

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

VERNELL CONLEY
PETITIONER,

v.

WENDY KELLEY, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS, OR
ALTERNATIVELY, FOR A WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2241

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QUESTION PRESENTED FOR REVIEW

PETITIONER WAS CONVICTED OF THREE DRUG OFFENSES AND SENTENCED BY THE JURY TO A TOTAL TERM OF 90 YEARS. THE ARKANSAS SUPREME COURT FOUND INSUFFICIENT EVIDENCE SUPPORTING TWO CONVICTIONS, WHICH THE COURT REVERSED, LEAVING INTACT HIS CONVICTION ON THE REMAINING COUNT, ON WHICH HE HAD BEEN SENTENCED TO 60 YEARS IN PRISON. ALTHOUGH THE JURY IMPOSED THE ORIGINAL SENTENCES IN A JOINT PROCEEDING IN WHICH IT CONSIDERED THE EVIDENCE ON ALL THREE COUNTS IN SETTING CONLEY'S PUNISHMENT, THE ARKANSAS SUPREME COURT REFUSED TO ORDER RE-SENTENCING LIMITED TO EVIDENCE ON THE REMAINING CONVICTION. DID THE REFUSAL TO ORDER RE-SENTENCING ON THE REMAINING CONVICTION, LIMITED TO EVIDENCE SUPPORTING THAT CONVICTION, VIOLATE CONLEY'S RIGHT TO DUE PROCESS OF LAW IN VIEW OF HICKS v. OKLAHOMA, 447 U.S. 343 (1980)?

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OPINION BELOW

The opinion of the Arkansas Supreme Court was originally designated as unpublished, carrying this disclaimer:

NOTICE: THIS DECISION WILL NOT APPEAR IN THE SOUTHWESTERN REPORTER. SEE REVISED SUPREME COURT RULE 5-2 FOR THE PRECEDENTIAL VALUE OF OPINIONS.

However, it is now published in the Southwestern Reporter without the designation that it would not be published. *Conley v. Kelley*, 2019 Ark. 23, 566 S.W.3d 113. A copy of the opinion is included in the Appendix as Exhibit A.

JURISDICTION

Petitioner invokes the jurisdiction of the Court pursuant to 28 U.S.C. § 1257(a). The Arkansas Supreme Court delivered its opinion on January 31, 2019. This petition is timely if filed on or before May 1, 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The 14th Amendment to the United States Constitution provides, in pertinent part: “nor shall any State deprive any person of life, liberty, or property, without due process of law.”

Arkansas Code Ann. § 5-4-103 provides, in pertinent part:

(a) If a defendant is charged with a felony and is found guilty of an offense by a jury, the jury shall fix punishment in a separate proceeding as authorized by this chapter.

The pertinent sections of the Arkansas Code relating to the statutorily-defined writ of habeas corpus provide, as follow:

Sec. 16-112-102:

(a)(1) The writ of habeas corpus shall be issued upon proper application by a Justice of the Supreme Court or a judge of the circuit court. The power of the Supreme Court and circuit court to issue writs of habeas corpus shall be coextensive with the state.

Sect. 16-112-103

(a)(1) The writ of habeas corpus shall be granted forthwith by any of the officers enumerated in § 16-112-102(a) to any person who shall apply for the writ by petition showing, by affidavit or other evidence, probable cause to believe he or she is detained without lawful authority, is imprisoned when by law he or she is entitled to bail, or who has alleged actual innocence of the offense or offenses for which the person was convicted.

28 U.S.C. § 2241 provides, in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.**(c)** The writ of habeas corpus shall not extend to a prisoner unless—

(3) He is in custody in violation of the Constitution or laws or treaties of the United States;

STATEMENT OF THE CASE

Petitioner Conley petitions for review of the decision by the Arkansas Supreme Court denying relief on his claim that he was entitled to be re-sentenced by jury following post-conviction relief granted by that court resulting in dismissal for insufficient evidence of two the three counts upon which he had originally been convicted. *Conley v. State*, 2014 Ark. 172, at 12, 433 S.W.3d 234, 243. The state court denied relief on his petition for writ of habeas corpus in *Conley v. Kelley*, 2019 Ark. 23, 566 S.W.3d 119 and Conley now seeks review of that decision.

Conley was sentenced to a total of ninety years based on the jury's sentencing decision of sixty years on Count 1 and thirty years reflecting concurrent sentences imposed by the trial court on the Counts 2 and 3 that were eventually vacated and which the trial court had ordered to be served consecutively to the sixty-year term. The evidence at sentencing showed that he had committed twelve prior felonies that supported the State's allegation of four or more prior convictions in support of a habitual offender provision authorizing imposition of enhanced punishment. *Conley v. State*, 2014 Ark. 172, at 3, 433 S.W.3d 234, 238.

The 60-year term on imposed on Count 1 remains in effect after the state supreme court's action dismissing the convictions on the other two counts. However, at trial, jurors considered the evidence adduced on all three counts in

arriving at the punishment verdict, including the evidence on Counts 2 and 3 that the supreme court found insufficient and ordered dismissed.

Conley argues in this Court that the state court's refusal to order a re-sentencing proceeding in which the jury would assess punishment based only on the evidence supporting his conviction on Count 1, including consideration of his prior convictions, violates his right to due process of law, subjecting him to illegal confinement in the Arkansas Department of Correction.

a. Summary of Material Facts

Petitioner Conley was convicted by a jury of three counts alleging drug-related offenses. He was convicted on Count 1 of delivery of a controlled substance, 0.5813 grams of crack cocaine to an undercover officer for \$100 in September, 2009. The evidence showed that two undercover officers met Conley on a rainy night in the parking area of a local park, having made contact with him earlier by phone. The officers could not remember the make and model of the car in which Conley was sitting during the transaction, but identified him at trial as the individual who sold them crack cocaine despite the short period of time involved. After the exchange the officers followed Conley away from the scene by car, noting the residence where he parked.

