

FILED**DEC 29 2022****CLERK OF SUPREME COURT
OF WISCONSIN**

STATE OF WISCONSIN
IN SUPREME COURT

Case No.

STATE OF WISCONSIN EX REL. GARY BOUGHTON, WARDEN,

Plaintiff-Respondent,

Appeal Case No.: 2020AP275-CR

v.

Grant County Case No.: 18-CF-12

DONALD L. WHITE,

Defendant-Appellant-Petitioner.

PETITION FOR WRIT OF HABEAS CORPUS

Defendant-Appellant-Petitioner, Donald L. White, by State Public Defender Regional Attorney Manager Joseph N. Ehmann, petitions this court to grant a writ of habeas corpus on the basis Mr. White was denied his right to effective assistance of counsel when his SPD-appointed appellate attorney, Attorney Jennifer Lohr, failed to timely file a petition for review from the court of appeals decision in *State v. Donald L. White*, 2020AP275 (Opinion issued November 3, 2022), as Attorney Lohr tried, but failed, to timely file paper copies of the petition for review in the Supreme Court clerk's office by 5:00 p.m. on the 30-day December 5, 2022, deadline. Mr. White asks that the court grant his writ and as a remedy deem as timely-filed, and consider on the merits, the petition Attorney Lohr filed one day late on December 6, 2022. In support thereof, Mr. White states as follows:

1. On September 5, 2018, a jury found Mr. White guilty of prisoner throwing or expelling bodily substances at a corrections officer. The court on September 28, 2018, imposed a two-year-and-six-month prison term consisting of one year and six months initial confinement followed by one year of extended supervision. Mr. White successfully petitioned the court of appeals to enlarge the time to file a notice of intent to pursue postconviction relief and Mr. White on February 18, 2019, filed a notice of intent requesting public defender representation.

2. On June 28, 2019, Attorney Jennifer Lohr accepted an SPD appointment to represent Mr. White in postconviction/appeal proceedings. Attorney Lohr ultimately litigated in the court of appeals an issue regarding the circuit court's decision to find Mr. White competent to stand trial.

3. On November 3, 2022, the Court of Appeals, Dist. IV, issued a decision rejecting the defense arguments and affirming the lower court's judgment. *State v. Donald L. White*, 2020AP275 (App. 3-28). With the adverse decision, Mr. White had a right to seek further discretionary review in this court by filing a petition for review. *See* Wis. Stat. § 809.62. Because a petition for review to this court must be filed within 30 days of the date of the court of appeals decision, the deadline for Attorney Lohr to file a petition was December 5, 2022. *See* Wis. Stat. § 808.10(1).

4. As noted above, and as established in Attorney Lohr's affidavit, Attorney Lohr e-filed the petition for review on the evening of December 5, 2022, but due to unexpected printing problems was unable to get paper copies of the petition to the clerk's office in Madison until shortly

after 5:00 p.m. closing. *See* Wis. Stat. § 801.15(1)(b); Attorney Lohr's affidavit (App. 29-30); & *St. John's Home v. Continental Cas. Co.*, 150 Wis. 2d 37, 40, 441 N.W.2d 219 (1989) ("We hold that to be timely, a petition for review must be delivered for filing in this court's clerk's office before 5 p.m. on the 30th day following the date the court of appeals' decision was filed.").

5. On December 27, 2022, this court entered an order dismissing Mr. White's petition for review on the basis it was not timely filed. The court's ruling is correct, the petition was not timely filed. This court should nevertheless review the petition on its merits on the basis Mr. White was denied his due right to effective assistance of counsel when his SPD-appointed appellate attorney failed to timely file the petition.

6. An indigent defendant has a due process right to a direct appeal of his conviction and sentence, and a right to a government-appointed attorney for that appeal. *State ex rel. Flores v. State*, 183 Wis. 2d 587, 604-05, 516 N.W.2d 362 (1994). The right to appellate counsel extends "through the filing of the petition for review and through subsequent proceedings in [the Wisconsin Supreme Court] if the petition for review is accepted." *State ex rel. Schmelzer v. Murphy*, 201 Wis. 2d 246, 253, 548 N.W.2d 45 (1996). The right to appointed appellate counsel encompasses a right to the effective assistance of counsel. *Flores*, 183 Wis. 2d at 605; *Schmelzer*, 201 Wis. 2d at 253. To prove an ineffective assistance of counsel claim, a defendant must establish counsel performed deficiently and the deficient performance prejudiced the defense. *See Strickland v. Washington*,

466 U.S. 668, 687 (1984); *Flores*, 183 Wis. 2d at 620; *Schmelzer*, 201 Wis. 2d at 253. In *Schmelzer* this court ruled when a defendant timely requests a petition for review be filed and the attorney fails to timely file the petition, “there is no question that the performance of counsel [is] deficient.” 201 Wis. 2d at 253. Regarding prejudice, this court has ruled “[i]n the case of *complete* denial of appeal, prejudice is presumed. That is, whenever the ineffective assistance is such as to deprive one *totally* of the right to appeal, the prejudice showing is presumed.” *Flores*, 183 Wis. 2d at 620, (emphasis in original), citing *Strickland*, 466 U.S. at 692, and *Pension v. Ohio*, 488 U.S. 75, 88 (1988). These cases establish failure to timely file a petition for review amounts to a complete denial of the right to appeal, and prejudice in such circumstances is presumed. In *Schmelzer* this court held “that a defendant in *Schmelzer*’s position [whose appointed attorney failed to timely file a petition for review] may petition this court for a writ of habeas corpus, and should the writ be granted, this court has the power to allow the late filing of the petition for review.” *Schmelzer*, 201 Wis. 2d at 255-56.

7. In the case at bar, as established in Attorney Lohr’s affidavit, Mr. White timely requested that a petition for review be filed. Because Mr. White timely informed Attorney Lohr that he wanted to seek further review of his case in this court, Attorney Lohr was obligated to file a petition for review on or before the 30-day filing deadline of December 5, 2022. *See Schmelzer*, 201 Wis. 2d at 255; & Wis. Stat. §§ 809.62(1m) & 808.10(1). Attorney Lohr’s failure to file the petition in this court by 5 p.m. on the December 5, 2022, deadline was deficient performance that prejudiced the

defense in that it resulted in a complete denial of Mr. White's right to seek permissive review of the court of appeals decision in this court. This court, thus, is urged to grant this writ of habeas corpus and as a remedy permit the late filing and consider on the merits the petition for review Attorney Lohr filed on December 6, 2022, one day late.

FOR THE ABOVE-STATED REASONS, the court is asked to grant Mr. White's writ of habeas corpus on the basis Mr. White was denied his right to the effective assistance of counsel when Mr. White's SPD-appointed appellate attorney failed to preserve Mr. White's right to seek permissive review of the court of appeals decision by timely filing a petition for review. As a remedy the court is asked to deem as timely-filed the petition Attorney Lohr filed one day late on December 6, 2022.

Dated this 29th day of December, 2022.

Respectfully submitted,



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