ORIGINAL

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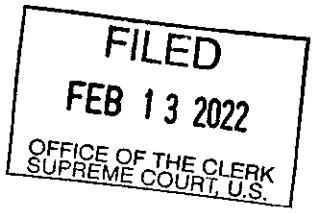

IN THE

SUPREME COURT OF THE UNITED STATES

John L. Jacques --- PETITIONER

vs.

State of Wisconsin --- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

WISCONSIN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

John L. Jacques, # 538578

Oshkosh Correctional Institution

P.O. Box 3310

Oshkosh, WI 54903

QUESTIONS PRESENTED

1. a) Is it sufficient reason for failing to raise new issues in a postconviction motion after first appeal that were not already litigated – that the new issues could have been litigated in the first appeal if not for the complete absence of legal assistance by court-appointed postconviction counsel? b) Is it sufficient reason also that a legal authority supporting the new issue (of the Rule of Completeness applying to something intended to be made viewable from code in electronically stored information) was not accessible by a prisoner. (The legal authority was the Sedona Conference Committee findings intended for attorneys and Judges.)
2. In postconviction, does it matter that a defendant is not informed by appellate counsel about the no merit report option and dangers of self representation verbally?
3. Is data that is contained within electronically stored information that can be readily compiled into viewable information, whether presented on the screen or printed on paper, also a "document" under Rule 34?
4. If electronically stored information is considered on an equal footing with a "document", does the Rule of Completeness apply to electronically stored information?
5. In the case of legal representation of an indigent defendant on first appeal in a state procedure, is it ineffective assistance of counsel when the attorney never speaks with nor communicates in any other way with the defendant, where the only assistance to the defendant is from inexperienced law students?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

- United States v. John Jacques; No. 08-cr-51-bbc; U.S. District Court for the Western District of Wisconsin; Judgment entered: 12-31-2008; 3-11-2009.
- John Jacques v. Jeffrey Pugh, warden; No. 11-cv-789-bbc; U.S. District Court for the Western District of Wisconsin; Judgment entered: 4-4-2011.
- United States v. John Jacques; No. 11-7131; United States Supreme Court; Judgment entered: 12-5-2011.
- John Jacques v. Jeffrey Pugh, warden; No. 12-1616; United States Supreme Court; Judgment entered: 11-2-2012.
- John Jacques v. Jeffrey Pugh, warden; No. 3: 12-cv-904-bbc; U.S. District Court for the Western District of Wisconsin; Judgment entered: 2-27-2013.
- John Jacques v. Jeffrey Pugh, warden; No. 12-8884; United States Supreme Court; Judgment entered: 4-29-2013.
- United States v. John Jacques; No. 3: 12-cv-904-bbc; U.S. Court of Appeals for the Seventh Circuit; Judgment entered: 7-2-2013; 7-16-2013.
- John Jacques v. Jeffrey Pugh, warden; No. 13-1638; United States Supreme Court; Judgment entered: 7-19-2013.
- United States v. John Jacques; No. 13-7214, United States Supreme Court; Judgment entered 12-9-2013.

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Petitioner begs the Court's pardon that due to very limited time because of a lockdown at this prison from the Covid outbreak here, this page could not be finished properly.

STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below:

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

The opinion of the circuit court of La Crosse county, Wisconsin appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was June 10, 2021. A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on the following date: November 17, 2021, and a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

U.S. Constitution, Article III

Section 2. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article III

Section 2. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Constitution, Article VI

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

U.S. Constitutional Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitutional Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitutional Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In the fall of 2007, petitioner Jacques conversed over the internet with an under-aged girl (13 years old) impersonated by a police officer, Crystal Sedevie. Jacques and the officer were using the internet server Yahoo™ messenger to commonly connect.

A few days before the police arrested him, Jacques almost agreed to meet the girl but changed his mind, saying that he had an appointment. The police then sent to Jacques' computer screen a "bawling face" animation; a crying face with little arms moving up and down, tantrum-like (the animations repeat continuously).

Jacques went to the meeting a few days later, was arrested and charged with something like "using the internet to have intercourse with a child". During the status conference (**R. 6**), officer Sedevie admitted that Jacques never talked of any kind of sexual contact with the girl and the charge was changed to "using the internet to facilitate a child sex crime". Sedevie also stated this in cross examination (**R. 41**: p. 133).