The police researched the residence address where Conley parked on the night of the transaction and obtained a search warrant, which they executed in

November, when Conley was not present in the residence. Based on the results of the search, he was arrested and prosecuted in Counts 2 and 3 of the information that charged that he possessed 32.5 grams of marihuana with intent to deliver and possession of drug paraphernalia—digital scales—respectively. The jury convicted him on the cocaine delivery and paraphernalia counts and on the lesser-included offense of possession of the marihuana, instead of possession with intent to deliver. *Conley v. State*, 2011 Ark. App. 597, 385 S.W.3d 875. On direct appeal, the Arkansas Court of Appeals held that trial counsel failed to preserve error correctly on any of the three counts and, consequently, declined to consider Conley’s insufficiency challenges on their merits. 2011 Ark. App. 597, at 4, 7, 385 S.W.3d at 878-79.

b. Summary of post-trial proceedings

Following affirmance of his convictions by the appellate court Conley filed for post-conviction relief pursuant to Rule 37.1 of the Arkansas Rules of Criminal Procedure in the trial court of conviction. The trial court denied relief on his multiple claims, but on appeal the Arkansas Supreme Court held that trial counsel rendered ineffective assistance with respect to his failure to preserve challenges to the sufficiency of the evidence supporting Counts 2 and 3. It found that the evidence supporting those convictions was legally insufficient and, thus, that trial counsel had rendered ineffective assistance:

Consequently, we conclude that the evidence is not sufficient to support Conley's convictions for possession of a controlled substance and possession of drug paraphernalia. In turn, we hold that trial counsel's performance was deficient and prejudicial, because had trial counsel made a proper motion for directed verdict, the sufficiency-of-the-evidence argument raised on appeal would have been successful. Accordingly, we reverse and remand with directions to dismiss the charges of possession of a controlled substance and possession of drug paraphernalia.

Conley, 2014 Ark. 172, at 12, 433 S.W.3d at 243. The court specifically ordered dismissal of Counts 2 and 3 in concluding its opinion:

Affirmed in part; reversed and remanded in part with directions to dismiss the charges of possession of a controlled substance and possession of drug paraphernalia.

Id. at 13, 433 S.W.3d at 243. However, the court did not remand for re-sentencing on Count 1, the conviction that had been sustained on appeal from the denial of post-conviction relief by the trial court. The court's mandate tracked the language in the opinion, again failing to order remand for re-sentencing, reading, in pertinent part:

THIS POSTCONVICTION CRIMINAL APPEAL WAS SUBMITTED TO THE ARKANSAS SUPREME COURT ON THE RECORD OF THE WASHINGTON COUNTY CIRCUIT COURT AND THE BRIEFS OF THE RESPECTIVE PARTIES. AFTER DUE CONSIDERATION, IT IS THE DECISION OF THE COURT THAT THE JUDGMENT OF THE CIRCUIT COURT IS AFFIRMED IN PART; REVERSED AND REMANDED IN PART WITH DIRECTIONS FOR THE REASONS SET FORTH IN THE ATTACHED OPINION.

(Mandate, *Conley v. State*, Ex. D, APP-26).

The relief ordered by the supreme court was to be implemented only by the circuit court's entry of an order dismissing Counts 2 and 3. There was not only no remand for re-sentencing, but also, no directive that the circuit court enter an Amended Judgment and Commitment Order, as Justice Hart noted is required under state law in her dissenting opinion in *Conley v. Kelley*, 2019 Ark. 23, at 12-13, 566 S.W.3d at 122, 123 (Hart, J., dissenting). Consequently, Conley remains confined on the basis of a sentencing order that has not been corrected, continuing to reflect that he was convicted on Counts 2 and 3 and sentenced to thirty years, concurrently, on those counts. (Judgment and Commitment Order, Ex. C, APP-20, 22).

Conley filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Arkansas on March 26, 2015, *pro se*. He alleged claims of ineffective assistance rendered by trial counsel. These included a claim preserved in the state post-conviction process arguing that trial counsel's performance was defective based on his failure to move for severance of the trial on Count 1 from trial on Counts 2 and 3. This claim was not addressed by the Arkansas Supreme Court on appeal from the denial of post-conviction relief based on the court's conclusion that the claim had essentially been mooted by its order dismissing Counts 2 and 3. 2014 Ark. 172, at 13, 433 S.W.3d at 234.

The Washington County (Arkansas) Circuit Court did not enter its order dismissing Conley's convictions on Counts 2 and 3 until August 27, 2015, fully *five months after* he filed his pro se petition for federal habeas relief. (Order, Ex. E, APP-28). Thereafter, on January 12, 2016, the United States Magistrate Judge appointed undersigned counsel to represent Conley in the federal habeas action.

Counsel moved the District Court to hold the federal proceeding in abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), in order to permit him to exhaust state remedies on July 29, 2016. Following objection by Director Kelley, the habeas court stayed the proceedings on February 1, 2017.

Conley first petitioned the Arkansas Supreme Court to recall its mandate issued in the Rule 37.1 appeal in which it had ordered the convictions on Counts 2 and 3 reversed and the charges dismissed. He moved the court recall the mandate issued in the case and grant leave to file an out-of-time petition for rehearing, arguing that the supreme court's decision to deem the ineffective assistance claim based on counsel's failure to move for severance of Count 1 from Counts 2 and 3 deprived him of a decision on this claim that would have warranted relief. Additionally, he argued in the out-of-time petition for rehearing tendered with the motion to recall the mandate that the court's disposition deprived him of re-sentencing on Count 1 relief which was necessary to ensure that the sentence imposed on Count 1 would not include consideration of the insufficient evidence

requiring the dismissal of Counts 2 and 3. (Out-of-Time Petition for Rehearing, Ex. G, APP-49-51). The court denied his motion to recall the mandate and requesting leave to file an out-of-time petition for rehearing. *Conley v. Kelley*, 2019 Ark. 23, at 4, 566 S.W.3d at 119; (FORMAL ORDER, Ex. H. APP-53).

