

NO: \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
DARLENE KAY HERRAN- PETITIONER

v.

STATE OF INDIANA - RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI  
TO THE INDIANA COURT OF APPEALS

AMENDED PETITION FOR WRIT OF  
CERTIORARI

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### Questions Presented for Review

- 1) Did the Indiana Court of Appeals err by ruling that when a trial court states that *pro-bono* counsel may be charged for costs of a transcript for an indigent client and an invoice is sent to counsel by the court reporter, that the issue is not ripe for appeal unless Appellate counsel is ordered to pay those costs. Is the trial court's statement a "chill" on the indigent client's 6<sup>th</sup> Amendment Rights?
- 2) When a person is placed on Home-Detention and one of the standard rules is that no person convicted of a felony will be allowed to live with the person on Home Detention, should that rule automatically extend to the defendant's spouse or is the extension to spouse an infringement on a family's right to living arrangements as described in *Moore v. City of East Cleveland*?

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**Citations to Lower Courts**

*Herran v. State* 129 N.E. 3d 836 (Ind. App. 2019) Unpublished.

*Herran v. State* 2019 Ind. Lexis 717 (Ind. Sept. 2019) *Transfer denied*.

**Jurisdictional Statement****Basis for Jurisdiction:**

On 2-23-2018, the State filed an Information charging the Appellant, Defendant, Darlene Kay Herran with Operating a Motor Vehicle after Forfeiture of License for Life, a Level 5 Felony.

A Plea Agreement was filed on 9-13-18 and Ms. Herran pled guilty and was sentenced on 11-29-18.

She pled guilty as charged and was sentenced to 5 years to the Indiana Department of Corrections with 2 years suspended to formal probation and 3 years of home detention.

One of the conditions of her home detention was that ...“No person convicted of a felony will be allowed to live or visit at your residence.”

Ms. Herran’s husband is also a convicted traffic felon and was required to move out. Darlene wrote a letter to the court on 12-7-18 stating she didn’t realize she wouldn’t be able to live with her husband, she no longer had her public defender for an attorney and couldn’t afford an attorney and asked the trial court to reconsider that portion of her home detention which would not allow her to live with her husband.

On 12-19-18, the trial court denied Darlene's request without a hearing.

On 12-18-18, Mr. Arnett, her current *pro-bono* attorney, filed an Appearance and a

Motion to Allow Defendant to Live with Spouse. That motion was denied 12-20-18 without a hearing.

On 1-25-19, the trial court ordered transcription costs to be paid from public funds but put Appellate counsel on notice that the court may assess costs against him.

Notice of Appeal was filed by Mr. Arnett *pro-bono* on 12-31-18 and *Pro bono* status of counsel was indicated on the first page.

The Indiana Court of Appeals issued an Unpublished Opinion on 6-27-19.

Petition to Transfer to the Indiana Supreme Court was filed on 7-20-19 and that Petition was denied by a 3-2 majority on 9-12-19.

28 U.S.C §1257 confers jurisdiction to the United States Supreme Court as this is an Appeal from the highest court in the State of Indiana.

### **Constitutional Provisions that Apply**

#### **6<sup>th</sup> Amendment**

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

#### **1<sup>st</sup> Amendment**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## **Other Regulations that Apply**

### Henry County Community Correction Rule 5:

You must provide a list of all persons residing at the residence. No person convicted of a felony will be allowed to live at or visit your residence. No person may move into the residence during your time on home detention without prior approval from HCCC. All persons living in the home are subject to the same terms as you regarding searches, drugs/alcohol/CBD and visitors.

## **Background and Prior Treatment of Issues Presented for Review**

Darlene Kay Herran was charged with Operating a Motor Vehicle after Forfeiture of License for Life as a Level 5 Felony on 2-23-18.

Pursuant to a Plea Agreement, she plead guilty as charged and was sentenced to 5 years at the IDOC with 2 years suspended to probation and 3 years of Home Detention.

Ms. Herran wrote a letter to the trial court stating she didn't realize she would not be allowed to live with her husband, that she no longer had a public defender for an attorney and she couldn't afford an attorney, and she asked the trial court to reconsider that portion of her home detention which did not allow her husband to live with her. The trial court denied that request without a hearing.

On 12-18-18, Mr. Arnett, Darlene Herran's current *pro-bono* attorney filed an Appearance and a Motion to Allow Defendant to Live with Spouse. That motion was summarily denied.

After Notice of Appeal was timely filed *pro-bono* by Mr. Arnett, the trial court ordered the transcript to be paid out of the Henry County account but stated: "...Counsel, however, is put on notice that the Court may assess such costs against Appellant Counsel."

