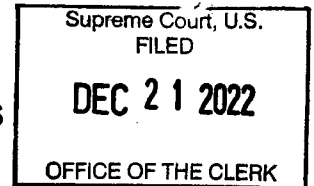


22-6417

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
of America



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

vs.

Mr. Dexter Payne — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United states court of Appeals for Eighth circuit.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

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

EA-Rile, P.O. Box 970.
(Address)

Marrianna, AR 72360-0970.
(City, State, Zip Code)

N/A.
(Phone Number)

QUESTION(S) PRESENTED

1. Relief under Federal Rules of Civil Procedure Rule 60(b)(6) is available only in extraordinary circumstances. In his motion, Mr. Burgie asked to be relieved of the district judge 2016 judgment order because of errors contained in magistrate judge 'recommended disposition' upon which the district court relied on rendered the proceeding fundamentally unfair. Specifically, the magistrate report concluded that his habeas petition was "successive" under section 2244(b)(2), because the factual and legal basis for his claims was reasonably available to him when the first petition was filed in 2006, but that was incorrect. Did the district court abuse its discretion when it refused to reopen Burgie's habeas proceeding on the ground that it had been closed for almost six years outweigh or undermined the public interest in not seeing states convict and incarcerate defendants for nonexistent offenses for the rest of their lives?

2. The petitioner Mr. Burgie was convicted of capital murder and Aggravated robbery which was a nonexistent offense at the time of the conduct in this case and is serving sentences of life without parole and life imprisonment for those offenses. Was the petitioner Mr.

QUESTION(S) PRESENTED

Burgie Rule 60 (b) (6) motion made within a "reasonable time" under such circumstances?

3. whether the district court abused its discretion when it denied Mr. Burgie appointment of counsel under Rule 60 (b) (6) so that he could present evidence that state of Arkansas is engaging in statewide racial discrimination against mostly low-income black defendants convicted of capital murder and aggravated robbery which was a nonexistent offense at the time of the crime?

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:

RELATED CASES

1. Burgie v. Norris, E.D. Ark. No. 5:06-CV-00205-BRW-JTR.
2. Burgie v. Hobbs, E.D. Ark. No. 5:13-CV-00228-BSM-JTR.
3. Burgie v. Kelley, E.D. Ark. No. 5:16-CV-00196-BSM-JTR.
4. Burgie v. Hobbs, No. 14-2963 (8th cir. 2015), reh'g denied (8th cir. 2015).
5. Burgie v. Kelley, E.D. Ark. No. 5:17-CV-00193-BSM-JTR.
6. Burgie v. Hobbs, 2013 Ark. 360. (per curiam)
7. Burgie v. Payne, No. 22-2866 (8th cir. 2022).

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	11
CONCLUSION.....	28-31

INDEX TO APPENDICES

APPENDIX A	united states court of Appeals for the Eighth circuit entered order on september 19, 2022.
APPENDIX B	united states district court entered order on August 3, 2022.
APPENDIX C	united states court of appeals for the Eighth circuit entered on october 26, 2022.
APPENDIX D	Federal Rules of civil Procedure 60.
APPENDIX E	28 U.S.C.A. § 2244. Finality of determination.
APPENDIX F	united states constitution, Amendment 14. Due Process.
APPENDIX G	Arkansas constitution, Article 4, § 2. Separation of Powers.
APPENDIX H	2007 Arkansas Laws Act 827 C.H.B. 2462).
APPENDIX I	Arkansas code Annotated § 5-10-101. Capital Murder.

INDEX TO APPENDICES

APPENDIX J Arkansas code Annotated § 5-12-102. Robbery, defined.

APPENDIX K Arkansas code Annotated § 5-12-103. Aggravated robbery.

APPENDIX L Simpson v. State, 274 Ark. 188 (1980).

APPENDIX M Burgie v. Hobbs, 2013 Ark. 360 (per curiam).

APPENDIX N Arkansas code Annotated § 5-4-401. Felonies, incarceration.

APPENDIX O Garland county circuit court docket sheet
18th East circuit Division I State v. Eric
Burgie case NO. 26CB-00-366

Appendix P United States court of appeals For the Eighth
circuit APC respondent responsive pleading to
Burgie's 2022 application for permission to file
a successive habeas petition