Conley then filed a petition for writ of habeas corpus authorized by Arkansas statute, ARK. CODE ANN. §§ 16-112-102 and 103, challenging the extant Judgment and Commitment Order that continues to reflect the 90-year sentence imposed at trial. His initial filing, in the Jefferson County (Arkansas) County Circuit, which had jurisdiction based on Petitioner's incarceration in the Tucker Maximum Security Unit located in that county, was eventually dismissed after counsel filed his opening brief in the Arkansas Supreme Court on motion of Respondent Kelley, Director, Arkansas Department of Correction. Respondent was transferred to the Varner Maximum Security Unit located in Lincoln County. Based on Arkansas law, because the Jefferson County Circuit Court lost jurisdiction to order relief once Conley was moved to a unit in the adjacent county, the state supreme court ordered the appeal dismissed over Conley's objection that Section 16-112-102 expressly provides for that court to exercise statewide jurisdiction. The court voted 4-3 to dismiss.¹

¹ The dismissal of Conley's first habeas corpus petition is noted in *Conley v. Kelley*, 2019 Ark. 23, at 16, n.2, 566 S.W.3d at 125, n.2. (Ex. A, APP-13).

c. Preservation of Petitioner's federal due process claim

Thereafter, Conley filed his habeas corpus petition in the Lincoln County Circuit Court.² The circuit court dismissed the petition, holding that the habeas corpus process is not a procedural vehicle for litigating his claim, explaining:

A petition for a writ of habeas corpus is not a substitute for post-conviction relief nor does it provide an opportunity to retry a case.

Whether the petitioner is entitled to relief from the delivery of a controlled substance (crack cocaine) conviction has been addressed on appeal and in a Rule 37 petition. A habeas corpus proceeding does not provide a means to revisit the merits of issues of issues that could have been addressed and settled, in the trial court, on appeal, or in a post-conviction proceeding.

(Order Dismissing Petition, Ex. B, APP-16-17).

Petitioner Conley did not seek to re-litigate his conviction for delivery of cocaine. Instead, he challenged the inaccuracy in the recitations in the extant Judgment and Commitment Order, (Petition for Writ of Habeas Corpus, Ex, F, APP-30, 37) in his first claim for relief. In his second claim, he attacked the Judgment and Commitment Order as failing to reflect re-sentencing on Count 1. (Ex. F, APP-31, 37-39), where the jury were permitted to consider the evidence adduced on all three counts, including the evidence held insufficient to support his

² The second habeas petition was filed in a circuit court in the same judicial district as the Jefferson County Circuit Court before the same Circuit Judge.

convictions on Counts 2 and 3 in reaching their sentencing verdicts on the three counts. (Ex. F, APP-38-39, ¶¶42-50).

In his third claim for relief in the Lincoln County habeas petition, Conley expressly argued that the failure to afford him re-sentencing upon dismissal of Counts 2 and 3 violated his right to due process. He phrased this claim:

3. PETITIONER CONLEY IS CONFINED UNDER THE JUDGMENT AND COMMITMENT ORDER OF THE WASHINGTON COUNTY CIRCUIT COURT WHICH HAS SUBSEQUENTLY BEEN RENDERED INVALID, OR VOID, BY THE ACTION OF THE ARKANSAS SUPREME COURT IN *CONLEY v. STATE*, 2014 Ark. 172, 433 S.W.3d 234 (2014) DISMISSING HIS CONVICTIONS ON COUNTS 2 AND 3 OF THE INFORMATION UPON WHICH HE WAS CONVICTED AT TRIAL, BUT WHICH REMAINS IN EFFECT, VIOLATING HIS RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE HIS SENTENCE ON COUNT 1 WAS DETERMINED BY THE JURY WHILE CONSIDERING EVIDENCE OFFERED BY THE PROSECUTION WITH RESPECT TO COUNTS 2 AND 3 WHICH WAS RULED INSUFFICIENT TO SUPPORT CONVICTION ON THOSE COUNTS.

(Ex. F, APP-39-40).

Finally, Petitioner Conley preserved his federal constitutional claim of due process violation in urging this ground for reversal in the direct appeal in the Arkansas Supreme Court. (Excerpt from Opening Brief, Ex. I, APP-55-59). In support of the argument he expressly relied on this Court's decision in *Hicks v. Oklahoma*, 447 U.S. 343, 347 (1980) in support of his due process argument.

On appeal, the Arkansas Supreme Court upheld the circuit court's dismissal order. *Conley v. Kelley*, 2019 Ark. 23, at 9-10, 566 S.W.3d at 121-22. It held:

Assertions of trial error and due process claims do not implicate the facial validity of the judgment or the jurisdiction of the circuit court. *Williams v. Kelley*, 2017 Ark. 200, 521 S.W.3d 104. Thus, the trial court did not clearly err by denying relief on this claim.

Conley brings this petition seeking review of the state court's decision.

REASONS FOR GRANTING THE WRIT

THE ARKANSAS SUPREME COURT'S REFUSAL TO ORDER RE-SENTENCING ON THE ONE REMAINING CONVICTION ON PETITIONER CONLEY'S THREE-COUNT INFORMATION CHARGING DRUG OFFENSES VIOLATED HIS RIGHT TO DUE PROCESS OF LAW WHERE THE JURY IMPOSED HIS SENTENCES ON ALL CHARGES IN A JOINT PROCEEDING THAT INCLUDING THE JURY'S CONSIDERATION OF EVIDENCE LATER FOUND INSUFFICIENT TO SUPPORT CONLEY'S CONVICTIONS ON TWO COUNTS WHEN THE SUPREME COURT GRANTED RELIEF ON THE OTHER TWO COUNTS IN THE STATE POST-CONVICTION PROCESS, ORDERING THOSE COUNTS DISMISSED.

