In The Supreme Court of the United States

MACKING NETTLES, PETITIONER

No. 18-6147

v.

CONNIE HORTON, WARDEN

//

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF
TO BRIEF IN OPPOSITION

Macking Nettles 271812
pro se
Chippewa Correctional Facility
4269 West M-80
Kincheloe, Michigan 49784

QUESTION PRESENTED

I. Whether a substantive mental incompetency claim — a radical jurisdictional defect — can be procedurally or time barred, state or federal, as there is a circuit split on both factors although, in any event, petitioner has clearly shown a "casual link" between his distorted perception, due to an unknown mental disease or defect, and his untimely filing for two AEDPA time periods, the first involving government interference or extraordinary circumstance where the trial court, during the guilty plea, misinformed petitioner that he could not seek appeal in telling him that he was giving up his right to leave to appeal by pleading guilty, to which a mentally incompetent petitioner affirmed, thus, never seeking any appeal which ultimately resulted untimely filing the first period.

PARTIES TO THE PROCEEDING

The only parties are those in the caption: Macking Nettles, a Michigan State prisoner; the respondent Connie Horton, Warden of a Michigan correctional facility.

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OPINIONS BELOW

Same as stated in Brief In Opposition (Br. In Opp.).

JURISDICTION

Petitioner and State of Michigan agree this Court has jurisdiction.

STATUTORY PROVISIONS INVOLVED

AEDPA 28 U.S.C. 2244(d).

INTRODUCTION

The State agrees a circuit split exists as to whether a substantive claim of mental incompetency — a radical jurisdictional defect — can be procedurally defaulted, but that no split exists on whether the competency claim is subjected to the AEDPA time period. A circuit split also exists on latter, e.g., Settle v. Sec'y Fla. Dept. of Corr., 2015 U.S. Dist Lexis 125892, 9 (Middle Dist. of Fla., 2015), holds, "Even though the habeas petition is untimely, petitioner's claim that he pled guilty while mentally incompetent [as at hand] is not barred from habeas review." Footnote thereto adds: "The exception has traditionally been applied where the claim was procedurally defaulted in state court... Nonetheless, in an abundance of caution, the Court will assume that the exception also applies to petitions that are untimely under the AEDPA's statute of limitations," precisely meaning the 11th Circuit will not apply the AEDPA time period to the substantive mental incompetency claim "in an abundance of caution." Id. Also is, Simon v. Giles, 2015 U.S. Dist Lexis 36695, holding, "It is therefore clear [defendant's] substantive claim of mental incompetency is not subjected

to the federal period of limitations," thereby creating a circuit split although the 11th Circuit had not had this type of case but made clear its position is it will not apply the AEDPA time period to a substantive mental incompetency claim "out of an abundance of caution". Settle, supra. With two opposing views between the 6th and 11th Circuits, that indeed creates a circuit split, needing this Court's clear resolution regarding the most fundamental right of every citizen, only to be tried while competent, a radical defect otherwise, and can be raised anytime.

STATEMENT OF THE CASE

The State claims petitioner simply chose to wait seven years postconviction (from sentencing in 1998-2005) to request appellate counsel (Br. In Opp., p 4). Not true. When, as at hand, the trial court tells a mentally incompetent defendant during plea-taking that he was giving up his leave to appeal by pleading guilty — in other words, he cannot seek appeal by taking a plea — to which a mentally incompetent defendant, before going unresponsive, affirms, thus, never seeking appeal as he takes heed to the seriously erroneous advising of the trial court, in effect, causing loss of his appeal and then untimely filing — as he has to appeal to the state courts first — is irrefutably government inteference demanding equitable tolling for the period of 1999 thru 2000 (Br. In Opp., p 7-8), as the evidence substantiates that petitioner's distorted perception due to mental incompetence had continued from the guilty plea proceeding worsened by sentencing and existed thereafter not only up to 2005 when he requested appellate counsel but continued on throughout 2011 as proven by other records, thus, causing his untimely

for the period of July 2010 – July 2011, the second limitation period for which the State argues petitioner is not entitled equitable tolling (Br. In Opp., p 12-13).

