[CAPTION]

MEMORANDUM IN SUPPORT OF VERIFIED PETITION TO PROCEED AS A PAUPER

Introduction

It has been the law in Indiana for over a century that indigent petitioners are entitled to a free transcript of their trial proceedings. Since 1956, that same rule has applied throughout the United States, pursuant to the Supreme Court's decision in Griffin v. Illinois, 351 U.S. 12 (1956). The right to a free transcript attaches where a state establishes a right to appeal for persons with financial means to afford a transcript. Clearly, Indiana provides for such a right.

Although petitioner is represented in this matter by private counsel, he nonetheless is indigent and therefore entitled to a record of trial proceedings at public expense. It would be a clear and unconscionable denial of Equal Protection, Due Process, and the Sixth Amendment right to effective assistance of counsel, if the court were to create an irrefutable presumption that anytime one has a private attorney, he necessarily can afford to purchase his own transcript.

Petitioner cannot prepare his petition for post-conviction relief (PCR) without a "Record of Proceedings;" nor can counsel properly discharge his obligations to his client if he is unable to review the transcript for possible error. Equal justice demands that an indigent petitioner, regardless of whether he or she is represented by a public or private attorney, or appearing *pro se* be provided with a copy of his/her pleadings and transcript at public expense. As is indicated by the attached affidavit, petitioner is indigent. He must, therefore, be supplied a transcript at public expense, despite the fact that other people have retained private counsel to represent him on direct appeal.

Argument

Indigent criminal defendants have a right to a Record of Proceedings at public expense.

In 1854, the Indiana Supreme Court in a *per curiam* opinion, held that an indigent petitioner must be provided with a copy of his trial transcript at county expense. Falkenburgh v. Jones, 5 Ind. 296 (1854). Similarly, the Supreme Court one hundred years later, ruled that "[t]here can be no equal justice when the

kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." Griffin v. Illinois, 351 U.S. at 19. As recently as 1977, the Supreme Court reaffirmed Griffin because it felt that adequate and effective appellate review was impossible without a trial transcript. Bounds v. Smith, 430 U. S. 817 (1977), *overruled, in part and on other grounds*, Lewis v. Casey, 518 U.S. 343, 354 (1996).

Over the years, the Supreme Court has affirmed the right of indigent defendants to a free trial transcript on numerous occasions. Williams v. Oklahoma City, 395 U.S. 458 (1969); Gardner v. California, 393 U .S. 367 (1969); Roberts v. LaVallee, 389 U.S. 40 (1967).

While it is true that a state need not provide any defendant with appellate (or PCR) review of their convictions, once a state has decided to provide such avenues for defendants with money, it cannot foreclose those avenues to impoverished defendants. Mayer v. Chicago, 404 U.S. 189 (1971). Thus, the Supreme Court reversed an Oklahoma court's refusal to grant an indigent defendant a free transcript and noted that such a decision "wholly denies any right of appeal to this impoverished defendant, but grants that right only to appellants [with] like convictions [who] are able to pay for the preparation of a ...transcript. This is an 'unreasoned distinction' which the Fourteenth Amendment forbids the State to make." Williams, *supra*, 395 U.S. at 460.

In Britt v. North Carolina, 404 U.S. 226 (1971), the Supreme Court summarized its principle formulated over the years:

> Griffin v. Illinois and its progeny establish the principle that the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an' adequate defense or appeal, when those tools are available for a price to other prisoners. While the outer limits of that principle are not clear, there can be no doubt that the State must provide an indigent defendant with the transcript of prior proceedings when that transcript is needed for an effective defense or appeal.

404 U.S. at 227. Although the right of an indigent defendant to a free transcript is clear, the parameters spoken of in Britt are not. In Hendryx v. State, 130 Ind. 265, 29 N.E. 1131 (1892), the Court held that the determination of indigency resides within the sound discretion of the trial judge. The fact that the petitioner is represented by private counsel here cannot be the basis for the denial of another

constitutional right. See United States v. Jackson, 390 U.S. 570 (1968). The petitioner has a constitutional right, guaranteed by the Sixth Amendment, to be represented by counsel. He cannot be forced to accept a public defender merely to obtain a free transcript. Such a procedure would serve no legitimate state purpose; on the contrary it would result in the taxpayers paying for both the transcript and the PCR attorney.

