

Justices Copy

UNITED STATES SUPREME COURT

RECORD NO. \_\_\_\_\_

19-5775

Petitioner in Pro Per  
RICHARD SOLDAN #358345  
CENTRAL MIGH. CORR.  
320 NORTH HUBBARD  
ST. LOUIS MI. 48880

-v-

Respondent  
STATE OF MICHIGAN  
ATTORNEY GENERAL  
PO BOX 30212  
LANSING MI. 48909

FILED

JUN 17 2019

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

ORIGINAL

VERIFIED PETITION FOR WRIT OF CERTIORARI  
FROM THE MICHIGAN SUPREME COURT

[9 Page Pleading Aprroximately 2162 Words]

RECEIVED

JUL 23 2019

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

QUESTION PRESENTED

MAY THE TRIAL COURT REFUSE TO APPOINT  
SUSTITUTE APPELLATE COUNSEL -- TO AN  
INDIGENT DEFENDANT CONVICTED ON HIS PLEA  
WHO SEEKS ACCESS TO FIRST TIER REVIEW IN  
THE MICHIGAN COURT OF APPEALS -- AFTER  
RELIEVING COUNSEL WHO DIDN'T COMPLY WITH  
ANDERS, AND WITH NO RECORD THE COURT  
REVIEWED THE CASE, BEFORE CONCLUDING THERE  
WERE NO MERITS FOR APPEAL ??

TABLE OF CONTENTS

	PAGE
TABLE OF APPENDIX	ii
TABLE OF AUTHORITY	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
RELEVANT FACTS	2-4
REASONS FOR GRANTING THE PETITION	5-7
CONCLUSION	8
RELIEF	9
PROOF OF SERVICE	9
VERIFICATION	9

TABLE OF APPENDIX

APPENDIX

- A --- 4-12-12 Request for successor counsel, and motion to withdraw plea.
- B --- 4-19-12 Ujlaky relieved; No Anders; No Review; No Successor Counsel.
- C --- 9-5-13 Trial Court's Denial of Successor Counsel.
- D --- 3-27-18 Trial Court's Denial of Successor Counsel.
- E --- 5-3-18 Trial Court's Denial of successor counsel.
- F --- 10-3-18 Michigan Court of Appeal's Denial.
- G --- 4-30-19 Michigan Supreme Court Denial.
- H --- David v. Birkett.

TABLE OF AUTHORITY

PAGE

US CONSTITUTION

Sixth Amendment 7,9

Fourteenth Amendment 2,9

UNITED STATES CODE

28 USC § 1257 2

US SUPREME COURT RULE

Rule 10 2

MICHIGAN COMPILED LAW

MCL 780.712(5) 5

MICHIGAN COURT RULE

AO 2004-6 Standard 5 5

CASES

Anders v. California 386 US 738 5,6,7,8

Anderson v. Burghuis 2009 US Dist. Lexis 101920 7

David v. Birkett 2006 US Dist. Lexis 66058 7

Evits v. Lucy 469 US 395 7

Gideon v. Wainright 372 US 335 6

Halbert v. Michigan 545 US 605 5

In Re Withdrawal 231 Mich. App. 504 4

Lafler v. Cooper 566 US 157 7

McCoy v. Court of Appeals 486 US 439 5

Penson v. Ohio 488 US 88 6,7

Smith v. Robbins 386 US 286 5

JURSIDICTION

1. The Michigan Supreme Court's Judgment was entered on April 30th, 2019. This Court's Jurisdiction is invoked under 28 USC § 1257, and Sup. Court Rule 10.

CONSTITUTIONAL PROVISION INVOLVED

2. Section 1 of the Fourteenth Amendment of the Constitution provides, in pertinent part: "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."

RELEVANT FACTS

3. Petitioner has a history of Special Education, Psychological Disabilities, and Mental Health issues he continues to receive Out Patient Treatment for.
4. On 10-13-11 Petitioner was sentenced to 26.5 Months to 15 Years, on 1 Resisting Officers (11-20115) for swimming away; and 3 Resisting Officers (11-20116) for failing to pull his Pontoon over.

PETITIONER ALWAYS SOUGHT TO APPEAL HIS CASE AND RECEIVE COUNSEL

5. Petitioner's requests, including but not limited to:
  - (A) On 12-12-11, which was actually the Second set of CC-265 appeal/attorney forms sent, although the trial court claimed they never got the first set, sent 10-27-11, which the trial court failed to file until 12-12-11; and
  - (B) On 12-12-11 another set of CC-265's because Petitioner still has not heard from an appellate attorney; and
  - (C) 1-17-12 as Petitioner still had not heard from an attorney; and
  - (D) On 4-12-12 , request for counsel, and request to withdraw plea. (App.A), when Ujlaky quits (APP.B); and
  - (E) On 5-12-12 prison legal writers, write letter for subsequent counsel, or re-issue judgment, extending timelines; and

- (F) On 7-10-12 a letter to the Trial Court Chief Judge; and
- (G) A 2013 Leave to the Michigan Court of Appeals, by fellow prisoners asking for Appellate Counsel, dismissed on 3-21-14 as untimely; and
- (H) On 7-20-13 a "Halbert" letter to the Trial Court by a fellow prisoner, denied on 9-5-13 (APP.C); and
- (I) On 3-8-18 to Trial Court, by prison legal writers when they told Petitioner he had an absolute right, under Halbert, to appointed counsel to perfect a first tier appeal of his conviction. Denied on 3-27-18 (APP.D) and 5-3-18 (APP.E); and
- (J) To Michigan Court of Appeals, denied 10-3-18 (APP.F); and
- (K) To Michigan Supreme Court 12-17-18, denied 5-30-19 (APP.G).