Vernell Conley petitioned the Arkansas courts for a writ of habeas corpus seeking relief from the extant Judgment and Commitment Order showing that he remains incarcerated on a 90-year sentence even after the state supreme court granted him post-conviction relief dismissing his convictions on Counts 2 and 3 of a three count information charging him with drug offenses in 2009. Despite the state supreme court's finding that the evidence offered by the State in support of Counts 2 and 3 was legally insufficient, resulting in its order directing dismissal of those charges,³ Conley was never afforded a re-sentencing proceeding on Count 1, leaving intact the 60-year sentence imposed on that count.

³ Relief in post-conviction based on insufficient evidence, like reversal on appeal on that ground, effectively results in acquittal on the charge, as the Court held in *Burks v. United States*, 437 U.S. 1 (1978) and *Greene v. Massey*, 437 U.S. 19

In *Hicks v. Oklahoma*, 447 U.S. 343 (1980), the issue arose from the trial jury's imposition of a mandatory 40-year prison term required by a habitual offender statute following his conviction for distributing heroin. The statute was subsequently declared unconstitutional by the Oklahoma Court of Criminal Appeals in *Thigpen v. State*, 561 P.2d 467, 471 (Okla. Crim. App.1977). When Hicks sought relief from his mandatorily-imposed 40-year term relying on *Thigpen*, the court rejected his argument, as the Court explained the Oklahoma court's reasoning:

The Court of Criminal Appeals acknowledged that the provision was unconstitutional, but nonetheless affirmed the petitioner's conviction and sentence, reasoning that the petitioner was not prejudiced by the impact of the invalid statute, since his sentence was within the range of punishment that could have been imposed in any event.

447 U.S. at 345. Reversing the state court, this Court held that "the State deprived the petitioner of his liberty without due process of law." *Id.* at 347. Petitioner Conley faces a similar situation to that addressed in *Hicks*.

a. The disposition of Conley's due process claim

The Arkansas Supreme Court never directly addressed Conley's due process claim and reliance on *Hicks v. Oklahoma* in its decision in *Conley v. Kelley*, while

(1978). The Arkansas courts do not order entry of an acquittal and, instead, order dismissal of the charges when the evidence is found to be insufficient.

recognizing that the due process claim had been included in the habeas petition filed in the Lincoln County Circuit Court. It initially summarized his claims:

Conley argued that (1) the existing judgment and commitment order under which he is committed is void or defective as a result of our decision in his Rule 37 appeal, which vacated two of the three sentences that he challenged; (2) his confinement under the judgment and commitment order is unlawful because his sentence on the remaining count was determined by a jury that also considered evidence deemed insufficient to support his conviction on the two dismissed counts; and (3) his confinement on the remaining count violates his due-process rights. Conley sought a new sentencing hearing limited to evidence supporting his delivery conviction and the entry of a new judgment reflecting the jury's sentence imposed on that count. The circuit court dismissed Conley's petition.

2019 Ark. 23, at 5, 566 S.W.3d at 119. However, after engaging in its analysis, the court upheld the circuit court's dismissal of Conley's petition, conflating the claims set forth in his habeas corpus petition and on appeal with the ineffective assistance claim the court had deemed moot by its decision granting relief on Counts 2 and 3. The majority concluded:

Assertions of trial error and due process claims do not implicate the facial validity of the judgment or the jurisdiction of the circuit court. *Williams v. Kelley*, 2017 Ark. 200, 521 S.W.3d 104. Thus, the trial court did not clearly err by denying relief on this claim.

III. Conclusion

"A habeas corpus proceeding does not afford a prisoner an opportunity to retry his case." *Johnson*, 2018 Ark. 42, at 3, 538 S.W.3d at 821. In essence, Conley is attempting to pursue arguments now that were not made at trial and to resurrect arguments that were addressed in his Rule 37 appeal. None of Conley's arguments provide evidence of probable cause to believe that he is being illegally

detained, and the circuit court did not clearly err in dismissing his petition.

2019 Ark. 23 at 9-10, 566 S.W.3d at 121-22.

Of course, Conley's claim that the extant Judgment and Commitment Order, continues to authorize his detention in contrary to the supreme court's order for dismissal of Counts 2 and 3-- based on the recitations in the order showing that he is confined for a total term of 90-years on Counts 1, 2, and 3 (Ex. C, APP-20, 22)-- unequivocally shows that he is being detained unlawfully. The court stated:

Conley is not serving a sentence for the dismissed possession charges, and he does not argue that his sentence for the delivery charge is outside the statutory range for a habitual offender sentenced for a class Y felony.

2019 Ark. 23, at 8, 566 S.W.3d at 121. It is correct that the trial court entered a formal order dismissing Counts 2 and 3 on August 27, 2015 (Ex. E, APP-28), more than fifteen months after the Clerk issued the mandate on May 7, 2014. (Ex. D, APP-26). But, there is no amended judgment or sentencing order confirming the change in Conley's sentence, as Justice Hart pointed out in her dissenting opinion. *Conley v. Kelley*, 2019 Ark. 23, at 12-13, 566 S.W.3d at 123 (Hart, J., dissenting)

Moreover, the court's explanation conflates the issue of trial counsel's ineffective assistance in failing to move to sever Count 1 from Counts 2 and 3 included in his pending federal habeas corpus action with the claim argued in the state habeas corpus process based on the court's failure to order re-sentencing on

Count 1. The ineffectiveness claim and the sentencing issue do arise from the same basic factual scenario—the supreme court’s disposition of Conley’s claim in the Rule 37 appeal granting relief based on counsel’s failure to properly object to evidentiary insufficiency as to Counts 2 and 3, leading to their dismissal. But, the ineffective assistance claim is predicated on the Sixth Amendment assistance of counsel right, while the issue arising from the failure of the Arkansas courts to afford Conley a re-sentencing proceeding is grounded in his reliance on the Due Process Clause of the 14th Amendment.