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
1. Ackermann v. U.S., 71 S.Ct. 209 (1950)	28
2. Buck v. Davis, 137 S.Ct. 759 (2017)	15, 23, 28
3. Davis v. Ayala, 576 U.S. 257, 285 (2015)	28
4. Flore v. White, 121 S.Ct. 712 (2001)	9, 15, 16, 21, 23, 29
5. Gonzalez v. Crosby, 125 S.Ct. 2641 (2005)	5, 23
6. Klapprott v. U.S., 69 S.Ct. 384 (1949)	13
7. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 863 (1998)	14, 25, 28
8. Mullane v. Wilbur, 95 S.Ct. 1881 (1975)	8, 12, 30
9. Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship, 113 S.Ct. 1489 (1988)	13
10. Sanders v. U.S., 83 S.Ct. 1068 (1963)	24
11. Strickland v. Washington, 104 S.Ct. 2052 (1984)	14
12. U.S. v. Davis, 139 S.Ct. 2319 (2019)	22
STATUTES AND RULES	
1. Ark. Code Ann. § 5-4-401. Felonies, incarceration	
2. Ark. Code Ann. § 5-10-101. Capital murder	5, 6, 16, 18, 21, 23
3. Ark. Code Ann. § 5-12-102. Robbery	
4. Ark. Code Ann. § 5-12-103. Aggravated robbery	5
5. Federal Rules of Civil Procedure Rule 60 (b)(6)	6, 11, 12, 13, 26
6. 28 U.S.C. § 2244 (b)(2)	6, 7, 15, 17, 18

OTHER

- 2007 Arkansas Laws Act 827 CH.B. 2462 5, 6, 17, 18, 21, 23
- U.S. Constitution, 14th amendment, Due Process clause 6, 14
- Arkansas Constitution, Article 4 § 2. Separation of powers 6, 8, 14

TABLE OF AUTHORITIES CITED

U.S. COURT OF APPEALS

PAGE NUMBER

1. *Burgie v. Hobbs*, No. 14-2963 (8th cir. 2015, reh'g denied (8th cir. Feb. 20, 2015)) 19
2. *Burgie v. Norris*, No. 12-2165 (8th cir. 2012) 19
3. *Burgie v. Payne*, No. 22-2866 (8th cir. 2022) 19
4. *Bynoe v. Baco*, 966 F.3d 972 (9th cir. 2020) 11,
5. *City of Duluth v. Fond Du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147 (8th cir. 2013) 14
6. *Groves v. Ault*, 614 F.3d 501, 511-12 (8th cir. 2010) 26
7. *In re Davenport*, 147 F.3d 605 (7th cir. 1998) 24, 28, 31
8. *Mitchell v. U.S.*, 958 F.3d 775, 790-91 (9th cir. 2020) 25
9. *Moxlenar v. Government of Virgin Islands*, 822 F.2d 1342, 1348 (3d cir. 2014) 12,
10. *Phelps v. Almeida*, 569 F.3d 1120 (9th cir. 2009) 12,
11. *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 897 (2d cir. 1983) 13
12. *Bitter v. Smith*, 811 F.2d 1398, 1402 (11th cir. 1987) 12,
13. *Thompson v. Bell*, 580 F.3d 423, 443-44 (6th cir. 2010) 12,
14. *Warren v. Kyler*, 422 F.3d 132, 137 (3d cir. 2005) 26
15. *Taylor v. Gilkey*, 314 F.3d 832 (7th cir. 2002) 24

U.S. DISTRICT COURT

PAGE NUMBER

1. *Burgie v. Hobbs*, E.D. Ark. No. 5:13-cv-00228-BSM-JTR 6, 13
2. *Burgie v. Kelley*, E.D. Ark. No. 5:16-cv-00196-BSM-JTR 6, 19, 21, 22
3. *Burgie v. Kelley*, E.D. Ark. No. 5:17-cv-00193-BSM-JTR 6, 19

TABLE OF AUTHORITIES CITED

4. *Burgie v. Norris*, E.O. Ark. NO. 5:06-cv-00205-BRW-JTR 6

5. *Esposito v. Ashcroft*, 288 F. Supp. 2d 292 (E.D. N.Y. 2003) 13

STATE SUPREME COURT CASES

PAGE NUMBER

1. *Burgie v. Hobbs*, 2013 Ark. 360. (per curiam) 5, 6, 17, 18, 21

2. *Burgie v. State*, CR-02-90, 2003 WL 367733 (Ark. Feb. 20, 2003) 5

3. *Commonwealth of Pennsylvania v. McIntyre*, 232 A. 3d 609 (2020) 26

4. *Gardner v. State*, 2017 Ark. 230, *3 (2017) 25

5. *Helford v. State*, 173 Ark. 989, 1000, 294 S.W. 33, 37 (1927) 22, 30

6. *In re Hinton*, 152 Wash. 2d 853, 860-61, 100 P. 3d 801 (2004) 26

7. *Nooner v. State*, 322 Ark. 87, 907 S.W. 2d 677 (1995) 7, 16, 25, 29

8. *Simpson v. State*, 274 Ark. 188 (1981) 6, 16, 21, 25

9. *Standridge v. State*, 2014 Ark. 515. 22

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 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 United States district court appears at Appendix 3 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 09-19-2022.