The court appointed Mr. John Wabaunsee to represent Jacques, (**R. 4**) 12-13-2007. The state was represented by Tania Bonnett.

The Status Conference entry, (**R. 12**), 03-05-2008 states: "Wabaunsee did get discovery". Within discovery was a CD containing the digital recording which represented the internet conversations between the police officer, Sedevie, and Jacques (**electronically stored information**), (exhibit #23 by the State in trial later, but the clerk's index had no Record #). Also, Mr. Wabaunsee was given a

printout (exhibit #1, 21/22 at trial; **R. 23-32**) of the parts of the electronically stored information that could be printed on paper.

Mr. Wabaunsee showed Jacques the printout at a jail meeting, and Jacques told him that the little fuzzy characters on the printout were in the place of color animations on the computer screen which repeat continuously. Wabaunsee said to Jacques that he wished that he could show the jury the **complete** 'depiction'.

Ms. Bonnett did not tell Mr. Wabaunsee about the existence of the animations, nor did she provide him with any technical assistance about the unique, proprietary computer software application necessary to completely and accurately depict the electronically stored information. During the trial, officer Sedevie revealed that the police and prosecution possessed and used the software application Yahoo™ decoder ex parte to display the conversations completely and accurately (**R. 41**: p. 54):

Trial day 1, p. 54 [Appendix E-22]:

> Q. So you do that in every case?
> A. Yes.
> Q. Okay. And can you produce a printed record of your chats?
> A. Yes. We find it easiest. It's more reader friendly. **We use a program called Yahoo decoder** and all that is is you will see the document and it will print it out in a more reader friendly format. You will see the different colors of inks that the people were using. You will see the smiley faces that get sent back and forth and it will -- it will -- makes it just easier to understand the chronological order.
> Q. I'm going to hand you now what's marked Exhibit number 21. Can you identify that, please?
> A. That is the chats with Ashliee and jackjacq printed off through the -- with the decoder program.
> Q. And have you reviewed that document?
> A. Yes.
> Q And does it appear to be an accurate and **complete** record of your chats with the suspect, jackjacq?
> A. **Yes**, save for that first line that I said that that -- the Yahoo archive does not get. Other than that, it's -- **it's complete**.

Ms. Bonnett pushed her key witness, Sedevie, **two more times** to tell the jurors that the printouts and the display of them on the large courtroom screen were a **complete** and accurate depiction of the conversations, the electronically stored information; that it was exactly as the conversations originally appeared on Jacques' computer screen: (**R. 41**: p. 57),

> Trial day 1, p. 57 [Appendix E-23], officer Sedevie questioned:
>
> Q. Okay. Apart from those two exceptions, being the first line and the one smiley face you've indicated, is this transcript a **complete and accurate depiction** of your chats with jackjacq as Ashliee?
> A. **Yes**.

And (**R.41**: p. 65) Trial day 1, p. 65 [Appendix E-23], officer Sedevie:

> A. (Pause.) Those are the chats between my screen name of Annie and jackjacq printed off using the Yahoo decoder.
> Q And again does that appear to be an **accurate and complete depiction** of those chats?
> A. **Yes**.

Jacques was convicted in a two-day trial on (03-18-08) (**R. 41,42**), and sentenced on (05-05-08) to 30 years, bifurcated (R. 44). Mr. Wabaunsee filed a notice to seek postconviction relief (05-09-08) (**R. 47**).

Before trial, Mr. Wabaunsee asked Jacques if he'd like a different attorney because he intended to retire after the trial was over. Jacques said no.

Also, Bonnett proposed to Wabaunsee before trial that if Jacques pled guilty to the charge, she would not send Jacques' seized laptop computer to the U.S. District Court for the Western District of Wisconsin for prosecution.

After sentencing, Jacques was taken into custody of U.S. Marshals and moved to

a small, very old jail. There he was coerced into pleading guilty using a 5-1/2 month extension until trial on the 70th day after the accusation by the Government. (He was charged with possession of a computer with 6 **deleted** child pornographic images.)

