

No. _____

In The
Supreme Court of the United States

J.P.,
Petitioner,
vs.

ARKANSAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BEN MOTAL
SUPREME COURT BAR NO. 313093
10 Benham Lane
Little Rock, Arkansas 72210
TEL: (501) 554-5119
E-mail: Ben@MotalLaw.com

Attorney for Petitioner

I.

Question Presented

Does the State of Arkansas's strict interpretation and enforcement of a procedural rule which requires criminal defendants to identify the specific flaws in the prosecution's case in order to make an effective motion for directed verdict of acquittal or dismissal, and also to make and renew such motion at specific points in time during the trial in order to preserve the motion for appellate review, violate the U.S. Constitution?

II.

Table of Contents

| | | |
|--------------|--|-------------|
| I. | Question Presented | i |
| II. | Table of Contents | ii |
| III. | Table of Authorities | iii |
| IV. | Petition for Writ of Certiorari | 1 |
| V. | Opinions Below | 1 |
| VI. | Jurisdiction | 1 |
| VII. | Constitutional Provisions Involved | 1 |
| VIII. | Statement of the Case | 2 |
| IX. | REASONS FOR GRANTING THE WRIT | 13 |
| X. | CONCLUSION | 14 |
| XI. | APPENDIX | 15 |
| A. | Ark. Sup. Ct. Order Denying Review | A-1 |
| B. | Ark. Ct. of App. Order Denying Rehearing | A-2 |
| C. | Ark. Ct. of App. Opinion | A-3 |
| D. | Ark. Ct. of App. Opinion (Reported) | A-7 |
| E. | Text of Arkansas Rule 33.1 | A-10 |
| F. | Text of Constitutional Provisions at Issue | A-11 |
| G. | List of Recent Appellate Cases Applying Rule 33.1 | A-12 |

III.

Table of Authorities

A. Case Law

| | |
|---|------|
| <i>Anderson v. State</i> , 108 S.W.3d 592 (Ark. 2003) | 6 |
| <i>Brown v. State</i> , 287 S.W.3d 587 (Ark. 2008) | 5 |
| <i>Chapman v. United States</i> , 500 U.S. 453 (1991) | 10 |
| <i>Daniels v. State</i> , 551 S.W.3d 428 (Ark. App. 2018) | 4 |
| <i>Edwards v. Carpenter</i> , 529 U.S. 446 (2000) | 8 |
| <i>Evitts v. Lucey</i> , 469 U.S. 387 (1985) | 8 |
| <i>France v. United States</i> , 164 U.S. 676 (1897) | 7 |
| <i>In re Motions for Directed Verdict in Criminal Cases</i> , 321 Ark. Appx. 698 (Ark. 1995) | 2 |
| <i>In re Rule 33.1</i> , 337 Ark. Appx. 621 (Ark. 1999) | 2 |
| <i>J.P. v. State</i> , 2020 Ark. App. 493 (Ark. App. 2020) | 10 |
| <i>Jackson v. Virginia</i> , 443 U.S. 307 (1979) | 3, 7 |
| <i>Kinsey v. State</i> , 2016 Ark. 393 (Ark. 2016) | 4 |
| <i>Lane v. State</i> , 564 S.W.3d 524, 533 (Ark. 2019) | 8 |
| <i>Lee v. State</i> , 2013 Ark. App. 209 (Ark. App. 2013) | 4 |
| <i>Martin v. State</i> , 567 S.W.3d 558 (Ark. App. 2019) | 4 |
| <i>McClina v. State</i> , 123 S.W.3d 883 (Ark. 2003) | 5 |
| <i>Neder v. United States</i> , 119 S.Ct. 1827 (1999) | 9 |
| <i>Phillips v. State</i> , 203 S.W.3d 630 (Ark. 2005) | 5 |

| | |
|---|-----------|
| <i>Reno v. Flores</i> , 507 U.S. 292 (1993) | 9 |
| <i>Simmons v. United States</i> , 390 U.S. 377 (1968) | 7 |
| <i>Smith v. State</i> , 343 S.W.3d 319, 327 (Ark. 2009) | 10 |
| <i>Sorum v. State</i> , 582 S.W.3d 18, 24 (Ark. App. 2019) | 8 |
| <i>Speiser v. Randall</i> , 357 U.S. 513 (1958) | 9 |
| <i>Strickland v. State</i> , 909 S.W.2d 324 (Ark. 1995) | 9 |
| <i>Thompson v. City of Louisville</i> , 362 U.S. 199 (1960) | 3 |
| <i>U.S. v. Pardue</i> , 765 F. Supp. 513 (W.D. Ark. 1991) | 3 |
| <i>Williams v. State</i> , 535 S.W.2d 842 (Ark. 1976) | 6 |
| <i>Williamson v. State</i> , 350 S.W.3d 787 (Ark. 2009) | 4 |

