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In the

Supreme Court of the United States

UNITED STATES,

Petitioner,

v. No. 74-1487

COLIN F. MacCOLLOM,

Respondent.

Washington, D. C.
March 29, 1976

Pages 1 thru 53

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner,	:	
v.	:	No. 74-1487
COLIN F. MacCOLLOM, Respondent.	:	

Washington, D. C.,

Monday, March 29, 1976.

The above-entitled matter came on for argument at 11:08 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

FRANK H. EASTERBROOK, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of Petitioner.

JOHN A. STRAIT, ESQ., 8811 South Tacoma Way, Tacoma, Washington 98499; on behalf of Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in United States v. MacCollom.

Mr. Easterbrook.

ORAL ARGUMENT OF FRANK H. EASTERBROOK, ESQ.,

ON BEHALF OF PETITIONER

MR. EASTERBROOK: Mr. Chief Justice, and may it please the Court:

The issue in this case is whether an indigent prisoner who did not appeal his conviction has, under the Constitution, an unconditional right to obtain a transcript of his trial for perusal in the hope that the transcript will disclose errors, the nature of which he does not yet know.

Put another way, the question is whether Congress over-stepped its constitutional powers when it required indigent prisoners to show that they had some need of a transcript to support a non-frivolous claim for relief.

The facts of this case are not complicated. Respondent was convicted in 1970 of uttering forged currency and sentenced to ten years imprisonment. He did not appeal that conviction. Counsel for respondent has represented that the reason he did not appeal was in order to avail himself of a more prompt motion in the District Court for reduction of sentence. The District Court denied that motion.

In March 1972, respondent filed (pro se) a motion for

transcript in Forma Pauperis. The Chief Judge of the District Court instructed the clerk of the court to return that motion to respondent, instructing him that he should file instead a motion for collateral relief, pursuant to 28 U.S.C. 2255.

In June of 1972, respondent filed a complaint for declaratory and injunctive relief, which the District Court allowed to be filed as a civil action. The complaint alleged that respondent desired collateral relief, that he believed that his counsel at trial had been inadequate, and that he believed that the evidence was insufficient to support his conviction.

The complaint also alleged that respondent's memory and trial notes were inadequate and that without a transcript he would be unable to frame his arguments for fair and effective relief. The prayer for relief in the --

QUESTION: Did the District Court consider this, the underlying pleading, as one filed under 2255 of Title 28?

MR. EASTERBROOK: The District Court did not state how it was considering the complaint. It dismissed it for failure to state a claim upon which relief could be granted. We believe that the best interpretation of this is that it considered it as a complaint under 2255 and the request for a transcript is ancillary to that complaint, and they dismissed it accordingly.

QUESTION: But the court never explicitly --

MR. EASTERBROOK: The court never explicitly settled

those grounds.

QUESTION: Mr. Easterbrook, is the respondent on parole now?

MR. EASTERBROOK: Yes, he is.

QUESTION: Is he working?

MR. EASTERBROOK: I do not know, Your Honor.

QUESTION: Maybe I should ask your opposition whether he is still indigent. Do you think the case has become moot at all?

MR. EASTERBROOK: We do not believe that it has become moot. He is still in custody for purposes of collateral relief, so long as he is on parole, and his parole runs through 1980. If he is no longer indigent, this case might become moot, but we have no reason to believe that that is so.

QUESTION: Well, if he is employed, he might not be.

MR. EASTERBROOK: That's correct.

QUESTION: At least we are not brought up to date.

MR. EASTERBROOK: We are not up to date. The record in this case closed as of 1973, and we have no further information as to his indigency after that date.

QUESTION: Do you have any idea what the transcript would entail, how lengthy it would be?

MR. EASTERBROOK: The transcript is a transcript of a two-day trial, Your Honor. It would probably cost in the nature of $400, although we have not obtained an exact estimate.

QUESTION: I gather the stenographic minutres are still available?

MR. EASTERBROOK: The stenographic minutes are still available, although they have not been transcribed.

The prayer for relief asked the District Court to declare that respondent has "an absolute constitutional right to a verbtaim transcript of his criminal trial, supplied at government expense, to aid him in preparing a motion for collateral relief." The complaint is, in essence, simply an asswertion of respondent's good faith. It asserts the respondent believes that his trial notes are inadequate and that he believes that he is entitled to relief. But it sets forth none of the grounds upon which those beliefs were based.

The District Court appointed counsel for respondent in order to investigate the claims, because the files and records of the case did not fully disclose whether he was entitled to the transcript he sought. The investigation with the aid of counsel disclosed no grounds upon which a transcript was needed, other than, as respondent's counsel candidly admitted to the Court of Appeals, to peruse in the hope that some error, the nature of which could not yet be determined, might show up.

The District Court ultimately dismissed the complaint for failure to state a claim. The Court of Appeals reversed, holding that a transcript must be provided upon request for search for error.

We believe that the starting point for an inquiry into an indigent's right to a trial transcript is 28 U.S.C. 753(f). That section provides that a trial transcript can be furnished without charge to an indigent prisoner proceeding in a motion for collateral relief under section 2255, and I quote: "If the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented" -- in other words, an indigent prisoner, far from being cut off on account of poverty from evidence that may be important to some collateral claims -- "is entitled by tatute to a trial transcript if he can show, first, that the transcript is necessary to support certain factual allegations; and, second, that those allegations, if proved by the transcript, would amount to a non-frivolous claim for collateral relief."

There can be no doubt that Congress meant to impose upon applicants the burden of demonstrating need and lack of frivolity. The Court of Appeals so held, and that portion of its opinion is reproduced at pages 8a to 10a of our petition for certiorari.

The legislative history of section 753(f) shows that it was amended in 1965 to extend to proceedings under section 2255 the same right to a transcript without cost that previously had been available in habeas corpus. The 1965 amendment adopted verbatim the 1961 proposal of the Judicial Conference, and that proposal was drafted to incorporate the almost universal rule of

both state and federal courts, a rule that had prevailed in collateral cases until the decision below, a rule that a prisoner must show more than a subjective desire for a transcript in a collateral proceeding in order to be entitled to it.

We believe that this legislative history and the almost universal rule in habeas corpus proceedings also disposes of respondent's argument that section 753(f), as worded and as construed by the Court of Appeals, suspends the privilege of the writ of habeas corpus. Far from suspending the privilege of the writ of habeas corpus, section 753(f) makes access to a transcript identical under both habeas corpus and under section 2255. There is no suspension.

QUESTION: There is no statute explicitly dealing with this subject in habeas corpus, is there, in federal habeas corpus? You say it is a case law?

