No. 19-7537

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Donald A. Spice — PETITIONER
(Your Name)

FILED
OCT 24 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

vs.

17th Circuit Court For the County of Kent Michigan — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

17th Circuit Court For the County of Kent Michigan
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Donald A. Spice
(Your Name)
Ionia Correctional Facility
1576 W. Blue Water Hwy
(Address)

Ionia Michigan 48846
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

Page:

QUESTION I

WHETHER MCR 6.433(C)(3) IS UNCONSTITUTIONAL AS IT VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE MANDATES OF THE UNITED STATES SUPREME COURT, REQUIRING STATES TO FURNISH TRANSCRIPTS TO INDIGENT DEFENDANTS FOR USE ON APPEAL, UPON REQUEST?

QUESTION II

WHETHER TRIAL COURT ABUSED ITS DISCRETION IN DENYING SPICE ACCESS TO THE TRANSCRIPTS, WHEN SPICE SHOWED GOOD CAUSE?

QUESTION III

WHETHER SPICE WAS DENIED ACCESS TO THE COURTS GUARANTEED BY THE UNITED STATES CONSTITUTION UNDER THE FIRST AND FOURTEENTH AMENDMENT, BY ACTIONS OF THE MICHIGAN EXECUTIVE AND JUDICIAL BRANCHES OF GOVERNMENT?

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TABLE OF AUTHORITIES CITED

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was July 29, 2019. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

STATEMENT OF FACTS

PETITIONER, Donald A. Spice, pro se, is unable to cite specifically from the record, as Trial Court denied all request. This action is contesting the denial of the transcripts and Right to Appeal due to Spice's indigence. I will give what facts I can remember.

Spice was arraigned and appointed counsel, Valerie A. Foster (P44459), November 10, 2015, who represented Spice throughout the proceeding till sentencing. Spice was scheduled for a Preliminary Examination December 7, 2015, after a Probable Cause Hearing, in which Spice tried to object to the delay. District Court informed Spice all communication to the court needed to be through counsel. Spice had not met Foster until that day.

December 7, 2015, Foster met with Spice, reading various reports to Spice. Spice was able to give an abbreviated version of the event, notifying Foster that during the initial interrogation with Ottawa County Sheriff had invoked the right to counsel, and the interrogation was videoed. Spice notified Foster other video evidence needed to be collected.

At the preliminary examination Foster notified District Court there was a problem. Spice unequivocally requested to represent himself. District Court denied the request, stating Foster was a fine attorney who had represented hundreds, if not thousands of clients. The State proceeded to present evidence.

Osbun [arresting officer], an Ottawa County Sheriff's Department K-9 handler, testified he and "Zeno" (K-9), were on their way home in the marked police vehicle and seen Spice walking along the road. Osbun stopped and asked Spice if he wanted a ride, Spice agreed. Osbun then informed Spice that a frisk was needed before entering the vehicle, Spice agreed. During the frisk Osbun felt an object that felt like a wallet, and asked if it was a wallet.

Spice replied it was and asked if Osbun wanted to see his identification, Osbun asked for the license. Osbun then physically escorted Spice around the SUV, placing Spice in the back seat. Osbun noticed a change of address label on the back of Spice's license and recognized the address matched that of a vehicle found burning a couple of miles away, which contained a human body. Osbun recognized the address because he had discovered the plate and ran the LEIN. Osbun notified Wilfong that he had Spice. Spice was taken was taken to an empty building to be interrogated. Spice was handcuffed.

Sergeant Wilfong, Ottawa County Sheriff's Department, testified he read Spice Miranda warnings and questioned Spice for nearly an hour. Spice was not arrested, but a person of interest. Spice was then taken to the Ottawa County Sheriff's Department.

Ottawa County Sheriff's Detective interviewed Spice after giving Miranda warnings. Spice confessed to killing Lori Vargas, the person found inside the burning vehicle. The preliminary examination was adjourned, as the medical examiner was not available.

Spice was placed on psychotropic medication in order to be removed from suicide watch.

January 12, 2016 the medical examiner testified the cause of death was blunt force trauma and the body was burned.

At the behest of Spice foster called a Grand Rapids detective, to which she had no idea why he was called. Spice wanted to testify concerning the stop and confession, on counsel's advice did not.

February 8, 2016 Status Conference, Foster requested exculpatory video evidence held by the State. The hearing was adjourned as Foster did not have time to go through the material.

March 7, 2016, Trial Court orders Assistant Prosecuting Attorney Kuiper

(P66576) to turn over video evidence. Hearing adjourned.