(R. 49) Order from court of appeals to extend deadline, (07-03-08), to appoint defense counsel.

The Frank J. Remington Center of the University of Wisconsin was appointed to represent Jacques in postconviction proceedings (07-28-08). Two students at the Remington Center introduced themselves to Jacques by mail, stating that they and a supervising attorney would be representing him.

(R. 50) Order from court of appeals to extend deadline, (11-26-08), due to a motion by the Remington Center. The new deadline was set to **01-05-09**.

Jacques met with only the two students twice. Jacques asked the students at the first meeting if it would be an argument in an appeal that the prosecution withheld parts of the internet conversations between the police officer and himself from the jury at trial.

In the second meeting, the students informed Jacques that they could find no merit and that Jacques had to decide whether to proceed pro se or nothing further could be done. Jacques told the students that he wanted to proceed pro se if that was the only option for him to argue that the prosecution withheld parts of the internet conversations. In this second meeting, Jacques requested for the students to ask the trial attorney, Wabaunsee, if he would write an affidavit or deposition

saying that he told Jacques that he, Wabaunsee, wished that he could show the many animations that Jacques told him that the police sent to his computer screen. The animations, it is asserted, were no less important for the jury to see than the plain text that the prosecution depicted on paper and the large courtroom screen.

(R. 52) Motion by the students for time extension; (dated 01-26-09 & filed 01-29-09).

This motion for extension, written by the students, is important to Jacques' Wis. Stat. § 974.06(1) motion to vacate. The motion to vacate is the base of the appeal denied by the State court of appeals, which is now petitioned for Writ of Certiorari. Appendix E, Jacques' motion to vacate, on pages 4 & 5, shows paragraphs 2-6 of the students' motion for extension; following are pertinent parts:

> ¶4 of the motion for extension: "After reviewing the trial attorney's material, Attorney Cooley and his students concluded that there were no issues of arguable merit. Law students Butler and Kind then visited Jacques in person shortly before Christmas, informed him of their conclusion, and advised him of his options. The students then informed Attorney Cooley that *they believed* Jacques wanted to discharge CAP from representation and appeal *pro se*, but that Attorney Cooley should visit Jacques in person to further discuss his options. Attorney Cooley informed the students that he would do so. The students then left for winter recess, believing that Attorney Cooley would be able to facilitate **the necessary steps.**
> ¶5: "Unfortunately, Attorney Cooley began experiencing debilitating health problems around that time. He became unable to visit Jacques or to take any further action on Jacques' case. Thus, the January 5 deadline passed without any further activity.
> ¶ 6: "Attorney Cooley's fellow **CAP attorneys did not discover that the deadline in Jacques' case had passed** until the students returned from winter recess on January 20 and learned that Attorney Cooley had not had the opportunity to visit Jacques, and had not requested any additional extensions. Upon learning of this, Byron Lichstein (director of CAP) and students Butler and Kind called Jacques and informed him of the situation."

[This call was the only time any attorney from the Remington Center communicated with Jacques, a 10 minute 'farewell' conference phone call, along with the two law students on the attorney's end. Movant]

(R. 53): Order of the Court of Appeals to extend time **and** dismissing the Remington Center from representing Jacques.

From January to May, 2009, Jacques was held at Dane Co. jail then Dodge Correctional Institution in maximum security. There was no opportunity for legal research. The deadline was extended for postconviction relief **(R. 54)**.

(R. 55): Jacques files motion for postconviction relief. He wrote the19-page motion on typing paper using a 1/8 in. diameter flexible insert from a ballpoint pen; the rest of the pen was not allowed. The first two pages of that motion were/are appended to the copy of Jacques' petition for Review to the State Supreme Court, Appendix D of this Petition.

(R. 57): Motion for postconviction relief denied.

The stark environment that Jacques was in and had to write and submit the motion for postconviction relief in, was the reason that there were no Authorities nor Rules of Law in the argument, and that there were many conclusory statements. These were the essential reasons that the Circuit Court gave for denial; and "the 5 w's and the h" it stated, meaning that Jacques didn't show that any harm occurred from the asserted Discovery violations and Sedevie's perjury.

(R. 58): Notice of Appeal filed, 7-29-2009.