REASONS FOR GRANTING THE PETITION

A. A substantive mental incompetency claim is a radical jurisdictional defect, thus, exempt from procedural and time bars.

B. In any event, petitioner establishes he is entitled equitable tolling for both periods the State argues: 1999 – 2000 and 2010 – 2011 (Br. In Opp., p 7-8; p12-13).

A.
A SUBSTANTIVE MENTAL INCOMPETENCY CLAIM IS A RADICAL JURISDICTIONAL DEFECT, THUS, EXEMPT FROM PROCEDURAL AND TIME BARS

Jurisdiction is "the court's statutory or constitutional power to adjudicate [a] case." United States v. Cotton, 535 U.S. 625, . Jurisdictional defect is "A defect, whether of omission or commission, in process, pleading, parties, or procedures which deprives the court of jurisdiction," Balentine's Law Dictionary, e.g., "[mental incompetency] divests the court of jurisdiction," People v. Superior Court (Marks), 234 Cal App 482, 490, therefore, "Unquestionably, the state is powerless to undertake the criminal prosecution of a mentally incompetent defendant. MCL 330.2022," People v Parney, 74 MA 173, 176. "Powerless" means no jurisdiction, thus, a substantive mental incompetency claim is a jurisdictional defect, as "[the claim] asserts that the defendant's due process rights were violated because he was tried while mentally incompetent," Williams v. Calderon, 48 FSupp2d 979, 990; "the error asserted by

the defendant — his competency to stand trial — goes to the heart of the conviction and jurisdiction of the convicting court." People v Tubbs, 64 MA 341, 346. The jurisdictional defect here is radical because it renders the conviction absolutely void, Moses v. Dept. of Corr., 274 MA 481, 485-86, amounting to "a jurisdictional defense [which] is a complete defense, that is, a defense that would bar conviction even if the people proved their case," People v Davis, 123 MA 553, 555, e.g., "...claims challenging the jurisdiction of the court to adjudicate defendant's guilt, such as mental incompetence claims to enter plea [as at hand]... they are similar to jurisdictional defenses in that there should have been no trial [or plea] at all." Bulger v. Curtis, 328 FSupp2d 692 (E.D. Mich 2004)(very circuit in question here). Jurisdictional defenses, such as substantive mental incompetency claims, must be reversed regardless of anything else, People v Johnson, 396 Mich 424, 443, 444-45, citing, Menna v. New York, 423 U.S. 61, 62, thus, a "Defendant may always challenge whether the State had a right to bring the prosecution in the first place," Johnson, supra, 442, as "jurisdiction can never be forfeited or waived," Cotton, supra, 630, e.g., "MCR 6.508...permits jurisdictionally based challenges to be raised after [exhaustion or expiration of appeals]." People v Carpentier, 446 M 27, 29. MCR 6.508(D)(3) states in relevant part: "...The court may not grant relief to the defendant if the motion... alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal... or in prior motion..." which precisely says jurisdictional defects can be raised anytime, therefore, the court erroneously denied petitioner's third 6.500 motion for relief

from judgment raising for the first time his competency claims (Appx EE), e.g., Carpentier, supra, 30, as well as the federal courts in denying review of the claims, as "A claim that one has been convicted while he was without competency to stand trial, which has not had previous adjudication, is not ordinarily subject to deposition without an evidentiary hearing, unless it can be held to be wholly devoid of any substance, not on the basis of exercised judgment but as a matter of clear legal frivolousness," Rhay, 884, which is by no means the case before you.

B.

IN ANY EVENT, PETITIONER ESTABLISHES HE IS ENTITLED EQUITTABLE TOLLING FOR BOTH PERIODS THE STATE ARGUES: 1999-2000 and 2010-2011 (Br. In Opp., p 7-8; p12-13)

Here, petitioner first establishes his incompetency during the proceedings, as his distorted perception due to mental incompetence had clearly continued from the proceedings, untreated and ignored, thereafter throughout the years up to, but stopping at, 2011 actual evidence shows causing his untimely filing.

