No. 19-7939

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

REPLY BRIEF FOR PETITIONER

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I. Respondent's opposition to the Petition is meritless, as it fails to address the Fifth and Sixth Amendment violations resulting from the decision below, which holds Petitioner responsible for the effect of counsel's ineffectiveness in failing to timely initiate his appeal, in contravention to this Court's determinations.

1. The brief in opposition provides no legitimate basis for denial of review. Indeed, Respondent's brief fails to address the federal constitutional issue raised in Petitioner's Question Presented, which focuses on the Wisconsin Supreme Court's sweeping determination that a defendant abandoned by counsel's "inexcusable" failure to initiate his appeal will be deemed to have forfeited it, along with his right to the effective assistance of counsel, by failing to pursue the appeal *pro se*. (Pet. i; Pet-App. A at 129-130).

Contrary to Respondent's claim (Opp. at 5-6), the majority decision of the Wisconsin Supreme Court conflicts with this Court's precedent, including *Garza v. Idaho*, 139 S. Ct. 738 (2019), *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), *Penson v. Ohio*, 488 U.S. 75 (1988), *Evitts v. Lucey*, 469 U.S. 387 (1985); *Rodriquez v. United States*, 395 U.S. 327 (1969), and *Douglas v. California*, 372 U.S. 353 (1963), all of 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 that appeal. The decision below is not, as Respondent urges, "bound up in idiosyncratic facts and Wisconsin appellate procedure law" with limited impact (Opp. at 6), but is instead grounded in a gravely unsound view of the Fifth and Sixth Amendment that is inconsistent with this Court's precedent, and will have a sweeping adverse effect upon the appellate rights of Wisconsin citizens.

2. Respondent's assertion that, despite the unavailability of any trial transcripts due to counsel's failure to initiate the appeal, Petitioner was "afforded the 'opportunity to appeal'" by mere reinstatement of his appellate rights (Opp. at 6-10), without more, elevates form over substance, and ignores the ultimate result of counsel's abandonment of Petitioner in failing to timely initiate his appeal – the loss of a meaningful appeal with the effective assistance of counsel to which he is constitutionally entitled. For it is due to counsel's failure to initiate the appeal that the transcripts of Petitioner's trial ultimately became unavailable, as a result of the court reporters' destruction of their notes based on the passage of time

with no appeal pending.[1] Thus, contrary to Respondent's claim, where counsel's "inexcusable" failure to timely initiate an appeal as directed by Petitioner results in the loss of the entire record of the trial proceedings, mere reinstatement of an "opportunity to appeal," without any record of Petitioner's trial occurring nearly a quarter-century ago[2], deprives a defendant of the constitutional right to a meaningful appeal and to the effective assistance of counsel on appeal.

3. Respondent also presses the determination of the majority below that Petitioner is to blame for the lack of a trial record because, it is claimed, his *pro se* procedural errors in seeking reinstatement of his appellate rights lost due to counsel's ineffectiveness resulted in destruction of the transcripts. (Opp. at 15; Pet-App. 126-132).

As recognized by the dissent, however, the insufficiency of the record is not attributable to Petitioner, but rather is imputed to the

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[1] Wisconsin Supreme Court Rule 72.01(47) requires court reporters to keep their notes for only 10 years following a court proceeding. Thus, following trial counsel's failure to initiate Petitioner's appeal, and the appellate courts' subsequent refusal to retroactively extend the deadline for doing so in response to Petitioner's *pro se* pleas, the notes from Petitioner's trial were destroyed in 2006. (Pet-App. at 135, 151-152).

[2] Respondent attempts to muster a claim that, despite the lack of any transcripts from Petitioner's 1996 trial, appellate counsel had a "substantial record to work with," consisting of the criminal complaint, docket entries stating witness names, and a sentencing transcript. (Opp. at 13-14). Plainly none of these documents contain any information about the evidence introduced at Petitioner's trial that resulted in his convictions. As this Court has recognized, a trial is the "paramount event" for determining a defendant's guilt or innocence in state criminal proceedings. *Herrera v. Collins*, 506 U.S. 390, 416, (1993). As no transcripts of the trial proceedings exist, there is no record of the evidence introduced that resulted in Petitioner's convictions, and thus the ability to appeal his convictions is thoroughly thwarted, again due to trial counsel's ineffectiveness in failing to initiate his appeal as directed in 1996.

government due to counsel's ineffectiveness. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991)(finding that the Sixth Amendment requires responsibility for any procedural default caused by counsel's ineffectiveness to be imputed to the State).