(R. 64): Motion by the State to vacate and remand for new decision, 11-30-2009.

(R. 65): Court of Appeals' decision and order reversing, 12-03-2009.

(R. 66): Circuit Court denies State's motion to vacate, 12-22-2009.

(**R. 67**): Notice of appeal filed by Jacques again, 12-31-2009.

(**R. 75**): Court of Appeals affirms Circuit Court's judgment, 3-10-2011.

(**R. 81**): State Supreme Court denies petition for review, 6-16-2011.

In 2015, Jacques sent a letter to the Remington Center requesting any information about the period that the two students were representing Jacques, such as the two dates that they visited Jacques in jail. The respondent stated that she could only find the dates of letters sent to Jacques, and listed them in response.

Late in 2016, Jacques sent to the Remington Center a properly completed Open Records Request form, and there was **no response**. Jacques filed a motion to enforce Discovery with the State Court of Appeals.

(**R. 84**) 7-27-2017: The Court of Appeals denied the motion, reasoning that there was not an open case at the time.

On 11-02-2017, Jacques filed a Wis. Stat. §974.06 motion to vacate in the Circuit Court of La Cross.

In April of 2018, after no decision from the Circuit Court, Jacques' sister printed out a copy of the Circuit Court docket on the case to find out if the Court had made a decision. The docket showed that the "Motion sent up to Br3", which is the court branch where the trial took place.

In April of 2019, Jacques sent a letter to the clerk of the Circuit Court requesting the price for a printout of the docket sheets of the case (to see if there was any new activity and to have the Circuit Court's letter-head date-stamped on the pages). Jacques' sister paid for the copies and postage, and with the copies sent by the clerk, the clerk stated in a note to Jacques: "I do want to let you know there

was a motion you filed that was lost in transition from our office to the Judge."

On May 9, 2019, Jacques sent a Petition for Supervisory writ to the State Court of Appeals, 05-16-2019. (The note from the clerk mentioned in the last paragraph was appended to that petition and is here in Appendix page E-5.)

On Aug. 15, 2019: Order of the Court of Appeals – IT IS ORDERED that the writ petition is denied ex parte.

On Sept. 12, Jacques filed a Motion to vacate again in the circuit court.

REASONS FOR GRANTING THE PETITION

In the State Court of Appeals' order summarily affirming the circuit court's order denying petitioner Jacques' motion to vacate his conviction, on page 2, ¶4 it states:

> "As far as we can determine from Jacques' current postconviction motion and appellate briefing, the issues that Jacques now raises are substantially the same issues that were already litigated in his previous appeal. We decline to address those issues on the merits."

And on page 3, ¶1 it states:

> "To the extent that Jacques' current postconviction motion or appellate briefing might be viewed as raising new issues that were not already litigated, we agree with the State that such new issues are procedurally barred because Jacques has not alleged a "sufficient reason" for failing to raise those issues previously."

When Jacques had to write his motion for postconviction relief after the Court of Appeals dismissed his court appointed counsel, he was unread in legal matters and had no access to legal material in maximum security confinement; not even access allowed to "settled" maximum security prisoners (initiation confinement).

The circuit court denied the motion because it contained no Rules or Authorities and was conclusory.

In the short time to write his appellate brief in 2009, Jacques searched for rules and authorities about electronically stored information. The large Georgetown Law Journal summary of cases had plenty on Discovery but nothing on electronically stored information.

Jacques cited Federal Rule 34 and the Notes of the Advisory Committee on 2006 Amendments to Rule 34 (**R.** 69, p. 15-19), 1-12-2010, hoping that the Court of

Appeals would consider carefully ¶13 of the Committee notes concerning Discovery of electronically stored information, technical support for the 'respondent' of discovery request, information on application software, and "other reasonable assistance to enable the responding party to use the information".

The Court of Appeals denied Jacques' appellate brief for lack of authorities, and adding the misstatement provided by the State's Response that Jacques had admitted that he knew of a software application that could completely and accurately depict the electronically stored information.

"Sufficient reason[s] for failing to raise those issues previously"

Jacques' court appointed attorney never said anything to Jacques before being dismissed by the Court of Appeals.