MR. EASTERBROOK: Well, section 753(f) says that you can obtain a transcript without charge in habeas corpus cases.

QUESTION: Yes.

MR. EASTERBROOK: The case law is and was in 1965, and was before then, that you must make the same showing that section 753(f) requires in 2255 cases. But it is a case law requirement, rather than an explicit statutory one.

QUESTION: As far as the statute goes, it just says you can obtain it?

MR. EASTERBROOK: That's right.

Section 753(f), we think, does no more than enact into law the observations of this Court in many of the cases, beginning in 1956 in Griffin v. California -- Griffin v. Illinois, excuse me -- dealing with the right to a transcript. This Court has observed many times that a transcript is not necessary in every case, and that in many cases less than all of the transcript will sufficet, and the legislature can take steps to effect those rules. Section 753(f) is such a step. The question here, therefore, is whether the device Congress has chosen is unconstitutional.

The burden of my argument is that Congress has provided indigents with multiple opportunities to review their criminal convictions and multiple opportunities to obtain a transcript that would facilitate such review. Congress therefore has not cut off review on account of a person's poverty. It has simply structured and confined the methods by which such review can be obtained.

Congress has provided the fair opportunity for review that this Court has held is required. It is true, of course, that the provisions of section 753(f) requiring an indigent person to show need and lack of frivolity do not apply to a person who can pay for his own transcript, and in that sense the destitute and the wealthy are not treated identically. The Court of Appeals thought this to be fatal, but this Court has held that absolute equality is not required, and the fact that a

particular tool might be of use to some defendants and applicants for collateral relief does not mean that the Constitution requires its provision. The Constitution requires a practical opportunity for effective review, and we believe that Congress has provided that opportunity.

QUESTION: And if he had taken a direct appeal, then under the Criminal Justice Act he would have got a complete transcript?

MR. EASTERBROOK: Exactly, Your Honor, that is --

QUESTION: Or as much as was necessary?

MR. EASTERBROOK: As much as was necessary. That is the very first way. Every defendant convicted in a federal criminal case has a right to appeal and, we believe, that is also true in every state with respect to serious crimes. On appeal, under the Criminal Justice Act, an indigent defendant has a statutory right to a transcript or a record of sufficient completeness as to allow him to present all of his claims on appeal. In almost every case, a full transcript is prepared or an agreed statement of facts is reached. In all cases in which new counsel is appointed on appeal, the Criminal Justice Act requires a full transcript to be prepared, and this Court has so held in Hardy v. United States.

An indigent defendant who seeks collateral relief --

QUESTION: And before you proceed, the same rule would be constitutionally required in any state appeal?

MR. EASTERBROOK: This Court has held that it is required in state appeals.

QUESTION: I don't know that there is a decision analogous to the Hardy case in the state courts, but roughly equivalent --

MR. EASTERBROOK: Yes, roughly equivalent. At least there would be a requirement of a record of sufficient completeness to allow you to present your claim on a more complete line.

QUESTION: Griffin v. Illinois and its proginy?

MR. EASTERBROOK: I think so, Your Honor.

An indigent defendant for whom such a transcript or record has been prepared and who later seeks collateral relief is entitled without charge to a copy of that transcript, and therefore every indigent defendant has an adequate opportunity both to obtain the transcript and to obtain full review of his claims without charge and without making a particular showing of need simply by appealing. He needs to resort to the standards under section 753 only if he elects not to appeal. That is to say no defendant in the federal system is denied a transcript on account of his indigence.

The respondent's current difficulties stem from his decision not to appeal and not from the federal statutes that govern provisions of transcripts.

Then, too, we think there are sound reasons for the decision of Congress to create a different standard when a

prisoner seeks a transcript for use in preparing a motion for collateral relief. The difference acts as a channeling device encouraging appeals, rather than delayed collateral attacks. Congress was entitled to conclude that this was diesrable because it enables and indeed encourages errors in trial to be detected and corrected more quickly.

QUESTION: Under the Court of Appeals opinion, would it make any difference whether the post-conviction relief sought was two years, five years, or ten years --

MR. EASTERBROOK: None at all, Your Honor.

QUESTION: -- or twenty years?

MR. EASTERBROOK: None at all, as long as the person was still in custody for purposes of 2255, the Court of Appeals view would require the preparation of the transcript. That might be difficult in some cases if the original stenographic tapes have been destroyed or lost. Usually it is much less likely that that would happen if the transcript had been transcribed.

QUESTION: Well, except you concede that the statute provides that even if it is five years, ten years, fifteen years, eighteen years, twenty-three years, that if he shows the need --

MR. EASTERBROOK: That's correct.

QUESTION: -- if he shows the need, that he is entitled to the transcript.

MR. EASTERBROOK: That is correct, Your Honor. But there would be some difficulties, we think, under the Court of Appeals rule if the transcript could not be prepared and there were no established need for it. In that event, the remedy might be collateral relief for want of a transcript, even though there would be no need for the transcript. That problem would not arise if the transcript had to be furnished only upon the showing of section 753(f).

QUESTION: But under the Court of Appeals opinion, whether it is two years or twenty yeas or thirty, they need show no reason for the need --

MR. EASTERBROOK: No, no reason whatever, Your Honor.

QUST ION: -- no demonstration at all.

MR. EASTERBROOK: That's correct, no demonstration at all is required.

QUESTION: Well, isn't there an implicit limitation in the Court of Appeals holding at least reserving the question of whether if the reporter had died, his notes were unavailable, and a transcript simply couldn't be prepared -- I didn't read the Court of Appeals opinion to suggest the man would simply be out on the street for that reason.

MR. EASTERBROOK: The Court of Appeals did not specifically address that question, Your Honor, as indeed it did not have to because the transcript could be prepared in this case, if that is necessary, and I think that question is still fairly

open to litigation in the Ninth Circuit. I don't want to indicate that the court has decided that one way or the other.

QUESTION: Mr. Easterbrook, supposing in his motion he had alleged that his trial counsel was ineffective in that he had failed to make objections to the admissibility of evidence from time to time during the trial that competent counsel would normally make. Would he be entitled to a transcript?

MR. EASTERBROOK: It is our position that under those circumstances that would probably not state a claim for relief, even if supported by the transcript. That would be so for two reasons: One, because, under most circumstances, that would not make out inadequate assistance of counsel; and the second because that is the kind of claim of inadequate assistance of counsel that could be raised effectively on appeal. It is the type of trial tactics and trial decisions that can be reviewed very effectively on appeal. And unleys the allegations of ineffective assistance of counsel were coupled, Mr. Justice Stevens, with a contention that counsel was also ineffective in failing to advise him of his right to appeal and failing to pursue an appeal, we believe that those kinds of claims should be raised on direct appeal and not on collateral attack.

