

18AP0152

STATE OF WISCONSIN

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CLERK OF COURT OF APPEALS
OF WISCONSIN

App. No. 2018AP000152

Case No. 2010CF000269

State of Wisconsin,
Plaintiff- Respondent,

v.

Chase M.A. Boruch,
Defendant-Appellant.

On Appeal From An Order Denying Boruch's
Request For Waiver Of Transcript Preparation Fees,
Entered In The Lincoln County Circuit Court On January 4, 2018,
The Honorable Robert R. Russell, Presiding

BRIEF OF
DEFENDANT-APPELLANT

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Pro Se

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STATEMENT OF ISSUES

1. On September 29, 2015, Boruch filed in the Lincoln County Circuit Court, a number of papers challenging his conviction in Lincoln County Case No. 2010CF000269 ("10-CF-269"), among which was a motion pursuant to Wis. Stat. § 974.06 ("974.06 Motion"). R: 171. See also R: 172 - R: 187. Represented by Lincoln County District Attorney, Mr. Galen Bayne-Allison, and by Assistant Attorney General, Mr. Robert J. Kaiser, the State of Wisconsin Objected to Boruch's 974.06 Motion on April 25, 2016. R: 208. After further briefing, several hearings and oral arguments, the Circuit Court DENIED Boruch's 974.06 Motion on April 27, 2017 ("974.06 Order"). R: 247; Appx. 102.

2. On July 14, 2017, Boruch appealed the Circuit Court's 974.06 Order to this Court. R: 255. App. No. 2017AP001441. After many requests for waiver of transcript preparation fees, both in this Court and in the Circuit Court, the Circuit Court DENIED Boruch's request for waiver of fees to prepare transcripts necessary to prosecute App. No. 2017AP001441, in an order dated September 19, 2017. R: 267, Appx. 106. Boruch appealed this order to this Court (App. No. 2018AP002116), and this Court REVERSED the same and ordered the Circuit Court to conduct a Girouard hearing, which the Circuit Court did on January 4, 2018. R: 281. The Circuit Court again DENIED Boruch's request for waiver of fees. R: 282; Appx. 112. Boruch appealed (App. No. 2018AP000152), which is the matter currently before this Court. On January 16, 2019, this Court ordered the Circuit Court to produce a transcript of the Girouard hearing.

The Circuit Court Erred By Using As The Basis For Denying Boruch's Request For Fee Waiver At The Girouard Hearing, The Fact That The Circuit Court Had Already Denied Boruch's Wis. Stat. § 974.06 Motion.

3. Boruch contends that the Circuit Court erred. Boruch contends that the Circuit Court's interpretation of Girouard v. Circuit Court, 155 Wis. 2d 148, 454 N.W. 2d 792 (Sup. Ct. 1990), renders Girouard pointless and useless, because the Circuit Court applied as a Girouard analysis, the fact that it had already denied Boruch's 974.06 Motion, reasoning, therefore, that there was no merit to an appeal of the same, and thus no need for transcripts.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

4. Boruch requests publication, because there is no case law which Boruch can find discussing how "merit" is to be assessed in a Girouard context, which is the body of this appeal. Boruch does not request oral argument.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

5. On November 29, 2010, a criminal complaint was filed in 10-CF-269, charging Boruch with First-Degree Intentional Homicide in the death of his mother, Sally Pergolski. R: 1. On November 16, 2011, after a seven-day jury trial, Boruch was found guilty of First-Degree Intentional Homicide. R: 76. On January 23, 2012, Boruch was sentenced to life imprisonment without the possibility of release onto extended supervision. R: 140; Appx. 101.

6. Boruch pursued a direct appeal, and his conviction was affirmed on January 22, 2014. R: 163. App. No. 2013AP-000925-CR. State v. Boruch, 2014 WI App 24, 352 Wis. 2d 755, 848 N.W. 2d 711. Boruch's petition for review to the Wisconsin Supreme Court was denied on May 23, 2014. R: 165. State v. Boruch, 2014 WI 50, 354 Wis. 2d 864, 848 N.W. 2d 859.

7. On September 29, 2015, Boruch filed his 974.06 Motion, challenging his conviction in 10-CF-269. The Circuit Court held four hearings on Boruch's 974.06 Motion: January 4, 2016; January 11, 2017; February 21, 2017; April 27, 2017 (hereinafter, when referring to these hearings collectively, Boruch will refer to the same as "the Hearings"). On April 27, 2017, in an oral ruling, the Circuit Court issued its 974.06 Order, DENYING Boruch's 974.06 Motion as barred by State v. Escalona-Naranjo, 185 Wis. 2d 168, 517 N.W. 2d 157 (Sup. Ct. 1994). Appx. 102.

