

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2754

APPENDIX A.

Eric C. Burgie

Plaintiff - Appellant

v.

Dexter Payne, Director, Arkansas Department of Corrections

Defendant - Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:16-cv-00196-BSM)

JUDGMENT

Before COLLTON, GRUENDER, and GRASZ, Circuit Judges.

Appellant's Notice of Appeal is construed as an Application for Certificate of Appealability. The court has carefully reviewed the original file of the district court, and the Application for a Certificate of Appealability is denied. The appeal is dismissed.

September 19, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

APPENDIX B.

ERIC C. BURGIE
ADC #120956

PLAINTIFF

v.

CASE NO. 5:16-CV-00196-BSM

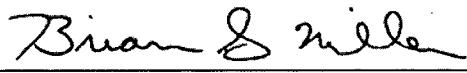
WENDY KELLY, Director,
Arkansas Department of Correction

DEFENDANT

ORDER

Eric Burgie's motion for relief from judgment [Doc. No. 30] and motion for appointment of counsel [Doc. No. 31] are denied because this case has been closed for almost six years. *See* Doc. No. 8.

IT IS SO ORDERED this 3rd day of August, 2022.



UNITED STATES DISTRICT JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 22-2754

Eric C. Burgie

APPENDIX C.

Appellant

v.

Dexter Payne, Director, Arkansas Department of Corrections

Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:16-cv-00196-BSM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 26, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

WESTLAW

Rule 60. Relief From a Judgment or Order [Rule Text & Notes of Decisions subdivisions I to III]
 FRCP Rule 60 | United States Code Annotated | Federal Rules of Civil Procedure for the United States District Courts (Approx. 10 pages)

United States Code Annotated
 Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
 Title VII. Judgment

Unconstitutional or Preempted Limitation Recognized by *Smalis v. Huntington Bank* W.D.Pa. Mar. 01, 2017

Federal Rules of Civil Procedure Rule 60

Rule 60. Relief From a Judgment or Order [Rule Text & Notes of Decisions subdivisions I to III]

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 60 are displayed in multiple documents.>

(a) Corrections Based on Clerical Mistakes; Oversight and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

- (1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
- (2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

APPENDIX D.

WESTLAW

§ 2244. Finality of determination

28 USCA § 2244 United States Code Annotated | Title 28. Judiciary and Judicial Procedure | Effective: April 24, 1996 (Approx. 4 pages)

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

APPENDIX E.**Proposed Legislation**

Effective: April 24, 1996

28 U.S.C.A. § 2244

§ 2244. Finality of determination**Currentness**

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a *prima facie* showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

Amendments

1996 Amendments. Subsec. (a). Pub. L. 104-132, § 106(a), substituted ", except as provided in section 2255" for "and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry".

Subsec. (b). Pub.L. 104-132, § 106(b), revised subsec. (b). Prior to revision subsec. (b) read as follows: "When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ."

Subsec. (d). Pub.L. 104-132, § 101, added subsec. (d).

1966 Amendments. Subsec. (a). Pub.L. 89-711 designated existing provisions as subsec. (a) and, in subsec. (a) as so designated, struck out provision making the subsection's terms applicable to applications seeking inquiry into detention of persons detained pursuant to judgments of State courts.

Subsecs. (b) and (c). Pub.L. 89-711 added subsecs. (b) and (c).

Notes of Decisions (2187)

28 U.S.C.A. § 2244, 28 USCA § 2244

Current through P.L. 117-214. Some statute sections may be more current, see credits for details.

**End of
Document**

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AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINT...

United States Code Annotated Constitution of the United States (Approx. 2 pages)

United States Code Annotated

Constitution of the United States

Annotated

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV-Full Text

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES;
DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF
REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC
DEBT; ENFORCEMENT

Currentness

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.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

APPENDIX F.

AR Const. Art. 4, § 2

West's Arkansas Code Annotated Currentness
 Constitution of the State of Arkansas of 1874
 ↗ Article 4. Departments
 ➔ **§ 2. Separation of powers**

APPENDIX G.