Petitioner's substantive incompetency, his competency to enter a valid guilty plea, is established by presenting sufficient facts to create a real, substantial, and legitimate doubt of competency to stand trial, Williams, supra, 990 n7-9. Evidence never presented to the trial court is permitted. Therefore unquestionably petitioner's substantive competency is violated in view of (Appx; C-N, BB), evidence the state tries to downplay as "random pages of transcripts" and "self-prepared documents" (Br. In Opp., p 14). However, "the court must accept as true all evidence of incompetency since it may

find such evidence not credible only after the actual competency hearing," Evans v. Raines, 534 FSupp 791, 795. In other words, petitioner cannot be called a liar regarding his statements, etc., when no one yet at any point has asked him anything about anything. Furthermore, evidence of incompetency may come from a variety of sources, e.g., Nick v. U.S., 874 FSupp 591, that can be from childhood, the offense itself, the PSR, all the way to the expiration of parole, e.g., Khay v. White, 385 Fed 883, 884, Anderson v. Yist, 1995 U.S. Dist Lexis 334, People v Whyte, 165 MA 429, emphasizing that while expert opinions and diagnosis are helpful, they are not essential to make out a prima facie showing of mental incompetence. Johnson v. Lindamood, 488 Fed Appx 394 (6th Cir.)(very circuit in question here), yet it ruled petitioner did not present all kinds of medical records in comparison to another case (Appx, AA). But for the trial court utterly ignoring substantial evidence establishing petitioner's procedural incompetency, petitioner would, in fact, have expert opinion, etc., which brings up:

Petitioner's procedural incompetency, unlike his substantive incompetency above, is limited to evidence known, or should have been known, by the court which should have alerted the court to the possibility petitioner might be mentally incompetent. He need not show actual incompetency, just the possibility, requiring the court to inquire into his competency on its own motion. Lokos v. Capps, 625 Fed 1256, 1267 n 8-10. Objectively viewing the evidence in light of each other, unquestionably petitioner's procedural

incompetency is violated where the court ignored sufficient evidence (Appx, C – I; BB (abnormal memory)).

Now that petitioner's competency to both plead and be sentenced is established, to better understand and see that his distorted perception due to mental incompetence had continued from the proceedings and thereafter years later which caused his untimely filing, it is necessary to point out the pattern of his distorted perception before, during, and following the plea.

Petitioner's distorted perception due to a mental disease or defect begins with his 911 call immediately following offense with petitioner, a 26-year-old then, confused of his own name as he tried to state it, then told by the operator to spell his name, he responded with, 'Michael, Michael Nettie' (Appx F), clearly not his name and not perceiving accurately what is told him. Fast forward three months later and he affirms the trial court misadvising him during the guilty plea that he was giving up his leave to appeal by taking a plea, unquestionably a misperception of facts (Appx C). About two weeks later off record, petitioner asked counsel, 'Did I actually kill somebody?,' emphasizing this was after having plead guilty, to which counsel replied, "yes," and, after petitioner dropped his head back down, quiet, counsel added, "You seem different than all my other clients," to the effect petitioner was odd or strange (Appx. K p3). A day later at sentencing, the court now correctly advises petitioner his appellate rights—although never mentioning having misadvised him of it prior to, during

the guilty plea — however, petitioner's procedural competency was at issue as shown above, ante, 6-7, thus, divested the court of jurisdiction to proceed without inquiring his competency, Superior Court, supra; in other words, the fact the court made no inquiry into petitioner's competency at sentencing in view of sufficient doubt, advising him his appellate rights, etc., is all void, the entire proceeding, Lokos, supra, 1261 n3, as the court cannot say whether petitioner even understood being advised his appellate rights, especially given the fact the court never asked or received a response from petitioner as to this (Appx O), and certainly the court cannot presume he understood, as presumption went clear out the window when petitioner, during the guilty plea, affirmed the trial court misinforming him he was giving up his leave to appeal by pleading guilty, revealing his complete confusion (Appx C). In fact, this required the court to also do a retrospective determination of petitioner's competency to plead two weeks earlier, as his procedural competency called into question his substantive competency, e.g., Wojtowicz v. United States, 550 Fed 786, 791, citing, Saddler v. United States, 531 Fed 83, 86-87 n4-7.