☐ 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: 10-26-2022, 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 _____ (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

1. United States constitution, 14th Amendment: "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 any person within the jurisdiction the equal protection of the laws!"
2. Arkansas constitution, Article 4 § 2. Separation of powers:
"No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the other, except in the instance hereinafter expressed directly or permitted!"
3. Arkansas statute, Ark. code Ann. § 5-4-401. Felonies, incarceration (see Appendix N).
4. Arkansas statute, Ark. code Ann. § 5-15-101. Capital murder (see Appendix I).
5. Arkansas statute, Ark. code Ann. § 5-12-102. Robbery (see Appendix J).
6. Arkansas statute, Ark. code Ann. § 5-12-103 Aggravated

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

robbery (see Appendix K).

7. 2007 Arkansas Laws Act 827 (H.B. 2462), (see Appendix H).

STATEMENT OF THE CASE

1. On June 28, 2001, the Petitioner Mr. Eric C. Burgie was found guilty by a Garland county jury of capital murder and Aggravated robbery which was the underlying felony the state used to support the capital murder charge. The petitioner was subsequently sentenced to life without parole and life imprisonment for these offenses. see *Burgie v. state*, CR-02-90, 2003 WL 367733 (Ark. Sup. Ct. Feb. 20, 2003).

2. Approximately, six years later on April 2, the Arkansas Legislature enacted Act 827 of 2007, which amended the capital murder statute to include the offense of Aggravated robbery. see Appendix G, 2007 Arkansas Laws Act 827 (H.B. 2462); see also, Appendix M, *Burgie v. Hobbs*, 2013 Ark. 360 (per curiam). However, the Legislature did not include a provision in the Act that would give the new aggravated robbery amendment retroactive operation to cases such as Mr. Burgie's where the alleged conduct occurred prior to the 2007 legislative amendment. id.

3. The petitioner challenged his convictions for these offenses in a state habeas proceeding in which he alleged that they were illegal

and void sentences under the Ex Post Facto and due process clauses), as well as separation of power principles. The Arkansas Supreme Court denied Burgie's appeal, stating that while "aggravated robbery" was not included in the capital murder statute on the date of the commission of the crime it could still support a capital murder conviction because the court had held in Simpson v. State, 274 Ark. 188 (1980), which was prior to the 2007 amendment that it could. see Burgie v. Hobbs, 2013 Ark. 360.

4. On August 2, 2006, the petitioner filed his first § 2254 habeas action in the district court challenging his 2001, capital murder and aggravated robbery convictions. see Burgie v. Norris, E.D. Ark. No. 5:06-cv-00205-BRW-JTR. And on two separate occasions the petitioner filed two second and third in time habeas petitions in district court on the grounds asserted in this petition which challenged the underlying convictions, but was incorrectly denied as "successive" under 28 U.S.C. Section 2244(b)(2). see Burgie v. Hobbs E.D. Ark. No. 5:13-cv-00228-BSM-JTR; Burgie v. Kelley, E.D. Ark. No. 5:16-cv-00196-BSM-JTR. The petitioner filed a fourth in time habeas action on August 7, 2017, asserting the same claims but was denied as "successive". Burgie v. Kelley, No. 5:17-cv-00193-BSM.

5. The petitioner filed his Rule 60(b)(6) motion under Federal Rules of Civil Procedure, asking to be relieved of the district court judgment order dismissing his

habeas petition as "successive" under section 2244(c)(2) because of errors contained in the Magistrate Judge "Recommended Disposition" filed on July 15, 2016, and which was adopted by the district court in its entirety. see *Burgie v. Kelley*, case No. 5:16-cv-00196-BSM, Doc. # 30-0, August 1, 2022.

Specifically, in Mr. Burgie's Rule 60(c)(6) motion he argued that magistrate judge Ray stated in the "Recommended Disposition" that he filed with the court that Burgie's 2016 habeas petition was "successive" because the factual and legal basis for his argument was available to him when he initiated the first habeas action in 2006. The magistrate judge based his conclusion on the fact that many years before Burgie's 2001 capital murder and aggravated robbery convictions the Arkansas Supreme court had held in *Nooner v. State*, 322 Ark. 87, 907 S.W. 2d 677 (1995), that while "aggravated robbery" was not specifically enumerated as a predicate statutory offense in the capital murder statute, it was nonetheless encompassed by the statute's inclusion of "robbery" as a predicate statutory offense of capital murder. see Doc. # 30-0. However, the petitioner contended that the Arkansas Supreme court

decision in Simpson and its progeny which the magistrate judge relied on in concluding that the factual and legal basis for the argument was available when he filed his first petition in 2006 is unreliable because the state courts construction of the capital murder statute amounted to a mere subterfuge, is fanciful, or sought to evade consideration of a federal question. see Mullaney v. Wilbur, 95 S. Ct. 1881 (1975). In clarifying this issue, the petitioner stated that the Arkansas Supreme court decision in Simpson, Noonan, and Burgie is at complete odds with its long series of precedent which have held that courts in Arkansas do not have any authority to read a criminal offense into a statute that was not put there by the legislature because it violates the constitutional principle of the separation of powers.