B. Statutes & Rules

| | |
|-----------------------------|---------------------|
| Ark. R. Crim. P. 33.1 | <i>Infra</i> |
| Fed. R. Crim. P. 29 | 10 |

C. Miscellaneous

| | |
|----------------------------------|-----------|
| 4 Blackstone, Commentaries | 10 |
| U.S. Const. amend. V | 6 |
| U.S. Const. amend. VI | 7 |
| U.S. Const. amend. XIV | 3 |

IV.

Petition for Writ of Certiorari

J.P., a minor, respectfully petitions this Court by and through his undersigned attorney for a writ of certiorari to review the judgment of the Arkansas Court of Appeals.

V.

Opinions Below

The decision by the Arkansas Court of Appeals denying J.P.'s direct appeal is reported as *J.P. v. State*, 2020 Ark. App. 493 (Ark. App. 2020). The Arkansas Supreme Court denied J.P.'s petition for review on January 21, 2021. That order is attached at Appendix A-1.

VI.

Jurisdiction

J.P.'s petition for review to the Arkansas Supreme Court was denied on January 21, 2021. Mr. Groomes invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within one-hundred and fifty days of the Arkansas Supreme Court's judgment. *See* 589 U.S. (03/19/2020) (extending deadline).

VII.

Constitutional Provisions Involved

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use, without just compensation.

United States 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.

United States Constitution, 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 of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VIII.

Statement of the Case

The constitutional questions presented by this case concern the manner in which states can use procedural rules to restrict and burden the exercise of a criminal defendant's fundamental rights. Since 1995, the Arkansas Supreme Court has enforced a judicially-crafted rule of criminal procedure which burdens the exercise of federal constitutional rights by restricting the manner in which criminal defendants may make an effective motion for a directed verdict of acquittal or dismissal. Ark. R. Crim. P. 33.1; *In re Motions for Directed Verdict in Criminal Cases*, 321 Ark. Appx. 698 (Ark. 1995).¹

¹ Rule 33.1 was later "rewritten for ease of understanding." *In re Rule 33.1*, 337 Ark. Appx. 621 (Ark. 1999) (per curiam).

Arkansas Rule of Criminal Procedure 33.1 states, in relevant part, that “[a] motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense.” Subsections (a) and (b) of the Rule also provide that a motion for dismissal must be made at the conclusion of the prosecution’s evidence and must be renewed at the close of all of the evidence in order to be effective.

This Court has long recognized it is the fundamental right of every citizen to have criminal charges dismissed by directed verdict prior to submission of the case to the jury if there is insufficient evidence to sustain a conviction. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979) (recognizing that it is “an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.”); *Thompson v. City of Louisville*, 362 U.S. 199, 204 (1960); *U.S. v. Pardue*, 765 F. Supp. 513, 524 (W.D. Ark. 1991) (“the system was designed by our ancestors so that judges, trained in the law, could properly consider whether reasonable minds could have found facts sufficient when combined with the law given by the court to find that the defendants are guilty beyond a reasonable doubt.”). A directed verdict of acquittal is not a privilege or a discretionary tool for promoting judicial economy; it is a constitutional right that is protected by the Due Process Clause. *Id.*; U.S. Const. amend. XIV.