8. On or about July 1, 2017, Boruch filed a letter in the Circuit Court (This may be erroneously entered in the Record as # 256, but is attached hereto as Appx. 103 - 103.7), wherein Boruch again requested that fees for producing transcripts of the Hearings be waived. Appx. 103.1. Boruch had earlier requested waiver of transcript preparation fees in a letter to the Circuit Court, dated February 16, 2017 (This may be erroneously entered into the Record as # 244, but is attached hereto as Appx. 104 - 104.5), in another letter to the Circuit Court, dated February 24, 2017 (This does not appear in the Record, but is attached hereto as Appx. 105 -

105.2), and during the April 27, 2017 hearing at which the Circuit Court entered the 974.06 Order. The Circuit Court ignored Boruch's requests for waiver.

9. On July 14, 2017, Boruch initiated an appeal in this Court concerning the Circuit Court's 974.06 Order. App. No. 2017AP001441. Then, on September 19, 2017, the Circuit Court entered an order DENYING Boruch's request for waiver of transcript preparation fees (hereinafter "Transcript Order"). R: 267; Appx. 106. On or about September 29, 2017, Boruch filed a letter in this Court, asking the Court to waive transcript preparation fees. Appx. 107 - 107.2. This Court DENIED that request in an order dated October 3, 2017. Appx. 108.

10. On October 16, 2017, Boruch, pursuant to this Court's October 3, 2017 Order, filed a notice of appeal concerning the Circuit Court's Transcript Order, initiating App. No. 2017AP002116. Pursuant to this Court's October 3 Order, proceedings in App. No. 2017AP001441 were STAYED pending resolution of App. No. 2017AP002116.

11. On November 13, 2017, Boruch filed a motion for summary disposition in this Court, asking for summary reversal of the Circuit Court's Transcript Order. Appx. 109 - 109.11. On November 30, 2017, this Court did SUMMARILY REVERSE the Transcript Order, ORDERING the Circuit Court to conduct a Girouard hearing. Appx. 110 - 110.2. On December 5, 2017, the Circuit Court scheduled a Girouard hearing for January 4, 2018. R: 281.

12. On December 21, 2017, Boruch sent a letter to the Circuit Court, wherein Boruch described that which he would be seeking at the Girouard hearing, and also requesting waiver of fees to produce a transcript of the Girouard hearing itself (This letter does not appear on the Record, but is attached hereto as Appx. 111 - 111.5).

13. On January 4, 2018, the Circuit Court held a Girouard hearing, and again DENIED Boruch's request for waiver of transcript preparation fees. R: 282 (hereinafter "Second Transcript Order"). Appx. 112. Also on January 4, 2018, but after the Girouard hearing, Boruch sent a letter to the Circuit Court, again asking for waiver of fees in producing a transcript of the Girouard hearing, as provided in State v. Jacobus, 167 Wis. 2d 230, 235, 481 N.W. 2d 642 (Ct. App. 1992) (This letter also does not appear in the Record, but is attached hereto as Appx. 113 - 113.10). The Circuit Court ignored Boruch's request for waiver of fees.

14. On January 23, 2018, Boruch initiated an appeal of the Circuit Court's Second Transcript Order, App. No. 2018AP000152, the appeal which is currently before this Court. Then, on January 25, 2018, Boruch filed another motion for summary disposition in this Court, asking for summary reversal of the Second Transcript Order. Appx. 114 - 114.16. This Court DENIED Boruch's request for summary disposition on February 7, 2018. Appx. 115.

15. On April 20, 2018, the Record On Appeal was filed in this Court in the instant appeal. R: 300.

16. On or about February 8, 2019, the Circuit Court Reporter filed in this Court, the transcript of the January 4, 2018, Girouard hearing, as Ordered by this Court on January 16, 2019.

ARGUMENT

The Circuit Court Erred By Using As The Basis For Denying Boruch's Request For Fee Waiver At The Girouard Hearing, The Fact That The Circuit Court Had Already Denied Boruch's Wis. Stat. § 974.06 Motion.