No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

HISTORICAL NOTES

Arkansas Code Revision Commission

Technical changes were made in 2004 to conform with the official Arkansas Code of 1987 as approved by the Arkansas Code Revision Commission.

CROSS REFERENCES

County government, officers, vacancies, see § 14-14-1308.

LAW REVIEW AND JOURNAL COMMENTARIES

Antley, The "Appearance of Fairness" Versus "Actual Unfairness": Which Standard Should The Arkansas Courts Apply to Administrative Agencies?, 16 U. Ark. Little Rock L.J. 587 (1994).

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Culpepper, Comment: Justice Reformed: Johnson v. Rockwell Automation, Inc., Torts, and the Separation of Powers in Arkansas, 63 Ark. L. Rev. 283 (2010).

Gitchel, Funding The Education Of Arkansas's Children: A Summary Of The Problems And Challenges, 27 U. Ark. Little Rock L. Rev. 1 (Fall 2004).

Holthoff, Note: Twelve Angry People. Arkansas Constitution Guarantees Right to Trial By Jury of Twelve Persons in Criminal Cases. Byrd v. State, 317 Ark. 609, 879 S.W.2d 435 (1994), 18 U. Ark. Little Rock L.J. 489 (1996).

King, Note: A Problematic Procedure: The Struggle for Control of Procedural Rulemaking Power, 67 Ark. L. Rev. 759 (2014).

Matthews, Lessons From Lake View: Some Questions And Answers From Lake View School District No. 25 v. Huckabee, 56 Ark. L. Rev. 519 (2003).

McDonald et al., School Finance Litigation And Adequacy Studies, 27 U. Ark. Little Rock L. Rev. 69 (Fall 2004).

McMath, The Arkansas Civil Reform Act of 2003 and Johnson v. Rockwell Automation, Inc., 46-FALL Ark. Law. 14 (2011).

Robertson, Note: Spradlin v. Arkansas Ethics Commission: A Hard-Line Approach to Separation of Powers, 48 Ark. L. Rev. 755 (1995).

Smith, Education Adequacy Litigation: History, Trends, And Research, 27 U. Ark. Little Rock L. Rev. 107 (Fall 2004).

Strauss, The Arkansas Several Liability "Catch 22": The Civil Justice Reform Act Post Johnson, 46-FALL Ark. Law. 10 (2011).

Wood & Baker, An Examination And Analysis Of The Equity And Adequacy Concepts Of Constitutional Challenges To State Education Finance Distribution Formulas, 27 U. Ark. Little Rock L. Rev. 125 (Fall 2004).

LIBRARY REFERENCES

Constitutional Law 50, 67, 76.
 Westlaw Key Number Searches: 92k50; 92k67; 92k76.
C.J.S. Constitutional Law §§ 54, 58, 59, 111 to 114, 169 to 173, 215, 216.

RESEARCH REFERENCES

Treatises and Practice Aids

Arkansas Model Jury Instructions -- Civil AMI 203, Issues--Claim for Damages Based on Negligence--Burden of Proof.

WESTLAW**ARKANSAS CODE OF 1987—TECHNICAL CORRECTIONS**

(2007 Arkansas Laws Act 827 (H.B. 2462) (Approx. 53 pages)

(2007 Arkansas Laws Act 827 (H.B. 2462))

ARKANSAS 2007 SESSION LAWS
86th GENERAL ASSEMBLY, REGULAR SESSION, 2007

Additions are indicated by Text; deletions by Text. Changes in tables are made but not highlighted. Vetoed provisions within tabular material are not displayed.

APPENDIX H.

ACT 827

H.B. 2462

ARKANSAS CODE OF 1987—TECHNICAL CORRECTIONS

AN ACT TO MAKE VARIOUS CORRECTIONS TO THE ARKANSAS CODE OF 1987
ANNOTATED; AND FOR OTHER PURPOSES.