QUESTION: Well, if the only error goes to the competence of counsel -- perhaps I should change the example to make it a little stronger that he didn't make the objections which any trained lawyer would make -- you know, the standard is

framed differently in different circuits -- but assume he had met in conclusory terms the standard, how can you charge him with the failure to appeal if he relies exclusively on the advice of the man he now says is incompetent but didn't realize at the time was incompetent?

MR. ESTERBROOK: There must be some reason to inquire whether part of the incompetence dealt with failure to pursue the appeal. Assuming, however, that part of the incompetence dealt with advising him accurately of what would be grounds for appeal and whether there were prospects, if there were a detailed showing and if the claim was of such pervasive error throughout the trial that no reasonably effective counsel would have engaged in this course of conduct, that might be the kind of claim that would require the preparation of a full trial transcript.

QUESTION: But I think if that would not be sufficient, if it were merely stated as a conclusion.

MR. EASTERBROOK: If it were just simply stated as the conclusion here, that is my counsel was ineffective, it surely would not be sufficient. There would be varying degrees of sufficiency of adequacy of a claim.

QUESTION: Here he alleges that he was so ineffective that the defendant's Sixth Amendment right was violated.

MR. EASTERBROOK: If that is the only conclusion, that is not adequate to require a trial transcript, not only because

of the reservations I have expressed in answer to your earlier questions, but also because there are many ways in which trial counsel could be inadequate that simply would not show up in a transcript, and an adjudication of the adequacy of counsel could take place without a transcript but with extrinsic material or with portions of the transcript, or if greater specificity could be provided, it could be determined that there was no merit to the claim even if proved to the last particular.

There are many stopping points along the way between the claim and the adjudication, and not all of those stopping points are going to require a transcript to determine where it is. That is, I think, a very sound reason why Congress was entitled to require the applicant to state the nature of his claim so that it could be determined whether this was one of those cases in which the transcript was needed or whether it was not.

There are a number of differences between direct appeal and collateral attack that we think support the decision of Congress to impose different standards upon access to a transcript under them. I have discussed some of them in answer to Mr. Justice Stevens' questions. They stem primarily from the fact that collateral attack is not a substitute for direct appeal, and that most of the grounds upon which ordinary collateral attacks would be based, for example, the double jeopardy clause or the unconstitutionality of the statute underlying conviction, simply don't show up in the transcript at all.

Conversely, most of the errors that would show up in a transcript do not provide grounds for collateral attack. Ordinary evidentiary rulings of the trial or incorrect or inadequate framing of the charge to the jury are not grounds that would support a collateral attack. The question of the sufficiency of the evidence is not a ground that would support a collateral attack. On collateral attack, the only claim open is that there was no evidence, and the absence of evidence could be refuted by many materials other than the provision of any part of the transcript.

QUESTION: Mr. Easterbrook, how do you get around the possibility that the jail house lawyers in use will now automatically ask for a transcript for appeal purposes?

MR. EASTERBROOK: That may well --

QUESTION: I guess there is no way to do that.

MR. EASTERBROOK: It may well be that that is what would happen. We certainly can't exclude that possibility.

QUESTION: Right.

MR. EASTERBROOK: But if that occurs, it is a result of the system of incentives created by Congress, and we think that Congress was entitled to, and indeed it may have been an excellent idea, to create those incentives, because of the desirability of resolving promptly any claims of error, so that innocent men can actually be released more promptly and so that if there are errors that require a new trial, the new trial can

be had more promptly before memories are faded and evidence dissipated. It would probably be a good idea to have claims of this sort resolved promptly on appeal, rather than, in this case, six or seven years later on collateral attack.

QUESTION: Well, I didn't say that he would actually appeal. I said he would ask for the transcript and then he wouldn't go through with the appeal.

MR. EASTERBROOK: In that event, he must face the consequent claim of deliberate by-pass, not only, as in this case, a by-pass of his unquestioned right to a transcript on appeal, but a deliberate by-pass of his appellate remedies sufficient to cut off later claims on collateral review. The jail house lawyer, I am afraid, would have to take that possibility into consideration.

QUESTION: Well, as suggested by the colloquy with my Brother Marshall, there is a time limitation on appeal, and there is none in a collateral attack, save only that the applicant must still be in custody.

MR. EASTERBROOK: Yes, I agree.

I think that the major consequence of section 753(f) and the particularized need and lack of frivolity requirements is simply to require individual applicants to show that they fall within the exception to the rule that normally a transcript is unnecessary to prosecute a collateral attack. And indeed, in light of the burden of someone who seeks to overturn his

conviction and to prove that he was not justly convicted, to show that he is in fact entitled to any relief at all. Only by exercising and using a screening device of this sort can Congress exercise the power which this Court has said that it has to determine that there are some cases in which transcripts are unnecessary and some in which less than all of the transcript is necessary.

The screening device serves other purposes as well. There are more than 1,500 federal defendants in criminal cases every year who elect not to appeal. There are large numbers of defendants in state criminal cases who elect not to appeal. If the decision of the Court of Appeals is upheld, there will be at least for a period of time a rather crushing burden upon court stenographers and reporters to produce large numbersof transcripts, a burden that might well slow down the process of production of transcripts for those for whom there is a real demonstrable need.

Moreover, the requirements Congress has used create at least rough equality between destitute defendants and the prisoner --

QUESTION: Let me just interrupt for a second. Do you conceive that our holding in this case will necessarily determine the state practices as well as the federal practice?

MR. EASTERBROOK: Insofar as it rests upon the Constitution, Your Honor, it would necessarily determine the state

practice as well.

QUESTION: Do you think a holding against you would necessarily rest on the Constitution, which is what I probably should have asked?

MR. EASTERBROOK: In light of the specific provision of Congress in section 753(f) that there should be a showing of need and lack of frivolity, I think a decision by this Court would have to rest on the Constitution.

QUESTION: We would have to hold that that statute is pro tonto constitutionally invalid?

MR. EASTERBROOK: That is correct, to the extent that it places those two requirements upon an applicant for collateral relief.

QUESTION: Of course, the Court of Appeals said it didn't have to reach a constitutional question. On what -- what is the ground do you conceive of the Court of Appeals' opinion?

MR. EASTERBROOK: The Court of Appeals said in a footnote that it was addressing a deficit not filled by the statute. We don't perceive on what grounds it could require Congress to expend monies and to provide a transcript to indigents when it has elected by statute not to provide such a transcript unless the Constitution requires that. It was the Constitution, the Court of Appeals thought, that required it to fill the deficit.