6. on August 3, 2022, U.S. District Judge Brian S. Miller entered a order which denied Mr. Burgie's Rule 60(b)(6) motion and motion for appointment of counsel because the case has been closed for almost six years. see Appendix B, doc #: 32-0.

7. The petitioner filed a motion for reconsideration which was never acted on by the court. see doc #: 35-0.

8. The petitioner filed his notice of appeal with the court (Doc. #: 37-0) and the clerk lodged the appeal record with the Eighth circuit's clerk of the court on August 18, 2022. Doc. #: 38-0.

9. The Eighth circuit construed the petitioners notice of appeal as an application for certificate of appealability and denied it without written opinion on September 19, 2022. see Appendix A.

10. And finally, the petitioner filed a petition for rehearing and for rehearing en banc stating that the district court abused its discretion in denying Burgie relief under Rule 60(b)(6). The petitioner contended that because he have been incarcerated for the last 22 years of his life and his convictions is based on a non-existent offense in violation of the supreme court decision in *Flore v. White*, 121 S.Ct. 712 (2001), his case presents extraordinary circumstances warranting relief regardless of fact the case has been closed for over five years in order to prevent the perpetuation of a injustice on him. The petitioner accentuated the importance of this, especially since it was the errors and unreliability of the magistrate judge recommended

disposition that the court relied on in denying Mr. Burgie's 2016 habeas action in the first place and that put a extreme hardship on him. The Eighth circuit denied the petition for rehearing and rehearing en banc on october 26, 2022. see Appendix C.

wherefore, the petitioner Mr. Burgie now submits his case on petition for the writ of certiorari and respectfully ask that this matter be selected by this honorable court for discretionary review and resolved according to the law, fairness and justice

REASONS FOR GRANTING THE PETITION

The Petitioner respectfully ask that this court select his case for review because he have been incarcerated in a state prison in Arkansas for over the last twenty-two years of his life for conduct that on the date of the offense constituted a nonexistent offense under the states capital felony-murder statute and in direct violation of the constitutional principles of due process and separation of powers. The petitioner Mr. Burgie was sentenced to life without parole and life imprisonment for these offenses and if this court decline to accept this case for judicial review he will eventually die here in the continuation of a manifest injustice in this case. The petitioner therefore contends that under these circumstances Mr. Burgies Rule 60 (b)(6) motion was made within a reasonable time.

I. The District court Abused Its Discretion when it Denied Mr. Burgie's Rule 60 (b)(6) Motion because case Had Been closed Almost SIX Years without considering other Adevant Factors that weighed In His Favor.

1. The petitioner urges this court to grant review in this case on the basis that there is a perceived conflict in the district court decision, in which the Eighth circuit court of Appeals denied Mr. Burgies application for a certifi- of appealability and Byrce v. Baca, 966

F.3d 972 (9th cir. 2020).¹ see Appendix B., see also, Appendix A. specifically, in Bynoe, the district court denied his Rule 60(b)(6) motion to reopen his habeas action, explaining that seven years had passed since the court had originally entered judgment and that it was not reasonable to reopen the case after so many years. id. However, the Ninth circuit reversed stating that the district court erred by taking note only of the seven year gap between the denial of Bynoe's request for a Rhines stay and the filing of his Rule 60(b)(6) motion and failing to accord appropriate weight to Bynoe's diligence and his ultimate timeliness. id.; see also, Bitter v. Smith, 811 F.2d 1398, 1402 (11th cir. 1987).

2. The situation here is similar in both Burgiel's and Bynoe's case. The district court denied both their Rule 60(b)(6) motions, apparently on the grounds that it was not made within a reasonable time because the cases had been closed for several years.

¹ Phelps v. Almeida, 569 F.3d 1120 (9th cir. 2009); Thompson v. Bell, 580 F.3d 423, 443-44 (6th cir. 2010); Moolenaar v.

These courts did not state whether it took upon consideration any other factors that was relevant to the matter and that may have weighed in their favor. The district court abused its discretion in Mr. Burgie's case because there was "other compelling reasons" for reopening the habeas action under Rule 60(b)(6). see Klapprott v. U.S., 69 S. Ct. 384 (1949).²

The Rule 60(b)(6) provision does not impose a particular time limit, but only requires that Mr. Burgie motion be made within a "reasonable time." see Appendix

D. In considering whether a Rule 60(b) motion is timely, courts have scrutinized the particular circumstances of each case, and balance the interests in finality with the reasons for delay. see PRC Harris, Inc. v. Boeing Co., 700 F.2d 894, 897 (2d Cir. 1983).

The courts below in Burgie case, did not do this, but instead applied a rather inflexible and overly restrictive reading of the rule to deny his motion for relief from judgment. The petitioner states that it is

Government of Virgin Islands, 822 F.2d 1342, 1348 (3d Cir. 2014); Esposito v. Ashcroft, 288 F.Supp. 2d 292 (E.D. N.Y. 2003).

² Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship,

true that this court has given Rule 60(b)(6) a very strict interpretation, in that it requires a showing of "extraordinary circumstances" before a case is re-opened under the rule and this is essential if the finality of judgments is to be preserved. see Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 863 n.11, & 864 (1998). However, in scrutinizing individualized cases it would be contrary to this court precedents and the prevailing notions of fairness and justice to apply the rule so strictly so as to deny Rule 60(b)(6) relief to petitioners convicted of nonexistent offenses in violation of due process and separation of power principles under U.S. constitution and serving life without parole sentences for those offenses. The petitioner states that this is particularly important since this court have stated that the central concern of the writ of habeas corpus is "fundamental fairness"³ and it would be extremely unfair and a egregious error to deny

113 S.Ct. 1489 (1988); City of Duluth v. Fond du Lac Band of Lake Superior Chippewa, 702 F.3d 1147 (8th Cir. 2013).

³ Strickland v. Washington, 104 S. Ct. 2052 (1984).

Mr. Burgie Rule 60(b)(6) relief to reopen his closed habeas action the district court incorrectly dismissed in 2016 as "successive" under 28 U.S.C. § 2244(b)(2). See Appendix E.

3. In Burgie's case there was several factors that weighed in his favor. Firstly, the interest in finality in the habeas judgment in this case was at minimal because neither the state of Arkansas or the district court have legitimate and abstract interest in finality of criminal judgments when those convictions are based on nonexistent offenses and the perpetual incarceration of defendants under those offenses without any real opportunity for adequate and meaningful habeas review of state convictions. And as this court have made clear, the 'whole purpose' of Rule 60(b) is to make an exception to finality. see Buck, 137 S.Ct. at 779 (quoting Gonzalez, 545 U.S. at 529, 125 S.Ct. 2641).

Secondly, this court have made clear that the state cannot consistently with the due process clause convict defendants for conduct that its criminal statute as properly interpreted does not prohibit. see Fiore v. White, 121 S.Ct. 712 (2001). And this court specifically stated in Gonzalez v. Crosby, 125 S.Ct. 2641 (2005) that while not every interpretation of the

federal statutes setting forth the requirements for habeas provides cause for reopening long since final, it clarified in footnote 9, that a change in the interpretation of a substantive statute may have consequences for cases that have already reached final judgment, particularly in the criminal context and cited *Fiore v. White*, 121 S.Ct. 712 (2001). This is not only significant but directly relevant to Burgie's case because in his Rule 60(b)(6) motion he contended that the district court incorrectly dismissed his petition in 2016 as 'successive' under section 2244(b)(2) on the grounds the factual and legal basis for his claims was available in 2006 when he filed his first habeas petition. The district court came to this conclusion because the magistrate judge stated in his "recommended disposition" that the Arkansas Supreme court had held in *Simpson v. State*, 274 Ark. 188 (1981) and *Nooner v. State*, 322 Ark. 87, 907 S.W. 2d 677 (1995), which was prior to Burgie's 2001 capital murder and aggravated robbery convictions that while aggravated robbery was not specifically enumerated in section 5-10-101 at the time of the crime it could still support a capital murder conviction. However, in Mr. Burgie's Rule 60(b)(6) motion he stated that the Arkansas Supreme court interpretation of the capital murder statute was

a manipulation of state law because it's not a proper interpretation of that statute as applied to him and is a obvious subterfuge to evade or avoid consideration of a federal question. And as such, under this courts decisions, the Arkansas supreme court interpretation of the capital murder statute is open to scrutiny by a federal court see *Mullaney v. Wilbur*, 95 S. Ct. 1881 (1975). And it is obviously clear, that Mr. Burgie's 2016 habeas action was considered 'successive' within the meaning of section 2244 (b) (2) because the district court relied on the courts interpretation of the capital murder statute in *Nooner and Simpson*.

4. The petitioner states that there is several factors indicating that Burgie was entitled to relief under Rule 60 (b) (6). As explained in both his 2016 habeas petition and the current Rule 60 (b) motion, the legislature amended the capital murder statute on April 2, 2007, to include the offense of Aggravated robbery. see Appendix H, 2007 Arkansas Laws Act 827 (H.B. 2462); see also, Appendix M., *Burgie v. Hobbs*, 2013 Ark. 360 (Per Curiam). This made clear to

Mr. Burgie that prior to April 2, 2007, the legislature had not included this offense in section 5-10-101. Thus, in 2006, when Burgie's first petition was filed he could not have made the arguments he made in his 2016 petition.

5. The petitioner states that a review of the procedural history of the claims Mr. Burgie raised in his 2016 habeas action throughout the state and federal courts will clearly show that he was diligent in pursuing these issues. Mr. Burgie first raised the constitutional claims here in a state habeas proceeding in which the appeal was denied in 2013 in *Burgie v. Hobbs*, 2013 Ark. 360 (per curiam). see Appendix M.