The court’s conclusion that Conley was attempting to re-package his ineffective assistance claim as a matter of jurisdictional error in an effort to obtain relief by habeas corpus is simply incorrect. Conley’s claim in federal habeas seeks relief for trial counsel’s ineffectiveness in failing to sever the charges that will arguably entitle him to a new trial on the issue of guilt, or, alternatively, result in a re-sentencing hearing, depending upon whether he can demonstrate that counsel’s defective performance met the second prong of *Strickland v. Washington*, 466 U.S. 668, 694 (1984), requiring him to show a reasonable probability that but for counsel’s defective performance, the outcome of the proceedings would have been different.⁴

⁴ In his federal habeas petition, Conley relies on Arkansas law describing the right to severance of charges joined based on similarity, but not arising from the same

The court re-stated its consistent rule that “[a] writ of habeas corpus is proper when a judgment of conviction is invalid on its face or when a circuit court lacks jurisdiction over the cause.” 2019 Ark. 23, at 5, 556 S.W.3d at 119, *citing Philyaw v. Kelley*, 2015 Ark. 465, 477 S.W.3d 503. But, the *Philyaw* court also explained: The petitioner must plead either the facial invalidity or the lack of jurisdiction and make a “showing, by affidavit or other evidence, [of] probable cause to believe” that he or she is illegally detained. 2015 Ark. 465, at 4, 477 S.W.3d at 477.

episode as an “absolute right.” *Passley v. State*, 323 Ark. 301, 308, 915 S.W.2d 248, 251 (1996) (“A defendant has an absolute right to a severance of offenses joined solely on the ground that they are of same or similar character. *Clay v. State*, 318 Ark. 550, 886 S.W.2d 608 (1994).”). In *Clay*, the court explained the significance of potential prejudice for joinder of similar drug offenses:

In drug cases the State cannot ordinarily prove that the accused sold drugs on one occasion by proving that he sold them on other occasions. *Rios v. State*, 262 Ark. 407, 557 S.W.2d 198 (1977); *Sweatt v. State*, 251 Ark. 650, 473 S.W.2d 913 (1971). Such proof of other sales, as we pointed out in *Sweatt*, would merely show that the accused had dealt in drugs before and hence was likely to do so again.

Clay, 318 Ark. at 554–55, 886 S.W.2d at 611. Petitioner recognizes, however, that relief in federal habeas requires a showing of probable prejudice under Strickland, rather than reliance on a presumption of prejudice that may be applied under state law. *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1912 (2017).

S.W.3d at 505-06. The right alleged by Conley in the statutory habeas corpus action is not dependent upon proof of trial counsel's ineffectiveness in failing to move for severance, although severance would have prevented the potential prejudice when his trial jurors were able to consider both the evidence ruled legally- sufficient to support Count 1 and that ruled legally-insufficient to support convictions on Counts 2 and 3 when deciding his punishment.

In instructing jurors at the punishment phase, the trial court did not advise the jury that the evidence must be considered separately and independently in assessing Conley's punishment on the three charges on which they had convicted.

Instead, the court instructed:

THE COURT: Ladies and gentlemen, members of the jury, you have found Vernell Conley guilty of Delivery of a Controlled Substance Crack Cocaine, Possession of a Controlled Substance Marijuana, and Possession of Drug Paraphernalia. The law provides that after the jury returns a verdict or verdicts of guilt but before it sentences the State and the Defendant may present additional evidence to be considered by the jury in its deliberations on sentencing. In your deliberations on the sentences to be imposed you may consider both the evidence presented in the first stage of the trial where you rendered verdicts on guilt and the evidence to be presented in this part of the trial. You'll now hear evidence that you may consider in arriving at appropriate sentences. The State may call its first witness.

(Sent. Hrg. Tr/203-04). Even assuming that a limiting instruction might have been effective in presuming that prejudice had not occurred in the sentencing on Count 1 based on consideration of evidence subsequently deemed insufficient by the

supreme court on counts 2 and 3, there was no attempt to limit the jury's consideration of the evidence with respect to the counts on which they set the punishment to be imposed by the trial court.

Consequently, Petitioner did argue a claim relating to the trial court's sentencing discretion that had resulted in the imposition of the 90-year sentence reflecting the sixty years imposed on Count 1 and the 30-year concurrent sentences imposed on Counts 2 and 3, ordered by the trial to be served consecutively to Count 1. (Ex. C, APP-22). The validity of the extant Judgment and Commitment Order has been discredited by the supreme court's action in ordering dismissal of the charges upon which the Order still reflects that Conley is confined. Even if corrected with an amended judgment to delete the references to his conviction and sentences on Counts 2 and 3, the Order would still violate Conley's right to be sentenced only on evidence sufficient to support his conviction on Count 1, the only conviction remaining intact following the Rule 37 appeal.

Arkansas is one of few states in which the trial jury in a non-capital case hears evidence in sentencing and arrives at a sentencing recommendation within the statutory range following conviction. ARK. CODE ANN. § 5-4-103(a). The trial court can reduce the term of years found by the jury, but cannot increase the term, as the trial court instructed the jury at Petitioner's trial. (Sent. Hrg. Tr/227). When there is error in the sentencing proceeding, the court has remanded for re-

sentencing. *See Buckley v. State*, 341 Ark. 864, 874-75, 20 S.W.3d 331, 338-39 (2000) and *Buckley v. State*, 349 Ark. 53, 61-64, 76 S.W.3d 825, 830-32 (2002) (reversal based on error during sentencing proceeding heard by jury requires remand for new sentencing hearing before newly-empanelled jury unless waived by both Defendant and State).