March 21, 2016, trial set for May 9, 2016.

May 9, 2016, Spice notifies Trial Court he wishes to proceed with trial, even though Foster wanted a continuance to get an expert witness for phone records and cell tower information. Spice articulated to Trial Court the numerous errors Foster was ignoring: Request for Counsel at initial interrogation; Stop, seizure, and search; How evidence was obtained from Spice's home; Brady material. More specifically how Foster had not communicated with Spice concerning the case. Foster had not prepared a witness list for the defense. Trial Court stated the issues needed to be addressed at a hearing prior to trial. Trial Court asked Spice if he thought this would all go away. Trial Court adjourned the jury trial.

Foster requested a hearing concerning the stop by Osbun, the questioning of Spice, and how evidence was obtained from Spice's home, without consulting with Spice. Trial Court granted the hearing.

May 19, 2016 Evidentiary Hearing, Foster was present, but Spice asked most of the questions through Foster. Osbun testified the stop was a welfare stop. There was no indication Spice had committed, was committing, or about to commit a crime. The emergency lights were activated prior to stopping Spice as Osbun made a U-turn, this was done to alert traffic of the hazard the vehicle presented. The SUV pulled in front of Spice, blocking his path, with the headlights shining on Spice.

Spice notified Foster she had called the wrong person concerning the confession.

A Grand Rapids detective testified, evasively, about how evidence was obtained from Spice's home without a search warrant. Kuiper interrupted the questioning and gave unsworn testimony about how the evidence was obtained

and what action he took. Trial Court asked Foster if this issue was a "silver platter" issue, to which Foster said yes. Trial Court denied the motion. Trial Court during the detective's testimony, sua sponte denied the search issue. Trial Court did not allow Spice to testify or present other evidence. Foster then asked about the video, Kuiper stated the video had been erased or had not recorded. Trial Court did not articulate any facts or legal premises for the denials.

June 13, 2016 through June 17, 2016 Jury Trial. Prior to jury selection Spice indicated he wanted people to testify, no witness list had been submitted. Spice again stated Foster had not met since January/February. An intern who had just passed the bar was at the request of Spice appointed as co-counsel. Kuiper in his opening argument stated Spice had lied to the police. Various people testified. An expert witness testified Spice lied to him about the windows being up. The way the vehicle was found the windows had to be open. Other people testified. When Sergeant finished his testimony for the State, Foster asked the jury to be excused. A request for the video of the interrogation was made, Kuiper asserted it was not the law at the time, Spice stated it was. Spice also stated this was the interrogation in which the hearing was for. Other testimony was presented, including the Ottawa County Sheriff's detective that presented the video of the interrogation he conducted. On the video was the question by the other detective concerning the car windows, to which Spice stated "the windows were down because of the fumes". One of the last witnesses to testify was the medical examiner, who stated that the cause of death was blunt force trauma, but could not state how it occurred other than what the police told him.

Spice was allowed to call only witnesses on the State's witness list: Ottawa County Sheriff's Department Sergeant who testified he was in charge

of the scene, instructing Osbun to search for scent tracks. The Sergeant then found the license plate and took it back to his vehicle to run it through the LEIN. After obtaining who the vehicle was registered to and the address it was passed on to other police officers. Not sure if this evidence was admitted. Trial Court specifically denied other law enforcement from testifying as the issue of the arrest was over.

Spice was convicted of First Degree Murder [MCL 750.316], Disinterment of a Dead Body [MCL 750.160], and Habitual Offender Fourth Degree [MCL 769.12].

July 13, 2016 Sentencing, Foster was not present, but co-counsel was. Spice was sentenced to mandatory Life imprisonment without the possibility of parole, Life imprisonment with the possibility parole. Trial Court did not give Spice an Appeal of Right form, Michigan Court Rules [herein: MCR] 6.425(F)(3).

July 19, 2016 Spice was transferred to the Michigan Department of Corrections [MDOC]. July 22, 2016 Spice was hospitalized. July 25, 2016, because of the psychotic episode Spice was transferred to Woodland Correctional Facility (Mental Health Prison). After Spice stabilized, he was transferred to Adrian August 2016, in the Resident Treatment Program [RTP]. August 12, 2016 Spice was denied a copy of the Right to Appeal form because he did not have 10¢ in spendable account (Exhibit A).

August 25, 2016 Deadline for Appeal of Right.

Spice was assigned a legal writer and psych medication changed. November 16, 2016 mailed Leave to Appeal form to Kent County Circuit Court.