Arkansas Rule 33.1 thus places two significant hurdles in front of a criminal defendant who seeks to invoke his or her constitutional right to a directed verdict of acquittal or dismissal in a case where the prosecuting authority fails to present sufficient

evidence that could convince a reasonable person that all elements of the crime are met beyond a reasonable doubt. First, under Rule 33.1, it is not enough for a criminal defendant or his counsel to simply make a motion for a directed verdict on the basis that there is insufficient evidence of the alleged crime. In fact, under the “strict” interpretation of the rule that has been adopted and applied by Arkansas appellate courts in countless decisions, it is not even enough for the defendant to identify the elements with respect to which the evidence is lacking in his or her motion. *See, e.g., Martin v. State*, 567 S.W.3d 558 (Ark. App. 2019) (“appellant’s motions for directed verdict merely recited the elements of the offense. He did not point to the specific elements that he now claims the State failed to prove. Because appellant’s motion . . . did not inform the circuit court of the specific issues in the State’s case that are now being challenged, the question of the sufficiency of the evidence to support his convictions is not preserved for appeal.”); *Daniels v. State*, 551 S.W.3d 428, 432 (Ark. App. 2018) (“[the] motion for directed verdict asserted only that the State failed to prove that ‘this act occurred’ or that [the defendant] ‘committed this act.’ This is too general to preserve the sufficiency-of-the-evidence issue for appellate review.”); *Lee v. State*, 2013 Ark. App. 209, *3 (Ark. App. 2013).

Even identifying the specific element for which proof is lacking is still not enough; the defendant must also specifically identify “how” the State’s proof of that element is insufficient. *Kinsey v. State*, 2016 Ark. 393, *9 (Ark. 2016) (“Kinsey generally argued that the State failed to negate self-defense, but in his directed-verdict motion, Kinsey failed to identify how the State’s proof was insufficient to meet its burden . . . [t]hus, we do not reach the merits on this point[.]”); *See also Williamson v. State*, 350 S.W.3d 787, 791 (Ark. 2009) (“even if Williamson’s directed-verdict motion could be construed as a challenge to the State’s proof of identity, he failed to state with any specificity how the

State’s evidence was flawed.”) Instead, Arkansas Rule 33.1 requires that a defendant “pinpoint” the specific evidentiary flaws in the prosecution’s case, and explain why those flaws exist, in order to make an effective motion for directed verdict or dismissal. *Id.*; *Phillips v. State*, 203 S.W.3d 630, 632 (Ark. 2005).

Next, for any defendant who manages to identify and articulate an evidentiary deficiency in the prosecution’s case with the requisite specificity, he or she still must make the motion at precisely the right time in the trial to invoke his constitutional right to dismissal. Rule 33.1(a)-(b). But the defendant is still not done. He or she must then *renew* the motion “at the close of all evidence.” *Id.* Such motion “must precede the closing argument at a bench trial[.]” *McClina v. State*, 123 S.W.3d 883 (Ark. 2003); *Hudson v. State*, 2014 Ark. App. 305 (Ark. App. 2014).

When a defendant fails to meet these exacting standards for asserting and preserving his constitutional right to a directed verdict, he or she is deemed to have “waive[d] . . . any question pertaining to the sufficiency of the evidence to support the verdict or judgment.” Rule 33.1(c). Arkansas courts hold that a motion that does not meet the specificity requirement is deemed to have never been made. *Brown v. State*, 287 S.W.3d 587 (Ark. 2008). The result is involuntary forfeiture of a fundamental right.

But the right to seek a directed verdict or dismissal is not the only fundamental right that is significantly impaired by Rule 33.1. The Rule also deprives the defendant of his or her right against self-incrimination. As the Arkansas Supreme Court has explained, the effect of a “not guilty” plea is to invoke the presumption of innocence and to require the State to prove *all* elements of the crime beyond a reasonable doubt:

He had entered a plea of not guilty. By so doing, he availed himself of any defense and all matters of justification and excuse available under the law, which are not required to be specifically pleaded. He put all material facts

alleged in the information in issue. Even the most patent truths were in issue. This plea was a continuing denial of every bit of evidence and every statement of every witness who testified against him. More importantly, he invoked his right to the presumption of his innocence and put the burden upon the state to prove his guilt beyond a reasonable doubt, as well as the right to remain silent in the hope that the jury would not be convinced of his guilt beyond a reasonable doubt.

Anderson v. State, 108 S.W.3d 592, 601 (Ark. 2003), quoting *Williams v. State*, 535 S.W.2d 842, 846 (Ark. 1976).