Conley sought relief through the only remedy available under state law⁵ for the purpose of correcting the 90-year sentence originally imposed upon his convictions essentially invalidated by the court's action on appeal from denial of

⁵ Arkansas Code Ann. § 16-90-111 provides statutory remedy for correction of an illegal sentence, but is only available to correct a facially-invalid sentence and not to address problems arising with the illegal imposition of a sentence. *Thompson v. State*, 2016 Ark. 380, at 1-2, 2016 WL 6518511; *Halfacre v. State*, 2015 Ark. 105, at 2-3, 460 S.W.3d 282, 284 (per curiam). Arkansas also recognizes the judicially-created writ of error *coram nobis*, which is limited to specific claims, such as violations of the duty to disclose evidence favorable to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963), and post-*Brady* decisions. Finally, a defendant claiming actual innocence based on newly-discovered scientific evidence may petition for habeas corpus under Arkansas Code Ann. § 16-112-201, *et. seq.* None of these post-conviction remedies recognized under Arkansas law would encompass Petitioner's claim before the court below.

relief by the trial court of conviction on his petition brought pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure. He exhausted his single Rule 37 petition in challenging counsel's ineffectiveness in failing to preserve error as to evidentiary insufficiency leading to the partial reversal ordered in *Conley*, 2014 Ark. 172, 433 S.W.3d 234. *See* ARK. R. CRIM. P. 37.2(b) ("All grounds for post-conviction relief from a sentence imposed by a circuit court, including claims that a sentence is illegal or was illegally imposed, must be raised in a petition under this rule."). In addressing Conley's argument that the court's disposition in his appeal from denial of Rule 37 relief, which only directed that the trial court enter an order dismissing Counts 2 and 3, and did not provide for re-sentencing in either the opinion or mandate, the court responded:

If Conley believed additional direction should have been given, he could have petitioned for rehearing rather than assuming that the mandate would have given direction that was not set forth in the opinion. Conley's argument that the issue of the "correctness of the recitations in the existing judgment did not arise until after this Court's mandate issued," is not persuasive. Our mandate did not add to or subtract from our opinion, and it was not inconsistent with the opinion in any way. Regardless, what Conley has advanced as a jurisdictional claim does not establish the circuit court's lack of subject-matter or territorial jurisdiction.

Conley v. Kelley, 2019 Ark. 23, at 7, 566 S.W.3d at 120. In imposing the blame for the lack of a re-sentencing order on Rule 37 appellate counsel for failing to petition for rehearing, the court effectively shifted the burden for its own error to Conley and his counsel, the court also effectively precluded him from obtaining the

relief he was entitled to as a matter of state law—a jury sentencing him on the basis of legally-sufficient evidence supporting his conviction—in denying him relief on his habeas corpus petition.

The court’s explanation shifts the fault for the violation of Conley’s statutory right to him by ignoring the fact that neither the court’s opinion, nor the mandate issued by the clerk direct the trial court to order re-sentencing and enter an Amended Judgment and Commitment Order following the re-sentencing proceeding. Instead of accepting responsibility for its own error, the court required, in retrospect, appellate counsel to anticipate that the mandate would not reflect the proper relief once the convictions on Counts 2 and 3 had been vacated.

Instead, the court placed the burden on Conley and post-conviction appellate counsel to anticipate the need to petition for rehearing to ensure a proper disposition of the case, including re-sentencing. Moreover, once the mandate issued, the time for petitioning for rehearing had lapsed. Conley asked the supreme court to correct the error when he moved to recall the mandate and for leave to file his out-of-time rehearing petition, but rather than correct the error, the court denied his request without opinion.

In looking to the court’s broad authority under Sections 16-112-102 and 103 to grant habeas corpus relief, Conley relied on the same statutory habeas corpus actions in which the Arkansas Supreme Court granted relief to offenders serving

life sentences for capital murder committed while juveniles. Those sentences were subject to challenge under the decisions in *Miller v. Alabama*, 567 U.S. 460 (2012), and its companion case, *Jackson v. Hobbs*, 567 U.S.460, 465-67 (2012). The court ordered relief even though the life sentences mandatorily imposed on those defendants were statutorily-authorized and the judgments were facially-valid. *Jackson v. Norris*, 2013 Ark. 175, at 2, 426 S.W.3d 906, 907. On remand in *Jackson*, the state supreme court reversed the denial of habeas corpus relief, applying the decision in *Miller/Hobbs* retroactively, and by implication, finding that the circuit court's imposition of the mandatory life sentence without possibility of parole was beyond the scope of its lawful authority.

The court rejected Conley's reliance on *Jackson* as evidence of the broad application of Section 16-112-103, which provides:

(a)(1) The writ of habeas corpus shall be granted forthwith by any of the officers enumerated in § 16-112-102(a) to any person who shall apply for the writ by petition showing, by affidavit or other evidence, *probable cause to believe he or she is detained without lawful authority*, is imprisoned when by law he or she is entitled to bail, or who has alleged actual innocence of the offense or offenses for which the person was convicted. (emphasis added).

It concluded:

Conley also argues in this section that even a facially valid sentence may result in jurisdictional error when it is imposed in violation of a statutorily authorized process, or if there is a change in the law that renders a previously valid sentence invalid. However, Conley's sentence was not imposed in violation of a statutorily authorized process, and unlike the claim in *Jackson*, Conley's claim does not

concern a statutorily authorized sentence that was later declared unconstitutional.