December 22, 2016 Spice was transferred to Brooks Correctional Facility. Through no fault of his, Spice was placed on the sanction wing and was denied the ability to use the law library and morning psych medication. Spice refused all medication. January 10, 2017 Deadline for Leave to Appeal (180 days).

January 11, 2017 Spice moved from sanction wing. Due to Spice's placement on sanction wing and denied medication, custody level reduced from Level IV to Level II, January 12, 2017. February 1, 2017 mailed hand written request for transcripts, noting denial of Appeal of Right form (Exhibit B).

April 4, 2017 law clerk wrote a letter, stating in part:

> "I have carefully reviewed and discussed your letter and file with Judge Rossi. MCR 6.433(C)(3) establishes a two-part test to have court fees waived. To have fees waived you must:
> 1) provide records to demonstrate that you cannot pay (you have met this test),
> 2) establish "good cause".
> To show "good cause" you need to tell the Court specifically what you expect to find in the transcripts. The conclusory statement that they are needed to prove you are innocence or to pursue post-conviction relief is insufficient. People v Caston, 228 Mich App 291 (1998). Having not met the second part of the test, your request cannot be granted at this time."

In an attempt to comply with the April 4th letter, Spice mailed (April 14, 2016) a letter specifying what the record would disclose.

With no response, Spice mailed (August 31, 2017) a motion requesting the transcripts under MCR 6.433(C) specifying numerous issues (Exhibit C). November 15, 2017 and January 9, 2018 Spice sent letters of inquiry about the motion. Receiving no response, Spice mailed a letter concerning MCR 8.107 involving the reporting of pending motions in circuit court (Exhibit D).

March 14, 2018 Spice received an undated Order denying the request for transcripts from Trial Court (Appendix A). Spice 'kited' prison accounting requesting a Statement of Account Activity, necessary to demonstrate indigence in the Court of Appeals. March 15, 2018 Spice was packed up for transfer to Ionia Reformatory March 16, 2018. Spice Immediately 'kited' to use the law library, indicating a deadline. Spice was not placed on the callout until March 24, 2018, and was not allowed back till March 30, 2018 for 1 hour. April 7, 2018 Spice received the Statement of Account Activity. Spice then

gave a prison official his pleading on April 16, 2018 to be mailed (Exhibit E), raising 3 issues:

QUESTION I

WHETHER MCR 6.433(C)(3) IS UNCONSTITUTIONAL AS IT VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE MANDATES OF THE UNITED STATES SUPREME COURT, REQUIRING STATE TO FURNISH TRANSCRIPTS TO INDIGENT CRIMINAL DEFENDANTS FOR USE ON APPEAL, UPON REQUEST?

QUESTION II

WHETHER TRIAL COURT ABUSED ITS DISCRETION BY DENYING SPICE ACCESS TO THE REQUESTED TRANSCRIPTS AT PUBLIC EXPENSE, IN ORDER TO APPEAL THE CONVICTIONS, AS PROVIDED BY MCR 6.433(C)(3)?

QUESTION III

WHETHER SPICE WAS DENIED ACCESS TO THE COURTS GUARANTEED BY THE US AND MICHIGAN CONSTITUTIONS, BY ACTIONS OF THE MICHIGAN AND JUDICIAL BRANCHES OF THE GOVERNMENT?

Spice noticed nothing was removed for postage a couple of months later and inquired. All request were denied. December 2018 mailed out the appeal of the undated Circuit Court order, which was denied as untimely by the Michigan Court of Appeals (Appendix B). Spice Appealed to the Michigan Supreme Court, which issued its denial July 27, 2019 (Appendix C).

CONSIDERATIONS FOR REVIEW

The primary concern of the United States Supreme Court is not to correct errors in lower court decisions, but to decide issues of importance to the public, and to resolve conflicts between appellate courts. This case contains several issues:

1. The United States Supreme Court in Wade v Wilson, 396 US 282, 286; 90 SCt 501; 24 LEd2d 470 (1970), declining to decide whether the Constitution "requires the State furnish an indigent state prisoner free of cost a trial transcript to aid him to prepare a petition for collateral relief". Under pursuant to MCR appellant is required to cite specific pages from the record for any claimed errors, and must provide a copy of the transcripts to appellate

court. See MCR 7.212(C)(7) and MCR 7.210(B)(1)(a). See also: Mitcham v Detroit, 355 Mich 182, 203; 94 NW2d 388 (1959); People v Bosca, 310 Mich App 1, 16; 871 NW2d 307 (2015); People v Petri, 279 Mich App 407, 413; 760 NW2d 882 (2008); People v Dunigan, 299 Mich App 579, 587; 831 NW2d 243 (2013)(generally refuses to consider issues for which appellant has failed to provide a transcript); People v Davis, 250 Mich App 357, 360-361; 649 NW2d 94 (2002)(only provided excerpts of testimony).;

