No. 20-_____

IN THE

Supreme Court of the United States

ROBERT JAMES POPE, JR.

Petitioner,

v.

WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

ANDREA TAYLOR CORNWALL
Assistant State Public Defender
Counsel of Record

WISCONSIN STATE
PUBLIC DEFENDER
735 N. Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
cornwalla@opd.wi.gov

QUESTION PRESENTED

Where trial counsel's ineffectiveness in failing to initiate an appeal results in a defendant's loss of appellate rights, can the constitutional right to an appeal with the effective assistance of counsel be deemed forfeited on the basis that the defendant did not pursue appeal *pro se*?

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION, STATUTES, and RULES

Petitioner Robert James Pope, Jr., respectfully petitions for a writ of certiorari to review the judgment of the Wisconsin Supreme Court.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court (App. A) is reported at 2019 WI 106, 389 Wis. 2d 390, 936 N.W.2d 606. The opinion of the Wisconsin Court of Appeals (App. B) is unpublished but noted at 2019 WI App 1, 385 Wis. 2d 211, 923 N.W.2d 177. The decision of the Milwaukee County Circuit Court (App. C) is unreported.

JURISDICTION

The Wisconsin Supreme Court filed its opinion on December 17, 2019. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right… to have the Assistance of Counsel for his defence."

The Fifth Amendment provides, in relevant part: "No person shall… be deprived of life, liberty, or property, without due process of law…"

The Fourteenth Amendment provides, in relevant part: "No State shall … deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

1. Following a 1996 trial, a Wisconsin jury convicted Robert James Pope, Jr. of two homicide charges, and he was sentenced to life in prison without parole. (App. A at 106). That same day, trial counsel signed and filed a form indicating that Mr. Pope wished to pursue postconviction relief, and that counsel would timely file the required "notice of intent" necessary to commence his direct appeal. (App. A at 106). However, trial counsel failed to file the "notice of intent," and he subsequently failed to respond to Mr. Pope's repeated letters and efforts to contact him regarding his appeal. (App. A at 106; R.56; 57; 79:30-40,42-43).[1] As a result, Mr. Pope's direct appeal rights expired with no appeal initiated. (App. A at 106-107).

[1] "R.__" refers to an item number in the state court record.

In the months and years that followed, Mr. Pope made repeated, unsuccessful *pro se* attempts to reinstate his right to direct appeal, lost through his trial lawyer's inaction. Those attempts included three extension motions filed in the Wisconsin Court of Appeals, in 1997, 1999, and 2003, all of which were denied. (App. A at 108-112; R.27; R.40; R.41; R.42). In denying these requests, the Court of Appeals found that Mr. Pope's failure to provide a sufficient reason why he waited 15 months[2] after sentencing before he made his initial request, and his failure to identify the specific issues he believed could be raised on direct appeal, doomed his requests for reinstatement of his direct appeal. (R.27; R.40; R.42).

Then, in 2014, the Wisconsin Supreme Court held, as a matter of first impression, that the appropriate forum and vehicle for obtaining relief based on trial counsel's ineffectiveness in failing to timely file a notice of intent is through a habeas petition filed in the Wisconsin Court of Appeals. *State ex rel. Kyles v. Pollard*, 2014 WI 38, 354 Wis. 2d 626, 847 N.W.2d 805. Within a month of that decision, Mr. Pope, following its direction, again sought reinstatement of his direct appeal rights, filing a *pro se* habeas petition in the Wisconsin

[2] As noted by the Wisconsin Supreme Court, Mr. Pope's initial extension request was actually made 14 rather than 15 months after his sentencing. (App. A at 108, n5).

Court of Appeals that alleged his trial counsel was ineffective in failing to timely file the notice of intent. (App. A at 112; R.43). The court remanded the case for fact-finding and, following testimony from trial counsel and Mr. Pope, the Milwaukee County Circuit Court made findings which included that trial counsel failed to follow through on filing the notice of intent as Mr. Pope had directed, and that Mr. Pope had been actively attempting *pro se* since 1996 to reinstate his direct appeal rights. (App. A at 112-113; R.56; R.57). Based on these findings, the State and undersigned counsel, appointed to represent Mr. Pope in his state habeas action, entered a stipulation jointly moving to reinstate Mr. Pope's direct appeal rights, which the Court of Appeals granted. (App. A at 113; R.60; R.62).

A notice of intent was then filed on Mr. Pope's behalf to commence the direct appeal process, and transcripts of the trial court proceedings were ordered. (App. A at 113). After learning that only the previously-prepared transcripts of Mr. Pope's preliminary hearing and sentencing were available, and that the court reporters could not provide transcripts of any of the pretrial or jury trial proceedings because their notes had been destroyed, undersigned counsel filed a

motion for postconviction relief[3] on Mr. Pope's behalf in March 2017, requesting a new trial on the basis that he was denied due process and his constitutional right to a meaningful appeal due to the unavailability of any transcripts from his 1996 trial. (App. A at 114; R.64). The circuit court granted a new trial, concluding that a meaningful appeal of the convictions was impossible without any trial transcripts. (App. A at 114-115; App. C at176-178; R.74; R.81:22-25).