QUESTION: Are you suggesting, then, that even though

it says that they didn't have to reach the constitutional question, in fact --

MR. EASTERBROOK: In fact, it reached it.

QUESTION: --it was saying it was constitutionally required?

MR. EASTERBROOK: That is correct. I think that is the only reasonable interpretation of what the court did.

QUESTION: Would it not be possible, Mr. Easterbrook, to hold that an adequate showing of need within the meaning of the statute is made by an allegation that the petitioner was not afforded effective assistance of counsel as required by the Sixth Amendment?

MR. EASTERBROOK: Without more?

QUESTION: Without more. Wouldn't that at least be a theoretically permissible way of deciding the case without reaching the constitutional --

MR. EASTERBROOK: I believe that would be a theoretically permissible way to decide the case, although in that event there would be some tension between the outcome of this case and the Court's resolution in Coppedge v. United States, in which the Court said that the standard for assessing frivolity of a motion for leave to appeal in Forma Pauperis is an objective standard, that is it depends upon demonstrable facts and not upon the feelings or beliefs of the person who is asking to appear in Forma Pauperis.

If it were sufficient simply to make a claim that "I believe that I was not given the adequate assistance of counsel," that would be an entirely subjective standard and would amount to that extent, we think, to a change of the standard that was established by Coppedge.

QUESTION: Of course, here the statutory condition is not that the suit be not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal, but really by a trial judge's or a circuit judge's certificate --

MR. EASTERBROOK: That is correct.

QUESTION: -- whatever the facts may be.

MR. EASTERBROOK: That's right, and if --

QUESTION: And could the government review a certificate when issued on an allegation such as my Brother Stevens suggested?

MR. EASTERBROOK: To the best of my knowledge, that has never been litigated. We have never sought to review such a certificate. There is no express provision in the statute or in the Criminal Appeals Act.

QUESTION: Do you think it could be reviewed?

MR. EASTERBROOK: I wouldn't like to foreclose our opportunity to test that, but I would say that we have never sought to review them, and that ordinarily if a trial judge or an appellate judge makes such a certificate, that is quite sufficient for the government.

QUESTION: Now, what happened in this case, the District Judge simply refused the request for a transcript --

MR. EASTERBROOK: That's correct. He dismissed the claim --

QUESTION: -- without certifying anything?

MR. EASTERBROOK: -- without certifying anything. The respondent then could have sought leave from the judge of the Court of Appeals, could have sought a certificate from the --

QUESTION: An individual judge, right.

MR. EASTERBROOK: -- from any judge in the Ninth Circuit.

QUESTION: Any circuit judge.

MR. EASTERBROOK: He did not do that because it was his intention to establish the principle that he had an automatic right to a transcript --

QUESTION: And so he appealed the dismissal?

MR. EASTERBROOK: Yes, Your Honor.

QUESTION: And that was the posture of the case in the Court of Appeals?

MR. EASTERBROOK: The Court of Appeals --

QUESTION: There was no allocation to any circuit judge?

MR. EASTERBROOK: None to any circuit judge. The Court of Appeals decided that he had an unqaulified right.

QUESTION: Mr. Easterbrook, it is my understanding that

there are federal districts, at least there have been, in which, as a matter of routine, the United States Attorney automatically orders a transcript in all cases in order that they will expedite the preparation of record and shorten the period required for appeal, the disposition of the appeal. Do you know the extent to which that practice is followed in the federal system?

MR. EASTERBROOK: I know that that practice is followed in a number of districts, but I think a great number less than the majority of districts. We do not have an exact figure on the number of districts in which that is true. And it is also true, as we discussed with the Court in Hardy v. United States, that there are a number of districts in which when, there is a request for a transcript, the transcript will be prepared as less expensive and less burdensome than litigating the question of access to the transcript. But, of course, the parameters of such preparation are set in large measure by the statutory requirements and the constitutional demands, so that the United States Attorneys will know when it is that they should order such a transcript to be prepared.

QUESTION: I don't know whether you can answer this, but assuming a transcript was prepared, you would have no objection to giving it to them?

MR. EASTERBROOK: None at all, Your Honor, and we believe that 28 U.S.C. section 2250 would require it to be given.

QUESTION: Mr. Easterbrook, you used the word

"parameters" a minute ago. What do you mean by that word?

MR. EASTERBROOK: The context, the legal context in which the decision is made not to resist a claim for a transcript depends upon statutes and the constitutuional decisions of this Court.

QUESTION: You don't use it, then, just interchangeably with perimeters?

MR. EASTERBROOK: No, I didn't.

QUESTION: Or boundaries?

MR. EASTERBROOK: Boundaries might have been even a better term, Your Honor.

QUESTION: Do you think that word is in the dictionary, the meaning you have just given?

MR. EASTERBROOK: I am afraid it is a corruption of a perfectly good scientific term. Going into the language, perhaps it is one of these weeds of language that crops up far too often.

MR. CHIEF JUSTICE BURGER: Mr. Strait.

ORAL ARGUMENT OF JOHN A. STRAIT, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. STRAIT: Mr. Chief Justice, and may it please the Court:

My name is John Strait, the attorney representing the respondent in this case, who was the petitioner in the District Court and Court of Appeals below.

I will try to address some diferences of opinion which the respondent has with the petitioner herein's position regarding the issues before this Court.

The issue presented by this case is considerably narrower than that as stated by the petitioner here. The issue is far closer to what you have implied, Mr. Justice Stevens, by your question, and that is not simply on a general allegation of demand for a transcript does an indigent federal petitioner subject to pursuing his rights under section 2255 become entitled to a transcript, but, rather, where there is an allegation of specific constitutional error -- in this case, the violation of the defendant in the original case, the petitioner's rights to Sixth Amendment effective assistance of counsel and Fifth Amendment due process rights for lack of sufficiency in the evidence -- where that specific allegation is made and made in good faith, but cannot be supported by specific references to the record because the record does not exist with which to support those allegations --

QUESTION: Let's narrow that a little bit. Do you mean any time a man says there is insufficient evidence, he gets a transcript?

MR. STRAIT: Basically, that is the respondent's position herein.

QUESTION: Well, have you seen one that didn't have that in there?

MR. STRAIT: Yes, Mr. Justice Marshall, I have seen several. The difference between my position here and the Solicitor General's is that I represent a lot of people in post-conviction relief proceedings and one of the roles of the counsel in trying --

QUESTION: But you don't usually put insufficient evidence?