2. In this case there was no Appeal of Right because Spice was unable to purchase a Right to Appeal form which had to be submitted within 42 days of sentencing. Spice was not allowed to Appeal by Leave. There only exist a post-conviction remedy to raise the issues MCR 6.500. The Federal Courts have determined a complaint of a denial of transcripts in a post-conviction proceeding fails, because there is no Constitutional right to a state post-conviction and such does not raise constitutional issues cognizable in a federal habeas application, Kirby v Dutton, 794 F2d 245, 245-246 (6th Cir 1986), determining 28 U.S.C. §2254(a) is only concerned with whether petitioner is in "custody in violation of the Constitution or laws or treaties of the United States." It is not concerned with issues unrelated to the validity of his custody. See also: Leonard v Warren, Ohio State Penitentiary, 846 F3d 832, 854-855 (6th Cir 2017); Lawrence v Branker, 517 F3d 700, 717 (4th Cir 2008); Cress v Palmer, 484 F3d 844, 853 (6th Cir 2007)(the Writ is not the proper means to challenge collateral matters as opposed to the underlying state conviction); Bell-Bey v Roper, 499 F3d 752, 756 (8th Cir 2007); Lambert v Blackwell, 387 F3d 210, 247 (3rd Cir 2004); Sellers v Ward, 135 F3d 1333, 1339 (10th Cir 1998).

The issue is compounded by the recent decision in Sampson v Garrett, 917 F3d 880 (6th Cir 2019), which held that an access to the court claim

alleging interference with an appeal is barred by Heck v Humphrey, 512 US 477, 114 SCt 2364; 129 LEd2d 383 (1994). In Sampson it was alleged court officials deprived him of receiving a record of trial transcripts which resulted in a failure on appeal. Sampson determined if the claim directly implies the invalidity of the conviction or sentence the claim must be barred by Heck, supra.;

3. The third issue, which again would be of first impression, encompasses three basis tenets: The Right to be Heard, The Right to Access to the Courts, and Right to Reasonably Timely Appeal. US v Smith, 94 F3d 204 (6th Cir 1996), adopted a modified Barker v Wingo, 407 US 514, 92 SCt 2182; 33 LEd2d 101 (1972), speedy trial analysis for evaluating potential due process violations in appellate delays, as other federal circuits had done. Id at 206.

No United States Supreme Court has held there is a right to a reasonably speedy appeal. However, decisions of the United States Supreme Court have clearly settled the proposition that a state having an appellate system to review criminal convictions, is constitutionally required to afford adequate and effective review to indigent criminal defendants. This "right" was established after the decisions of Cochran v Kansas, 316 US 255, 257; 62 SCt 1068; 86 LEd 1453 (1942), and Dowd v US ex rel. Cook, 340 US 206; 71 SCt 262; 95 LEd 215 (1951), observed access to the court claims. While the Right to Access to the Courts exist, the United States Supreme Court has recognized the Constitutional basis is unsettled law, Christopher v Harbury, 536 US 403, 415; 122 SCt 2179, 153 LEd2d 413 (2002). In most cases it seems the right derives from the First Amendment of the United States Constitution: "Congress shall make no law...respecting to petition the government for redress of grievances". The Right also finds support in the Due Process Clause of the

United States Constitution where a prisoner was banned from sending papers from the prison resulted in dismissal of his appeal of right, Dowd, 340 US at 206. See also Evitts v Lucey, 469 US 387, 401; 105 SCt 830; 83 LEd2d 821 (1985).

QUESTION I

WHETHER MCR 6.433(C)(3) IS UNCONSTITUTIONAL AS IT VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE MANDATES OF THE UNITED STATES SUPREME COURT, REQUIRING STATES TO FURNISH TRANSCRIPTS TO INDIGENT CRIMINAL DEFENDANTS FOR USE ON APPEAL, UPON REQUEST?

