

No. 19-_____

**IN THE
SUPREME COURT OF THE UNITED STATES**

DEWEY LEE MCBRIDE,
Petitioner,

v.

CHARLES L. RYAN, WARDEN,
ARIZONA DEPARTMENT OF CORRECTIONS
Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

NATMAN SCHAYE
COUNSEL OF RECORD FOR PETITIONER
DEWEY LEE MCBRIDE

Arizona Capital Representation Project
25 South Grande Avenue
Tucson, Arizona 85745
(520) 229-8550
natman@azcapitalproject.org

TABLE OF CONTENTS

Table of Authorities	Error! Bookmark not defined.
QUESTIONS PRESENTED	1
I. OPINIONS BELOW.....	2
II. STATEMENT OF JURISDICTION	3
III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	4
IV. STATEMENT OF THE CASE	4
V. REASONS FOR GRANTING CERTIORARI	6
A. THIS COURT SHOULD PROVIDE GUIDANCE ON THE CONTOURS OF “DIRECT REVIEW” UNDER 28 U.S.C. §2244(d)(1)(A)	6
B. THE COURT SHOULD ESTABLISH A DUE PROCESS RIGHT TO AN UNBIASED JUDGE IN STATE POST-CONVICTION.....	9
VI. CONCLUSION	9

TABLE OF AUTHORITIES

Cases

<i>Carey v. Saffold</i> , 536 U.S. 214 (2002)	8
<i>Evans v. Chavis</i> , 546 U.S. 189 (2006)	8
<i>Gardner v. Florida</i> , 430 U.S. 349 (1977)	9
<i>Jimenez v. Quarterman</i> , 555 U.S. 113 (2009)	7, 8
<i>Lawrence v. Florida</i> , 549 U.S. 327 (2007)	7
<i>In re Murchison</i> , 349 U.S. 133 (1955)	9
<i>State v. Ward</i> , 118 P.3d 1122 (Ariz. App. 2005)	4
<i>Tumey v. Ohio</i> , 273 U.S. 510 (1927)	9
<i>Williams v. Pennsylvania</i> , 136 S.Ct. 1899 (2016)	9

Statutes

A.R.S. §13-4033(B)	4
28 U.S.C. §1254(1)	3
28 U.S.C. §2101(c)	3
28 U.S.C. §2244(d)	4
28 U.S.C. §2244(d)(1)(A)	6, 7
28 U.S.C. §2244(d)(2)	7
28 U.S.C. §2254	2, 6, 7

Other Authorities

Arizona Rules of Criminal Procedure Rule 32.1.....	4, 5
Supreme Court Rule 13	3
U.S. Const. amend. XIV, § 1	4
U.S. Constitution	5

QUESTIONS PRESENTED

**A. WHETHER MR. McBRIDE’S “DIRECT REVIEW” CONTINUED UNTIL
HIS CLAIMS WERE DECIDED BY AN UNBIASED JUDGE**

**B. WHETHER DUE PROCESS REQUIRES STATES TO PROVIDE AN
UNBIASED JUDGE TO DECIDE CLAIMS ON DIRECT REVIEW**

I. OPINIONS BELOW

The memorandum decision of the United States Court of Appeals for the Ninth Circuit that is the subject of this petition, filed October 23, 2018, is attached as Appendix A.¹ That court's order summarily denying Petitioner McBride's Petition for Rehearing with Suggestion for Rehearing en Banc, filed November 29, 2018, is attached as Appendix B. The United States District Court for the District of Arizona's unpublished order dismissing Mr. McBride's petition for habeas corpus under 28 U.S.C. §2254 as untimely, filed January 26, 2017, is attached as Appendix C. That court's magistrate's Report and Recommendation suggesting dismissal as untimely is attached as Appendix D.

This Court's order denying certiorari, filed December 7, 2015, is attached as Appendix E. The Arizona Supreme Court's order denying review, filed April 21, 2015, is attached as Appendix F. The Arizona Court of Appeals Memorandum Decision granting review but denying relief, filed September 22, 2014, is attached as Appendix G. The Pima County Superior Court order granting rehearing and ordering resentencing, but failing to reconsider Mr. McBride's challenges to his convictions, filed February 12, 2014, is attached as Appendix H. That court's order denying relief, filed November 13, 2013, is attached as Appendix I. That court's order granting Mr. McBride's motion for the judge who had previously presided over

¹ The appendices are contained in a separate volume due to their number and length.

the case, Hon. Jane Eikleberry, to be recused for cause, filed July 29, 2013, is attached as Appendix J.