In both denial opinions of Jacques' 2009 postconviction motion and 2010 appellate brief, the courts stated that Jacques could not explain the materiality of the animations withheld from the jury.

Jacques' 2019 (**R**. 88) motion to vacate cites significant new information found in an obscure Federal case: The "Sedona Conference Committee" findings on Discovery of electronically stored information (**R**. 88, p.13,14). These findings are meant only for attorneys and Judges; not accessible to a prisoner.

It is contended that with some diligence, the appointed attorney could have found this and would also have knowledge of the Rule of Completeness in 2009-2010.

(**R**. 88, p.13,14) [2019 motion to vacate]:

Shirley Williams, et al., v. Sprint/United Management Company, 230 F.R.D. 640 (2005), [The issue in that case was whether a party is required to produce the document with 'metadata' intact. The embedded codes for the animations are **not** the same as 'metadata']:

> 230 F.R.D. 640, at 646:
> "Metadata, commonly described as "data about data", is defined as "information describing the history, tracking, or management of an electronic document."
>
> [*650] "**Comment 9.a.** to the Sedona Principles for Electronic Document Production focuses on the scope of a "document" under Fed. R. Civ. P. 34. It notes that although Rule 34 was amended in 1970 to add "data compilations" to the list of discoverable documents, there was no suggestion that "data compilations" was intended to turn all forms of "data" into a Rule 34 "document". The comment suggests that the best approach to understanding what constitutes a "document" is to examine what information is readily available to the computer user in the ordinary course of business.
> If the information is in view, it should be treated as the equivalent of a paper "document". Data that can be readily compiled into viewable information, [*651] whether presented on the screen or printed on paper, is also a "document" under Rule 34."
>
> [*652] "While recognizing that the Sedona Principles and comments are only persuasive authority and are not binding, the Court finds the Sedona Principles and comments particularly instructive in how the Court should address the electronic discovery issue currently before it. "**Comment 9.a.** to the Sedona Principles for Electronic Document Production approaches discoverability based on what constitutes a "document" under Rule 34. This comment uses **viewability** as the determining factor in whether something should be presumptively treated as a part of a "document"."

The Wisconsin statute related to Federal Rule 34 is:

> Wis. Stat. § 804.09 Production of documents and things and entry upon land for inspection and other purposes.
> (2) Procedure.
> (b) If a request does not specify a form for producing **electronically stored information**, a party shall produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms;

Federal Rule 34, "Notes of Advisory Committee on 2006 amendments" states the following on discovery of electronically stored information. [¶13 parallels Wis. Stat. § 804.09 (2)(b), and extends to reasonable technical assistance.]

> ¶1 Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents.
>
> ¶13 If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. Rule 34(a) requires that, if necessary, a responding party "translate" information it produces into a "reasonably usable" form. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information.

The animations withheld from the jury (and proprietary software application used by the State ex parte) were something viewable and it is contended that they are, in Discovery terms, part of the "document". And it is contended that the Rule of Completeness gives the respondent of the discovery request the right to the complete depiction of the electronically stored information.

Another authority not findable back in 2010 is the "Judicial Expectations of Counsel" in the U.S. District Court of the Eastern District of Wisconsin, *Travelers Property Casualty Company of America v. Cannon & Dunphy, S.C., 997 F. Supp. 2d 937*, at *947:

> "Principle 3.01 Because discovery of electronically stored information is being sought more frequently in civil litigation and the production and review of electronically stored information can involve greater expense than discovery of paper documents, it is in the interest of justice that all judges, counsel, and parties to litigation become familiar with the fundamentals of discovery of electronically stored information."

The issue of electronically stored information was addressed by Justice Abrahamson in *Custodian of Records v. State* (In re Doe), 2004 WI 65, [*P61]:

> "In 2004, most information is kept in digital form, and discovery, preservation, and production of electronic information is one of the leading legal issues facing not only corporate America but also government. Reform in discovery, including electronic discovery, is a priority in several jurisdictions. This court has not previously confronted the issue of discovery of electronic data."
>
> And [*P64]: "The majority opinion does not recognize the special problems in production of electronic information or give guidance to the judge or the parties about these unique issues."