In the end, it would be 7½ years later that reveals what petitioner perceived of the court advising him his appellate rights at sentencing, and that is made known by his letter to the court in 2005 in which he states he was denied appellate counsel at sentencing (Appx L). This, being stark contrary to facts, confirms his out of touch with

reality at sentencing and that his mental condition, ignored and untreated, had worsened over the proceedings as proven by the pattern just shown.

Moreover, the fact seven years postconviction he was still of the distorted perception of being denied appellate counsel at sentencing is affirmative proof, the letter confirms, that his distorted perception due to mental incompetence had continued from the proceedings up to that point seven years later in 2005 along with the misperception of unable to appeal as he had not sought any appeal, having affirmed the trial court misadvising him he could not seek appeal (Appx C). So, when the State says petitioner presented no evidence of incompetency following the conviction and sentence is to ignore his letter, not giving proper weight and consideration to it, proving his distorted perceptions from the proceedings still existed in 2005, thus, there is a continuity from one period to the next, a "casual link" between his mental condition, distorted perception, and untimely filing for the intermediate federal period 1999-2000 (Br. In Opp., 7-8), See Ata v. Scutt, 662 F3d 736, 741 (6th Cir. 2011), re-iterating government interference by the trial court misinforming petitioner he could seek no appeal, as he was giving up his leave to appeal (Appx C), which certainly attributed significantly to petitioner's untimely filing in addition to his distorted perceptions.

More importantly, petitioner's chronic distorted perception did not stop in 2005 with the letter. Other records prove his distorted

perception continued and caused his untimely filing in 2011 (Br. In Opp., p12-13). So, to the State asserting even if petitioner be granted equitable tolling for 1998-2005, he would still be six years too late (Br. In Opp., p 12-13), not true. The State says the second period went from the conclusion of his first 6500 motion for relief from judgment in July 2010 to July 2011 (Br. In opp., p 13). However, records show that petitioner's chronic distorted perception this time was being denied appeal by leave that he asked appellate counsel about filing before his 6500 in 2007 (Appx CC), but when counsel failed to, petitioner's pro se second 6500 raised this issue as proven by the denial of reconsideration stating the issue raised (Appx DD)[1], as the second 6500 was filed October 2011. Therefore, as appellate counsel was appointed for a 6500, petitioner's distorted perception of being denied appeal by leave ~~went~~ from, but not limited to, 2007 (when asking counsel to appeal by leave (Appx CC, FF)) to 2011 (when raising issue in second 6500 (Appx DD). The period of distorted perception, 2007 - Oct 2011 encompasses the limitation period July 2010 - July 2011 (Br. In Opp., p 13), thus, causing his untimely filing, entitling equitable tolling. Ata, ~~I~~ d.

Now both periods require equitable tolling: 1999-2000 and July 2010 - July 2011 (Br. In Opp., p 7-8; p 12-13).

Petitioner's third 6500 raised his competency claims which was erroneously denied, being jurisdictional, ante, 4. He then raised same claims in a state habeas up to the Michigan Supreme that rejected it (Appx GG).

[1] This confirms his distorted perception that he should have an appeal by leave 13 years post-conviction, and his distortion only increased by the court affirming he could only seek leave to appeal in 2005 (Appx HH); in actuality petitioner could not. This is the second time court misinformed petitioner of his appeal: first being he cannot appeal, when could (Appx C); then he could, when he could not (Appx HH).

Months later petitioner filed a federal habeas of same competency claims, now before this Court.