The Arizona Supreme Court's order denying review, filed February 15, 2013, is attached as Appendix K. The Arizona Court of Appeals memorandum decision granting review but denying relief, filed May 25, 2012, is attached as Appendix L. The Pima County Superior Court order denying post-conviction relief, filed July 7, 2011, is attached as Appendix M. The transcript of the August 17, 2009 sentencing, at which the court imposed sentences totaling 37 years for Mr. McBride's burglary and drug offenses, is attached as Appendix N.

II. STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1), which grants it authority to review decisions of the United States Courts of Appeal by certiorari. The Ninth Circuit denied relief to Mr. McBride in a memorandum decision on October 23, 2018. (Appendix A). That court denied rehearing on November 29, 2018 (Appendix B). Counsel undersigned previously attempted to file this petition within 90 days of that date. It was postmarked February 27, 2019, and received by the Clerk on March 7, 2019. However, the petition was rejected on March 7, 2019, due to counsel's errors, with instructions that the errors be corrected and the petition be resubmitted within 60 days. It is therefore timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13.

* * *

* * *

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the following statutory and constitutional provisions.

28 U.S.C. §2244(d):

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; ...

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

U.S. Const. amend. XIV, § 1:

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...

IV. STATEMENT OF THE CASE

Petitioner Dewey McBride was convicted and sentenced for drug and burglary charges in Arizona state court pursuant to a plea agreement. (Appendix N). State law requires that direct review be conducted through post-conviction proceedings initially held by the trial judge. A.R.S. §13-4033(B); Rule 32.1, Arizona Rules of Criminal Procedure; *State v. Ward*, 118 P.3d 1122, 1126 ¶9 (Ariz. App. 2005) (Post-conviction proceedings are “the functional equivalent of a direct appeal.”). Mr. McBride’s timely challenges to his convictions and sentences based on his mental incompetence and ineffective assistance of counsel were summarily denied by the trial judge. (Appendix M). The court of appeals affirmed on the

merits. (Appendix K). The state supreme court denied review on February 15, 2013. (Appendix K).

Mr. McBride filed a second post-conviction notice on June 10, 2013. His second petition raised the identical issues contained in the first. However, it supported them with newly discovered evidence that the trial judge received damning evidence against Mr. McBride prior to sentencing, but concealed that evidence from the parties. (ER 194-211). He argued that his federal due process rights were violated because he was sentenced by and his post-conviction challenges were decided by a biased judge. (ER 199-201). A newly assigned judge granted Mr. McBride a new sentencing, but refused to reconsider his challenges to his convictions that had been denied by the biased judge. (Appendix H).

Before the new sentencing occurred, and without objection from the prosecution, Mr. McBride petitioned for review of his challenges to his convictions by the court of appeals. In affirming, the appellate court concluded, “The provisions of [post-conviction] Rule 32.1 [of Criminal Procedure] appear to provide no procedural avenue for a defendant to present a successor claim of judicial bias to challenge the validity of a previous post-conviction proceeding.” (Appendix G at 4 n. 1). Mr. McBride petitioned the state supreme court for review, arguing that the denial of reconsideration for post-conviction rulings by a biased judge itself denied him his right to due process under the U.S. Constitution. (ER 94-99). His petition was summarily denied on April 21, 2015. (Appendix F). He filed a timely petition for certiorari on July 20, 2015. (ER 77-87). It was denied on December 7, 2015.

(Appendix E). He filed his petition pursuant to 28 U.S.C. §2254 in district court on July 21, 2016. (ER 8).

In calculating the one-year statute of limitations under 28 U.S.C. §2244(d)(1)(A), the district court correctly concluded that Mr. McBride’s second post-conviction petition continued direct review because: 1) that petition was “limited to an elaboration of the facts relating to the claims in the first petition,”; and 2) the state court decided the second petition on the merits. (Appendix C at 6-7, 9, *quoting King v. Roe*, 340 F.3d 821, 823 (9th Cir. 2003)(per curiam), *abrogated on other grounds by Evans v. Chavis*, 546 U.S. 189 (2006). However, the court failed to deduct the time for filing a petition for certiorari following the state supreme court’s denial of review and therefore erroneously ruled that Mr. McBride’s habeas petition was filed 88 days late. (*Id.* at 14).

The Ninth Circuit granted a certificate of appealability on the timeliness issue. In affirming, the court assumed that the second state petition was a continuation of direct review and purportedly applied 28 U.S.C. §2244(d)(1)(A). (Appendix A at 2). However, it failed to deduct the time during which Mr. McBride’s timely petition for certiorari was pending from the one-year limitations period and found his habeas petition to be one day late. (*Id.*).