"Whether and when must a criminal defendant be informed

Of the option of a no merit report"

In *State of Wisconsin ex rel. Ford v. Mike Holm*, warden, 2004 WI App. 22, on P.2:

> "An indigent defendant is constitutionally entitled to the appointment of counsel at public expense for the purpose of prosecution his or her "one and only appeal ... as of right" from a criminal conviction. **Douglas v. California**, 372 U.S. 353, 357-58."

And on P. 4:

> "After appointed postconviction **counsel** has reviewed the transcripts and record, he or she must confer with the defendant regarding the defendant's right to appeal, the potential merit or lack of merit thereof in pursuing either a postconviction motion or appeal, and if applicable, the availability of the "no-merit option". See ***Flores***, 183 Wis. 2d at 605-607."

In *State ex rel. Flores v. State*, 183 Wis. 2d 587, at *605:

> "A threshold question in this case is whether and when must a criminal defendant be informed of the option of a no merit report under sec. (Rule) 809.32, Stats. The option of a no merit report is set forth in sec. (Rule) 809.32, Stats."

And at *606: "Accordingly, it follows that a criminal defendant must be informed about the no merit option when it becomes relevant to the defendant's decision as to how to exercise the right of appeal."
And also at *606: "Ineffective assistance of counsel would be found were counsel to close a file because of no merit when the criminal defendant does not know of the right to disagree with counsel's assessment and thereby compel counsel to submit a no merit report."

And at *620: "It does not matter how or in what manner the defendant is so informed [of options when counsel finds no merit]." ... "There is no requirement that Mr. Flores be informed about the no merit report verbally at the time of his discussion with counsel about the lack of merit to his appeal. All that is required is that the information is conveyed to him. If there is evidence that he was informed once, by whatever means, there is no need that he be repeatedly informed," ... "There is undisputed evidence on the record that Mr. Flores was in fact informed of his appellate rights, and about the no merit option, through the initial mailing to him from the Office of the State Public Defender. The Office of the State Public Defender [*611] routinely delivers a packet of information entitled "Information for Clients" in its initial mailing to each new client." ... "Within this packet there is a **brief description** of the various options on appeals.
And at *614: "We conclude that a criminal defendant may be informed about appellate rights **through the use of written materials**. Once so informed, **the information need not be repeated verbally**."

Wis. Stat. 809.32(1)(b) Counseling and notification

1. Prior to the filing of a no merit report, the **attorney** shall discuss with the person all potential issues identified by the **attorney** and the person, and the merit of an appeal on these issues. The **attorney** shall inform the person that he or she has 3 options: [a.; b.; c.]

In *State v. Evans*, 2004 WI 84, *P. 31: "If a defendant elects the former option and desired to proceed pro se, "the defendant must be provided clear warnings regarding the dangers of self-representation and waiving the right to appellate counsel before appellate counsel may withdraw." *State v Thornton*, 2002 WI App. 294, P. 21."

Jacques' motion to vacate, (which the Court of Appeals affirmed the circuit court's denial of), began with the following:

"This motion is pursuant to Wis. Stat. § 974.06(1). The authority for presenting this motion in the Circuit Court is State v. Balliette, 2011 WI 79:

> [*P32] "To bring a postconviction motion alleging ineffective assistance of appellate counsel, a defendant is required to file a petition for [writ of] habeas corpus with the appellate court that heard the appeal. State v. Knight, 168 Wis. 2d 509, 520, 484 N.W.2d, 540 (1992). When, however, the conduct alleged to be ineffective is postconviction counsel's failure to highlight some deficiency of trial counsel in a § 974.02 motion before the trial court, the defendant's remedy lies with the circuit court under Wis. Stat. § 974.06 or a petition for habeas corpus. Rothering, 205 Wis. 2d at 679, 681. [State ex rel. Rothering v. McCaughtry, 205 Wis. 2d 675]"
>
> "This motion alleges a violation of the U.S. Constitution and the State Constitution by ineffective assistance of movant's postconviction counsel. The conduct of postconviction counsel alleged to have been ineffective was their failure to find and argue that there were significant deficiencies of defense counsel in the trial proceedings and prosecutorial misconduct."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John Jacques

John L. Jacques

Date: February 14, 2022