

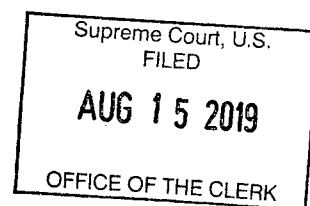
No. 19-5658

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

of America

Mr. Eric C. Burgie — PETITIONER
(Your Name)



vs.

State of Arkansas — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Arkansas Supreme Court.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

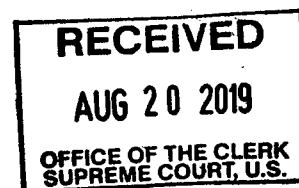
PETITION FOR WRIT OF CERTIORARI

Mr. Eric C. Burgie, ADC # 120956.
(Your Name)

P.O. Box 970.
(Address)

Marrianna, Arkansas 72360.
(City, State, Zip Code)

N/A.
(Phone Number)



QUESTION(S) PRESENTED

1. The state of Arkansas does not treat as a systematic matter, afford indigent prisoners "meaningful review of a claim of ineffective-assistance-of-counsel on direct appeal. Instead, the prisoner must bring the claim in a rule 37 post-conviction proceeding where counsel is not constitutionally guaranteed. The petitioner asks this court to answer whether the due process clause requires appointment of counsel to those prisoners where state collateral review is the first opportunity a prisoner can present a challenge to his conviction?

2. The petitioner asks the court to answer whether the state of Arkansas, and the systematic operation of the Rule 37 procedure impeded Buzgale's right to federal habeas review on ineffective-assistance-of-trial-counsel claims by removing these claims to the Rule 37 proceeding where counsel is not guaranteed?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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- 1) 28 U.S.C. § 2244(c)(1)(A).
- 2) A.C.A. § 16-111-111-111.
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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A. to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Pulaski county circuit court appears at Appendix B. to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 3-14-2019. A copy of that decision appears at Appendix A.

☒ A timely petition for rehearing was thereafter denied on the following date: 5-2-2019, and a copy of the order denying rehearing appears at Appendix C.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including 8-20-2019 (date) on 7-25-2019 (date) in Application No. 19 A 107.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. constitution

Amendment VI : In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV : section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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 law; nor deny to any person within its jurisdiction the equal protection of the laws.

Arkansas Rules of Criminal Procedure

Ark. R. crim. Proc., Rule 37.1 (see Appx. E)

Ark. R. crim. Proc., Rule 37.2 (see Appx. F)

Ark. R. crim. Proc., Rule 37.3 (see Appx. G)

Ark. R. crim. Proc., Rule 37.4 (see Appx. H)

Ark. R. crim. Proc., Rule 37.5 (see Appx. I)

Arkansas statute

Arkansas code annotated § 16-111-111 Declaratory Judgment. (a) when declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise is alleged to be unconstitutional, the attorney General of the state shall also be served with a copy of the proceeding and to be entitled to be heard;

Arkansas code annotated § 16-111-112. construction:

This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respects to rights, status, and other legal relations; and is to be liberally construed and

constitutional and statutory provisions involved

administered;

U.S. statute

28 U.S.C. § 2244 (d)(1)(A) - Finality of determination:

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.

STATEMENT OF THE CASE

On April 2, 2018, the petitioner Mr. Burgie filed with the Pulaski county court his petition for declaratory Judgment under Arkansas code Annotated § 16-111-111-111, challenging the Arkansas Rules of criminal Procedure, Rule 37.1 to 37.4, as unconstitutional under the 6th and 14th amendment of U.S. constitution.

Specifically, the petitioner claimed that the Arkansas Rule 37 Procedure is unconstitutional as applied to him because it denied him the right to challenge his conviction on claims of ineffective-assistance-of-trial counsel at his Rule 37 post-conviction proceeding which provided the first opportunity for him to raise such a claim.

Furthermore, the petitioner contended that because he was indigent and confined, he was unable, without appointment of counsel to develop the evidentiary basis for a claim of ineffective-assistance-of-counsel. And because the state of Arkansas

had deliberately chose to remove ineffective-assistance-of-trial counsel claims from the direct appeal process, where counsel is constitutionally guaranteed to the Aule 37 proceeding where it is not, the due process clause obligated the state "to assure the indigent prisoner an opportunity to present his claims fairly in the context of the states appellate process;" and "requires that the appellate system be free from unreasoned distinctions". The petitioner also contended that the failure to appoint him counsel in the proceeding was an impediment to seeking federal habeas review because by the the state deliberately choosing to remove trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the state significantly diminished the petitioners ability to file such claims within the time-frame articulated in 28 U.S.C. § 2244 (d) (1) (A).