The petitioner petitioned the United States Supreme Court for a writ of certiorari which was denied. The petitioner filed his second section 2254 habeas petition in 2013, raising these constitutional issues and it was denied as "successive" within meaning of section 2244 (b) (2). see *Burgie v. Hobbs*, E.D. Ark. No. 5:13cv00228-BJS-M-JTR. The Eighth circuit later denied Burgie's application for certificate of appealability, and his subsequent petition for rehearing. *id.*

The petitioner attempted a third petition in 2016, with the same results from both the district court and

Eighth circuit. see Burgie v. Kelley, E.D. Ark. NO. 5:16cv00196-BSM-JTR. And in 2017, the petitioner filed a fourth in time habeas petition challenging his 2001 capital murder and Aggravated robbery convictions but was denied again by the district court and Eighth circuit as 'successive' under section 2244 (b)(2). see Burgie v. Kelley, E.D. Ark. NO. 5:17cv00193-BSM-JTR.

Furthermore, in 2012, 2015, and 2022, Mr. Burgie filed his application for permission to file a 'successive' habeas petition on the constitutional questions involved here but the eighth circuit denied each one without written opinion. see Burgie v. Norris, No. 12-2165 (8th cir. Aug. 31, 2012); Burgie v. Hobbs, No. 14-2963 (8th cir. Jan. 29, 2015), reh'g denied (8th cir. Feb. 20, 2015); Burgie v. Payne, No. 22-2866 (8th cir. 2022), reh'g denied, see Appendix F.

And finally, as this court can see, the Garland county docket sheet will reflect that the petitioner Mr. Burgie has made repetitive attempts at challenging his capital murder and aggravated robbery convictions on the constitutional questions raised in the federal habeas proceeding stated up above starting in 2015 to 2022 but have been denied relief by the Arkansas courts consistently. see Appendix F. the petitioner Mr. Burgie states

that because he have alleged in the state court proceedings via the petition to correct an illegal sentence under Ark. Code Ann. § 16-90-111(a), that his convictions for these offenses are illegal and void, such claims may be raised at any time. There can be no doubt that Mr. Burgie have consistently and diligently challenged his 2001 convictions for these offenses in both the state and federal courts for well over two decades despite the reluctance of the courts to grant him full review of his claims.

II. Belief IS Warranted Under Rule 60(b)(6) Because There IS NO Legitimate Governmental Interest In A State Incarcerating Mr. Burgie For The Rest Of His Life For A NONEXISTENT offense

1. The petitioner states that the district court abused its discretion when it denied his Rule 60(b)(6) motion on the grounds the habeas proceeding had been closed almost six years because the state of Arkansas does not have any legitimate interest in the perpetual incarceration of Mr. Burgie for conduct that at the time of the crime constituted a non-existent offense.

2. The petitioner states that this court has held that a

state cannot consistently with the due process clause convict a defendant for conduct that its criminal statute, as properly interpreted does not prohibit. see *Fibre v. White*, 121 S. Ct. 712 (2001). In *Mr. Burgie's* 2016, habeas action he alleged that his capital murder and aggravated robbery convictions violated the due process and Ex Post Facto clause(s), as well as the constitutional principles of separation of powers because the legislature in Arkansas did not amend the capital murder statute to include "Aggravated robbery" until April 2, 2007.⁴ see Appendix H, see also, *Burgie v. Kelley*, E.D. Ark. NO. 5:16-cv-00196-BEM-JTR. And in his 2022, Rule 60(b)(6) motion Burgie stated that the district court incorrectly denied his 2016 habeas action as "successive" under 28 U.S.C. § 2244 (b)(2), because the magistrate judge relied on the Arkansas Supreme court holding in *Simpson v. State*, 274 Ark. 188 (1981), to conclude that the factual and legal basis for his argument was

⁴ Appendix I, Ark. Code Ann. § 5-10-101(c)(1)(A). Capital Murder, pg. 3; see also, Appendix M., *Burgie v. Hobbs*, 2013 Ark. 360 (per curiam), fn. 3.

available when he filed his first petition for habeas relief in 2006. see case No. 5:16-CV-00196-BSM, Doc. #: 30-0.

