No. 21-7200

IN THE

SUPREME COURT OF THE UNITED STATES

John L. Jacques --- PETITIONER

vs.

State of Wisconsin --- RESPONDENT

Petition for Rehearing of The Court's Order

Denying petitioner's Petition for Writ of Certiorari

John L. Jacques, # 538578

Oshkosh Correctional Institution

P.O. Box 3310

Oshkosh, WI 54903

Brief background: After conviction and sentencing, the state public defenders' office appointed the Remington Center of the University of Wisconsin to represent Jacques for postconviction. The representation consisted of an attorney and two law students. The attorney never spoke with Jacques; never met with him; nor wrote any letter to him.

In their second motion for time extension, the two students told the state court of appeals that they thought that Jacques wanted to dismiss the Remington Center and proceed in postconviction pro se. The students stated, ¶4 of the motion: "but that the Attorney Cooley should visit Jacques in person to further discuss his options." And in ¶5: "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."

The students' motion for extension is case record **R:52**, 1/29/2009; (on page 4,5 of Appendix F, the Wis. Stat. §974.06 motion to vacate).

The Wis. Stat. §974.06 motion to vacate [which the state court of appeals affirmed the circuit court's denial of] began with the ground that Jacques' right to competent postconviction counsel on first appeal was violated, in that the appointed attorney: never spoke with; never met with; and never wrote to Jacques.

> ***State v. Allen***, 328 Wis. 2d 1(?) ¶22: "Section 974.06(1) allows prisoners to move to vacate, set aside, or correct a sentence where the prisoner is claiming (1) his sentence was imposed in violation of the constitution;

In the students' motion for extension, **R:52**, ¶4,5, they state that the attorney was not ever able to meet with Jacques to discuss the defendant's options.

The rest of the motion to vacate concerned: what the trial defense attorney missed doing; how the state took technical advantage of him with the state's main evidence in the form of electronically stored information; and impeachable testimony by the state's key witness that was not brought to light to the jury. This was mostly new information which a competent attorney would have found, but that Jacques could not find for his pro se first appeal, some was only findable by an attorney such as the Sedona Conference Committee findings on Discovery of electronically stored information.

The state court of appeals **did not** consider the ground of the motion to vacate that Jacques' attorney did not discuss a defendant's rights on appeal, including the option to file a no-merit report. The court of appeals only dwelled on its single issue: that Jacques previously argued that the electronically stored information included codes that represented things that were **viewable** (which the state did not show to the jury), and that the state should have provided the proprietary computer software application to the defense, which it used ex parte.

In ***State of Wisconsin ex rel. Ford v 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 purposes of prosecution of 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 v. Evans***, 2004 WI 84, P. 31:

> "If a defendant elects the former option and desires 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."

In ***State v. Louis J. Thornton***, 259 Wis. 2d 157, at *173:

> "On a distinct but related issue of how appointed counsel, after concluding there is no merit to further postconviction or appellate proceedings on behalf of a client, should document the client's decision to waive an appeal, the Wisconsin Supreme Court has declined to make any particular method of documentation mandatory." ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 624."
> "The court explained that the record must reflect that the defendant was informed of the right to appeal and of the right to counsel, as well as of the "No Merit report option" under ***Anders v. Calif.***, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2d 493 and Wis. Rule 809.32. However, "it does not matter how or in what manner the defendant is so informed" Id. at 610.

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 *610: "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.]

Finally, Jacques' motion to vacate 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:

> "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."

Respectfully submitted,

John Jacques

John L. Jacques

Date: May 12, 2022

No. 21-7200

IN THE

SUPREME COURT OF THE UNITED STATES

John L. Jacques --- PETITIONER

vs.

State of Wisconsin --- RESPONDENT

Certification of Good Faith by petitioner

I, John Jacques, petitioner, declare that this petition for rehearing of The Court's order denying a petition for writ of certiorari is presented in good faith and not for delay.

During the period after the state supreme court entered its order denying discretionary review until the deadline to file a petition for a writ of certiorari, the prison that the petitioner was (and is) in had its second outbreak of corona virus and was "locked down" for about a month, followed by severe restrictions on prisoner movement.

In last minute haste by the prison librarian, the Table of Authorities could not be done, the state appeal brief was neglected to be included, and there was not enough time to insert some citings in the petition for writ of certiorari.

John Jacques

John L. Jacques, petitioner