On 1-8-19 when the transcript was delivered, an invoice was delivered to *pro-bono* counsel for \$94.50 from the Court Reporter, Mark A. Stamper.

On January 31, 2019, Defendant filed a Motion to Correct Errors which was never ruled on, which complained that *pro-bono* Appellate Counsel may be assessed transcript fees for an indigent defendant in this instance.

## **Treatment by the Court of Appeals**

In the Indiana Court of Appeals, the Statement of Issues, issue 1 was:

“Can a trial Court order pro-bono Appellate Counsel to pay transcript costs for in indigent client?”

Issue 3 was:

“When a person is placed on Home Detention and one of the rules is that no person convicted of a felony will be allowed to live there, should that rule extend to a spouse where neither of the marriage partners is a “violent” felon or a danger to the general public?”

The Court of Appeals ruled on pages 6 and 7 of its Memorandum Decision, that the issue of assessing costs of the transcript to *pro-bono* Appellate Counsel was not ripe for appeal and that neither Appellate Counsel nor Ms. Herran sustained any injury. The Appellate court then declined to address the issue of chilling Ms. Herran’s 6<sup>th</sup> Amendment Right to Counsel.

On the issue of not allowing a felon spouse to live with the Home-Detention defendant, the Court of Appeals correctly compared a condition of Home Detention to a condition of probation. The Appellate Court went on at page 12 of its decision to say that condition was not punitive in nature and didn’t interfere with Ms. Herran’s ability to stay married and was not a “no contact” order so therefore the trial court did not abuse its discretion when it entered the Home Detention order which was signed by Ms. Herron. That court did not address the Constitutionality of the interpretation of the rule by the trial court as related to this court’s ruling in *Moore v. City of East Cleveland* 431 U.S. 494, 499 (1997).

The Indiana Supreme Court denied transfer by a 3-2 vote.

## **ARGUMENT**

### ***Pro-bono* Counsel for Indigent Clients cannot be Required to Pay Transcript Costs.**

The Indiana Supreme Court encourages attorneys to perform some *pro-bono* work for the indigent and in fact when renewing one’s bar card the question of how much *pro-bono* work was done is asked.

It would seem outrageous for that court to encourage *pro-bono* work and then allow local courts to be able to require payment for transcripts.

The Court of Appeals is correct in footnote 2 on page 7 of its Opinion in this cause in its analysis that an indigent defendant is allowed to proceed without payment of fees, including transcripts. *Hollowell v State* 19 N.E. 3<sup>d</sup> 363 (Ind. 2014), *Wright v. State* 772 N.E. 2<sup>d</sup> 449 (Ind. App. 2002).

Several United States Supreme Court cases require indigent defendants be furnished transcripts at public expense as to not do so would run afoul of equal protection. *See Griffin v. Illinois* 351 U.S. 12,19 (1956), *Long v. District Court of Iowa* 285 U.S. 192,194 (1966), *Gardner v. California* 392 U.S. 367 (1969).

The Indiana Court of Appeals refused to address the issue, however claiming the issue was not ripe for appeal and no harm was done to Herran or counsel. Such is not the case. Counsel was invoiced by the court reporter and Herran's right to counsel was chilled because what attorney in their right mind would want to have to pay to do *pro-bono* work? That seems ridiculous. If counsel does not pay the invoice, which he won't unless the United States Supreme Court tells him to, will the trial court order him to pay the invoice?

In a death penalty case, the United States Supreme Court ruled that whatever the objectives of the law, those objectives "cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." *United States v. Jackson* 390 U.S. 570,582 (1968).

In *Jackson* the Supreme Court determined that it was unfair and coercive to pleading guilty if capital punishment was applicable only to those who were found guilty at trial and not applicable to those who chose a plea agreement thus, chilling the fundamental right to a jury trial. In the case at bar, the threat of having *pro-bono* counsel having to pay for transcripts would chill the right to competent counsel for indigents.

A trial court judge should not be allowed to use his position as a "bully pulpit" to discourage *pro-bono* counsel for the indigent. Therefore this court should rule that the trial judge in this case by threatening to charge *pro-bono* counsel along with the invoice from the court reporter chilled the defendant's 6<sup>th</sup> Amendment right to competent counsel and was contrary to equal protection of the law.

### **Living Arrangements for Those on In Home Detention**

The trial court erred in not giving Ms. Herran a hearing on her request and subsequent motion that the home detention rule not be interpreted so broadly as to automatically include a spouse and the Indiana Court of Appeals erred by ruling it was merely a standard condition of home detention and not punitive in nature. In fact on page 12 of the Memorandum Decision, the Appellate Court ruled as follows:

The condition at issue here was entered as part of the standard conditions of the home detention order and agreement, which is the type of ministerial or administrative condition which could be imposed without being expressly provided for in the plea agreement.