However, in the Arkansas Supreme court deciding Mr. Burgie's appeal, it stated that the circuit court did not abuse its discretion in denying Burgie's petition because the petition failed to state a colorable cause of action. According to the court a colorable cause of action is a claim that is legitimate and may reasonably be asserted given the facts presented and the current law or a reasonable and logical extension or modification of it. see Penn. v. Gallagher, 2017 Ark. 283. The petitioner

contention is that based off the facts presented in this case and the applicable law, a reasonable and logical extension or modification of the law would require that an 'exception' be made to the long-standing rule that indigent prisoners are not entitled to assistance of counsel in post-conviction proceedings that provide the first opportunity for raising such a claim.

In Mr. Burgie's petition for rehearing he argued that the circuit court's conclusion was in error because Arkansas law does not provide for review on direct appeal for trial error ineffective-assistance-of-counsel claim that was not first raised in the trial court. Instead, a prisoner must bring such a claim under Arkansas Rule 37 procedure, which is specifically designed to raised such issues. Furthermore, the petitioner argued that because the state of Arkansas had deliberately chosen to remove trial-ineffectiveness claims from the direct appeal process where counsel is constitutionally guaranteed, to the Rule 37 proceeding where it is not. The 14th amendment due process clause right to assistance of counsel on direct appeal extends to indigent prisoners at post-conviction proceedings which provides the first opportunity for a prisoner to raise a trial-ineffectiveness claim since the Rule 37 proceeding is equivalent to a prisoners first direct appeal as to the ineffective-of-assistance claim. And contrary, to the circuit court opinion

the petitioner was not contending that the courts decisions in Martinez v. Ryan, 566 U.S. 1 (2012), Trevino v. Thaler, 569 U.S. 413 (2013), and Sasser v. Hobbs, 743 F.3d 1151 (8th Cir. 2014), dictated appointment of counsel in post-conviction proceedings, but rather that those decisions strongly suggest that ~~of~~ the U.S. Constitution require appointment of counsel in these circumstances or some other suitable exception. The Supreme Court denied rehearing without written opinion on May 2, 2019.

REASONS FOR GRANTING THE PETITION

FIRST QUESTION

The question presented in this petition is whether the petitioner Mr. Burgie has a right under the 14 amendment, due process clause, to appointment of counsel in a state collateral proceeding that provides the first opportunity for a indigent prisoner to present a challenge to his conviction on trial-error ineffective-assistance-of-trial-counsel claims.

The petitioner contends that the U.S. constitution, due process clause, including a long string of precedent in this court and the Eighth circuit court of appeals establishes and strongly suggests that appointment of counsel to indigent prisoners acting pro se in state post-conviction proceedings in the state of Arkansas that provides initial-review of trial-error ineffective-assistance-of-counsel claims are constitutionally required or at the very least, requires an 'exception' to the long-standing rule that prisoners are not entitled to appointment of counsel in state post-conviction proceedings.

Furthermore, the petitioner filed with the Pulaski county circuit court a petition seeking declaratory judgment relief under Arkansas code Annotated § 16-111-111-111. In this suit Mr. Burgie challenged the Arkansas Rules of criminal procedure,

Rule 37.1 to 37.4 as unconstitutional because the procedure denied indigent prisoners such as himself, the right to assistance of counsel for the purpose of identifying and raising meritorious claims of ineffective-assistance-of-trial counsel at the Rule 37 proceeding. The petitioner further contended that this also violated his right to a fair trial as guaranteed by the U.S. constitution. see Appendix ,

In Mr. Burgie's case the circuit court stated that Burgie had sought to have the Arkansas Rule 37 procedure held unconstitutional but failed to raise the issue on direct appeal. Thus, the court concluded that Burgie failed to demonstrate a colorable cause of action and denied his petition. However, the circuit court's decision was in error as recognized by the Arkansas Supreme court. see Appendix ,

And while the Arkansas Supreme court stated in its March 14, 2017, opinion that Burgie could have raised the issues he's raising here in his Rule 37 proceeding, that conclusion also is in error and contradictory to the court's established precedent. For example, the petitioner states that although the Arkansas Supreme court has stated that a motion for a new trial can be used for raising ineffective assistance of counsel (I.A.C.) claims, the court recognized in *Bousaville v. state*, 323 Ark. 194, 282 S.W. 3d 757, 760 (2008) (per curiam), that it's unrealistic to expect trial counsel to call into question his own competence." *id.*