2019 Ark. 23, at 7-8, 566 S.W.3d at 120. This result is disingenuous. Conley has consistently argued that while his sentence was not facially-invalid and was authorized by statute at the time it was imposed. And, while *Jackson* is not wholly on point, it does represent that the habeas corpus remedy accommodates retroactive changes to facially-valid sentences based upon a later change in circumstances that requires correction. For instance, in *Custis v. United States*, 511 U.S. 485, 497 (1994) the Court held that a federal sentence relying on a prior state court conviction may be challenged once the prior conviction is set aside.

Conley recognizes the difference noted by the court in that *Jackson* required correction based on the finding that the Arkansas statute mandating imposition of a life sentence for a juvenile convicted of capital murder, while the later event in his case involved the vacation of two convictions based on application of constitutional protections, the guarantee of due process in ensuring that a criminal conviction is supported by sufficient evidence and the Sixth Amendment guarantee of effective assistance of counsel. The state supreme court's distinction, along with its mischaracterization of Conley's claim to re-sentencing as one involving "trial error," demonstrates an unreasonable interpretation of state law, as Justice Hart explained in her dissent, criticizing the majority's approach: "These findings are as curious as they are illogical." 2019 Ark. 23, at 10, 566 S.W.3d at 122.

In *Hicks*, the Court explained:

It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. *The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion*, cf. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

447 U.S. at 346 (emphasis added). While the defendant in Oklahoma was “entitled” to have the jury assess punishment, under Arkansas law Conley was sentenced by the trial jury as a matter of statutory directive. ARK. CODE ANN. § 5-4-103(a). In fact, an Arkansas defendant cannot waive jury trial without consent of the State. *See* ARK. CODE ANN. § 16-89-108:

(a) In all criminal cases, except where a sentence of death may be imposed, trial by a jury may be waived by the defendant, *provided the prosecuting attorney gives his or her assent to the waiver*.
(emphasis added)

Here, Conley's expectation that his sentence would be decided based only upon proof that the offenses charged by the State would be supported by legally-sufficient evidence was frustrated when the Arkansas Supreme Court failed to remedy the integrity of the jury's sentence on Count 1 as a result of the jury's

consideration of the insufficient evidence on Counts 2 and 3 in assessing punishment jointly on all counts upon which he had been convicted.

b. Conley's 60-year sentence on Count 1

The 60-year sentence imposed by the jury on Count 1 was not facially-invalid and, thus, did not justify relief on that theory of jurisdictional error recognized as subject to remedy through the statutory habeas corpus process. The jury was instructed that it could impose a sentence of ten years to life imprisonment based on Petitioner's twelve prior convictions.

Petitioner's 60-year sentence was based on application of the Arkansas habitual sentencing statute. ARK. CODE ANN. §§ 5-4-605(b)(1)(A)(ii), (b)(2)(A). He acknowledges his prior record and recidivism, but his prior convictions arose as multiple charges were charged on four different occasions, as Mr. Tucker explained: "He's been to prison four times and released on parole four times." (Sent. Hrg. Tr/211-12).

The penalty for delivery of *any* amount of cocaine under the statute in effect at the time of Petitioner's prior offenses was a Class Y felony, which carried a minimum of imprisonment of ten (10) to forty (40) years or life imprisonment, ARK. CODE ANN. § 5-64-401(a)(i), with increasing statutory minimum sentences for increased quantities of Schedule I or II substances delivered. Each of Petitioner's convictions on multiple charges resulted in sentences imposing

imprisonment for the statutory minimum of ten years in the Arkansas Department of Correction. (Sent. Hrg. Tr/204-08).⁶ Thus, while Petitioner's record was

⁶ The prosecutor offered evidence of prior convictions that showed that Petitioner was convicted on three counts of delivery of cocaine and one count of conspiracy to deliver cocaine in Washington County, in Arkansas, in 1997, and sentenced to ten years in the Arkansas Department of Correction, with ten years suspended; convicted of possession of cocaine in Lee County, Arkansas, in 1997, and the court imposed a 120 month suspended sentence; was convicted of three misdemeanor charges of Failure to Answer a Summons in Fayetteville, Arkansas, District Court in 2007, and fined; one count each of delivery and possession of cocaine, in Washington County, in 2002, and sentenced to 120 months in ADC; and delivery and possession of cocaine in Benton County, Arkansas, in 2006, and again sentenced to 120 months in ADC, with 60 months suspended; and again convicted of two counts of delivery of cocaine in Washington County, and sentenced to 120 months in ADC followed by 120 months suspended; and guilty of possession of marijuana and Obstructing Governmental Operations in Fayetteville District Court and fined in 2007. In addition, the prosecutor offered Conley's prior federal conviction from 2013 for Counterfeiting, resulting in a 33 month sentence imposed by the United States District Court for the Western District of Arkansas. (Sent. Hr. Tr/204-08).

lengthy in terms of convictions, the sentences imposed suggest that the amounts of cocaine that Petitioner actually delivered were minor.⁷

Even though the jury could have imposed a life sentence in light of the number of prior convictions, it did not do so.

In *Hicks*, the Court rejected the argument advanced by Oklahoma that the 40-year sentence imposed on the state's habitual offender act did not have to be set aside because it was not necessarily prejudicial since it fell within the statutory range for the offense on which Hicks was convicted.

Had the members of the jury been correctly instructed in this case, they could have imposed any sentence of "not less than ten . . . years." Okla.Stat., Tit. 21, § 51(A)(1) (1971). The possibility that the jury would have returned a sentence of less than 40 years is thus substantial. It is therefore, wholly incorrect to say that the petitioner could not have been prejudiced by the instruction requiring the jury to impose a 40-year prison sentence.