As the State admits, petitioner filed multiple motions, reconsiderations, etc., many rejected as "improperly filed" the State asserts (Br. In Opp., p 15). As his persistence shows diligence, his many "improperly filed" motions, etc., speaks moreso to incompetence than competence. And it makes no difference that petitioner implied or stated he was competent after 2005 of the letter (Br. In Opp., p12) because if the Court gives petitioner equitable tolling up to 2005 due to mental incompetence, he would be deemed mentally incompetent until, and only until, he receives a proper evaluation, not because petitioner states he is competent, e.g., U.S. v. Hemsi, 901 Fed 293, 296 (Court deemed defendant incompetent; defendant argued and appealed he was competent, to no avail). Thus, petitioner stating he is competent is meaningless.

In the end, no one can say when a defendant will gain competency. "Mental illness does not generally begin or end abruptly" Artz v. Burton, 2014 U.S. Dist Lexis 96641, and while mental diseases may improve, mental defects do not. United States v. Cortes-Crespo, 9 MJ 717 1980 CMR Lexis 606. So, setting an arbitrary time on an issue that is exempt from procedural and time bars would be substantially prejudice to a mentally incompetent defendant, especially a one-year period, as the State allows more time than that, giving 15 months, 330.2031, but if competency is not still gained, then civil procedures

can be sought, thus, proving a blanket set time limit cannot be placed on competency which has numerous veribles such as whether it is a mental disease or defect, the severity, treatment, reoccurences, etc., that preclude the inhumanity of setting a time limit on a mentally incompetent defendant to attain competency and then appeal issues that actually arose while incompetent. Clearly, Congress did not intend for this cruelty by the enactment of AEDPA.

Petition calls for granting.

CONCLUSION

There are double circuit splits on the most serious Constitutional right there is — mental competency to stand trial. The splits need a clear Supreme Court resolution. Petition calls for granting.

Dated: 1-5-19

Macking Nettles 271812

Equitable tolling is appropriate when a petitioner can show: "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). But "equitable tolling is used sparingly by federal courts," and the party seeking it bears the burden of establishing an entitlement to it. *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010). Nettles argues that his petition should be equitably tolled due to mental incompetence. To merit equitable tolling on that ground, a petitioner must show that "(1) he is mentally incompetent and (2) his mental incompetence caused his failure to comply with [the] statute of limitations. In short, a blanket assertion of mental incompetence is insufficient to toll the statute of limitations. Rather, a causal link between the mental condition and untimely filing is required." *Ata v. Scutt*, 662 F.3d 736, 742 (6th Cir. 2011).

The district court determined that Nettles did not qualify for equitable tolling because he presented no evidence that his mental illness was the cause of his failure to file a timely § 2254 petition. *Nettles*, 2018 WL 1035721, at *4. And there is nothing in his COA application or § 2254 petition showing that his very untimely petition was caused by his mental illnesses. Nettles states that he suffers from bipolar affective disorder, depression, and post-traumatic stress disorder. He asserts that he had an impaired memory and a "seriously impaired sense of reality," and he argues that "he obviously cannot comply with appellate procedures while out of touch with reality for periods of a day up to months at a time." [In *Ata*, 662 F.3d at 739-40, however, the petitioner alleged that he missed the filing deadline because he had been hospitalized numerous times for his mental illnesses and was otherwise unable to understand the applicable legal rules. The petitioner also submitted years of medical documents substantiating the severity of his mental illness, *id.* at 739, 744, which Nettles has not done.] Moreover, as the district court noted, Nettles filed several state post-conviction motions during the time that he suffered from these same mental illnesses. *Nettles*, 2018 WL 1035721, at *4. And even if Nettles could show that his mental illnesses did qualify as an extraordinary circumstance that prevented him from filing a timely habeas petition, he has not made the other required showing for equitable tolling, i.e., that he has been diligently pursuing his rights. Nettles was pursuing state court relief in

Appx BB1

FAMILY:

Father: Dan Dudley, died in 1992.

Mother: Mandy Nettles, died in 1984.

Sister: Patricia Nettles, age 32, resides in Pontiac, Michigan, telephone number unknown.

Sister: Arnita Nettles, age 26, resides in Detroit, Michigan, telephone number unknown.

Brother: Robert Nettles, age 29, resides in Atmore, Alabama, Telephone No. (334) 368-1808.