And although, a prisoner can raise an ineffective-assistance-of-trial counsel claim acting pro se in the trial court on a motion for new trial, the Eighth circuit in Sasser v. Hobbs, 735 F.3d 833 (8th cir. 2013), stated "that a procedure to assure adequate representation cannot depend on a defendants acting without representation." id.; Trevino v. Thaler, 133 S. Ct. 1911 (2013). Thus, in Mr. Bugles case, ~~he~~ it is clear that he was not provided the adequate opportunity to raise ineffective-assistance-of-trial counsel claims in the trial court and under Arkansas law, his claims wouldnt have been preserved for review. Specifically, the Arkansas supreme court has stated that it is well settled that it will not consider ineffective-assistance-of-counsel as a point on direct appeal unless that issue has been considered by the trial court. see Slocum v. State, 325 Ark. 38, 40, 924 S.W. 2d 237, 238 (1996) (citing Edwards v. State, 321 Ark. 610, 906 S.W. 2d 310 (1995)). In most cases, the court has simply refused to consider ineffective assistance claims on direct appeal. see Maxwell v. State, 359 Ark. 335, 477 S.W. 3d 442, 445 (2004); Willis v. State, 334 Ark. 412, 977 S.W. 2d 890, 894 (1998). In fact, the court has decisively stated that, "if the ineffective-of-assistance-of counsel claim is predicated on counsels failure to object, than it is the kind of error that should be addressed in a Rule 37 proceeding, not in a direct appeal where the issue is admittedly not preserved for appeal" see Zuckley v. State, 349 Ark. at 69, 76

S.W. 3d at 835.

Moreover, the petitioner states that this court should grant discretionary review in this matter in order to resolve the conflict between the Eighth circuit's decision in Sasser v. Hobbs, 735 F.3d 833 (8th Cir. 2013), and the Arkansas supreme court decision in this matter with regards to the federal question presented herein. Specifically, in Sasser the Eighth circuit concluded that "Arkansas did not 'as a systematic matter' afford Mr. Sasser 'meaningful review of a claim of ineffective assistance of trial counsel on direct appeal'" see Sasser, 735 F.3d, at 853 (quoting Trevino, 133 S.Ct. at 139). The Eighth circuit, reasoning with Trevino in mind, stated: "It is only possible for an indigent defendant to bring an ineffective assistance on direct appeal in Arkansas if (1) the defendant raises the claim pro se in the trial court or (2) the defendant's trial counsel 'falls on his own sword' by moving for a new trial based on his own ineffectiveness and also moving for appointment of new counsel. Neither alternative is sufficient in light of Trevino... A direct appeal procedure predicated on such a conflict of interest does not present indigent defendants a viable opportunity to challenge their... trial counsel's ineffectiveness." Id.

The petitioner states that the Arkansas supreme court misconstrued Burgie's argument because it was not his

contention that this court's decisions in Martinez v. Ryan, 566 U.S. 1 (2012) and Trevino v. Thaler, 569 U.S. 413 (2013), established a right to appointment of counsel in state post-conviction proceedings. But rather, Burgie's argument was that those cases strongly suggests that the U.S. constitution may require an 'exception' in his situation because (1) the Rule 37 proceeding was the first proceeding that provided Burgie with the opportunity to challenge his conviction on trial error ineffective-assistance-of-trial-counsel claims; (2) Mr. Burgie was without counsel during the rule 37 proceeding and because of his confinement was in no position to develop the evidentiary basis for a claim of ineffective-assistance, which often turned on evidence outside the trial record; (3) the Eighth circuit's decision in Sasser v. Hobbs, 735 F.3d 233 (8th Cir 2013), called into question the practice of the state of Arkansas not appointing a attorney to indigent prisoners at the Rule 37 proceeding that provides initial-review of trial error ineffective-assistance-of-counsel claims; and (4) that by the state of Arkansas deliberately choosing to remove trial ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, to the Rule 37 proceeding where it is not, that decision this court has stated, is not without consequence, and Burgie's

contention is that the due process clause require that the right to counsel on the first direct appeal be extended to his first Rule 37 proceeding raising trial error ineffective assistance of counsel claims.

The petitioner further states that neither conclusion that the Pulaski county circuit court and Arkansas supreme court relied upon in denying Burgie's Declaratory Judgment relief makes any practicable sense as reasoned by the Eighth circuit in Sasser. And in both instances Mr. Burgie's ability to bring trial error ineffective-assistance-of-counsel-claim on direct-appeal and/or the Rule 37 proceeding is seriously impeded, simply, because he is indigent and confined to prison and cannot afford an attorney to represent him in these proceedings. And this clearly offends the U.S. constitution because the right to effective assistance of counsel at trial is a bedrock principal in our justice system...

Moreover, the petitioner states that because the Rule 37 proceeding was the first opportunity for BURGIE to bring an challenge to his conviction on ineffective-assistance-of-trial-counsel claims. This essentially made BURGIE's Rule 37 proceeding his "one and only appeal" as to an ineffective-assistance claim, Id., at 756, 111 S. Ct. 2546. and as this court stated in Martinez v.