MR. STRAIT: No, not normally, not unless I am very certain that there is some basis to support that.

QUESTION: Well, do you think that is enough, just insufficient evidence?

MR. STRAIT: I am saying that at least that combined with Sixth Amendment, which is the case before the Court, yes, Your Honor.

QUESTION: What was the exact language you pleaded on the Sixth Amendment?

MR. STRAIT: You will find that in the appendix at page 11 through 13, the court's appendix.

QUESTION: Where is the exact language?

MR. STRAIT: It is at the bottom of page 11, "Petitioner in good faith believes the transcript will show that" -- and then at the top of page 12 --"a. Petitioner was not afforded effective assistance of counsel as required by the Sixth Amendment to the United States Constitution." And below, that, "b, There was insufficient evidence to support the" --

QUESTION: Is it possible that you can have a broader one than "he was denied effective assistance of counsel as required by the Sixth Amendment"?

MR. STRAIT: No, I don't believe so. The problem that was confronting the petitioner in this case --

QUESTION: Well, then, I have to ask you again: You think that anybody from now on makes height verbal, these two, he gets a transcript?

MR. STRAIT: Tell, the problem is --

QUESTION: Yes or no?

MR. STRAIT: The answer is yes. The problem with that -- if I understand your reluctance to accept that position -- is that these are constitutional claims, they are in fact constitutional claims which require a transcript in order to be asserted and reviewed by the court, and indeed for the trial counsel, that is the counsel that is representing the individual at the trial court level on the post-conviction relief proceeding, to have available to him to review solely so he can tell whether they are meritorious to raise, and that is the problem that has been recurrent in the pleadings here and the misquoting of the statement taken by respondent herein at the Court of Appeals below.

QUESTION: I understood Mr. Easterbrook's position to be that insufficiency of the evidence was not a ground upon to support collateral relief, that the total absence of any evidence

would clearly be, under Thompson v. Louisville.

MR. STRAIT: That's correct.

QUESTION: But insufficiency of the evidence is something available on appeal but not on collateral attack. That is Mr. Easterbrook's position, is it not?

MR. STRAIT: I would have a caveat to that position -- that is his position, yes -- I would have a caveat to that position to the degree that the difference between a total lack of evidence in the record for the Fifth Amendment or Fourteenth Amendment purposes versus the insufficiency of the evidence is not an apparent difference in standard as in my experienc with Appellate Courts. The issues are treated exactly the same.

QUESTION: Well, one, at least as far as this Court's jurisprudence goes, one is a constitutional violation and the other is not.

MR. STRAIT: I agree with that, Mr. Justice Stewart, but the position that I am asserting is that the constitutional implications are the standard that is actually employed in reviewing the record in order to determine whether there was insufficiency of evidence, and the standards that are employed in order to determine the lack of evidence under the Fifth Amendment, in my experience, have been coextensive. And so the problem is partially a semantic one in that the necessity of the transcript to raise either issue is exactly the same, and whether one could raise one only on appeal and the other properly in

either appeal or post-conviction relief --

QUESTION: Well, is it a statutory standard or does the statute provide for the standard for review on direct appeal of the evidence, or is it a rule?

MR. STRAIT: No, I believe it would be case law. There is no statutory standard.

QUESTION: But on collateral relief in the federal court with respect to a federal prisoner, can't you make an allegation that the evidence wasn't sufficient to satisfy a statute or a rule?

MR. STRAIT: Yes, but, again, I think the standard that the petitioner would bear would be exactly the same, whether he phrased it in the constitutional or the statutory sense. He would have to show that there was no evidence in the record to support either the statutory element that he was arguing was not sufficiently reflected --

QUESTION: Well, would this question or this situation here arise only where or mostly where the issue involved wasn't raisable on appeal?

MR. STRAIT: No, I don't think it necessarily would. It could in fact be raised on appeal. The effective assistance of counsel issue might, for practical reasons, not be available on appeal because of the difficulty of the individual involved knowing that he had suffered from ineffective assistance of counsel.

QUESTION: But if there has been an appeal, there has been a transcript, I take it?

MR. STRAIT: Yes, sir, that would be correct, for all practical purposes. The Solicitor General's office is not conceding that you are entitled to a transcript as a right in an appeal without a showing of some need. Presumably they are trying to adhere to the position, the narrowest reading of Hardy v. United States, which says at least where there is new counsel on appeal, it is an absolute right of the trial testimony transcription, but they are holding open the question of whether where there is original appointed counsel or original trial counsel on appeal --

QUESTION: Well, in any event, as a practical matter, this problem would arise only when there hasn't been an appeal?

MR. STRAIT: That is correct, and that is exactly the reason why the government's position herein does not address the problem which MacCollom faces, which is this is his only remedy. As I pointed out in my answering brief, there can be no allegation of intentional by-pass. The record does not support that. The very problem raised by the Sixth Amendment effective assistance of counsel, as implied by your question, is that the individual who is subject to the ineffective assistance of counsel will also have his appeal rights affected by that.

QUESTION: I take it that -- it sounds as though it would hardly ever arise if it were in the case of a state

prisoner.

MR. STRAIT: It would be extremely unlikely to arise.

QUESTION: Because he would have to have exhausted his state remedies which would include an appeal.

MR. STRAIT: Normally that is correct.

QUESTION: -- which would involve a transcript.

MR. STRAIT: That is correct, under the virtually unanimous rules of the states with which I am familiar.

QUESTION: But how about a claim that is not of ineffective assistance of counsel relating to explanation of the right to appeal, but simply a claim limited to ineffective assistance of counsel at trial? Now, you say that is the kind of thing that would never be raisable under appeal?

MR. STRAIT: No, that would certainly be raisable in most state court of appeal proceedings.

QUESTION: And federal court, too, wouldn't it?

MR. STRAIT: And in subsequent federal court proceedings.

QUESTION: No, I mean a direct appeal on the federal system.

MR. STRAIT: Yes.

QUESTION: If you changed counsel.

MR. STRAIT: Yes.

QUESTION: Are you suggesting, Mr. Strait, that the Court of Appeals' statement of its holding is broader than was

necessary?

MR. STRAIT: Very substantially, Mr. Justice Rehnquist. What I am suggesting specifically is that the actual language which the government bases virtually the entirety of its position upon is not the holdingin the cases, exclusively dicta, because in this particular case the indigent petitioner, under section 225, did allege constitutional error, he did allege a good faith that it existed, he did show that there was no adequate alternative to a transcript with which to present material to the court, and the functioning of section 2255 left him with no alternative but to follow this procedure.

