise entitled. This Court accordingly should overrule that portion of ***Smalley*** which uses "timeliness" to deny relief to those left unrepresented by counsel due to the unconstitutional abandonment by post-conviction or appellate counsel. The Court likewise should clarify that the equitable defense of laches *cannot* constitutionally be applied to deny reinstatement of direct appeal rights based on delays by those involuntarily unrepresented after being unconstitutionally abandoned by counsel on direct appeal.

Because this case only addresses a claim that Lopez-Quintero was unconstitutionally abandoned by his attorneys for purposes of his direct appeal, WACDL addresses only the constitutional implications of that particular claim on either the timeliness of a habeas petition or the application of laches.[1] Different considerations may or may not apply where the claim is not abandonment by counsel but ineffectiveness in how counsel handled the appeal. *Cf.* ***Smith v. Robbins***, 528 U.S. 259 (2000) (distinguishing unconstitutional abandonment or denial of counsel, which is *per se* prejudicial, from ineffectiveness of counsel, which requires showing of resulting prejudice).

WACDL likewise does not argue here that the mere fact that a defendant may have been abandoned or involuntarily unrepresented in the process of preparing or pursuing the habeas petition requires the same result. Unlike for purposes of the direct appeal, there is no constitutional right to counsel on subsequent post-conviction proceedings. *E.g.*, ***Coleman v. Thompson***, 501 U.S. at 752 (citations omitted); *but cf.* ***Holland v. Florida.***, 560 U.S. 631 (2010) (statute of limitations for federal

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[1] Of course, the same analysis applies regardless of whether counsel abandons an ongoing appeal or effectively abandons the client by failing to perfect an appeal. In either case, the defendant is denied the right to a direct appeal with the assistance of counsel. *See* ***Roe v. Flores-Ortega***, *supra*.

habeas subject to equitable tolling based on failures of habeas counsel).

CONCLUSION

WACDL therefore asks that the Court reject the state's and the lower court's unjustified restrictions on habeas relief, overrule the suggestion in *Smalley* that delay alone is sufficient to deny habeas relief, and clarify, consistent with the Supreme Court's holdings in *Murray, supra,* and *Coleman v. Thomson, supra,* that any delay or other procedural missteps committed by a defendant while unconstitutionally denied the assistance of counsel cannot constitutionally be held against him or her.

Dated at Milwaukee, Wisconsin, September 12, 2018.

Respectfully submitted,

WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
Amicus Curiae

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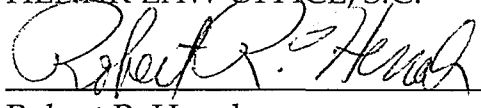

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RULE 809.19(8)(d) CERTIFICATION

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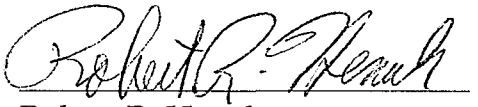

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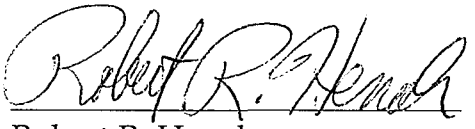

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