2. The State appealed, and the Wisconsin Court of Appeals reversed and reinstated Mr. Pope's convictions. (App. B at 159-172). That court held that under Wisconsin case law, Mr. Pope was required to show that the missing transcripts from his trial, if available, would establish a valid claim of error, and that his motion failed to do so. (App. B at 170,172). The Court of Appeals also found that Mr. Pope had "not done everything that reasonably could be expected in order to perfect his appeal" because in his prior *pro se* attempts to reinstate his direct appeal rights, he did not tell the court what arguable issues he believed could be raised. (App. B at 171-172).

[3] A motion for postconviction relief is part of Wisconsin's "direct appeal" process, similar to what other states typically call a motion for a new trial. *See State v. Evans*, 2004 WI 84, 273 Wis. 2d 192, 682 N.W.784, *abrogated on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900.

3. The Wisconsin Supreme Court granted review, and affirmed by a 4-3 vote. (App. A).

While the majority acknowledged that trial counsel was to blame for failing to file the notice of intent in order to commence the appeal process, it refused to apply a presumption of prejudice to the deprivation of Mr. Pope's right to appeal and to effective counsel on appeal based on the unavailability of any trial transcripts, because it attributed the lack of transcripts to his failure to promptly proceed with an appeal *pro se* following trial counsel's abandonment. (App. A at 120-128,132). According to the majority, Mr. Pope "caused the transcript to be unavailable because he sat on his rights." (App. A at 126). In the majority's view, despite trial counsel's abandonment, Mr. Pope should have moved more quickly "to defend his rights" in requesting reinstatement of the deadline. (App. A at 126-127,131). Moreover, the majority also held that, even though counsel abandoned him and the appellate courts repeatedly denied reinstatement of his direct appeal rights, Mr. Pope should have ordered the transcripts himself, before the court reporters destroyed them. (App. A at 127-128,131). Such missteps, said the majority, amount to forfeiture of the constitutional right to a meaningful appeal with effective counsel:

> …..Both parties and this court all agree that counsel's failure to file the notice of intent was inexcusable. But that does not excuse Pope's failure to timely move to extend the deadline to file the notice of intent. Nor does it excuse his failure to order the trial transcript for over ten years. Pro se litigants, though acting without counsel, are still required to timely assert their rights. If they do not, then they may forfeit those rights. …

(App. A at 129-130).

A three-justice dissent vehemently disagreed (App. A at 133-158), pointing to this Court's decisions[4] which guarantee criminal defendants the right to the effective assistance of counsel on direct appeal, and which establish that prejudice is presumed when an attorney's deficient performance deprives a defendant of his direct appeal. (App. A at 133). In the dissent's view:

> The majority acknowledges the failure of Robert James Pope Jr.'s trial counsel to file the Notice of Intent to Pursue Postconviction Relief—the prerequisite to the appointment of appellate counsel—which resulted in the deprivation of Pope's constitutionally-guaranteed direct appeal rights. Majority op., ¶9. ***Nevertheless, … the majority burdens a pro se criminal defendant with commencing postconviction proceedings on this own and without the assistance of counsel the Sixth Amendment otherwise promises him.*** When this pro se criminal defendant inevitably committed errors, this court seized upon his inability to correctly follow the rules of appellate procedure to deny him what the Constitution guarantees.

(App. A at 134)(emphasis added).

The dissent concluded that when an appellant has been deprived of his constitutionally-guaranteed right to the effective

---

[4] Citing *Douglas v. California*, 372 U.S. 353, 355-358 (1963*); Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985); *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000); *Garza v. Idaho*, 139 S. Ct. 738, 744, 747 (2019).

assistance of counsel for a direct appeal and the trial transcript, requiring assertion of a valid claim of error without any basis for doing so "imposes a condition no appellant could meet." (App. A at 149). The dissent also noted that, under this Court's precedent[5], "[t]he deprivation of constitutionally-guaranteed counsel on direct appeal is properly imputed to the State." (App. A at 150-151).

The dissent concluded with the following admonition:

> . . . Undoubtedly many will celebrate—indeed, be relieved by—the result the majority reaches in this case. A person convicted of double homicide remains confined. ***However, the law does not support the majority's decision in this case; the law contradicts it. … Pope's conviction stands, unreviewed, at the expense of constitutional guarantees designed by the framers to protect the innocent, not free the guilty.*** While some may be tempted to deny defendants their fundamental constitutional rights when they have been convicted of heinous crimes, doing so erodes the constitutional rights of all citizens – including the innocent – by leaving their enforcement to the discretionary impulses of the government at the expense of individual liberty.