By requiring a defendant who has already plead not guilty to identify *with specificity* the “holes” in the State’s case in order to invoke his fundamental constitutional right to seek a directed verdict of acquittal, Rule 33.1 forces the defendant to choose between forfeiting that right or surrendering his Fifth Amendment right against self-incrimination. U.S. Const. amend. V. Any motion for directed verdict or dismissal that relies on insufficient proof of a specific element effectively forfeits the right to challenge the lack of proof as to any other element which is not specified. *See* Ark. R. Crim. P. 33.1(c). Since, under Rule 33.1(c), such a motion is the only available method of challenging the sufficiency of the evidence, the consequence of a specific directed verdict motion is a permanent forfeiture of the defendant’s right to challenge the sufficiency of proof of all elements omitted from the motion – in legal effect, a concession that there is evidence to support the elements not specified in the motion. This compelled forfeiture is incompatible with the defendant’s not guilty plea which operates as “a continuing denial of every bit of evidence . . . [e]ven the most patent truths” and as an availment “of any defense and all matters of justification and excuse available under the law[.]” *Anderson*, 108 S.W.3d at 601. The invariable result is a detrimental change in the rights held by the defendant before making a specific motion for directed verdict and thereafter.

Once the right to have the courts hold the prosecution to its burden with regard to the unspecified elements has been forfeited, the only thing standing between the defendant and a miscarriage of justice is the jury. However, whether the evidence is sufficient to sustain a conviction is purely a question of law for the court.² A defendant has a fundamental right to have the question decided by a judge, as “a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt[.]” *Jackson v. Virginia*, 443 U.S. 307 (1979).

In some circumstances, it may be wise for a defendant to waive his or her right to challenge some elements in order to focus the court’s attention on other elements which present a stronger case for dismissal. However, it is much more common for a defendant to exercise his or her right to challenge all elements in a motion for acquittal. Whether a defendant elects to make a specific motion for directed verdict, as opposed to the more common general motion, is a matter of trial strategy. It is not an election that can or should be forced upon the defendant by a procedural rule. Rule 33.1 violates the fundamental constitutional rights of criminal defendants to due process and freedom from self-incrimination by forcing this “Hobson’s choice” upon them. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (“we find it intolerable that one constitutional right should have to be surrendered in order to assert another.”)

And, those are not the only fundamental constitutional rights infringed by Rule 33.1. The Rule also impairs the enforcement of a defendant’s right to effective assistance of counsel, and in many cases effectively deprives defendants of that right. When a defense attorney unsuccessfully attempts to invoke and preserve a defendant’s right to

² *France v. United States*, 164 U.S. 676, 681 (1897).

challenge the sufficiency of the evidence, the defendant is deprived of his fundamental due process right as a result of his counsel's error. *See Edwards v. Carpenter*, 529 U.S. 446 (2000). If the defendant takes an appeal and his appellate attorney is precluded from challenging the sufficiency of the evidence due to the lack of preservation of the error, the defendant's right to effective assistance of counsel on appeal is severely hampered. *See Evitts v. Lucey*, 469 U.S. 387 (1985).

Once the right to challenge the sufficiency of the evidence is lost, and a case that should have never gone to the jury results in an unjust conviction, the injustice can only be corrected without the aid of two other crucial rights: the right to counsel and the presumption of innocence. An unjustly convicted defendant who is procedurally barred from challenging the sufficiency of the evidence supporting his conviction on direct appeal must seek post-conviction relief. However, the defendant has no right to counsel in state post-conviction proceedings. *Lane v. State*, 564 S.W.3d 524, 533 (Ark. 2019). In addition to being on his or her own, the defendant is no longer presumed innocent and instead bears the burden of proving the merit of his or her defenses to the State's case. *Sorum v. State*, 582 S.W.3d 18, 24 (Ark. App. 2019) ("When it is asserted that counsel was ineffective for the failure to make a motion or argument, the petitioner must show that the motion or argument would have been meritorious[.]")

This predicament has become so commonplace in Arkansas that it has virtually become a feature of the state's criminal justice system. There have been more than sixty reported Arkansas appellate cases in the last three years alone in which a defendant has been deprived of his or her right to challenge the sufficiency of the evidence due to his or her trial counsel's supposed failure to make or renew a "specific" motion for a directed verdict as required by Rule 33.1. (Appendix, A-12.) And, that is only the tip of the iceberg.