However, the petitioner contended in his motion that it was error for the district court to rely on the Arkansas Supreme court interpretation of the capital murder statute at the time of Burgler's alleged conduct under Fiore because it was a nonexistent offense. The petitioner further clarified in his Rule 60 (b)(6) motion that the Arkansas Supreme court holding in Simpson was directly at odds with its own well established precedent which clearly prohibited courts in Arkansas from violating the separation of powers doctrine by reading offenses into criminal statutes that was not put there by the legislature⁵. see Standridge v. State, 2014 Ark. 515. It is well established in Arkansas that state have no authority to convict and sentence defendants for nonexistent offenses. *id.*

Moreover, it is very important to note that this court have held in U.S. v. Davis, 139 S. Ct. 2319 (2019), that a court violate due process and separation of powers principles when it expands the reach of a criminal statute by judicial construction in order to save it from

⁵ Helford v. State, 173 Ark. 989, 1000, 294 S.W. 33, 37 (1927).

being held unconstitutional, as can be seen in this case. *id.*

3. The petitioner states that relief under Rule 60(b)(6) is especially warranted because such factors as, "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process", is particularly high in this case and weigh heavily in Mr. Burgie's favor in comparison to the governmental interest in finality with respect to his 2001 conviction for a nonexistent offense. see Buck v. Davis, 137 S. Ct. 759 (2017).

4. Furthermore, this court clarified in footnote 9 of Gonzalez v. Crosby, 125 S. Ct. 2641 (2005), that a change in the interpretation of a substantive statute may have consequences for cases that have already reached final judgment, particularly in the criminal context and cited Fiore v. White, 121 S. Ct. 712 (2001). For instance, in this case, when the Arkansas legislature amended section 5-10-101 to include the "aggravated robbery" offense on April 2, 2007⁶, this clarified the criminal offenses within the scope of the capital murder statute sufficiently under Fiore to show that Burgie was

⁶ Appendix H, Act of Apr. 2, 2007, NO. 827 § 19, 2007 Ark. Acts 4380, 4386, codified in Ark. Code Ann. § 5-10-101(c)(1)

convicted of nonexistent offense. The petitioner want to remind this court of its admonition that conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged, and is relevant here. see Sanders v. U.S., 83 S. Ct. 1068 (1963).

5. In the seventh circuit decision in In re Davenport, 147 F.3d 605 (7th Cir. 1998),⁷ the court stated that "a procedure for post-conviction relief can fairly be termed inadequate when it is so configured as to deny a convicted defendant any opportunity for judicial rectification of so fundamental a defect in his conviction as having been imprisoned for a nonexistent offense" *id.* The petitioner states that if this court decline review of his case it will effectively be perpetuating the denial of relief under Rule 60(b)(6) to a man who had no opportunity for the judicial rectification of his 2001 convictions for a nonexistent offense. In such a case, relief under Rule 60(b)(6) may be appropriate upon a court consideration of the prejudice caused to other parties, including the states interests in finality of

(A)(vi) (2007).

7 Taylor v. Gilkey, 314 F.3d 832 (7th Cir. 2007).

the judgment and the "risk of undermining the public confidence in the judicial process".⁸ see Liljeberg, 486 U.S. at 863-64, 108 S. Ct. 2194.

III. The District Court Abused Its Discretion When It Denied Mr. Burgie The Appointment Of Counsel Under Rule 60 (b)(6) For The Purpose Of Proving Racial And Economical Discrimination Regarding The Conviction Of Black Defendants For Capital Murder And Aggravated Robbery Which Was A Nonexistent Offense At The Time Of The Commission Of The Offense

1. The petitioner states that this court should grant review in Mr. Burgie's case because the issues raised by this petition reaches beyond facts of his case and affect other defendants similarly situated,⁹ as well as inmates confined under similar circumstances in other jurisdictions.¹⁰

2. If this court decline to accept this case for review it most likely will send the message to other states that they are

⁸ Mitchell v. U.S., 958 F.3d 775, 790-91 (9th Cir. 2020).

⁹ Appendix L, Simpson v. State, 274 Ark. 188 (1981); Nooner v. State, 322 Ark. 82, 907 S.W. 2d 677 (1995); Gardner v. State, 2017 Ark. 280, *3 (Ark. 2017).

free to incarcerate defendants like Mr. Burgie for nonexistent offenses for the rest of their lives as well without any opportunity for habeas review of their unconstitutional state court convictions.

3. The petitioner states that review is appropriate in Mr. Burgie's case under Rule 60(b)(6) because in both his Rule 60(b) motion and motion for appointment of counsel he stated he needed counsel in order to show racial and economical discrimination reflected in the large number of African-American defendants in comparison to white defendants who have been convicted of capital murder and Aggravated robbery which is in fact a nonexistent offense. The petitioner states that by far most convictions in Arkansas for this offense is had against black defendants, and that most white defendants convicted of similar conduct under very similar circumstances is instead charged and convicted of less severe offenses and is subjected to lesser penalties. The petitioner states that the district court abused its dis-

10. Commonwealth of Pennsylvania v. McIntyre, 232 A.3d 609 (2020); Warren v. Kyler, 422 F.3d 132, 137 (3d cir. 2005); Graves v. Ault, 614 F.3d 501, 511-12 (8th cir. 2010); In re Hinton, 152 Wash. 2d 853, 860-61, 100 P.3d 801 (2004).

cretion under Rule 60(b)(6) by not allowing Burgie the opportunity to present evidence of this to the court with the assistance of counsel.