(App. A at 157) (emphasis added).

[5] Citing *Coleman v. Thompson*, 501 U.S. 722, 754 (1991) and *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

REASONS FOR GRANTING REVIEW

I. The Wisconsin Supreme Court's decision, which burdens a criminal defendant with pursuit of his appeal *pro se* after counsel abandons him or face forfeiture of his appeal, is in direct conflict with this Court's interpretation of the Sixth Amendment, which requires a presumption of prejudice where counsel's failure to commence an appeal results in the loss of appellate proceedings.

As this Court recently noted, in the Sixth Amendment context, "past precedents call for a presumption of prejudice whenever 'the accused is denied counsel at a critical stage,' and to an even greater extent, "when counsel's deficiency forfeits an 'appellate proceeding altogether.'" *Garza v. Idaho,* 139 S. Ct. 738, 747 (2019)(quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000)); *see also, Penson v. Ohio*, 488 U.S. 75, 88 (1988). This is so, this Court said, because "there is no disciplined way to "accord any 'presumption of reliability'…to judicial proceedings that never took place." *Garza, Id.,* citing *Flores-Ortega*, 528 U.S. at 483 (quoting *Smith v. Robbins*, 528 U.S. 259, 286 (2000)).

In *Flores-Ortega*, this Court held that "a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice," noting that it had thus "long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally

unreasonable." *Flores-Ortega*, 528 U.S. at 477 (citing *Rodriquez v. United States*, 395 U.S. 327 (1969); *Peguero v. United States*, 526 U.S. 23, 28 (1999)). Thus, this Court held that when an attorney's deficient performance costs a defendant an appeal he would have pursued, prejudice should be presumed, with no further showing of the merits of any underlying claims. *Flores-Ortega*, 528 U.S. at 484.

There is no dispute that immediately following his conviction, Mr. Pope directed counsel to commence his direct appeal, and that trial counsel failed to do so. Indeed, the majority acknowledged that counsel's failure to file the notice of intent was "inexcusable." (App. A at 129). Thus, Mr. Pope "reasonably relied" on his counsel to file the notice, and counsel's failure to do so was unreasonable.

However, rather than presume prejudice where counsel has failed to commence an appeal, a majority of the Wisconsin Supreme Court's instead does the opposite—it requires a defendant whose lawyer has abandoned him to pursue an appeal on his own, with the skill of an appellate lawyer, or face forfeiture of his appeal and his

right to effective assistance of counsel on appeal.[6] This determination directly conflicts with, and is a perversion of, this Court's Sixth Amendment precedent that provides where a lawyer's deficient conduct results in loss of the right to appeal, prejudice is presumed.

The majority decision leaves defendants, often indigent, with minimal education and no legal training, to navigate appellate procedures and pursue an appeal on their own—including obtaining and paying for transcripts, identifying meritorious issues, and following the intricacies of appellate procedure—if their lawyer fails to follow their direction to commence an appeal. Indeed, the majority

---

[6] Notably, in the week following its decision in this case, the Wisconsin Supreme Court issued another opinion, again with a 4-3 split, which also involved a trial lawyer's failure to file the notice of intent. *State ex rel. Wren v. Richardson*, 2019 WI 110, 389 Wis. 2d 516, 936 N.W.2d 587. In *Wren*, the majority again burdened the defendant with proceeding *pro se* following his lawyer's abandonment:

> … [W]e regularly require legally untrained litigants to assert their rights in a timely manner. ***Nothing prevented Wren from contacting another attorney. Nothing prevented Wren from researching available options to ensure he took advantage of every possible legal argument he could make. It surely cannot be that 20-year-olds (Wren's approximate age when he found out no appeal was forthcoming) are deemed incompetent. And while the PSI [presentence investigation] noted Wren had a second grade reading level at the time of sentencing, that detail alone does not mean he cannot research, consult others, and find out what needs to be done.*** In fact, Wren did just this when he filed four pro se motions regarding other matters prior to filing his habeas petition. This reflects someone who is more than capable of being resourceful. [footnotes omitted]

Wren, 936 N.W.2d at 595,¶23 (emphasis added).

finds that a defendant who fails to pursue their appeal *pro se* after their lawyer's abandonment risks "forfeiture" of their appeal.

Such a result contradicts this Court's precedent, which instead requires a presumption of prejudice. *Flores-Ortega*, 528 U.S. at 484. As this Court has recognized, "[t]hose whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings." *Rodriquez,* 395 U.S. at 330.