The United States Supreme Court has given extensive consideration to the rights of indigents on appeal. The first case to consider right right was Griffin v Illinois, 351 US 12; 76 SCT 585; 100 LEd 891 (1956), in which the Court pondered whether Illinois law, consistent with the Equal Protection, and Due Process Clauses of the Fourteenth Amendment of the United States Constitution. The Court found "[d]estitute defendant's must be afforded as adequate review as defendants who have money enough to buy transcript." Id at 19. The Court did clarify, "[w]e do not hold ... that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendant". Id at 20.

A mere two years later, the US Supreme Court in Eskridge v Washington State Board of Prison Terms and Paroles, 357 US 214; 78 SCt 1061; 2 LEd2d 1269 (1958)(per curiam), rule a provision of a Washington law, which gave discretion to a trial court an independent determination of the merits of an appeal "if in his opinion justice thereby be promoted" was unconstitutional. The Court determined that the conclusion of the trial court was not an adequate substitution for the full appellate review available to other defendant's in Washington able to pay for transcripts. Id at 216.

Burns v Ohio, 360 US 252, 253; 79 SCt 1164; 3 LEd2d 1209 (1959), considered the question of whether a State may constitutionally require an indigent defendant in a criminal case to pay a filing fee before permitting the person to file a motion for leave to appeal in its courts. After trial and conviction Burns appealed to the Ohio Court of Appeals, which affirmed without opinion. Burns appealed, but did nothing for four years, then sought to appeal, providing an affidavit of poverty and a motion to proceed in forma pauperis. The clerk of the Ohio Supreme Court refused to file the paperwork, returned the pleadings, and sent a letter notifying Burns the filing fee could not be waived. Id at 253-254. In rejecting the argument Burns had received one appeal, the US Supreme COurt reaffirmed Griffin, stating:

> "as Griffin holds, once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." 351 US at 18, 22. This principle applicable where the state has afforded an indigent defendant to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency."
>
> ... Ohio seeks to distinguish Griffin on the further ground that leave to appeal to the Supreme Court of Ohio is a matter of discretion. But this argument misses the crucial significance of Griffin. In Ohio, a defendant who is not indigent may have the Supreme Court consider on the merits of his application for leave to appeal from a felony conviction. But ... an indigent defendant is denied that opportunity. There is no rational basis for assuming that indigents' motion for leave to appeal will be less meritorious than those of other defendants. Indigents must, therefore, have the same opportunities to invoke the discretion of the Supreme Court of Ohio." Id at 257-258.

The US Supreme COurt continued to stand behind the Griffin rational in Smith v Bennett, 365 US 708, 709; 81 SCt 895; 6 LEd2d 39 (1961), stating:

> "We hold that to interpose any financial consideration between an indigent prisoner of the state and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws."

Applying free transcripts to collateral proceedings. This made clear these principles were not limited to direct appeals by criminal defendants, but

extended to state post-conviction proceedings.

> "When an equivalent right is granted by a state, financial hurdles must not be permitted to condition its exercise." Id at 712. For "[t]he Fourteenth Amendment weighs in the interest of rich and poor criminals in equal scales and its hand extends as far to each." Id at 714.

On the same day the US Supreme Court decided Douglas v California, 372 US 353; 83 SCt 814; 9 LEd2d 811 (1963), it also decided Lane v Brown, 372 US 477; 83 SCt 768; 9 LEd2d 892 (1963) and Draper v Washington, 372 US 487; 83 SCt 774; 9 LEd2d 899 (1963). The essence of these three decisions is that when a State allows an appellate process, it may not discriminate between rich and poor by denying to indigent appellants the use of trial transcripts is such transcripts may be purchased by an affluent appellant for use in presenting an appeal. Justice Goldburg, in Draper, put the matter succinctly:

> "In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given to appellants with funds --- The State must provide the indigent defendant with the means of presenting his contentions to the appellate court which are as good as those available to a nonidigent defendant with similar contentions". Id at 496.

Long v District Court of Iowa, 385 US 192; 87 SCt 362; 17 LEd2d 290 (1966)(per curiam), the US Supreme Court reversed, holding that a State must furnish a free transcript of a habeas corpus proceeding to a state prisoner for use on appeal. The Long Court granted the writ solely to the refusal to furnish an indigent with a transcript for use on appeal. Id at 194.

Roberts v La Vallee, 389 US 41, 42; 88 SCt 194; 19 LEd2d 41 (1967)(per curiam), in vacating a decision based upon a New York statute requiring payment, found " we have made clear that differences in access to the instruments needed to vidicate legal rights, when based on the financial situtation of the defendant, are repugnant to the Constitution."