4. Moreover, the petitioner further states that because of Mr. Burgie indigent status, and the lower economic background and educational level of most black defendants convicted of capital murder and Aggravated robbery the district court abused its discretion under Rule 60(b)(6) by not affording him the opportunity via the appointment of counsel in order to show that the state of Arkansas is discriminating against low-income black defendants who are being affected by this nonexistent offense. The petitioner believes that evidence could have been uncovered that would demonstrate that the state is discriminating against defendants like him because it knows that most black defendants convicted of this offense does not have the resources and outside support to make the public aware of the fact the state is enforcing a nonexistent offense against mostly black defendants. The state is in effect denying the public the right to be informed of the governments misconduct in the administration of its laws in Arkansas. In other words, the state is trying to keep what's going on with this in

Arkansas hidden from public scrutiny and is getting away with it because of Burgie's poverty. The petitioner believe that such conditions show that "extraordinary circumstances" are presented by this case and that Mr. Burgie is being subjected to an "extreme hardship." see Likiermann v. U.S., 71 S.Ct. 209 (1950).

5. As this court decisions clearly demonstrate that discrimination on the basis of race and low-income status, is odious in all aspects, and is especially pernicious in the administration of justice, see Buck v. Davis, 137 S.Ct. 759 (2017). And that relying on race to impose a criminal sanction, especially for a nonexistent offense "poisons public confidence" in the judicial process. see Davis v. Ayala, 576 U.S. 257, 285 (2015); In re Davenport, 147 F.3d 605 (7th cir. 1998). And such concerns are exactly among those this court have identified as supporting relief under Rule 60 (b)(6). see Liljeberg, 486 U.S., at 864, 108 S.Ct. 2194.

CONCLUSION

The petitioner states that this court made clear in Buck v. Davis, 137 S.Ct. 759 (2017), that the 'whole purpose' of Rule 60 (b) is to make an exception

to finality. see *Buck*, 137 S. Ct. at 799 (quoting *Gonzalez*, 545 U.S. at 529, 125 S. Ct. 2641). In Mr. Burgie's 2016 habeas action the district court incorrectly dismissed his petition as "successive" under section 2244(c)(2). It did this because it relied on statements in the magistrate judge "recommended disposition" which erroneously concluded that the factual and legal basis for the arguments raised in the petition was reasonably available at the time Burgie filed his initial habeas action in 2006. Although, the magistrate report cited and relied on the Arkansas Supreme Court decision in *Nooner v. State*, 322 Ark. 87, 907 S.W. 2d 677 (1995), which was prior to Burgie's 2001 capital murder and aggravated robbery convictions and which held that "aggravated robbery" could support such a conviction, it disregarded the fact the Arkansas Legislature amended section 5-10-101 to include "aggravated robbery" on April 2, 2007, and was clarified by the Arkansas Supreme Court in *Burgie v. Hobbs*, 2013 Ark. 360 (per curiam), despite fact the court was reluctant to reverse his convictions. Thus, prior to April 2, 2007, the petitioner could not have made this argument in his first habeas action in 2006. Moreover, the district court disregarded Burgie's argument that the decisions in *Nooner*, *Simpson*, and *Burgie* did not apply and violated the U.S. Supreme Court decision in *Fiore v. White*, 121

s. ct. 712 (2001), as well as the Arkansas Supreme court well settled jurisprudence on the constitutional principle of the separation of powers, see Helford v. State, 173 Ark. 989, 1000, 294 S.W. 33, 37 (1927) which prohibited courts in Arkansas from reading offenses into criminal statutes that was not put there by the legislature. The petitioner contended that the Arkansas Supreme court Nooner decision was simply a manipulation of state law in order to avoid or evade consideration of the federal question raised in Burgies 2016 habeas action and was open to scrutiny under this courts decision in Mullaney v. Wilbur, 95 S. Ct. 1881 (1975).

The petitioner states that his 2001 capital Murder and Aggravated robbery convictions violates both the due process and separation of powers concerns in Fiore v. White, 121 S. Ct. 712 (2001) and U.S. v. Davis, 139 S. Ct. 2319 (2019), because it was based on conduct that at the time of the crime was not prohibited by section 5-10-101 when properly interpreted. And the Arkansas supreme court is reading section 5-10-101 in a way that is clearly expanding the reach of the statute in order to save it from being held unconstitutional under due process clause and

constitutional principle of separation of powers. As such, the district court reliance on that decision was clearly erroneous, and the denial of Burgie's 2022 Rule 60(b)(6) motion was fundamentally unfair and should be rectified because the procedure employed by district court was inadequate when it results in a man being convicted of a non-existent offense with no opportunity for habeas relief. see In re Davenport, 147 F.3d 605 (7th Cir. 1998). The petition for a writ of certiorari should be granted.

Respectfully submitted

Mr. Eric C. Burgie

date: 12/20/2022.