

No. 19-7816

Supreme Court, U.S.  
FILED

FEB 10 2020

OFFICE OF THE CLERK

\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

TERRY GAY

— PETITIONER

(Your Name)

vs.

THE STATE OF COLORADO

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the Tenth Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Terry Gay, #131986

\_\_\_\_\_  
(Your Name)

Arkansas Valley Correctional Facility  
12750 Highway 96, Lane 13

\_\_\_\_\_  
(Address)

Ordway, CO. 81034

\_\_\_\_\_  
(City, State, Zip Code)

Unknown

\_\_\_\_\_  
(Phone Number)

ORIGINAL

### QUESTION(S) PRESENTED

- 1) Under the standards set by this Court in Martinez v. Ryan, 132 S.Ct. 1309 (2012), must a U.S. District Court allow evidentiary development of a fact-based claim of ineffective assistance of trial counsel, if the state courts have failed to do so?
- 2) When a state regulates claims of constitutional entitlement to its collateral review venue, does it violate a Defendant's Fourteenth Amendment due process rights when it fails to allow development of those claims in the state courts?

## LIST OF PARTIES

[X] 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:

## TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	4
REASONS FOR GRANTING THE WRIT .....	5-9
CONCLUSION.....	10

## INDEX TO APPENDICES

APPENDIX A .....Decision, U.S. Court of Appeals for the Tenth Circuit

APPENDIX B .....Decision, U.S. Dist. Court for the Dist. of Colorado

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

## TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>Ardolino v. People</u> , 69 P.3d 73 (Colo. 2003).....	4, 7, 8
<u>Dooly v. People</u> , 2013 CO 34, 302 P.3d 529.....	8
<u>Douglas v. California</u> , 372 U.S. 353 (1963).....	5, 7
<u>Erickson v. Pardus</u> , 127 S.Ct. 2197 (2007).....	7
<u>Evitts v. Lucey</u> , 469 U.S. 387 (1985).....	5
<u>Haines v. Kerner</u> , 404 U.S. 519 (1972).....	6, 7
<u>Hicks v. Oklahoma</u> , 447 U.S. 343 (1980).....	9
<u>Martinez v. Ryan</u> , 132 S.Ct. 1309 (2012).....	5, 7
<u>Massaro v. United States</u> , 123 S.Ct. 1690 (2003).....	5, 7
<u>Moore v. People</u> , 2014 CO 8, 318 P.3d 511.....	7
<u>People v. Simpson</u> , 69 P.3d 79 (Colo. 2003).....	8
<u>People v. Walker</u> , 2014 CO 6, 318 P.3d 479.....	7
<u>Schriro v. Landrigan</u> , 127 S.Ct. 1933 (2007).....	7
<u>Silva v. People</u> , 156 P.3d 1164 (Colo. 2007).....	8

## STATUTES AND RULES

28 U.S.C. sec. 2254.....	4, 6
Colorado Revised Statute, sec. 18-1-410.....	3, 8
Colorado Rule of Criminal Procedure 35(c).....	4, 8

## OTHER

Sixth Amendment, United States Constitution.....	3, 5
Fourteenth Amendment, United States Constitution.....	3, 9

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 <sup>A</sup>\_\_\_\_\_ 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 <sup>B</sup>\_\_\_\_\_ 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 \_\_\_\_\_ 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 \_\_\_\_\_ 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.

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was Nov. 13, 2019.

☒ 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 \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied 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. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment of the United States Constitution:

"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; nor deny to any person within its jurisdiction the equal protection of the laws."

Sixth Amendment of the United States Constitution:

"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 defence."

Colorado Revised Statute, section 18-1-410(1): Postconviction Remedy:

"Notwithstanding the fact that no review of a conviction of crime was sought by an appeal within the time prescribed therefor, or that a judgment of conviction was affirmed on appeal, every person convicted of a crime is entitled as a matter of right to make applications for postconviction review."



## STATEMENT OF THE CASE

In 2005, Mr. Gay attended an underage key party at a home outside of Denver, CO. During the party, a fight between numerous persons broke out, a shot was heard and the victim in this case was killed from a shot to the head. Most party goers fled, but those who remained agreed that it was one of the two black guys at the party who had fired the shot, i.e., Mr. Gay or his companion, "Ra." (Ra was at first identified as the shooter by the victim's girlfriend, however she later changed her story and identified Mr. Gay as the shooter.) There was great speculation amongst those who were interviewed as to who the shooter was, but the police focused on Mr. Gay as he had a previous charge where it was alleged he had threatened another with a handgun (no weapon was ever found.)