QUESTION: You say then that where the Court of Appeals, in the last sentence of its opinion, says "we hold" --

MR. STRAIT: That's right.

QUESTION: -- that is really dicta, which it may well be?

MR. STRAIT: That is exactly what I am assering, yes. I am saying that if the court wishes to breach the broader issue, that is the issue which has been framed by the Solicitor's representative here, as to whether there is an absolute right to a transcript for any indigent prisoner, federal prisoner proceeding, ancillary to a 2255 proceeding, that issue is really not before this Court and ought not to be reached.

QUESTION: Well, Mr. Strait, you don't suggest though the Court of Appeals decided that there had been compliance with

753(f)?

MR. STRAIT: I think what the Court of Appeals confronted was the problem of other courts' interpretations of the demands of 753(f), with particular reference to specific claims of Sixth Amendmetn ineffective assistance of counsel --

QUESTION: May I ask --

MR. STRAIT: -- and found that that was the most compliance that could be --

QUESTION: Well, can there be compliance with 753(f) except as there is an application for and a certificate granted either by a trial judge or a circuit judge?

MR. STRAIT: No, there would have to have been a certificate and that issue --

QUESTION: So at the very least, the Court of Appeals decision does not rest upon a holding of compliance with 753(f)?

MR. STRAIT: No, I believe that is correct. What the Court of Appeals decision rests upon is its reading of the interrelationship between section 1915, the general in Forma Pauperis provision, and 753(f) and the apparent inconsistency in relation to habeas corpus 2255 and in Forma Pauperis generally, and said in view of the unclear statutory nature of it -- now, the Solicitor General is asserting that it is quite clear to him, based on his prior reading of the cases, but certainly there is some room for disagreement about that. I believe Mr. Justice Blackmun has addressed some of the ambiguities here in

an article in Federal Rules Decision, 43 Federal Rules Decision, which addresses at least the nominal nature of the problem, and what I am suggesting is that the Court of Appeals' attempt to fashion a remedy, given that situation, ought not to be disturbed since there is no particular reason, given the nature of the holding here to do so, that is the actual holding of the case.

Now, the --

QUESTION: Do you think there is a constitutional holding?

MR. STRAIT: I think that there are constitutional principles which led the Court of Appeals to adopt that particular statutory reading. I do not believe that the actual literal holding that the Court of Appeals reached in their mind is a constitutional holding.

QUESTION: You don't think they held that it was required by the Constitution?

MR. STRAIT: I think that if they had felt that they could not have interpreted the statutes that way, the way that they did, they would have been forced to strike unconstitutionally, which of course is the position that we assert here insofar as it applies to MacCollom's particular case.

QUESTION: The dissenting judge in the Court of Appeals certainly viewed the court's decision as a constitutional decision, didn't he, Judge Taylor?

MR. STRAIT: Yes, Judge Taylor did. And I would, in that regard, to be candid, I would say that I do not believe that unless the Constitution places some pressure upon reading the statutes that way, that that would be, in fact, the way that you would interpret the statutes.

QUESTION: The inevitable reading, wouldn't it?

MR. STRAIT: Yes.

QUESTION: How did the five or six, whatever the number were of judges who voted for rehearing en banc view that question?

MR. STRAIT: They exclusively viewed it as a constitutional question, simply saying that there is no reason to depart from the statutory interpretations adopted by other circuits, and in the initial hearing of Wade v. Wilson, which was ultimately reversed and remanded on other grounds by this Court, in the Ninth Circuit, no reason to adopt a different interpretation unless there was a constitutional reason to do so, and they were of the opinion that this Court's decision --

QUESTION: Why didn't Wade bind this panel?

MR. STRAIT: The position of the panel was that Wade did not reach the issue specifically, and that Wade had been cast in further doubt to the degree that its dictum did by the subsequent court decisions of Ross and North Carolina v. Britt.

QUESTION: And apparently the majority of the active judges didn't believe that Wade bound them either, or they

would have had to grant rehearing?

MR. STRAIT: That's correct. And I might add that, as the litigant there, I was somewhat surprised that they did not. I expected them to do so.

The position that we assert has not, I think, been accurately presented to the Court, not too surprisingly, by the Solicitor General in regards to Article I, section 9, clause 2. Since this is the only forum that the petitioner below, the respondent herein, has in which to assert his Sixth Amendment and Fifth Amendment deprivations of which he complains, the question of his right to transcript becomes one of access, not simply a nice tool to help him once he gets in, because of the way section 2255 operates. And I would refer you to the extensive discussion of 2255 and its procedures in the Hayman case, which this Court decided, and also in the Sokol article, which is cited in my brief. You might also refer to the University of Kansas Law Review article, in Volume 20, a student note which talks about the dilemma which is presented to the petitioner who asserts claims such as MacCollom's.

Specifically, what happens is, in order to assert his constitutional claims of Fifth and Sixth Amendment deprivations of right to counsel and sufficiency of the evidence, the problem then becomes one of him having to identify as a prerequisite to even having his 2255 application accepted and then getting his trancript, he has to identify to the record in a procedure

very similar to that struck down by this Court in Gardner v. California, he has to identify the basis for his claimed allegations of error.

QUESTION: Well, Mr. Strait, your previous argument suggested that ineffective assistance of counsel claims were virtually impossible to raise on appeal, or at least were very difficult. But certainly insufficiency of evidence claims are not difficult to raise on appeal, are they?

MR. STRAIT: No, that is correct.

QUESTION: In fact, that is the traditional forum to raise them in?

MR. STRAIT: I agree. The problem is that there is no constitutional guarantee to the opportunity to do so, and the by-pass argument essentially, which the Solicitor General relies upon to emphasize this policy choice of Congress to emphasize appeal over post-conviction relief, stands the constitutional relationships between post-conviction relief and appeal on their head.

QUESTION: But why do you need a constitutional right to do so when you have got a statutory right?

MR. STRAIT: You don't, but MacCollom would because in MacCollom's situation he had both the problem of the Sixth Amendment and ineffective assistance of counsel -- Fifth Amendment, pardon me, insufficiency. He was not able to raise by appeal because he did not do so, and if --

QUESTION: Now, you say he was not able to because he didn't do so. Are you saying that had he chosen to appeal, there would have been some impediment to his raising them?