Ayan, 132 S. Ct. 1309 (2012), this may justify an exception to the constitutional rule that there is no right to counsel in post-conviction proceedings. see *id.*, at 755, 111 S. Ct. 2546; *Douglas v. California*, 372 U.S. 353, 357, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963) (holding that states must appoint counsel on a prisoners first appeal).

The petitioner believe that the due process clause of the U.S. constitution requires appointment of counsel to indigent prisoners raising ineffective-assistance-of-trial counsel at the first Rule 32 proceeding because this court has long held that the sixth amendment right to effective assistance of counsel is made obligatory on the states by the fourteenth amendment, and that an indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed for him. see *Gideon v. Wainwright*, 83 S. Ct. 792 (1963). The Petitioner think it would be extremely unfair and a injustice if this court continue to allow states to remove trial-error ineffective assistance of trial counsel claims from the direct-appeal process, where appointment of counsel is constitutionally required, to the Rule 32 proceeding where it is not, and without consequence, because when a state does so it significantly diminishes a prisoners ability to file such claims. The petitioner believe that he has a right to a meaningful review of trial error ineffective-assistance of-counsel-claims, just the same

as any other claim he asserts in challenging his criminal conviction. And two, although it is true, as this court acknowledged in Martinez v. Ryan, 132 S. Ct. 1309 (2012), that there are some sound reasons for deferring consideration of ineffective-assistance-of-trial-counsel claims until the collateral-review stage. However, this court has made it explicitly clear that the fourteenth amendment obligates a state "to assure the indigent defendant an opportunity to present his claims fairly in the context of the state's appellate process," Pennsylvania v. Finley, 481 U.S. at 556, 107 S. Ct., at 1994, quoting Boss v. Moffitt, 417 U.S. 600, 616, 94 S. Ct. 2437, 2447, 41 L. Ed. 2d 341 (1974), and "requires that the state appellate system be free from unreasoned distinctions," "id., at 612, 94 S. Ct. at 2444.

And in Coleman v. Thompson, 111 S. Ct. 2546 (1991), this court stated that while the state may have wide latitude to structure its appellate process as it deems most effective, it cannot, consistent with the fourteenth amendment, structure it in such a way as to deny indigent defendants meaningful access. Accordingly, if a state desires to remove from the process of direct appellate review a claim or category of claims, the constitution binds the state to ensure that the defendant has effective assistance of counsel for the entirety of the procedure where the

removed claims may be raised... similarly, fundamental fairness dictates that the state, having removed certain claims from the process of direct review, bear the burden of ineffective assistance of counsel in the proceeding to which the claim has been removed. Thus, in this case the petitioner believes that since the 14th amendment requires appointment of counsel on an indigent prisoner first direct appeal, see Douglas v. California, 382 U.S. 133 (1966). It also requires that the indigent prisoner right to appointment of counsel as to the ineffective-assistance-of-counsel claim be extended to Burger's Rule 32 proceeding, since it is the equivalent to his "one and only appeal", which under this court's precedent is constitutionally required.

SECOND QUESTION

And finally, the petitioner, Mr. Burger ask this court to resolve another relevant issue akin to the issue presented in the second question. In the courts below Mr. Burger asserted that the unconstitutional procedures and the systematic operation of the Arkansas Criminal Procedure Rule 32.1 to Rule 32.4, impeded Burger's right to federal habeas review on claims of ineffective-assistance-of-trial counsel. The petitioner argued that because the state chose to remove trial-ineffectiveness claims

outside of the direct-appeal process, where counsel is constitutionally guaranteed, the state significantly diminished a prisoners ability to file such claims within the period of time prescribed by 28 U.S.C. § 2244 (d)(1)(A), following the conclusion of his direct-appeal and state post-conviction remedies. Thus, the 'design and operational effect' of the Rule 37 procedure, caused Burgie to be time-barred from federal habeas review of his claims of ineffective-assistance-of-trial-counsel.

In Martinez v. Ryan, 132 S. Ct. 1309 (2012), this court specifically acknowledged that a prisoners inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. id. However, this court further stated that the states decision to remove trial-ineffectiveness claims outside the direct appeal process is not without consequence for the states ability to assert a procedural default in later proceedings. But Burgies contention is that since it is clear that the state significantly diminished his ability to file such claims it was impossible for him to bring trial-ineffectiveness claims on federal habeas review within the time frame articulated under § 2244 (d)(1)(A), without the assistance of counsel. In the past this court have constantly stated that 'cause' for a procedural default

under the cause and prejudice test must necessarily be something external to the petitioner, something that cannot fairly be attributed to him, like some interference by officials that made compliance impracticable. The petitioner believe that the circumstances described here would be sufficient to show that the state actions here significantly diminished his ability to bring these claims within a timely manner consistent with §2244(d)(1)(A).

The petitioner respectfully ask this court to grant discretionary review on the questions presented herein.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mr. Eric C. Burgie.

Date: 08-15-2019.