In the instant case, given the jury's decision to impose a 60-year term on Count 1, rather than life, it is similar *incorrect* to say that Conley's jury was not influenced by the evidence offered in support of Counts 2 and 3, upon which it had convicted in imposing the sentence. Moreover, the jury had convicted based upon

⁷ The sentencing statute for delivery of cocaine was amended to reduce penalty ranges for lesser amounts of cocaine under the 10-year minimum when Petitioner committed his prior offenses. ARK. CODE ANN. § 5-64-422, as amended, Acts of 2011, Act 570, § 46, eff. July 27, 2011.

instructions on the same principles of Arkansas law that were ultimately applied by the state supreme court in vacating the convictions on those counts.

In her dissent, Justice Hart observed:

How much the marijuana and paraphernalia counts contributed to the jury's decision to give Mr. Conley sixty years for selling \$ 100 worth of crack can never be known. I can think of no more fundamental aspect of due process than that a jury's decision be based on relevant evidence. A flawed trial process produces unjust results that go beyond the question whether the defendant "did it." The State has no interest in an excessive sentence.

2019 Ark. 23, at 15, 566 S.W.3d at 124.

The *Hicks* Court, addressing a sentencing issue arising in the context of state court jury sentencing process, found that the State's failure to comply with its own law violated the federal constitutional guarantee of due process. On comparable facts, the Court held:

In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.

447 U.S. at 346 (emphasis in original). Petitioner does not argue that the majority of the Arkansas Supreme Court has deliberately sought to deny him the re-sentencing that would produce a sentenced set by a jury on only the facts sufficient to support his conviction on Count 1, left undisturbed by the court in his Rule 37 appeal. Despite Justice Hart's criticism, the majority may have legitimately felt

constrained by precedent in confronting the novel issue presented by Conley's claim that the failure to order re-sentencing violated his right to due process of law.⁸ Nonetheless, the court's decision has left him with no remedy under state law to correct the error.

c. Conley's claim for relief under Section 2241

The decision of the Arkansas Supreme Court exhausts all state remedies that provide options for pursuing post-conviction relief. The denial of relief on the

⁸ Petitioner's case is not the only indication of an ongoing problem in the Arkansas courts involving disposition of cases in which the supreme court has ordered a reversal of a conviction for insufficient evidence. In *Thornton v. State*, 2019 Ark. 124, 2019 WL 1855112, the court reviewed a fourth action arising in the same case in which the petitioner sought to obtain relief based on the supreme court's reversal of his capital murder conviction and scope of relief ordered. Justice Baker dissented from the denial of relief, explaining:

Because the majority continues to fail to correct the errors from Thornton's previous appeals, I dissent from the majority opinion. This is Thornton's fourth time before the court regarding this appeal. In three of those cases, Thornton has contended that this court's mandate from *Thornton I* reversed and dismissed all his convictions. *Thornton v. State*, 2014 Ark. 157, 433 S.W.3d 433 S.W.3d 216. I agree and would reverse the circuit court's denial of Thornton's petition to correct his illegal sentence pursuant to Ark. Code Ann. § 16-90-111.

2019 Ark. 124, at 3 (Baker, J., dissenting).

appeal from dismissal of Conley's petition for habeas corpus ordered by the circuit court effectively bars him from obtaining a the re-sentencing proceeding on Count 1 that should have been ordered when the state supreme court ordered dismissal of Counts 2 and 3 based on insufficient evidence. Conley's incarceration on the 60-year term the Judgment and Commitment Order that continues to reflect the original 90-year sentence imposed on the three counts on which he was convicted violates the protection afforded by the 14th Amendment Due Process Clause.

Given the precedential clarity provided by the Court in *Hicks*, the Arkansas courts have failed to apply state law with respect to the sentencing process committed to the jury in jury trials consistent with the requirements of due process. Petitioner Conley recognizes that the Court rarely grants habeas corpus relief in a direct petition and concedes that he has not proceeded to file for relief pursuant to 29 U.S.C. § 2241 in the lower courts. His reason for not doing so is based on the complete development of the facts essential to resolve the issue he presents in this petition, and the likelihood that Respondent will argue that the Arkansas Supreme Court's holding is based on an adequate and independent ground under state law for decision. Assuming that Petitioner's claim of a federal due process violation is meritorious, this Court has discretion to exercise its discretion to review the claim under Section 2241.

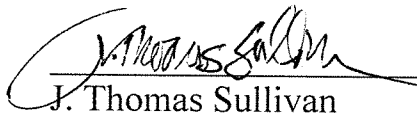
d. “Certworthiness” of Petitioner’s claim

Petitioner’s issue reflects the same need for this Court’s review as that warranting review in *Hicks v. Oklahoma*. *Hicks* has significant precedential value in instructing state courts that compliance with state law is a necessary element in the maintenance of a credible federalized judicial scheme in which state courts are bound to enforce federal constitutional protections. *E.g., Michigan v. Long*, 463 U.S. 1032, 1042, n. 8 (1983) (“The state courts are required to apply federal constitutional standards, and they necessarily create a considerable body of “federal law” in the process.”). *Hicks* addressed one important aspect of the duty of state courts within the federal system: to interpret and apply state law in a manner that does not deprive individuals of the due process guaranteed by the 14th Amendment. Petitioner Conley’s issue offers the Court an opportunity to affirm the same duty imposed on state court systems that warranted review nearly four decades ago in *Hicks*, issued in 1980.

CONCLUSION AND PRAYER FOR RELIEF

Based on the foregoing argument and authorities, Petitioner moves the Court grant the petition and issue a writ of certiorari to review the judgment of the Arkansas Supreme Court. On review, Petitioner moves the Court summarily remand this case for reconsideration in light of *Hicks v. Oklahoma*, or alternatively, order plenary review. Alternatively, Petitioner moves the Court issue the writ of habeas corpus to review the lawfulness of Petitioner's incarceration under the Judgment and Commitment Order remaining in effect in his case.

Respectfully submitted this 30th day of April, 2019.



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