Grandmother: Clara Nettles, age 81, resides in Camden, Alabama, telephone number unknown.

According to the defendant, he was raised in Detroit, Michigan, until he was approximately 11 years old. At that time, his mother died and he went to live with his grandmother in the State of Alabama. According to the defendant it was a traumatic situation and he was abused emotionally and neglected. He conveyed that he was mistreated by family members although, he was never involved in any foster care. He did reveal that his sister had been involved in foster care. This writer attempted to confirm the family history information, but was unable to reach his father, Robert Nettles, at the provided telephone number. There was no other way to contact family members.

MARRIAGE:

The defendant revealed that he had been married previously, but could not remember the name of his ex-wife. He conveys that he has no children.

EMPLOYMENT AND ECONOMICS STATUS:

The defendant was last employed with Staff Solutions in the City of Detroit, Michigan. This is an employment agency. He worked at various locations as clerical help, light industry, demolition, and construction. The defendant revealed that he has had employment training as a clerk while in the United States Military. He was in the United States Army from May 19, 1990 to January 1993. He left under a General Discharge, but Honorable conditions.

Book sources: American College of Physicians Mosby Medical Dictionary

Appx BB2

BIPOLAR MOOD DISORDER	SEVERE DEPRESSION	MAJOR DEPRESSIVE DISORDER	POST TRAUMATIC STRESS DISORDER	EVIDENCE
SYMPTOMS / ELEMENTS				
mood fluctuates between extreme highs (manic) and lows (depression) (Exh 21)	depression may alternate with periods of euphoria in a person with manic depression (Exh 22)	Depressed mood. United States v Sanchez, 38 Fsupp 2d 355, 369	depression may co-exist (Exh 23)	'my moods I should have dealt with long ago'; 'I was in a very depressed major mood' (Exh 2)(Endnote 8)
inheritance not exactly known (Exh 21); associated with traumatic childhood, extends into adulthood (Endnote 7)	traumatic experience in childhood, i.e., death of parent, may increase getting depression (Exh 22)	cause may involve: psychological factors,	events that result in PTSD include being assaulted; most common in children, elderly (Exh 23)	traumatic, abused, neglected, mistreated childhood; experienced death of mother in childhood (Exh 3) (Endnote 7)
major mental disorder of mania, depression, moods (Exh 21)			psychological disorder, Bouchillon v Collins, 907 F2d 589	'my warped thinking, moods, very depressed' state (Exh 2)(Endnote 8, 9)
secondary impact on perception, thinking, decision making, relationship with counsel; decrease ability to understand legal process. United States v Wearing, 2011 US Dist Lexis 11137, 8	inability to make decisions (Exh 22) feelings of guilt (Exh 22)	irrational cognition, Id.,	affects processing ability, intelligence, and cognitive skills. US v Reynolds, 2009 US Dist 100495, 4	• mispercieved court (Exh 7)(Endnote 18) • nonresponsive during plea (Exh 14 p5) • counsel told petitioner he was different as if petitioner was odd (Exh 1 pg 3) • feelings of guilt (Exh 2, 12)
changing moods (Exh 21)				'my moods [plural]'; 'very depressed major mood' (Exh 2)(Endnote 9)
while severely depressed, may not care whether he lives or dies (Exh 21)				'I don't care what happens to me. I really just want to die!' (Exh 2)
develops in early 20s; 1 in 10 attempt suicide (Exh 21)	may contemplate suicide; recurrent thoughts of death (Exh 22)	suicidal thoughts, feelings of hopelessness, Id.,		• attempted suicide at 22 (Exh 8)(Endnote 1) • 'just want to die!' (Exh 2)
Poor concentration (Exh 21) (endnote 4)	poor concentration (Exh 22)	impaired concentration, Id.,	poor concentration (Exh 23)	It took him three hours to write 1½ page statement by repeated stopping (Exh 5)
speech may be difficult to follow (Exh 21)				Operator could not understand petitioner trying to state his name (Exh 4)(Endnote 2)
changes topics frequently (Exh 21)				Police testified petitioner kept saying "different things" (Exh 5b)
may be violent (Exh 21)			reaction. Bouchillon, supra, 590	'my moods' and 'very depressed' state caused the offense (Exh 2)(Endnote 8)
may hear voices (Exh 21)	may hear things (Exh 22)	paranoid delusions, Id.,		'my mind was saying one thing' (Exh 12)
lack insight into condition (Exh 21)				The double question marks (??) behind, 'I was in a very depressed major mood??' emphasize his lack of insight of his condition (Exh 2)
when experiencing extreme mood period, patient is out of touch with reality. Harries v Dutton, 594 Fsupp 949, 954; may last days, weeks, months, Id., 954.				stating he was 'in a very depressed major mood' during offense was him out of touch with reality at that time (Exh 2); his letter confirms his out of touch with reality at sentencing (Exh 7, 12)(Endnote 18) which proves his condition lasted 3 months, Id.
nonobvious, to laymen, Id., 954; medication needed to restore petitioner to competency. United States v Miller, 2013 US Dist Lexis 32415, 3, 4			nonobvious to laymen Id., 593, 597, requiring expert evaluation	• received no medication, treatment, examination, or inquiry; • no obvious signs of mental illness
		impaired memory, Id.,	memory. Reynolds, supra,	unable to remember own name (Exh 4), who ex-wife was (Exh 3)(endnotes 2, 3)
			stress, Id., 590	Police testified petitioner "seemed stressed" (Exh 10)(Endnote 5)
			develops weeks, months, years later (Exh 23)	'long ago' referring to his warped thinking and moods refers to his traumatic childhood (Exh 3)(Endnote 9)