Williams v Oklahoma City, 395 US 458, 458-459; 89 SCt 18181; 23 LEd2d

440 (1969), once again determined that a transcript needed to perfect an appeal must be furnished as State expense to an indigent defendant, who in this case was sentenced to 90 days in jail and a $50 fine for drunk driving.

Gardner v California, 393 US 367, 370; 89 SCt 580, 21 LEd2d 601 (1969), indicated that so long as there is any appellate or post-conviction route open by which an indigent prisoner may obtain his liberty, that criminal defendant is entitled to the transcripts for use in pursuing that end. It futher instructed:

> "It is argued that since petitioner attended the hearing ... he can draw on his memory in perparing his application to the appellate court. And that court, if troubled can always obtain the transcript from the lower court. But we deal with an adversary system where the initiative rest with the moving party. Without a transcript the petitioner, as he prepared the application to the appellate court, would only have his own lay memory of what transpired before the ... court. For an effective presentation of his case he would need teh findings of the ... Court and the evidence that had been weighed and rejected in order to present his case in the most favorable light. Certainly a lawyer, accustomed to precise points of law and nuances in testimony, would be lost without such a transcript, save prehaps for the unusual and exceptional case. The lawyer having lost below, would be conscious of the skepticism that prevails above when a second hearing is sought and would as sorely need the transcript in petitioning for a hearing before the appellate court as he would if the merits of an appeal were at stake. A layman hence needs the transcript even more.
>
> ... Since out system is an adversary one, a petitioner carries the burden of convincing the appellate court that the hearing before the lower court was either inadequate or that the legal conclusions from the facts deduced were erroneous. A transcript is therefore the obvious starting point for those who try to make out a case for a second hearing. The State can hardly contend that a transcript is irrelevant to the second hearing, where it specifically provides one, upon request to the appellate court and the State attorney. So long as this system of repeated hearings exist and so long as transcripts are available for preparation ... they may not be furnished [to] those who can afford them and denied [to] those who are paupers." Id at 369-371.

Wade v Wilson, 395 US 282, 286; 90 SCt 501; 24 LEd2d 470 (1970), expressly declined to define the parameters of 28 U.S.C. §2254 access to free transcripts. However, a year later in Mayer v City of Chicago, 404 US 189; 92 SCt 410; 30 LEd2d 372 (1971), stated:

"whether an appeal is discretionary or as of right does not effect an indigent's right to a transcript, since '[i]ndigents must ... have the same opportunities to invoke the discretion' of the courts as those who can afford the cost". Id at 190-191 n1. (citing Burns, 360 US at 258).

Concluding:

"an appellant cannot be denied a record of sufficient completeness" to permit proper consideration of his claims. Id at 198. As is would be an invidious discrimination for the State to make available a transcript to those who could afford them yet deny them to those who were indigent. Id at 193.

Britt v North Carolina, 404 US 226, 227; 92 SCt 931; 30 LEd2d 400 (1971), found that according to Griffin and its extensive progeny command that a State must provide an indigent criminal defedant with the basic tools for an adequate defense or appeal, when those tools are available for a price to other criminal defendants. It developed a two-prong test. Id at 228.

In US V MacCollom, 426 US 317, 95 SCt 2006; 49 LEd2d 666 (1976)(plurality opinion), a case in which the US Supreme Court upheld the constitutionality of 28 U.S.C. §753(f), which provides the means for an indigent to obtain a transcript for use on appeal. Justice Blackmun concurred in the judgment of the four Justice plurality, finding that the conditions of §753(f) provide petitioners with the opportunity to present thir claims and §753(f) was constitutional in the this limited scope. Id at 329-330. That is the only holding, the rest is mere dicta.

In turning to MCR 6.433(C)(3):

> (C) OTHER POSTCONVICTION PROCEEDINGS. An indigent defendant who is not eligible ro file an appeal of right or an application for leave to appeal may obtain records and documents as provided in this subrule.
>
> (1) The defendant must make a written request to the sentencing court for specific documents or transcripts indicating that the materials are required to pursue postconviction remedies in a state or federal court and are not otherwise available to the defedant.
>
> (2) It the documents or transcripts have been filed with the court and not provided previously to the defendant, the clerk must provide the defendant with copies of such materials without cost to the

defendant. If teh requested materials have been provided previously to the defendant, on the defendant's showing of good cause to the court, the clerk must provide the defendant with another copy.

(3) The court may order the transcription of additional proceedings if it finds there is good cause for doing so. After such a transcript has been prepared, the clerk must provide a copy to the defendant.