V. REASONS FOR GRANTING CERTIORARI

A. THIS COURT SHOULD PROVIDE GUIDANCE ON THE CONTOURS OF “DIRECT REVIEW” UNDER 28 U.S.C. §2244(d)(1)(A)

Congress established that the one-year statute of limitations for filing a habeas corpus petition begins to run on “the date on which the judgment becomes

final by the conclusion of direct review or the expiration of the time for seeking such review ...” 28 U.S.C. §2244(d)(1)(A). In the present case, Mr. McBride’s “direct review” continued into a second round of post-conviction proceedings. This occurred because he acted diligently to discover evidence of judicial misconduct that – as the state court recognized – granted him the right to reassert the issues raised in his initial “direct review” post-conviction proceedings. As a result, his state judgment did not become final until this Court denied his petition for certiorari from the second round of proceedings. (Appendix E). His §2254 petition, filed seven and one-half months later, was therefore timely.

The district court recognized, “[T]he ‘newly discovered evidence’ should not be considered another claim, but the avenue in which McBride was able to elaborate on the facts included in the first [post-conviction] petition.” (Appendix C at 9). The Ninth Circuit assumed the conclusion to be correct. (Appendix A at 2). Regardless, the court refused to toll the period during which Mr. McBride’s timely petition for certiorari was pending. (*Id.*). In doing so, the court jumped from the provision governing the conclusion of direct review, 28 U.S.C. §2244(d)(1)(A), to the provision governing collateral attacks in state courts, 28 U.S.C. §2244(d)(2).

The court’s conclusion was based on the decision in *Lawrence v. Florida*, 549 U.S. 327, 332 (2007), which held that the time for petitions for certiorari are not part of the tolling for state collateral proceedings under §2244(d)(2). It is submitted, however, that the circumstance presented here is far more analogous to *Jimenez v. Quarterman*, 555 U.S. 113 (2009). There, the state court granted the

petitioner an out-of-time appeal because he had not received notice from his attorney that the attorney did not believe there to be any nonfrivolous grounds to appeal before the appeal was dismissed. *Id.* at 116. The lower federal courts refused to treat the out-of-time appeal as Jimenez’ direct review and dismissed his habeas petition as untimely. *Id.* at 117. This Court reversed:

We hold that where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not yet “final” for purposes of 28 U.S.C. §2244(d)(1)(A). In such a case, “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review” must reflect the conclusion of the out-of-time direct appeal or the expiration of the time for seeking review of that appeal.

Id. at 121. Like Jimenez, Mr. McBride’s direct review was sent off track due to no fault of his own. In fact, Mr. McBride’s circumstance is even more compelling for it was not his representative who failed him, but the court itself. Further, the unbiased state judge not only considered the merits of the issues Mr. McBride presented, but granted him partial relief by ordering that he be resentenced.

Perhaps the lower courts’ analysis in the present case was thrown off by Arizona’s unusual procedure by which inmates convicted by plea may not appeal, but are given direct review through post-conviction proceedings in the trial court. Certainly, the Court has been required to repeatedly address habeas petitioners whose cases arise in California’s unusual system. *E.g., Evans v. Chavis*, 546 U.S. 189, 192 (2006); *Carey v. Saffold*, 536 U.S. 214, 217 (2002). In any case, granting certiorari here will enable the Court to provide valuable guidance to the lower courts and guarantee the parties consistent treatment.

B. THE COURT SHOULD ESTABLISH A DUE PROCESS RIGHT TO AN UNBIASED JUDGE IN STATE POST-CONVICTION

The state appellate court found that Arizona law failed to provide Mr. McBride a device by which he could assert his due process right to a fair arbiter in post-conviction. It is respectfully submitted that this Court must clearly establish that this is unacceptable.

This Court has long and clearly held that the Due Process Clause guarantees every defendant an impartial judge. Nearly ninety years ago, the Court ruled that any circumstance “which might lead [a judge] not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.” *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). A judge’s acceptance of evidence in secret renders that judge biased as a matter of law. *E.g., In re Murchison*, 349 U.S. 133, 138-139 (1955)(consideration of evidence taken in secret violates due process). *See also Gardner v. Florida*, 430 U.S. 349, 362 (1977)(consideration of undisclosed information by capital sentencing judge violates due process).

In its most recent statement on the subject, the Court held that due process guarantees defendants the right to an impartial judge even in discretionary post-conviction proceedings. *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1903, 1909-1910 (2016). It is submitted that the Court again make clear that this fundamental right applies in every state in the union.

VI. CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari be granted.

Respectfully submitted this 23rd day of April, 2019.

_____/s/ Natman Schaye_____
Natman Schaye
Counsel for Petitioner Dewey McBride