Appx CC

3. Your 6th Amendment rights were violated.	3. Okay. I'll put that argument in if I can figure out some way to make it hold water.
4. You want the arguments federalized.	4. Okay.
5. You want to know about MCR 6.428, and whether it means you do not have to file a 6500 motion first.	5. As I read 6.428, it allows for the issuance of a judgement if the appellate lawyer did not file within the time provided by MCR 7.204(A)(2). Does this answer your question? You stated you are going to research this question further. Let me know what you decide.
6. What is the status of getting items you want.	6. I don't have them. I am going back to Wayne County on July 5th, I will check again.
7. Should I request a Ginther hearing?	7. Yes.
8. Will I re-type the items you want put into the brief which I don't put in?	8. I will have them re-typed.

In light of your letter, I will have the 6500 motion and brief re-typed. I hope to send another draft out within 10 days. Part of the delay is this is a holiday week.

Thank you for your attention to this mailing.

Sincerely,

Lawrence J. Bunting

cc: file

Appx DD

in the law. Consequently, the court's denial of defendant's motion was proper and defendant's motion to reconsider is denied as a matter of law.

Incidentally, the current motion to reconsider would fail on the merits as well. Defendant argues that he was denied effective assistance of counsel on appeal for counsel's decision to pursue a motion for relief from judgment in lieu of filing a delayed application for leave to appeal.

A defendant is not deprived of the effective assistance of counsel on appeal by a failure of his attorney to seek discretionary review. Where a defendant has no absolute right to appeal, there is no constitutional right to counsel, and there can be no deprivation of effective assistance. *Wainwright v Torna*, 445 US 586, 102 S Ct 1300 (1982). A criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals or applications for review in this Court. *Ross v Moffitt*, 417 US 600, 94 S Ct 2437 (1974). There can be no inquiry into the performance of counsel on a motion for relief from judgment in terms of ineffective assistance of counsel, because there is no right to counsel. *People v Walters*, 463 Mich 717, 624 NW2d 922 (2001). There is no constitutional right to an attorney in state post-conviction proceedings. *Pennsylvania v Finley*, 481 US 551, 107 S Ct 1990 (1987).

In the present case, because defendant pled guilty to the charges, he waived his right to an automatic appeal. Because he did not have an absolute right to appeal, but could have only sought a discretionary review, he cannot argue ineffective assistance of counsel. Furthermore, the court would reiterate that counsel's strategic decision to file the motion for relief from judgment instead of a delayed application for leave to appeal was reasonable under the circumstances.