#### BREAKDOWN OF ATTORNEY RELATIONSHIP AND HIS SUBSEQUANT ABANDONMENT

6. On 3-1-12, During a 3-1-12 video conference, There is a breakdown in attorney/client relationship, when Appointed Appellate Counsel (Ujlaky) refused to: (a) Forword 50 pgs. of Transcripts Petitioner ordered, the court sent to Ujlaky, leaving Petitioner with no Transcripts; (b) Withdraw the Defective Plea, where the Court never advised of the Mandatory Consecutive Sentence, resulting in a 21 year max, instead of 15 year max plead to; (c) Raise IAC, for trial counsel not advising Petitioner of the 21 year max.

On 4-19-12 the Trial Court relieves Ujlaky (APP.B) without appointing substitute counsel, although Petitioner requested on 4-12-12 (APP.A), as instructed by Ujlaky; not only was this less than 28 days until Petitioner's 6 month filing deadline of 5-15-12, but Ujlaky never forwarded the needed transcripts, until after the deadline.

COURT MADE NO EXAMINATION FOR MERITS ON APPEAL BEFORE DENYING COUNSEL

7. The 4-19-12 Order (APP.B) said there was a "reading of the...Motion to Vacate the Order of Appointment" and "a hearing on the record in open court" and "the Court being fully informed in the premises, and for all the reasons set forth on the record"; but nowhere does the Court articulate the "reasons" only frivolous issues exist, or if there was ANY issues of arguable merit. If the Court would have reviewed the case, it would have seen it's defective plea for not advising Petitioner he was under mandatory consecutive sentencing, before they accepted the plea.

In a September 2013 the Court states: "only frivolous issues could be identified" (ln.7 APP.C), but no citing HOW they were, or what was, "identified". In March 2018 (ln.7-8 APP.D) "The Court found that termination of appellate counsel was permitted under...231 Mich App 504, 508 (1998)," but no evidence the Court examined Appellant's case. The Court then falsely implied that Petitioner appealed the merits of his conviction and they were dismissed as frivolous, when it stated: "Both levels of appeal sought review of files 11-20115 and 11-20116." "Both round of appeals" were to get Counsel ONLY; NOT for "review" on the merits. In May 2018 (APP.E) we again find no evidence of review of possible merits on appeal; stating: "Ujlaky included references to legal authority in his Motion. [letter] Attachments to Mr. Ujlaky's motion supported HIS BELIEF that the appeal should not be pursued." and "At the Hearing on the Motion, the Court cited the relevant legal authority governing the issue...[and] the Motion should only be granted if non-frivolous issues exists, and "that APPEARS to be the case here.""

8. There has been 3 attempts to receive the transcripts of the "hearing on the record" for the "reasons" "only frivolous issues could be identified"; but these were never provided.

REASONS FOR GRANTING THE PETITION

9. In Halbert v. Michigan this Court made it clear, "The Due Process and Equal Protection Clauses REQUIRE appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals." Halbert 545 US at 610 (2005). and in Smith v. Robbins it was made clear for appellate counsel to withdraw they must comply "...with a valid state procedure for determining whether defendant's appeal is frivolous..." Robbins 386 US at 286 (2000).

The valid state procedure for Michigan is set forth pursuant to MCL 780.712(5) "...standards to which all criminal defense services shall conform...", and Michigan Supreme Court Rule A0 2004-6, Standard 5 states: "An Appeal may never be abandoned by counsel;...counsel may seek withdrawal pursuant to Anders v. California 386 US 738; and related constitutional principles."

"In Anders [this Supreme Court] held that a motion to withdraw must be accompanied by "a brief referring to anything in the record that might arguably support the appeal." 386 US at 744. That requirement was designed to provide the (appellate courts) with a basis for determining whether appointed counsel have fully performed their duty to support their clients' appeals to the best of their ability. The Anders requirement assures that the indigent defendants have the benefit of what wealthy defendants are able to acquire by purchase -- a diligent and thorough review of the record and an identification of any arguable issues revealed by that review. Thus, the Anders brief assists the court in making the critical determination whether the appeal is indeed so frivolous that counsel should be permitted to withdraw." McCoy v. Court of Appeals 486 US at 439 (1988).