Mr. Gay was charged, tried and convicted of first degree murder, following which he appealed. A division of the Colorado Court of Appeals affirmed his conviction. He sought review by the Colorado Supreme Court, which was denied. He then filed a motion for postconviction relief under Colorado Rule of Criminal Procedure 35(c) in which he raised claims of ineffective assistance of trial counsel, all of which have been regulated to review by the Colorado Supreme Court in that venue. See Ardolino v. People, 69 P.3d 73, 75-76 (Colo. 2003). Mr. Gay's initial-review post conviction application which posted a challenge to claims of constitutional entitlement regulated to that venue and no counsel was allowed to assist him. Mr. Gay appealed that summary denial which was affirmed. Cert. was again sought and denied. Mr. Gay then filed a section 2254 habeas application, also which was denied. The U.S. Dist. Court declined to grant Mr. Gay a certificate of review, so he sought one from the U.S. Court of Appeals for the Tenth Circuit. On Nov. 13, 2019, that Court denied his request. This appeal followed.

## REASONS FOR GRANTING THE PETITION

- 1) Under the standards set by this Court in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), must a U.S. District Court allow evidentiary development of a fact-based claim of ineffective assistance of trial counsel, if the state courts have failed to do so?

In *Douglas v. California*, 372 U.S. 353, 355-57 (1963), this Court initially determined that all criminal defendants have the right to assistance of counsel in pursuit of any first appeal as a matter of right allowed by a state. Later, in *Evitts v. Lucey*, 469 U.S. 387, 396 (1985), this Court found that the right to assistance of counsel on any first appeal as a matter of right allowed by a state requires that the defendant receive effective assistance from said, as evaluated under the standards set by this Court in *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984).

More recently, in *Massaro v. U.S.*, 123 S.Ct. 1690, 1694 (2003), this Court held that a claim by a defendant that his right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution is best presented in a collateral review motion, rather than on direct appeal, as to do so will allow what in all likelihood is a fact-based claim to be developed. In doing so, this Court found that by allowing this, i.e., development of such a claim, it will keep an appellate court from speculating as to the merits of said and making findings on claims that lack merit or skipping those that have merit. Id. In other words, given the nature of fact-based claims, a trial court is in the best position to evaluate said, as it very well may be the same judge who presided over the trial (thereby allowing a judge who is most familiar with the case to rule). Moreover, the trial court is free to take evidence, testimony and assess the credibility of both as they're allowed. Id.

More recently still, this Court in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), found that when a state regulates a claim of ineffective assistance of counsel to the

collateral review venue and then either fails to appoint counsel on a defendant's initial-review collateral challenge to said, or counsel's performance once appointed/retained is ineffective, the defendant may show "cause" for procedural default of any such claim he/she later presents in a 28 U.S.C. sec. 2254 habeas application. Id., at 1318. This Court equated a state defendant's initial-review collateral attack motion to being an extension of the defendant's first appeal as a matter of right, given that this is the defendants first opportunity to receive review of a constitutional entitlement claim or error. Id. at 1317.

The question presented here is one of allowance of development of such a claim when a state, as here, did not appoint counsel and allow development of fact-based claims of ineffectoive assistance of counsel. In essence it is a question of whether a U.S. District Court must allow such development, or alternatively, as set forth in Claim Two, infra, a state violates a defendant's due process rights when it fails to allow for said?

In the instant case, Mr. Gay set forth several substantive claims of ineffective assistance of counsel, including failure to investigate; a related claim that counsel was burdened by an overwhelming workload that prevented counsel from subjecting Mr. Gays case to the meaningful adversarial challenge demanded by the Sixth Amendment; and counsel's inexperience failed to allow proper assessment of the jurors' competence during voir dire. The State did not appoint counsel or allow development of any of these claims. Moreover, neither did the U.S. Dist. Court of Colorado. Finally, on appeal from the U.S. Dist. Court, respectfully, the U.S. Court of Appeals for the Tenth Circuit sidestepped the issue by finding that Mr. Gay, an indigent, pro-se, prisoner litigant, with no formal legal training, failed to raise the issue in his initial section 2254 habeas application. See Appendix A, pp. 8-9.