17. The Wisconsin Supreme Court decided Girouard v. Circuit Court, 155 Wis. 2d 148, 454 N.W. 792, in 1990. Girouard instructs Circuit Courts to waive fees associated with preparing transcripts for indigent litigants in civil cases. Girouard, 159. This Court made this clear in its November 30, 2017 Order, which Order granted Boruch's November 13, 2017, motion for summary disposition. Appx. 110 - 110.1. In that same Order, this Court instructed the Circuit Court, that "If the circuit court finds the action [Boruch's 974.06 Motion] is not frivolous and the petitioner is indigent, the court must (emphasis added) waive the transcript fees. Girouard, 155 Wis. 2d at 159." Appx. 110.1. The Circuit Court did FIND Boruch to be indigent (Appx. 112; 1-4-18 Tran, p. 19), but made NO findings as to frivolity, simply restating that it had already denied Boruch's 974.06 Motion, which it also did with NO findings as to whether Boruch's 974.06 Motion did or did not have merit.

18. Since Girouard was decided in 1990, the Wisconsin Supreme Court has cited Girouard 10 times in its opinions (Based on a LEXIS search on April 20, 2018). NONE of the

post-Girouard opinions of the Wisconsin Supreme Court describes how "merit," for the purposes of transcript fee waiver, for the further purpose of appeal, is to be assessed. Further, since 1990, the Wisconsin Court of Appeals has cited Girouard 76 times in its opinions (Based on a LEXIS search on April 20, 2018), NONE of which describes how "merit," for the purposes of transcript fee waiver, for the further purpose of appeal, is to be assessed. Boruch assumes, for the purposes of this appeal, that this Court is equating "not frivolous" with "arguably meritorious", or "frivolous" with "meritless".

19. Whether a claim is arguably meritorious, is a question of law, which this Court reviews de novo. State ex rel. Hansen v. Circuit Court, 181 Wis. 2d 993, 998, 513 N.W. 2d 139, 141 (Ct. App. 1994). In this Court's November 30, 2017 Order, this Court indicated that the Circuit Court "must" (Appx. 110.1) grant waiver of transcript preparation fees if Boruch is found indigent, and if the claims advanced on Boruch's 974.06 Motion are not "frivolous." Appx. 110.1. Indigency is clearly a finding of fact. The Circuit Court did FIND Boruch to be indigent (1-4-18 Tran, p. 19), and Boruch does not seek to reverse that part of the Second Transcript Order.

20. Boruch asserts that the Circuit Court improperly applied Girouard when it stated, "This Court has already found and ordered... 'that the Defendant is entitled to no relief' in its order of May 4, 2017, and therefore has already found that the defendant's claims for relief are not 'arguably meritorious'

as required by Girouard..." Appx. 112. 1-4-18 Tran, pgs. 20-21. In the 974.06 Order, the Circuit Court never described why Boruch's claims were meritless. Incorporating by reference an order which itself does not assess merit, is no way to make a merits assessment.

21. The level of proof required on Boruch's 974.06 Motion is clear and convincing evidence. State v. Walberg, 109 Wis. 2d 96, 102, 325 N.W. 2d 687, 689 (Sup. Ct. 1982). (Boruch disputes this level of proof, though does so in a way which may not be relevant to this appeal, and is raised now for the purposes of non-waiver). The Circuit Court FOUND this at the April 27, 2017 hearing. In finding that Boruch's 974.06 Motion was without merit, the Circuit Court found that Boruch had not demonstrated by clear and convincing evidence that he was entitled to relief. If the standard for arguable merit, for the purposes of appeal, were clear and convincing evidence, there would never be a need for a Girouard hearing, at least in a § 974.06 context, because if one could satisfy a clear and convincing standard at a Girouard hearing, then one would have already shown merit, by clear and convincing evidence, on the underlying Wis. Stat. § 974.06 motion, which would entitle the person to relief, and thus no appeal would be had (at least not by the defendant), and thus there would be no need for transcripts. This would leave the circuit court's decision unreviewable.

22. In addition, Girouard is applied in civil cases with different natures. It is applied in 974.06 contexts, in which the nature is quasi-criminal, and the burden of proof

is by clear and convincing evidence. Walberg, 107. Girouard is also applied in civil cases with the normal burden of proof, that is, a preponderance of the evidence. Small v. Krupp, 2014 Wisc. App. LEXIS 635 (Ct. App. 2014). In fact, Girouard is a "preponderance of the evidence" case itself, that is, a parental visitation rights case. Monroe County Department of Human Services v. T.M. (In re M.A.B.), 2017 Wisc. App. LEXIS 610 (Ct. App. 2017); Wis. Stat. § 48.415 (1)(c)(preponderance of evidence required).