The U.S. Supreme Court has already spoken on a former Indiana statute which provided transcripts to defendants only when they were represented by public defenders. In overturning that law as a violation of the Equal Protection clause of the Fourteenth Amendment, the Court stated:

> The rules of the Indiana Supreme Court expressly permit an appeal from the denial of a writ of error *coram nobis,* but also require that a transcript be filed in order to confer jurisdiction upon the court to hear such appeal. The Indiana court has held that under the above-quoted provision of the Public Defender Act, only the Public Defender can procure a transcript of a *coram nobis* hearing for an indigent; an indigent cannot procure a transcript for himself and appeal *pro se,* nor can he secure the appointment of another lawyer to get the transcript and prosecute the appeal ....The provision before us confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all. Such a procedure, based on indigency alone, does not meet constitutional standards. We have no doubt that Indiana, with its historic concern for equal justice under law, will find no practical difficulty in correcting the constitutional deficiency which this case exposes.

Lane v. Brown, 372 U.S. 477, 480-81, 485 (1963) (footnotes omitted).

In Lane, the defendant sought a free transcript to proceed *pro se,* but the language of the Court strongly suggests that it would also hold that a defendant represented by private counsel is also entitled to a free transcript if the defendant is in fact indigent. From a practical standpoint, such procedure would avoid the unnecessary appointment of a public defender who procures the transcript, and then has his client discharge him in favor of a privately retained attorney.

Without the "Record of Proceedings," petitioner cannot prepare his PCR, since he must review and cite to the Record to represent his client competently, in accordance with Disciplinary Rule 6-101(A)(2) which reads, in part: "A lawyer shall not: ...(2) Handle a legal matter without preparation adequate in the circumstances." The Supreme Court has agreed, stating, "We conclude that this counsel's duty cannot be discharged unless he has a transcript of the testimony and evidence presented by the

defendant and also the court's charge to the jury, as well as the testimony and evidence presented by the prosecution." Hardy v. United States, 375 U.S. 277, 282 (1964).

Conclusion

The only time that a free transcript should be denied is if the request for that transcript is "plainly frivolous," if an "adequate alternative remedy" is available, or if the defendant has waived his right to appeal. Bounds v. Smith, *supra*, 430 U.S. at 822, n. 8. None of those exceptions apply in this case. Petitioner submits that the public policy declared by our Court in 1854 is as valid today as it was over a century ago, and that Falkenburgh mandates that Petitioner be provided with a "Record of Proceedings" at public expense.

WHEREFORE, Petitioner, by counsel, moves this court to find him indigent, order that a transcript of his trial, guilty plea, and all pleadings filed therewith be prepared at public expense; order that any filing fees be waived, and for all other just and proper relief.

(Signature)

REFERENCES

I.C. 33-40-6-4 (requiring counties that are part of the public defender comprehensive plan to comply with the Indiana Public Defenders Commissions (Standards for Indigent Defense Services in Non-Capital Cases) "in order to qualify for State reimbursement)."

Standards for Indigent Defense Services in Non-Capital Cases, Standard N ("The comprehensive plan shall authorize expenditures for investigative, expert, or other services for a person who has retained private counsel for a trial or appeal when the person is unable to pay for the services and such services are necessary to prepare and present an adequate defense. Such services are eligible for reimbursement from the public defense fund if authorized by the Court").

CASE LAW

Schuck v. State, 53 N.E.3d 571 (Ind.Ct.App. 2016) (trial court abused its discretion by denying Motion for Public Funds for investigation expenses, where Defendant hired private counsel but could not afford to hire investigator and adequately showed how he would benefit from an investigator; further, Defendant's private attorneys were not required to first get permission from local public defender's office before asking trial court for public funds).

Beauchamp v. State, 788 N.E.2d 881(Ind.Ct.App. 2003) (trial court urged to reconsider ruling, in event of retrial, denying a requests for funds for a forensic pathologist, ophthalmologist, and a pediatric neurologist made by Beauchamp who hired a private attorney but could not afford experts; the State's case hinged on inferences from opinions of six medical doctors with various specialties and the charge was serious, a Class B felony).