10. Ujlaky failed to conform to Anders, simply claiming Petitioner had no issues of merit, and failing to set forth the issues of arguable merit, namely: Defective Plea and Ineffective assistance of trial counsel for failure to advise of mandatory consecutive, and/or a resentencing due to Double Counting by being sentenced under two sentencing schemes. Petitioner urged Ujlaky to raise these issues, during their single video conference. Ujlaky not only failed to pursue them in advocacy for his client, but he omitted them from all his communications, and his pleadings to the trial court, and effectively became *amicus curiae* and opponent to Petitioner's appeals.
11. Additionally, it was the Trial Court -- and NOT the (Reviewing) Court of Appeals -- concluding there were no appealable issues, but there is no evidence or articulation on the record that the trial court made a conscientious examination or "Review" of Petitioner's case, before relieving Ujlaky, and ruling Petitioner had no merits for appeal.

Furthermore, the Trial Court effectively affirmed it's own judgment (circumventing appellate review of it's own judgment), AND left Petitioner with no advocate at a critical stage of his criminal proceedings. *Gideon v. Wainright* 372 US 335. "[Petitioner] was thus entirely without assistance of counsel on appeal. In fact the only relief that counsel sought before the [court] was leave to withdraw, an action that can hardly be deemed advocacy on [Petitioner's] behalf. [additionally] It is therefore inappropriate to apply either the prejudice requirement of *Strickland* or the harmless-error analysis of *Chapman*." See *Penson* at 88-89.

12. We know the "6th Amendment requires effective assistance at critical stages of a criminal proceeding...[which includes] the right to effective assistance on appeal" Halbert as cited in *Lafler v. Cooper* 566 US at 157 (Mich 2012); and "Actual or Constructive denial of appellate counsel altogether is legally presumed to result in prejudice." *Anderson v. Burghuis* 2009 US Dist. Lexis 101920 at 58-59 (ED. Mich. 2009) quoting *Penson v. Ohio* 488 US at 88-89 (1988); and "The Fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage." *Penson* at 85-86; relying on *Evitts v. Lucy* 469 US at 395-396 (1985).
13. Although not binding, (but on all fours), In *David v Birkett* 2006 US Dist. Lexis 66058 at 4 (ED. Mich. 2006 unp.), (APP.H) Judge Tarnow found that "Appellate counsel's failure to withdraw from Petitioner's appeal in compliance with the dictates of Anders amounts to constructive denial of Counsel." In *David*, as in Appellant's case, counsel withdrew against Appellant's wishes, failed to comply with Anders, and the trial court failed to appoint successor counsel. Tarnow -- relying on Halbert -- granted the Habeas on condition that the trial court appoint substitute counsel.

## CONCLUSION

14. Petitioner never waived his constitutional right to have appointed appellate counsel perfect his first-tier review to the Michigan Court of Appeals.
15. There is no question Petitioner is an indigent defendant "ill equipped to represent" himself, but "who seek[s] access to first-tier review in the Michigan Court of Appeals". Petitioner never had an attorney perfect a first-tier review for him, nor has Petitioner ever filed a first-tier review on the merits of his conviction. More than once, Fellow prisoners help appeal with the Trial Court, Court of Appeals, and Michigan Supreme Court to have successor counsel appointed; One was dismissed as untimely, because Ujlaky quit at the last minute and failed to forward the needed transcripts; and the 2018-2019 round they failed to address the merit. It is undisputed that Petitioner has been trying to get the counsel he is entitled since his conviction; and even made a timely motion to withdraw his plea.
16. We also know:
  - (A) Ujlaky did not withdraw in conformity with Anders, which is the valid Michigan procedure to withdraw; and Ujlaky failed to point to any possible issues of arguable merit on appeal, and omitted the merits -- in his letters, and pleadings to the court -- (spotted by fellow prisoners) Petitioner told him about; and
  - (B) There appears to be no record the Trial Court made a conscientious exam or review of Petitioner's merits on appeal before relieving Ujlaky and leaving Petitioner without counsel at a critical stage; and
  - (C) The Trial Court effectively affirmed it's own judgment and circumvented first-tier review thereof -- in the Michigan Court of Appeals -- perfected by an attorney advocate.

RELIEF

17. Petitioner requests this court to decide whether or not the Trial Court and Ujlaky's actions survive Constitutional Muster; and if this Supreme Court decides those actions do not provide the Due Process and Equal Protections our ForeFathers envisioned in the Sixth and Fourteenth Amendments, then Order the Michigan Supreme Court to remand to the Trial Court, with instructions to Appoint Appellate counsel and perfect Petitioner's First-Tier Appeal in the Michigan Court of Appeals; or take any other action this Supreme Court deems just. Thank You.

PROOF OF SERVICE

Petitioner did serve this on the Michigan Attorney General at the above address; and on the Livingston County Prosecutor at 210 S. Highlander Way, Howell Mi. 48843, on 7-17-2019.

VERIFICATION

Petitioner Richard Soldan, Declares under the penalties of perjury all contained herein and attached hereto is true, per 28 USC 1746.

Sincerely Grateful,

Richard Soldan 7-17-19