CONCLUSION

For the aforementioned reasons, defendant's motion to reconsider is hereby DENIED. IT IS SO ORDERED.

DANIEL A. HATHAWAY
CIRCUIT COURT JUDGE

12-15-11
DATE

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August 2, 2006

MACKING NETTLES, JR.271812
Brooks Correctional Facility
2500 S. Sheridan Road
Muskegon, MI 49444

re: PEOPLE V MACKING NETTLES, JR.
98-8191

Dear MACKING NETTLES, JR.

I have been appointed to represent you on appellate proceedings in the above case. According to my information, you were convicted on 09-11-1998, of MURDER, SECOND DEGREE, MCL 750.317, and sentenced on 09-24-1998 to 30 Years to 60 Years imprisonment. I received the documents identified below:

- ☐ Order of Appointment of Substitute Appellate Counsel
- ☐ Judgement of Sentence
- ☐ Sentencing Information Report
- ☐ Register of Actions
- ☐ Transcripts, including preliminary examination 7-16-1998; arraignment 7-30-1998; plea 9-11-1998; and sentence 9-24-1998. [A transcript for a calendar conference on August 19, 1998 is listed but was not provided to me.]

Because I am a substitute attorney for purposes of a 6500 motion, I presume you have obtained the above documents from Mr. Baron. Please advise me if you do not have any of these documents.

I have read through the file I obtained after your last attorney, Mr. Dory Baron, withdrew. I have only court file documents, not any correspondence between you and Mr. Baron. There is, however, a letter to Judge Diane Hathaway dated October 12, 2006, in which you told the court that you believe you were "sentenced incorrectly based on the wrong information that the Court used to determine" your sentence.

App x GG

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January 3, 2017

MACKING NETTLES
#271812
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Re: *Nettles v Chippewa Correctional Facility Warden*, CoA 331507; 07/28/2016 CoA order

This is in response to a letter we received from you today. As explained in our 12/19/2016 letter, if the Court of Appeals issues an order or opinion regarding a petition for a writ of habeas corpus with which you are dissatisfied, then you may file an application for leave to appeal to this Court under MCR 7.305.

In a civil matter, an application for leave to appeal to this Court must be filed within 42 days of the Court of Appeals opinion or order. MCR 7.305(C)(2). Here, the deadline would have been 09/08/2016. It is now too late to file an application for leave to appeal here.

The Court Rules provide for **no exception** to the time limitation[1] on the filing of Applications for Leave to Appeal. MCR 7.305(C)(4) specifically states that "[l]ate applications will not be accepted ...." And MCR 7.316(B) states that "[t]he Court will not accept for filing a motion to file a late application for leave to appeal ...."

I've enclosed your letter.

Respectfully,

/s/ Inger Z. Meyer
Deputy Clerk

IZM
Enclosures
cc: L Moody P51994

1 MCR 7.305(C)(4) creates a prison mailbox rule that deems a Michigan prisoner's application for leave to appeal in a *criminal* matter presented for filing on the date of deposit in the correctional institution's outgoing mail. But the time limitation remains the same.

Appx HH

Next, as defendant entered a plea, he did not have an appeal of right, but could have only filed an application for leave to appeal. MCR 7.203(A)(1)(b). Secondly, as defendant did not request appellate counsel until October 12, 2005, he again could only have sought leave to appeal. Based on these facts, it would appear that appellate counsel made the strategic decision to file a motion for relief from judgment in lieu of seeking appellate review. Relying on *Jones v Barnes,* supra, the court finds no error in counsel's chosen course of action.

Finally, the court would note that the sentence imposed was not excessive and was in accordance with the law. To quote the defendant at the time of sentencing: "I deserve what I'm getting."

CONCLUSION

For the aforementioned reasons, defendant's motion for relief from judgment is hereby DENIED. IT IS SO ORDERED.

DANIEL A. HATHAWAY
CIRCUIT COURT JUDGE

11-2-11
DATE