MR. STRAIT: No. What I am saying is that the very process of the choice to appeal was affected by the very ineffectiveness of assistance of counsel which he asserts. Secondly, if the government is to say that there has been essentially an intentional by-pass of the right to a transcript, not the right to post-conviction relief, which they could not argue because of Article I, section 9, clause 2, then the problem is that nowhere was MacCollom advised -- and I am certain of this, that the record will reflect it -- nowhere is MacCollom advised that if he did not exercise his right of appeal, now he would not get a transcript. It would stand the concept of waiver on its head. Of course, he was never advised as to that. That was not, in fact --

QUESTION: You say of course he was never advised of that. He doesn't allege that, does he?

MR. STRAIT: No, he cannot at this time until he gets the transcript.

QUESTION: Well, had he gone ahead and appealed, he would have had a transcript and perhaps could have made that allegation.

MR. STRAIT: But the problem is -- I understand your position -- the problem is that he would have to know that he

should appeal in order to get a transcript before he can knowingly make any decision to by-pass that right, if you follow me.

QUESTION: Yes, but your man doesn't allege in his petition that he was not advised of his right to appeal?

MR. STRAIT: No, he does not allege that he was not advised of his right to appeal by the court. The allegations that he would make specifically, when this matter is returned to the District Court for further proceedings, would be that his attorney did not advise him of what would happen if he did not appeal.

QUESTION: Well, we don't know what he would allege if --

QUESTION: Why would he allege that?

MR. STRAIT: Well, the problem is that most of the material that is involved in that issue was also connected to the Sixth Amendment question, because there was a colloquy, he believes -- and I, as the attorney, entered the case afterward, have no way of knowing whether this is accurate or not until I see the transcript -- he alleges that there was a colloquy between him and the attorney --

QUESTION: Well, that is not before us, is it?

MR. STRAIT: No, it is not, but the point I am raising is that the only way it will ever get before anyone is if he gets the transcript.

QUESTION: Well, why can't he petition for a

transcript?

MR. STRAIT: I'm sorry?

QUESTION: Why can't he put it in his application or petition he filed?

MR. STRAIT: He probably would have been willing to do so, but the attorney who was representing him at that time felt that there was some question as to whether that would in fact turn out to be the case and wanted to see the transcript first before he took up the court's time with an allegation that he thought very likely could be in fact frivolous, which raises a number of issues that I wish to discuss briefly with the Court, and these have to do with the policy questions before the Court that are presented by the broader issue which, if the Court reaches, I think it should consider -- I would submit it should consider.

The government's position is virtually exclusively that there is a burden on court reporter services and that there is a financial interest in reducing the availability of transcripts in situations such as MacCollom's. This Court has never found that monetary considerations alone justify the deprivation of a right to a transcript or availability to a transcript in an original proceeding.

Secondly, as I believe Mr. Justice Marshall pointed out by his question, there are likely to be an increased number of requests for transcript, so that there will be proportionately

less monetary saving, if any.

Thirdly, as the counsel for the --

QUESTION: Well, you suggest that the whole thing is kind of a balancing process, but certainly in cases such as Ross v. Moffitt, where we held there was no right to counsel on a discretionary appeal, that isn't in terms of balancing the financial harm to the state against the benefit to the indigent, it is just a question of saying the indigent's rights go so far and no further.

MR. STRAIT: I agree, but I think Ross supports the position that MacCollom takes here, which is that since the discretionary appeal is being exercised, as the Court points out, with a series of factors, including the availability of a transcript, the prior assistance of counsel, presumably the availability of counsel prior to the time he withdraws from the discretionary appeal application, et cetera --

QUESTION: Well, you may be right, but the analysis is in terms of access, not in terms of what burdens the thing would place on the government.

MR. STRAIT: I agree, and that is why I have been emphasizing that it is a question of access here, not simply a question of expense. But there are policy considerations which the Solicitor General raised regarding expense and availability of resources for doing things like this, and I felt it was appropriate to address those.

Our position really is that the very policy of post-conviction relief and the efficient functioning of the lower courts requires that MacCollom's position be in fact adopted. And my premise is that the screening function performed both by counsel where counsel exist -- in the day of Legal Services and Prison Legal Services projects, that is not as uncommon for indigents as it used to be, without the capacity to retain counsel -- and, secondly, the function of the court itself, in reviewing 2255 applications, will be greatly enhanced and minimize ultimately the judicial time expended, for exactly the same reason that those district courts and federal attorneys have adopted the policy in some areas of the country of not resisting transcript applications, because of the litigation cost and time involved in litigating whether the person is entitled to them or not. The court will be spared that amount of time. When the record by the pro se applicant comes in to him, with or without the assistance of counsel at some point, the record will reflect clearly the existence or non-existence of the claimed errors, which will allow the reviewing judge considerably greater freedom to screen the cases and get rid of them if they are in fact frivolous.

Lastly, the dilemma that I was addressing to you, Mr. Justice Rehnquist, of the trial lawyer's ability to try to find out if there is any merit to what his client says is greatly enhanced where the lawyer in fact exists, and that, in my

experience, is one way of minimizing some impact on the courts with frivolous claims.

QUESTION: Well, isn't there another way to minimize the impact on the courts in all cases except where the claim is ineffective assistance of counsel, and that is for district courts to require the trial lawyer to prepare the appeal?

MR. STRAIT: That may work. There are --

QUESTION: How many trial lawyers who try a case for two or three days need a full transcript?

MR. STRAIT: Well, it depends. Speaking as a trial lawyer, Mr. Justice, I have found that I almost always need one because the things that I am focusing on as an advocate in court to a jury are very different than the kinds of things I review the record for to be addressed in an appellate court or in a post-conviction relief proceeding.

QUESTION: Does that mean you need the entire transcript to make an evaluation of an appellate problem?

MR. STRAIT: Very often not, but what I do is --

QUESTION: Most often not, would that not be so?

MR. STRAIT: Not in my experience, Mr. Chief Justice.

QUESTION: Don't you keep notes when you try a case?

MR. STRAIT: Yes, but the notes very rarely reflect, for example, the basis of the court's rulings on issues of evidence which --

MR. CHIEF JUSTICE BURGER: We will resume there at

1:00 o'clock.

[Whereupon, at 12:00 o'clock noon, the Court was recessed until 1:00 o'clock p.m.]

AFTERNOON SESSION - 1:01 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mr. Strait, you may continue.

MR. STRAIT: Mr. Chief Justice, I am not sure, I believe my time is expired, so I will conclude with these remarks.

The problem that is presented for the particular indigent, the 2255 petitioner in MacCollom's situation, is that where he is raising Sixth Amendment and Fifth Amendment issues as he has, the transcript itself becomes the access issue under the scheme of 2255. Without the transcript, he cannot frame his issues properly to be reviewed by the District Court for the initial screening, and once the District Court has screened them, cannot review the issues properly as to frivolity without the transcript to tell whether those issues are properly set forth in the record.