It would be a long and sobering task to count the number of Arkansas appellate cases in the past twenty-six years which involve a failed attempt to make a motion for dismissal or directed verdict that satisfied the meticulous requirements of Rule 33.1. In each of those cases, a defendant was deprived of a fundamental due process right that he or she made a conscious effort to invoke and preserve, as a result of the implementation and “strict” interpretation of Arkansas Rule 33.1.

Although Arkansas Rule 33.1 is not a legislative act, that fact does not immunize it from challenge on constitutional grounds. Like legislators, judges “are officers of the Government, and hence proper objects of that healthy suspicion of the power of government which possessed the Framers and is embodied in the Constitution.” *Neder v. United States*, 119 S.Ct. 1827, 1845 (1999) (Scalia, J., concurring in part and dissenting in part). Like legislation, judicially-crafted state procedural rules that substantially impair fundamental constitutional rights must meet the most stringent test for constitutionality. *See Speiser v. Randall*, 357 U.S. 513, 520-21 (1958) (“the more important the rights at stake the more important must be the procedural safeguards surrounding those rights.”) This requires a showing that the rule is narrowly tailored to serve a compelling state interest. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

Rule 33.1 cannot withstand such scrutiny. The Rule is not “narrowly tailored” to do anything other than precisely what it does: deprive American citizens of their fundamental due process rights on an enormous scale. Indeed, the rule does not even have a rational relationship with its ostensible goals. The rule is said to prevent a trial “by ambush” by allowing the trial judge to “reflect on the issue and give an informed decision.” *Strickland v. State*, 909 S.W.2d 318, 324 (Ark. 1995) (Corbin, J., concurring.) Laudable as that goal may be, there is absolutely no rational reason why the sole responsibility of

“informing” the trial judge should be thrust upon the defendant. The State is not entitled to any presumption that the evidence it put forward is sufficient to sustain its burden. However, Rule 33.1 essentially creates an unjustified presumption of sufficiency in favor of the State that can only be partially rebutted by a defendant’s “specific” motion for directed verdict.

There is absolutely no rational justification for shifting the burden onto the defendant in this manner. The State is the party that has brought the charges and the State bears the sole burden of proving them. When a defendant moves for directed verdict, the prosecution is well-positioned to explain to the judge, with whatever degree of specificity that is desired, how it has met its burden on each required element. Doing so places no additional burden on the prosecution, as it will need to make such arguments to the jury in order to secure a conviction in any event. Furthermore, keeping the burden on the State to defeat the motion does not affect the trial judge’s discretion to allow the State to reopen its case to supply missing proof if justice requires. *See generally Smith v. State*, 343 S.W.3d 319, 327 (Ark. 2009).

The Arkansas Supreme Court has also suggested that Rule 33.1 is justifiable by “[j]udicial economy alone.” *Strickland*, 909 S.W.2d 318 at 324 (Corbin, J., concurring). Although it may certainly be “economical” to smother a defendant’s assertion of his fundamental rights and to presume that any guilty verdict returned by the jury is supported by sufficient evidence, rather than have judges examine the legal question of whether there was sufficient evidence to take the case to the jury in the first place, this is the type of arbitrary shortcut that the U.S. Constitution deplores. 4 Blackstone, Commentaries *350. The notion that “judicial economy” may justify stripping defendants of constitutional rights that they made a deliberate effort to invoke is anathema to

American principles of law. *Chapman v. United States*, 500 U.S. 453, 465 (1991) (“[e]very person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees.”)³

Similarly, the nullification of a motion for directed verdict that is not “renewed” at the close of all evidence serves no purpose that could justify the sudden and involuntary forfeiture of a fundamental right that has already been properly invoked. This is why, unlike Arkansas Rule 33.1, the Federal Rules of Criminal Procedure do not require a motion for acquittal to be “renewed” at all in order to be effective, much less in a formalistic manner at a specific time in the proceedings. *See* Fed. R. Crim. P. 29. Indeed, the Federal Rules do not even require a motion for acquittal to be made prior to the jury verdict. Fed. R. Crim. P. 29(c)(1).

In sum, Arkansas Rule 33.1 is an impermissible restriction on the rights guaranteed by the U.S. Constitution. For the reasons discussed, the rule does not come close to meeting the exacting standard required of procedural rules that restrict the exercise of fundamental rights. Far from being “narrowly tailored” to avoid unnecessary impairment of fundamental rights, Rule 33.1 is designed to do the exact opposite.