Subtitle

AN ACT TO MAKE VARIOUS CORRECTIONS TO THE ARKANSAS CODE OF 1987
ANNOTATED.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code § 2-5-207 is amended to read as follows to correct the classification of an offense and to make stylistic changes:

<< AR ST § 2-5-207 >>

- (a) It shall be is unlawful for any person to:
 - (1) Use the term "Arkansas certified" or any similar term concerning the quality of bait or ornamental fish without the proper certification from the State Plant Board;
 - (2) Falsely advertise or represent any bait or ornamental fish as being certified by the board;
 - (3) Use any emblem, label, or language for the purpose of misleading a person into believing that any bait or ornamental fish has been certified by the board when the certification has not been obtained;
 - (4) Misuse any tag, label, or certificate issued by the board;
 - (5) Obtain or attempt to obtain the certification of any bait or ornamental fish by making a false statement or misrepresentation to the board or to the board's inspectors, deputies, or agents;
 - (6) Violate any of the rules and regulations rule or regulation of the board under this subchapter; or
 - (7) Violate any agreement made as a condition for receiving a certificate.
- (b) Any person who pleads guilty or nolo contendere to or is found guilty of violating the provisions of this section is guilty of a misdemeanor violation and shall be punished by a fine of not less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500) for each offense.
- (c)(1) A certificate issued under this subchapter may be revoked by the Director of the State Plant Board after a hearing before the director, regardless of whether a prosecution is commenced.
- (2)(A) Any person whose certificate is revoked by the director shall be is entitled to an appeal to the board.
- (B) The decision of the board on appeal shall be is final.

SECTION 2. Arkansas Code § 2-5-208 is amended to read as follows to clarify the duty of the State Plant Board in administering § 2-5-201 et seq.:

<< AR ST § 2-5-208 >>

2-5-208. Intergovernmental cooperation.

In administering this subchapter, the State Plant Board may shall cooperate to the fullest extent possible with other agencies of the state and the federal government.

<< AR ST § 2-40-819 >>

(b) Notwithstanding the provisions of subsection (a) of this section, with respect to a horse claimed in a claiming race run at a licensed racetrack regulated by the Arkansas Racing Commission, the commission may require:

- (1) ~~Require that the~~ The negative equine infectious anemia test shall to have been conducted at an approved laboratory within the previous (12) twelve (12) months, rather than the previous six (6) months; ~~and/or~~
- (2) ~~Allow any such test~~ Any negative equine infectious anemia test required to be conducted within the last six (6) months to be conducted after the race and after title and risk of loss have passed to the buyer; ; or
- (3) That the requirements of both subdivisions (b)(1) and (2) of this section be met.

SECTION 10. Arkansas Code § 3-5-227(d)(1)(B)(i) is amended to read as follows to correct an incorrect reference to a criminal offense:

<< AR ST § 3-5-227 >>

(B)(i) That the purchaser is aware that giving, procuring, or otherwise furnishing any alcoholic beverage to any person under twenty-one (21) years of age is a ~~misdemeanor~~ a criminal offense as provided in §§ 3-3-201 and 3-3-202; and

SECTION 11. Arkansas Code § 5-1-102(13)(B)(ii)(c) is amended to read as follows to make stylistic changes:

<< AR ST § 5-1-102 >>

(c) An act that is committed in the course of medical research, experimental medicine, or ~~acts~~ an act deemed necessary to save the life or preserve the health of the ~~mother~~ woman.

SECTION 12. Arkansas Code § 5-2-605(4) is amended to read as follows to clarify a reference:

<< AR ST § 5-2-605 >>

(4) A person who reasonably believes that another person is about to commit suicide or to inflict serious physical injury upon himself or herself may use nondeadly physical force upon the other person to the extent reasonably necessary to thwart the ~~result~~ suicide or infliction of serious physical injury;

SECTION 13. Arkansas Code § 5-2-606(b)(2) is amended to read as follows to clarify references:

<< AR ST § 5-2-606 >>

(2)(A) The person is the initial aggressor.