(4) Nothing in this rule precludes the court from ordering materials to be supplied to the defendant in a proceeding under subchapter 6.500.

It requires a showing of "good cause" or need. People v Caston, 228 Mich App 291, 302-303; 579 NW2d 368 (1998), is the only case to discuss the constitutionality of MCR 6.433(C)(3), which determined under the facts of that case it was constitutional. It relied solely upon MacCollom, determining that Caston had made only a bare allegation. Both MacCollom and Caston waited two years before making the request for the transcripts. Both had the opportunity for direct review, and both made conclusory statements.

This court rule should not be read in isolation. MCR 7.212(C)(7) requires appellant to cite specific pages in supprt of any claimed error, or the issue is deemed waived. Wilson v Taylor, 457 Mich 232, 243; 557 NW2d 100 (1998)(abandon argument by failing to cite the record to support it); People v Bosca, 310 Mich App 1, 16; 871 NW2d 307 (2015); People v Petri, 279 Mich App 407, 413; 760 NW2d 882 (2008); People v Milstead, 250 Mich App 391, 404 n.8; 648 NW2d 648 (2002)(failed to cite record, forfieted issue). Appellant is also required to provide the transcript on appeal, MCR 7.210(B)(1)(a). See also: People v Dunigan, 299 Mich App 579, 587; 831 NW2d 243 (2013)(Court of Appeals generally refuses to consider issues for which an appellant has failed to provide an transcript); People v Wilson, 196 Mich App 604, 615; 493 NW2d 471 (1992).

This then would necessitate use of a transcript in order to prosecute an appeal, requiring the State to furnish such a transcript to those in

financial need, Griffin, 351 US at 19; Eskridge, 357 US at 216.

In subsequent decisions the US Supreme Court adhered to and in many way significantly expanded upon the holding of Griffin, allowing criminal defendants the ability to have the same appellate review as those able to pay their own way. The

US Supreme Court hasindicated that a transcript need not be provided if it is not necessary to decide a nonfrivolous claim, context and subsequent precedent makes clear that it referred to practical necessity, not strick necessity. MacCollom, upheld 28 U.S.C.§753(f), which provides federal indigent prisoners access to transcripts of prior proceeding only if a judge certifies "that the suit or appeal is not frivolous and the transcript is needed to decide the issue presented by the suit of appeal." §753(f).

It is fairly clear §753(f) uses "needed" to refer not to strick necessity, but to a practical necessity. Justice blackmun's opinion concurring to the judgment in MacCollom, which is controlling due to its narrow scope, 426 US at 329: "I write separately, however, to emphasize the narrowness of the Constitutional issue that is before us and the ease of its resolution." Construed §753(f) to require substantially less than a showing of strick necessity, stating: "In order for [the prisoner] to obtain a transcript of his trial, he was required to show only that his claim was not frivolous and there was a basis, grounded on some articulable facts, for believing that transcripts would assist him in his §2255 proceeding. Clearly there is no constitutional requirement that the United States provide an indigent with a transcript when that transcript is not necessary in order for him to prove his claim, or when his claim is frivolous on its face." Id at 329-330.

It is respectfully submitted that MCR 6.433(C)(3) is unconstitutional under United States Supreme Court precedents.

QUESTION II

WHETHER TRIAL COURT ABUSED ITS DISCRETION IN DENYING SPICE ACCESS TO THE TRANSCRIPTS, WHEN SPICE SHOWED GOOD CAUSE?

Spice submitted two motions, requesting the transcripts. The First was mailed February 1, 2017 and the second August 31, 2017 (Exhibit C). Both were filed with the court February 6, 2017 and September 15, 2017 repsectively. An undated order denied the request (Appendix A). Which motion does it deny?

MCR 2.602(A)(1) requires that all orders must be in writing, signed and dated with the date they are signed. See Also People v Vincent, 455 Mich 110, 125; 565 NW2d 629 (1997). Under Michigan rules of procedure, an order is not effective unless it is in writing, signed by the court, and dated. in People v Kelly, 181 Mich App 95, 97-98; 449 NW2d 109 (1989), the court observed docket entries do not conform to the requirement for an order 2.602(A). Kelly cited Hartman v Roberts-Walby Enterprises, Inc., 380 Mich 105; 155 NW2d 842 (1968) and People v Norman, 9 Mich App 647, 651 n.4; 158 NW2d 38 (1968). That which is not legitimate should not be legitimized. The Michigan Court of Appeals determined that the order was March 7, 2018.