In the case at bar, Petitioner J.P., a juvenile, was adjudged to be delinquent based on a conviction for tampering with property following a bench trial. *J.P. v. State*, 2020 Ark. App. 493 (Ark. App. 2020). Petitioner challenged his juvenile delinquency adjudication on the ground that the acts he was accused of committing did not satisfy the

³ It should also be noted that there are alternative methods for enforcing procedural rules which do not result in a deprivation of substantive constitutional rights. *See Evitts*, 469 U.S. at 399.

elements of the crime charged by the State. *Id.* He also contended that the facts found by the trial judge were not supported by proof beyond a reasonable doubt. *Id.*

Applying Rule 33.1, the Arkansas Court of Appeals refused to consider Petitioner's arguments on the sole ground that his trial counsel had purportedly failed to renew his motion for dismissal at the close of the evidence. *Id.* at *3. Although Petitioner's trial counsel repeated the arguments made in his motion for dismissal following the close of evidence at the bench trial, the Court of Appeals characterized those statements as a "closing argument," and not a renewal of the previous motion. *Id.* at *4. Consequently, the Court of Appeals held that it could not review Petitioner's timely challenge to the trial judge's application of state criminal law to the facts adduced at trial. *See Id.*

The Court of Appeals likewise refused to consider Petitioner's challenge to the application of Rule 33.1 on appeal. *Id.* Neither the State nor the trial court had made any mention of Rule 33.1 at Petitioner's trial, nor had there been any ruling that would have caused Petitioner or his trial counsel to believe it would have application in his case. Nonetheless, the State argued for the first time on appeal that Rule 33.1 should bar Petitioner's sufficiency of the evidence arguments. Petitioner then challenged the application of such rule on constitutional grounds in his reply brief, which was his first and only opportunity to respond after the argument had been initially raised. The Court of Appeals proceeded to apply Rule 33.1 and held that, since Petitioner's arguments against the application of Rule 33.1 were "raised for the first time on appeal," they were procedurally barred. *Id.*

J.P.'s petition for rehearing and petition for review to the Arkansas Supreme Court were denied.

IX.

Reasons For Granting The Writ

The Court should take this opportunity to examine a state procedural rule that is routinely used to justify the forfeiture of fundamental constitutional rights in Arkansas criminal courts. The sheer volume of Arkansas appellate cases applying the rule make the constitutional question raised in this case worthy of examination by this Honorable Court.

This case also presents an unusual situation where the governmental entity which is responsible for enacting and enforcing the rule being challenged – the Arkansas Supreme Court – is also the entity which is tasked with reviewing its constitutionality. The Arkansas Supreme Court and Court of Appeals have no incentive to consider the constitutionality of a rule which they have enacted and continue to enforce, and which they believe promotes judicial economy. As such, the Arkansas courts will likely continue to refuse to consider such challenges on procedural grounds, as they have done in this case. The state courts are well aware that a refusal to consider challenges to Rule 33.1 on procedural grounds makes it less likely that this Court will grant review to consider the constitutionality of such rule. It is therefore appropriate and necessary for this Court to consider such challenge although no ruling on this issue was made in the courts below.

Arkansas Rule 33.1 has deprived countless Americans of their fundamental constitutional due process rights for two-and-a-half decades. If left unreviewed, it will likely continue to deprive countless others of their rights for years to come unless this Court intervenes. The Court should grant this petition for a writ of certiorari to consider the important constitutional question presented by this case.

X.

Conclusion

For the foregoing reasons, Petitioner J.P. respectfully requests that this Court issue a writ of certiorari to review the judgment of the Arkansas Court of Appeals.

DATED this 21st day of June, 2021.

Respectfully submitted,

A handwritten signature in black ink that reads "Ben Motal". The signature is written in a cursive, flowing style.

BEN MOTAL
U.S. Supreme Court Bar No. 313093
10 Benham Lane
Little Rock, AR 72210
(501) 554-5119
Ben@MotalLaw.com
COUNSEL FOR PETITIONER

No. _____

In The
Supreme Court of the United States

J.P.,

Petitioner,

vs.

ARKANSAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