Moreover, such a perverse result contradicts this Court's determination that the Sixth Amendment requires the responsibility for any procedural default caused by the ineffective assistance of counsel to be imputed to the State. *See Coleman v. Thompson*, 501 U.S. 722, 754 (1991) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). As the Seventh Circuit Court of Appeals has aptly noted:

> [The defendant] was constitutionally entitled to the assistance of counsel on direct appeal, but the state of Wisconsin gave him the runaround. It allowed counsel to withdraw unilaterally, then used the ensuing procedural shortcomings to block all avenues of relief. ***Yet one principal reason why defendants are entitled to counsel on direct appeal is so that they will not make the kind of procedural errors that unrepresented defendants tend to commit. The Constitution does not permit a state to ensnare an unrepresented defendant in his own errors and thus foreclose access to counsel.***

Betts v. Litscher, 241 F.3d 594, 596 (7th Cir. 2001)(emphasis added).

This case merits review because the Wisconsin Supreme Court's decision is in direct conflict with this Court's clear mandate that counsel's deficiency in failing to commence an appeal on behalf of his client that results in the loss of an appeal requires a presumption of prejudice, with no further showing from the defendant of the merits of his underlying claims. *Flores-Ortega*, 528 U.S. at 484.

II. The decision below is wrong and deeply troubling because it eviscerates the right to effective assistance of counsel on appeal and the right to a meaningful appeal.

The Wisconsin Supreme Court's decision is wrong, and seriously erodes the Sixth Amendment right to counsel on appeal and the due process right to a meaningful appeal. The majority's insistence that a defendant must demonstrate what meritorious issues exist, despite appellate counsel's inability to review any part of the trial transcript due to trial counsel's failure to timely commence the appeal, contravenes the United States Constitution.

The majority decision fails to acknowledge this Court's well-established precedent that provides a criminal defendant the right to the effective assistance of counsel on direct appeal. *Douglas v. California*, 372 U.S. 353, 355-358 (1963); *Evitts v. Lucey*. 469 U.S. 387,

396-397 (1985). It also ignores the critical necessity of, and the due process right to, the trial transcript to an appeal.

For this Court has determined that, where a state appeal of a criminal conviction is a matter of right, the due process and equal protection provisions of the Fourteenth Amendment require that sufficient procedures must assure adequate appellate review, including production of transcripts. *See Griffin v. Illinois*, 351 U.S. 12 (1956) (Fourteenth Amendment requires that indigent defendants be afforded the same appellate review as defendants who can pay for transcripts); *Eskridge v. Washington State Bd. of Prison Terms and Paroles*, 357 U.S. 214 (1958) (state court's denial of indigent defendant's motion for free transcript was a denial of due process under the Fourteenth Amendment); *Draper v. Washington*, 372 U.S. 387 (1963) (trial judge's conclusion that an indigent's appeal would be frivolous was an inadequate substitute for full appellate review available to nonindigents, where the effect of that finding prevented appellate review based on a complete trial record, violating the Fourteenth Amendment).

The paramount importance of the trial transcript to an appeal is well-known:

> [T]he most basic and fundamental tool of [an appellate advocate's] profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law.

Hardy v. United States, 375 U.S. 277, 288 (1964)(Goldberg, J., concurring).

Here, counsel on appeal had no record of the trial to review due to the unavailability of the trial transcripts caused by trial counsel's failure to commence the appeal. Counsel therefore had no basis from which to determine what potentially meritorious grounds for appeal might exist, thus depriving the defendant of his Sixth Amendment right to the effective assistance of counsel on appeal and the due process right to a meaningful appeal. As this Court has noted, "[I]t is unfair to *require* an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal." *Flores-Ortega,* 528 U.S. at 486 (emphasis in original).

The Wisconsin Supreme Court's majority decision makes a mockery of the Sixth Amendment right to the effective assistance of counsel and the right to an appeal, contradicts this Court's precedent, and abrogates constitutional rights. In the dissent's words:

> The majority says "[t]here is nothing exceptional about requiring the appellant to assert a facially valid claim of arguable prejudicial error." Majority op., ¶33. This is certainly true when an appellant has been afforded the effective assistance of counsel for a direct appeal and the trial transcripts—the primary guide for asserting error on appeal—are available. However, when an appellant has been deprived of those constitutionally-guaranteed rights, requiring him to assert a facially valid claim of arguably prejudicial error without any basis for doing so imposes a condition no appellant could meet. ***The law affords Pope a new trial but the majority denies him one, thereby perpetuating the trampling of his constitutional rights that began with his counsel abandoning him and the court of appeals looking the other way.***

(App A at 149-150)(emphasis added).

CONCLUSION

Robert James Pope, Jr., respectfully requests that this Court grant certiorari.

Dated this 5th day of March, 2020.

Andrea Taylor Cornwall
Assistant State Public Defender
Counsel of Record

WISCONSIN STATE
PUBLIC DEFENDER
735 N. Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
cornwalla@opd.wi.gov