Herran argues that the challenged condition unduly infringes upon her fundamental right to be married. It has been recognized that citizens have a fundamental right to enter into and maintain a marriage relationship. *See, e.g., Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.") However, the condition of Herran's home detention prohibiting her from living with a felon or having a felon visit her home did not implicate Herran's ability to remain legally married to her spouse, nor

did it materially add to the punitive obligations of her sentence. It does not require her to divorce her husband, legally separate from him, or to alter her legal status as to her spouse in any way. This was not a ‘no-contact’ order prohibiting Herran from having any contact with her spouse. Because this standard condition of home detention did not materially add to the punitive obligation of Herran’s sentence, we conclude that the trial court did not abuse its discretion when it entered its Home Detention Order and Agreement.

The Appellate Court was only partially correct in its analysis and failed to address *stare – decisis* by the United States Supreme Court.

In *Moore v. City of East Cleveland* 431 U.S. 494, 499 (1977) the Supreme Court stated: ... “[W]hen the government intrudes on choice concerning family living arrangements, this court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”

That court recognized the right to live together as a nuclear family. *Id.* at 504, 505.

More recently the Indiana Court of Appeals in *Carswell v. State* 721 N.E. 2<sup>d</sup> 1255,1258 (Ind. Ct. App. 1999) when addressing a claim of undue intrusiveness by a condition of probation upon a Constitutional Right said the appellate tribunal must consider and balance: “1) The purpose sought to be served by probation; 2) the extent to which constitutional rights enjoyed by law abiding citizens should be afforded probationers and 3) the legitimate needs of law enforcement.”

The trial court certainly did not address the importance of governmental interests advanced and the extent to which they were served by the “no felon including spouse” rule as the trial court denied both requests for hearing on the matter without a hearing.

The Indiana Court of Appeals failed to address the constitutionality of the interpretation of the complained of condition of Home Detention and ignored the requirements of Appellate Review laid down in *Moore supra* and *Carswell supra*.

Two Glaring misconceptions were espoused on page 12 of the Appellate Court’s Decision:

1) The Court of Appeals stated:... “[t]his was not a “no-contact” order prohibiting Herran from having any contact with her spouse...”. Essentially it was akin to a no-contact order. She is on home detention, unable to leave on her own as she has no driver’s license, and unable to leave without permission from Community Corrections and her husband is unable to go to the residence as the rule is interpreted, so by phone would be the only way they could have contact.

2) The Court of Appeals also stated:... “this standard condition of home detention did not materially add to the punitive obligation of Herran’s sentence,”...

Actually the separation of the nuclear family in this instance creates a significant hardship on the couple. They are being punished by having to maintain two households which can wreak extreme financial hardship on many families.

## Reasons the Court Should Grant Certiorari

- 1) On the issue of the trial court ordering that *pro-bono* appellate counsel may be charged for transcripts for an indigent client, the trial court has run afoul of the 6<sup>th</sup> Amendment right to competent counsel and the chilling effect the threat has on that right as prohibited by *Jackson supra*. This issue is one which is well settled in law and the Court of Appeals decision is contrary to the dictates of *Jackson supra*, *Griffin supra*, *Long supra*, *Hollowell supra*, and *Wright supra*.
- 2) As far as the issue of the Home Detention rule no felons living with or visiting the person on home detention extending to a spouse, this is a case of first impression and needs to be decided by this court as family separation and family living arrangements raise questions of constitutional consequence concerning protected rights and Substantive Due Process and if no hearing is held the procedure is contrary to *Moore supra* and *Carswell supra*.

## Conclusion

This court should find that the trial court cannot threaten *pro-bono* counsel for indigent defendants with the possibility of having to pay for transcripts and reverse the Court of Appeals Memorandum Decision on that issue and to declare that counsel shall not be required to pay the invoice tendered with the transcript.

On the issue of whether the rule of “no felons living with or visiting a person on home detention” should extend to a spouse, this court should reverse the Court of Appeals and order that a hearing should be held in the trial court which follows the dictates of *Moore supra* and *Carswell supra*. which requires balancing the governmental interests with the degree of intrusion on the family.

Thus this court should reverse the Court of Appeals and remand to the trial court for hearing on the issue of family living arrangements.

Respectfully submitted,

/s/Dale W. Arnett

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### **CERTIFICATE OF SERVICE**

I, the undersigned attorney, hereby certify that I have caused a copy of the foregoing PETITION FOR WRIT OF CERTIORARI to be served upon the below listed Parties, by regular first class mail, and email, on this 10th day of February, 2020.

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