(B) However, the ~~person's~~ initial aggressor's use of physical force upon another person is justifiable if:

- (i) The ~~person~~ initial aggressor in good faith withdraws from the encounter and effectively communicates to the other person his or her purpose to withdraw from the encounter; and
- (ii) The other person continues or threatens to continue the use of unlawful physical force; or

SECTION 14. Arkansas Code § 5-4-323(e) is amended to read as follows to correctly classify a criminal offense:

<< AR ST § 5-4-323 >>

(e) *Any* Upon conviction, any person who fails to make a good faith effort to comply with a court order issued pursuant to this section is guilty of an ~~unclassified misdemeanor~~ a violation and shall be punished by a fine of at least one hundred dollars (\$100) but not more than one thousand dollars (\$1,000).

SECTION 15. Arkansas Code § 5-4-501(d)(2)(A)(viii) is repealed so as to remove an obsolete reference.

<< AR ST § 5-4-501 >>

~~(viii) Sexual abuse in the first degree, § 5-14-108 [repealed];~~

SECTION 16. Arkansas Code § 5-4-501(d)(2)(A)(ix) is repealed so as to remove an obsolete reference.

A.C.A. § 5-10-101

West's Arkansas Code Annotated Currentness

Title 5. Criminal Offenses (Refs & Annos)

"Subtitle 2. Offenses Against the Person (Chapters 10 to 24)

"Chapter 10. Homicide (Refs & Annos)

"§ 5-10-101. Capital murder

APPENDIX I.

(a) A person commits capital murder if:

(1) Acting alone or with one (1) or more other persons:

(A) The person commits or attempts to commit:

(i) Terrorism, as defined in § 5-54-205;(ii) Rape, § 5-14-103;(iii) Kidnapping, § 5-11-102;(iv) Vehicular piracy, § 5-11-105;(v) Robbery, § 5-12-102;(vi) Aggravated robbery, § 5-12-103;(vii) Residential burglary, § 5-39-201(a);(viii) Commercial burglary, § 5-39-201(b);(ix) Aggravated residential burglary, § 5-39-204;(x) A felony violation of the Uniform Controlled Substances Act, § 5-64-101 -- 5-64-508, involving an actual delivery of a controlled substance; or(xi) First degree escape, § 5-54-110; and

(B) In the course of and in furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of a person under circumstances manifesting extreme indifference to the value of human life;

(2) Acting alone or with one (1) or more other persons:

(A) The person commits or attempts to commit arson, § 5-38-301; and

(B) In the course of and in furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of any person;

(3) With the premeditated and deliberated purpose of causing the death of any law enforcement officer, jailer, prison official, firefighter, judge or other court official, probation officer, parole officer, any military personnel, or teacher or school employee, when such person is acting in the line of duty, the person causes the death of any person;

(4) With the premeditated and deliberated purpose of causing the death of another person, the person causes the death of any person;

(5) With the premeditated and deliberated purpose of causing the death of the holder of any public

office filled by election or appointment or a candidate for public office, the person causes the death of any person;

(6) While incarcerated in the Department of Correction or the Department of Community Correction, the person purposely causes the death of another person after premeditation and deliberation;

(7) Pursuant to an agreement that the person cause the death of another person in return for anything of value, he or she causes the death of any person;

(8) The person enters into an agreement in which a person is to cause the death of another person in return for anything of value, and a person hired pursuant to the agreement causes the death of any person;

(9)(A) Under circumstances manifesting extreme indifference to the value of human life, the person knowingly causes the death of a person fourteen (14) years of age or younger at the time the murder was committed if the defendant was eighteen (18) years of age or older at the time the murder was committed.

(B) It is an affirmative defense to any prosecution under this subdivision (a)(9) arising from the failure of the parent, guardian, or person standing in loco parentis to provide specified medical or surgical treatment, that the parent, guardian, or person standing in loco parentis relied solely on spiritual treatment through prayer in accordance with the tenets and practices of an established church or religious denomination of which he or she is a member; or

(10) The person:

(A) Purposely discharges a firearm from a vehicle at a person or at a vehicle, conveyance, or a residential or commercial occupiable structure that he or she knows or has good reason to believe to be occupied by a person; and

(B) Thereby causes the death of another person under circumstances manifesting extreme indifference to the value of human life.