Mr. Gay respectfully submits that as a pro-se prisoner litigant, not only is he entitled to liberal construction of his pleadings (including reading into said the strongest arguments suggested), as required by this Court in Haines

v. Kerner, 404 U.S. 519, 520–21 (1972); see also e.g., Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007); but also, a reviewing court should provide to such a litigant, the opportunity to develop a claim of constitutional entitlement a state has regulated to collateral review, if the state has failed to provide the opportunity to the litigant as required under its own rules. See Schriro v. Landrigan, 127 S.Ct. 1933, 1940 (2007). Hence in combination, Mr. Gay submits that his Sixth and Fourteenth Amendment guarantees should have required the U.S. District Court to allow evidentiary development. Id., see also, e.g., Douglas, Massaro, Martinez supras. In turn Mr. Gay respectfully moves this Court to appoint counsel and allow review of this claim.

- 2) When a state regulates claims of constitutional entitlement to its collateral review venue, does it violate a Defendant's Fourteenth Amendment due process rights when it fails to allow development of those claims in the state courts?

The question before this Court is whether when a state fails to allow development of a claim of constitutional entitlement it regulates to its collateral review venue, (because there is a need for factual development of such a claim), and then doesn't allow for expansion of the claim through evidentiary inquiry, does the state violate the defendant's due process protections?

this question arises out of Colorado's regulation of several claims of constitutional entitlement to the collateral review venue. See Ardolino v. People, 69 P.3d 73 (Colo. 2003)(regulating claims of ineffective assistance of trial counsel to the collateral review process); Moore v. People, 2014 CO 8, 318 P.3d 511 (regulating claims of involuntary waiver of right to testify to collateral review process); People v. Walker, 2014 CO 6, 318 P.3d 479 (regulating claims of involuntary waiver of right to jury trial to collateral review process.)

Specifically, in this case, the question is to claims of ineffective assistance of trial counsel. In Ardolino, supra, the Colorado Supreme Court, relying on this Court's findings in Massaro, supra, and earlier rulings, held all criminal

defendants have a right to seek collateral review of their convictions, regardless of whether the defendant took a direct appeal or not. See id, 69 P.3d at 76 (citing sec. 18-1-410(1) C.R.S., Crim.P.Rule 35(c)). The Court then went on to find that unless the motion, files and record of the case clearly establish that a defendant is not entitled to relief, he/she "must" be allowed the opportunity to prove the substance of a claim of ineffective assistance of trial counsel. Id, 69 P.3d at 77.

The premise of creation of what looks and feels to be an interpretation by the Court of what section 18-1-410(1) C.R.S. and Crim.P.Rule 35(c) require, i.e., the creation of a procedural due process right, the question then becomes one of when a state denies such a right, does it violate the defendants Fourteenth Amendment protections?

In a nutshell, it is clear that a statute or regulation/rule can create a due process right which may be enforced under the Due Process Clause of the Fourteenth Amendment. See e.g., Hewitt v. Helms, 459 U.S. 460, 471 (1983). In Colorado, section 18-1-410(1) C.R.S., has repeatedly been interpreted to mandate that all criminal defendants have a right to seek collateral review of their convictions. See Ardolino, 69 P.3d at 76 (citing both section 18-1-410(1) C.R.S. and Crim.P. Rule 35(c)); see also, Dooley v. People, 2013 CO 34, para. 2, 302 P.3d 259, 261; People v. Simpson, 69 P.3d 79, 81 (Colo. 2003)(allowing that all a criminal defendant need do in his/her initial-review postconviction application is set forth facts, which if proven true would entitle the defendant to relief in order for evidentiary development to become required); Silva v. People, 156 P.3d 1164, 166-67 (Colo. 2007)(there is a limited statutory right to assistance of counsel in pursuit of postconviction relief in Colorado, so long as the defendant sets forth facts, which if proven true would allow for relief.)

Here, Mr. Gay submits that the State of Colorado failed to allow him the opportunity to prove the substance of his claims of ineffective assistance of trial counsel, despite the fact that he set forth grounds for relief which if

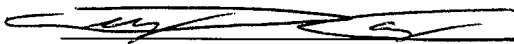
proven true would have allowed him the relief requested. Consequently the state failed to follow its own mandates as to what the law/rules require, which in turn violated his due process protections guaranteed under the Fourteenth Amendment of the United States Constitution. See e.g., Hicks v. Oklahoma, 447 U.S. 343, 346 (1980)(finding that a states failure to follow its own rules may create an independent due process violation that becomes enforceable under the Fourteenth Amendment's Due Process Clause.)

This is what Mr. Gay submits occurred in his case and in fact in numerous other cases throughout Colorado. Consequently he respectfully moves this Court to grant certiorari on this issue and allow further briefing and subsequent reversal of his case for evidentiary development. This and all other relief is respectfully requested.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Terry Gay, #131986 (Pro-Se)

Date: 2/5/2020