Spice specifically pointed to numerous appellate issue, the transcripts are needed to present the claims (Exhibit C). Not only was the appellate issues presented, but also that he was denied the ability of an appeal of right, because he could not obtain a copy of the form which was denied expressly by the MDOC (Exhibit A). Spice further asserted that the Trial Court at sentencing failed to provide a copy of the form as required by MCR 6.425(F)(3) during the appeal to the Court of Appeals. But in order to raise the actual claim the transcripts are required to cite the specific page MCR 7.212(C)(7).

Spice specifically referred to these claims: Stop, seizure, and search; Denial of Appeal of Right; Self-representation; Corpus Delicti; Dissatification

of Foster, at the May 9, 2016 proceeding; Confession, in which counsel called the wrong individual; False testimony; Evidence obtain wrongfully; Brady violation.

Think about that- counsel called the wrong individual concerning the confession. Under Michigan procedures the defendant must establish a factual predicate for an ineffective assistance claim, People v Solloway, 316 Mich App 174, 189; 891 NW2d 255 (2016).

As previously asserted, the need for transcripts is needed to present the claimed errors.

Trial Court abused its discretion by denying Spice access to the transcripts, an should reverse Trial Court's order.

QUESTION III

WHETHER SPICE WAS DENIED ACCESS TO THE COURTS GUARANTEED BY THE UNITED STATES CONSITUTION UNDER THE FIRST AND FOURTEENTH AMENDMENT, BY ACTIONS OF THE MICHIGAN EXECUTIVE AND JUDICIAL BRANCHES OF GOVERNMENT?

While the right to access to the courts exist, the constitutional basis is unsettled, Christopher v Harbury, 536 US 403, 415; 122 SCt 2179; 153 LEd2d 413 (2002). Decisions fo the United States Supreme Court have clearly settled the proposition that a state having an appellate system cor criminal cases is constitutional required to provide a means of affording adequate and effective means of review to indigent defendants, Griffin, supra. In some circumstances the right derives from the First AmendmentCalifornia Motor Transport Co. v Trucking Unlimited, 404 US 508, 510; 92 SCt 609; 30 LEd2d 642 (1972). Other cases have found support in the Due Process Clause of the Fourteenth Amendment, Wolff v McDonnell, 418 US 539, 576; 94 SCT 2963; 41 LEd2d 935 (1974); Dowd v US ex rel. Cook, 340 US 206; 71 SCt 262; 95 LEd 215 (1951); Cochran v Kansas, 316 US 255, 257; 62 SCt 1068; 86 LEd 1453 (1942).

The facts of this case are straight forward. Spice was sentenced and not given an appeal of right form, violation of MCR 6.425(F)(3). Spice was denied an right to appeal form because he did not have 10¢ in his spendable balance (Exhibit A). Spice presented a motion to tghe Trial Court requesting the transcripts to appeal the convictions. There was a response from the law clerk concerning the pleading (not that they were procedurally defective) and Spice attempted to correct the error. After a period without hearing anything, Spice submitted an new motion, which was filed with the Trial Court. Trial Court, after three inquiries, issues an undated order in violation of 2.602(A)(1). Spice submits an appeal to the Michigan Court of Appeals to MDOC staff for mailing. The pleading are not mailed. Spice again mails the pleadings, but is denied due to being untimely (Appendix B), and uses, I assume, is the docket entries to make that determination.

the facts and law are pretty settled in this area. However, Spice assert the need for a reasonably speedy appeal mandate needs to be issued by the United States Supreme Court.

Pursuant to 28 U.S.C. §2254(b)(1)(B)ii), habeas relief generally should not be granted until the prisoner has exhuasted state remedies, unless there exist "circumstances rendering such process ineffective to protect the rights of the prisoner". Inordinate delay in adjudicating appeals shouold be such a circumstance. See: Turner v Bagley, 401 F3d 718, 728 (6th Cir 2005)(8 year delay); Phillips v White, 851 F3d 567, 576 (6th Cir 2017)(7 years delay); Workman v Tate, 957 F2d 1339, 1344 (6th Cir 1992)(3 year delay); Carpenter v Young, 50 F3d 869 (10th Cir 1995)(2 year delay).

In this case it cannot be disputed Spice submitted two different motions, both requesting the transcripts. One order was issued, denying the request for not showing "good cause" (Appendix A). This Court can determine

on its own that Spice did present factual issues that would require the transcripts to present the issues. So either Trial Court made a factual determination so grossly wrong or never addressed the motion. The facts of this case present issues that should be addressed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 10/22/2019