23. The only way to make Girouard functional in its applications to cases with differing burdens and natures, is to require a claim-by-claim specific assessment of merit, that is, the intrinsic rights and wrongs of each claim advanced, which Boruch argued at the Girouard hearing. 1-4-18 Tran, p. 17. In order to avoid Girouard being used as a self-referential, begging the question logical fallacy, Girouard must be understood to define "arguable merit", for the purposes of appeal, as a standard proportionally lower than the burden on the underlying action. Otherwise, Girouard would be superfluous.

24. Boruch asks that this Court FIND/CONCLUDE that arguable merit, for the purposes of appeal in a Girouard context, means "legally cognizable," that is, does the law recognize the claim being advanced as something upon which relief could be granted. If so, there is arguable merit to an appeal.

25. If this Court chooses to assess this appeal under the "not frivolous" language used in its November 30 Order,

and also decides that "frivolous" is something different than "without arguable merit", there is some authority on such assessment, under which, an appeal from the Circuit Court's 974.06 Order would not be frivolous.

26. Wis. Stat. § 809.25(3) discusses when an appeal can be considered frivolous. An action is frivolous if it is without a reasonable basis in law or equity. § 809.25(3)(c)(2). This is similar to the way that Fed. R. App. P. 38 is construed. This "reasonable basis" language seems to indicate that an appeal cannot be frivolous if the claims raised therein are "legally cognizable". A claim is cognizable if it is capable of being judicially examined. Garner, Bryan A., ed. Black's Law Dictionary, p. 132. St. Paul: West Publishing Co., 2016. All of the claims raised by Boruch in his 974.06 Motion are legally cognizable. The State conceded this at the April 27, 2017 hearing on Boruch's 974.06 Motion. See also 1-4-18 Tran, pgs. 10 and 11.

27. By another definition of "frivolous," an appeal is frivolous if the result of the appeal is obvious. N.L.R.B. v. Catalina Yachts, 679 F. 2d 180, 182 (9th Cir. 1982). For the Circuit Court to find that an appeal from its 974.06 Order would obviously fail requires a lot of assumptions and inferences. For example, in its 974.06 Order, the Circuit Court denied Boruch's request for a State v. Machner, 92 Wis. 2d 797, 285 N.W. 2d 905 (Ct. App. 1979), hearing. If the same were overturned on appeal, it is possible that trial counsel would testify such that Boruch would be entitled to relief. This constitutes a plausible chance that the Circuit Court's 974.06

Order would be reversed, and when an appeal has a plausible chance at reversal, it cannot be frivolous. 21-338 Moore's Federal Practice - Civil § 338.20[2]. Also, an appeal is unlikely to be frivolous when there is little or no caselaw interpreting the issues raised. Id. As shown above (¶ 18), Boruch is unable to find any authority interpreting Girouard in a Wis. Stat. § 974.06 context.

28. If this Court chooses to assess this appeal under the "arguably meritorious" language used in its November 30 Order, and also decides that "without arguable merit" is NOT equivalent to "frivolous," there is some authority by which this appeal can be assessed, under which, Boruch is entitled to relief. This authority is the "no-merit report" procedure. In Anders v. California, 386 U.S. 738 (1967), the U.S. Supreme Court established the no-merit procedure, and in that opinion, the Court specifically indicated that "without arguable merit" is NOT equivalent to "frivolous." Anders, 743. This was reaffirmed in Smith v. Robbins, 528 U.S. 259, 270 (2000). Wis. Stat. § 809.32 is Wisconsin's no-merit rule. This rule REQUIRES a discussion as to why a claim does or does not have merit, and this rule was found acceptable by the U.S. Supreme Court in McCoy v. Court of Appeals, 486 U.S. 429 (1988). Under this theory, the Circuit Court erred, because there was no discussion by the Circuit Court as to merit before it entered its 974.06 Order.

29. The Girouard application to Section 974.06 motions is confusing and unclear, and thus requires explanation by this Court. Boruch respectfully asks this Court to clarify the terms and applications in and of Girouard.