In the dissent's words:

> Inexplicably, the majority repeatedly faults Pope for not ordering the transcripts within the 10 years following his trial. Majority op., ¶¶17 n.10, 44, 46. Not surprisingly, the majority neglects to explain how Pope was supposed to identify or track down the correct court reporter, or pay the substantial fees necessary to obtain a four-day trial transcript, or know that the court reporter's notes would be destroyed 10 years after the trial unless he orders the transcript, all without the assistance of counsel. His trial counsel's failure to fulfill his obligations to Pope, who was constitutionally entitled to receive the transcript along with the assistance of counsel to pursue his direct appeal, bears the initial fault for the delays in this case. The court system's subsequent failures to recognize Pope's constitutional rights to counsel, a direct appeal, and a transcript, caused the destruction of the trial transcript, not Pope.
>
> Because Pope was not responsible for the unavailability of the transcripts, he should not bear the consequences of their destruction.

(Pet-App. A at 152-153).

Moreover, as this Court recognized in *Garza*, "while it is the defendant's prerogative whether to appeal, it is not the defendant's role to decide what arguments to press. That makes it especially improper to impose that role upon the defendant simply because his opportunity to appeal was relinquished by deficient counsel." (citing *Jones v. Barnes*, 463 U.S. 745, 751, 754 (1983)). *Garza,* 139 S. Ct. at 748. Thus, unlike the Wisconsin Supreme Court's opinion in this case,

in *Garza* this Court declined to place a "pleading barrier" on a defendant whose opportunity to appeal should never have been lost, reiterating that it would be "unfair and ill advised" 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.'" *Garza* at 748-749 (quoting *Flores-Ortega*, 528 U.S. at 486, and citing *Rodriquez*, 395 U.S. at 330).

4. Further, Petitioner has never claimed, as Respondent asserts, that his right to direct appeal "guarantees" that he will prevail on the merits on appeal, or that he is entitled to "automatic reversal" upon reinstatement of his lapsed direct appeal rights or whenever a trial transcript is missing. (Opp. at 7-14). Rather, Petitioner's claim relied upon his constitutional right, as determined by this Court, to a meaningful appeal with the effective assistance of counsel, of which Petitioner asserted he was deprived due to the unavailability of any trial transcripts, caused by counsel's failure to initiate his appeal in a timely manner.

As a result of counsel's deficiency, Petitioner was deprived of the effective assistance of counsel on appeal to which he was entitled, as

without any transcript of his trial held a quarter-century ago, appellate counsel had no trial record from which to determine whether or not any arguably meritorious issues existed for appeal. This deprivation resulted in a denial of Petitioner's right to appeal, including a right to the no-merit process prescribed by this Court in *Anders v. California*, 386 U.S. 738 (1967).

5. Respondent's claim that Petitioner "had a presumptively fair, error-free trial assisted by competent counsel" and that there is a "strong presumption of reliability in the outcome of the trial" (Opp. at 7, 16), ignores that this Court has held the presumption of reliability inapplicable where a defendant is actually or constructively denied the assistance of counsel altogether, either at trial or on appeal. *Flores-Ortega*, 528 U.S. at 482-483 (citing *United States v. Cronic*, 466 U.S. 658, 659 (1984); *Penson,* 488 U.S. at 88.

This Court has also concluded that where counsel's deficient performance results in forfeiture of an appeal itself, a presumption of prejudice applies, because the "adversary process itself" is rendered "presumptively unreliable." As this Court stated, "Put simply, we cannot accord any 'presumption of reliability' to judicial proceedings

that never took place." *Flores-Ortega*, 528 U.S. at 483 (internal citation omitted).

Here, Petitioner's convictions stand unreviewed, due to trial counsel's ineffectiveness in failing to timely initiate his appeal, and the resulting unavailability of the trial transcripts, which caused, according to the Wisconsin Supreme Court, "forfeiture" of Petitioner's appeal. (Pet-App. A at 129-130). Such "forfeiture" of the appeal due to the ineffective assistance of counsel thus renders the proceeding "presumptively unreliable" and, under *Flores-Ortega*, warrants a presumption of prejudice.

6. Finally, despite Petitioner's conviction by a jury of two counts of homicide as a party to a crime, as noted by the dissent, "he nevertheless retains the constitutional and statutory rights our laws secure." (Pet-App. A at 136-137)(citing *Turner v. Safley*, 482 U.S. 78, 84 (1987); *Cruz v. Beto*, 405 U.S. 319, 321 (1972)). At the expense of fundamental constitutional rights and in contradiction to this Court's precedent, the Wisconsin Supreme Court's decision upholds Petitioner's convictions, unreviewed by any appellate court due to trial counsel's ineffectiveness in failing to initiate his appeal. This Court should accept this case for review.

CONCLUSION

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

Dated this 16th day of June, 2020.

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