Given that situation, the statutory scheme would present Article I, section 9, clause 2 suspension of the writ problems, as I have stated in my brief, if the Court were to reject the position taken by the Ninth Circuit as to the narrow catagory of petitioners represented by MacCollom, the respondent before this Court.

QUESTION: By that, you said the narrow -- as represented by him -- those who have a claim that includes, whatever else it has, it includes the claim of ineffective assistance of counsel --

MR. STRAIT: And in addition those that have shown by their affidavit no adequate alternative to a transcript from which to get that information, and also those who have had counsel appointed, which was the case for MacCollom, by the initial trial court, all three of those distinguishing factors.

Excuse me, I take it I do have more time?

MR. CHIEF JUSTICE BURGER: Yes, you do have.

MR. STRAIT: The primary problem that is presented by the government's approach to habeas corpus is that it presumes that there is some necessary incentive available through the appellate scheme which undercuts habeas corpus. That obviously could not be a proper congressional purpose. While there may be in fact values to be emphasized by encouraging early appeal of criminal cases, the simple fact remains that central to this government's founding was the concept of habeas corpus, which means that there never will be a concept of finality in criminal law, the same as there would be in a civil case. For that very reason, most of the government's arguments concerning the advantages which Congress has created by discouraging habeas corpus simply don't address the constitutional question which is raised by MacCollom's situation.

QUESTION: Well, are you suggesting that Congress would have had to enact the habeas corpus act of 1867? For eighty or ninety years, there was no collateral review even of federal convictions.

MR. STRAIT: Well, that is a very tough question, Mr. Justice Rehnquist. My position is that today there would have to be some implementation or an interpretation by the courts that the habeas corpus act was self-implementing, and that we have never had to confront the question of whether the judiciary act alone, if it were none, would not present some jurisdictional basis for habeas corpus.

QUESTION: Suppose Congress, next session, repealed the 2255, the habeas corpus act, so that there was no stated post-conviction remedy, what then?

MR. STRAIT: My position is that Artifle I, section 9, clause 2 would become self-effectuating and the courts would have to entertain such a motion, such proceedings. Presumably, this Court, which I would think --

QUESTION: Even though no one thought for the first eighty years of the Republic that it had that effect?

MR. STRAIT: Well, I believe there was the judiciary act of 1789 --

QUESTION: That's the federal --

MR. STRAIT: That is correct, but that is all --

QUESTION: In 1867 they extended the act to the state--

MR. STRAIT: Yes, I understand that, but --

QUESTION: But did the 1867 act bracket federal prisoners -- did the pre-1867 litigation cover federal prisoners

the way the 1867 act covered state prisoners?

MR. STRAIT: I don't know.

QUESTION: I thought the judiciary act of 1789 had a provision covering federal prisoners?

MR. STRAIT: Yes, it does. There is no question but that the judiciary act of --

QUESTION: The 1867 extended federal habeas relief to state prisoners?

MR. STRAIT: That's right, and this Court has not been confronted with the position prior to the Fourteenth Amendment's enactment of whether the heabeas corpus right would have to be implemented directly by the states, and prior to the time that could have been confirmed under the Fourteenth Amendment as a right made applicable. The problem had bean resolved by the federal legislation to which you referred.

The position that the government takes with regards to the equal protection issue raised by respondent below, I believe misstates the position which both the Ninth Circuit adopted in its opinion and that asserted here by respondent. Specifically, the equal protection position taken is not that the wealthy person's standards are to be met by the state or the federal government in aiding indigent prisoners. Quite the contrary, the issue is one of adequate access, and the language which the lower court relied upon and which I submit is appropriate and meets MacCollom's requirements in this case is the

language of this Court in Ross v. Moffitt, specifically that the duty of the system is to assure the individual, the indigent defendant, an adequate opportunity to present his claims fairly, and at least where Sixth Amendment claims and Fifth Amendment claims, as asserted by MacCollom, are raised, that requires a transcript in the post-conviction relief context of habeas corpus.

I do not believe that the government can assert to the contrary that the language relied upon below is any different. That is the standard. It is the standard used by this Court in equal protection cases in right to transcript and right to counsel, and that is, I believe, the only standard adopted by the lower court decision.

QUESTION: Mr. Strait, I want to catch you before you sit down. Is your client on parole?

MR. STRAIT: It is an awkward question to answer, Mr. Justice Blackmun. My client's position right now is thathe was revoked recently and is presently incarcerated in the King County Jail for Seattle, Washington, pending a federal detainer hearing, federal review hearing of his parole status, at which I have been advised he will be returned to custody, federal custody, presumably at McNeil Island. And whether he will be transferred again to Leavenworth, Kansas, I do not know.

QUESTION: So he remains indigent?

MR. STRAIT: He remains not only indigent but in

custody and indigent. He is, if you will pardon the expression, disgustingly indigent.

QUESTION: Was he working in the meantime?

MR. STRAIT: Beg pardon?

QUESTION: Was he working in the meantime when he was on parole?

MR. STRAIT: The reason -- I meant to call Your Honors' attention to the affidavit in Forma Pauperis, which is part of this Court's records, that he submitted a new affidavit as of the filing of the proceeding, the petition for review by this --

QUESTION: That's a year ago?

MR. STRAIT: -- yes, and at that time he had been employed, I believe, for a total income, gross income of $1,000 in the previous nine months, all of which was expended at that time, and he has not been employed since, which I assume is one of the reasons he got in trouble with his parole status.

QUESTION: Even if awkward in certain respects, except as it relates to the possible aspect of mootness, it has nothing to do with the issues of the case?

MR. STRAIT: I agree. For the purposes of custody, for 2255 proceedings, the fact that he was either actively on parole or in custody would be sufficient.

QUESTION: The indigent inquiry is directed toward mootness, and that has a great deal to do with the case.

MR. STRAIT: Yes.

QUESTION: That is why I said, except for mootness, it would have nothing to do with the merits.

MR. STRAIT: To clarify that matter, I can assert with certainty that the individual is still indigent at this time and has not at any time during the pendency of this proceeding been other than indigent within the prior definitions of indigency by case law.

Thank you very much.

MR. CHIEF JUSTICE BURGER: You have about two minutes left, Mr. Easterbrook, do you have anything further?

MR. EASTERBROOK: I have nothing further, unless the Court has questions.

MR. CHIEF JUSTICE BURGER: Hearing none, thank you, gentlemen. The case is submitted.

[Whereupon, at 1:07 o'clock p.m., the above-entitled case was submitted.]

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