RELIEF REQUESTED

WHEREFORE, Boruch respectfully requests that this Court please grant Boruch the following relief:

30. That this Court please find this as a timely-filed brief;

31. That this Court AFFIRM the portion of the Second Transcript Order which found Boruch to be indigent;

32. That this Court FIND/CONCLUDE/HOLD that "arguable merit", for the purposes and in the context of Girouard, for the further purpose of appeal, is equivalent to "legally cognizable";

33. That this Court FIND/CONCLUDE/HOLD that a proper Girouard analysis, for the purposes of transcript fee waiver, for the further purpose of appeal, requires SPECIFIC, claim-by-claim analysis of merit with SPECIFIC findings of fact and conclusions of law;

34. That this Court DECLARE the exact burden of proof that a petitioner must meet to establish arguable merit in a Girouard analysis when seeking transcript preparation fee waiver, when the underlying action is a Wis. Stat. § 974.06 motion;

35. That this Court assess each claim advanced by Boruch in his 974.06 Motion [the underlying action upon which the Circuit Court applied Girouard] (R: 171 - R: 187, R: 208, 222, 224, 225, 235), making SPECIFIC findings of fact and conclusions of law for each claim, and therefrom make a finding that Boruch has established "arguable merit" for the purposes of transcript fee waiver, for the purposes of this

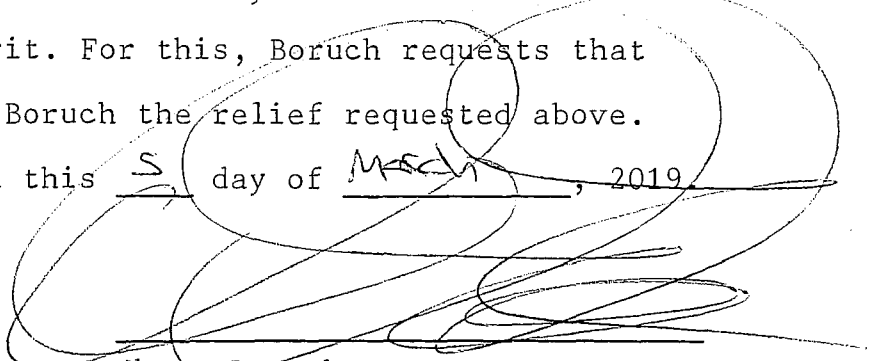
appeal, and that this Court then ORDER that transcripts of the Hearings be produced at no cost to Boruch, or, in the ALTERNATIVE, that this Court REMAND this matter to the Circuit Court for an identical assessment;

36. For such other and further relief as this Court may deem just and equitable.

CONCLUSION

37. The Circuit Court erred. The Circuit Court erred in not ordering production of transcripts of the Hearings. The Circuit Court erred by incorporating into its Second Transcript Order, the 974.06 Order it entered on April 27, 2017, because the Circuit Court did not make specific and express findings/conclusions as to why it considered Boruch's claims to be without merit. For this, Boruch requests that this Court please grant Boruch the relief requested above.

Respectfully signed this 5 day of March, 2019.


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CERTIFICATION AS TO
FORM AND LENGTH

I certify that this brief meets the form and length requirements set forth in § 809.19(1)(a)-(i) and § 809.19(8)(b)-(d), that this brief is produced with a monospaced font having 10 characters per inch, is double spaced, has a 1.5 inch left margin, has a 1 inch margin on each other side, and is 17 pages in length, including the table of contents, the table of authorities, the statement of issues, and the statement on oral argument and publication.

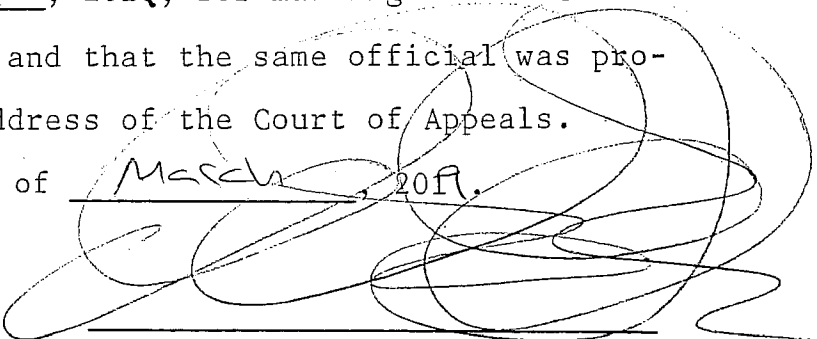
CERTIFICATION AS TO
RULE 809.19(12)

I certify that I am an unrepresented party, and thus, pursuant to § 809.19(8)(a)(4) and § 809.19(12)(a), I have not filed an electronic copy of this brief.

CERTIFICATION OF MAILING

I certify that this brief was delivered to the proper officials within Waupun Correctional Institution on the 5 day of March, 2019, for mailing to the Clerk of the Court of Appeals, and that the same official was provided with the correct address of the Court of Appeals.

Signed this 5 day of March, 2019.


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