(b) It is an affirmative defense to any prosecution under subdivision (a)(1) of this section for an offense in which the defendant was not the only participant that the defendant did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid in the homicidal act's commission.

(c)(1) Capital murder is punishable as follows:

(A) If the defendant was eighteen (18) years of age or older at the time he or she committed the capital murder:

(i) Death; or

(ii) Life imprisonment without parole under §§ 5-4-601 -- 5-4-605, 5-4-607, and 5-4-608; or

(B) If the defendant was younger than eighteen (18) years of age at the time he or she committed the capital murder:

(i) Life imprisonment without parole as it is defined in § 5-4-606; or

(ii) Life imprisonment with the possibility of parole after serving a minimum of twenty-eight (28) years' imprisonment.

(2) For any purpose other than disposition under §§ 5-4-101 -- 5-4-104, 5-4-201 -- 5-4-204, 5-4-301 -- 5-4-307, 5-4-401 -- 5-4-404, 5-4-501 -- 5-4-504, 5-4-601 -- 5-4-605, 5-4-607, 5-4-608, 16-93-307, 16-93-313, and 16-93-314, capital murder is a Class Y felony.

CREDIT(S)

Acts of 1975, Act 280, § 1501; Acts of 1983, Act 341, § 1; Acts of 1985, Act 840, § 1; Acts of 1987, Act 242, § 2; Acts of 1989, Act 97, § 1; Acts of 1989, Act 856, § 1; Acts of 1991, Act 683, § 1; Acts of 1993, Act 1189, § 2; Acts of 1995, Act 258, § 1; Acts of 1995, Act 800, § 1; Acts of 2003, Act 1342, § 5, eff. April 14, 2003; Acts of 2007, Act 827, § 19, eff. July 31, 2007; Acts of 2007, Act 827, § 20, eff. July 31, 2007; Acts of 2009, Act 748, § 6, eff. July 31, 2009; Acts of 2009, Act 1395, § 3, eff. July 31, 2009; Acts of 2011, Act 570, § 22, eff. July 27, 2011; Acts of 2013, Act 1490, § 3, eff. Aug. 16, 2013.

Formerly A.S.A. 1947, § 41-1501.

HISTORICAL AND STATUTORY NOTES

Arkansas Code Revision Commission

Technical changes were made in 2006, 2009, and 2011 to conform with the official Arkansas Code of 1987 as approved by the Arkansas Code Revision Commission.

2003

Acts of 2003, Act 1342, § 5, amended (a) by adding "terrorism, as defined in § 5-54-205," following "attempts to commit" in (a)(1); and making changes to reflect gender-neutral language throughout.

2007

Acts of 2007, Act 827, §§ 19, 20, amended the section by rewriting (a)(1)(A); and making nonsubstantive changes to (a)(8). Prior to its amendment, (a)(1)(A) read:

"(A) The person commits or attempts to commit:

"(i) Terrorism, as defined in § 5-54-205;

"(ii) Rape, § 5-14-103;

"(iii) Kidnapping, § 5-11-102;

"(iv) Vehicular piracy, § 5-11-105;

"(v) Robbery;

"(vi) Burglary, § 5-39-201;

"(vii) A felony violation of the Uniform Controlled Substances Act, §§ 5-64-101--5-64-608, involving an actual delivery of a controlled substance; or

"(viii) First degree escape, § 5-54-110; and"

2009

Acts of 2009, Act 748, § 6, amended the section by adding new (a)(1)(A)(xi).

Acts of 2009, Act 1395, § 3, amended the section by redesignating former (a)(1)(A)(ix) and (a)(1)(A)(x) as present (a)(1)(A)(x) and (a)(1)(A)(xi); adding new (a)(1)(A)(ix).

2011

A.C.A. § 5-12-102

West's Arkansas Code Annotated Currentness

Title 5. Criminal Offenses (Refs & Annos)

↳ Subtitle 2. Offenses Against the Person (Chapters 10 to 24)

↳ Chapter 12. Robbery (Refs & Annos)

⇒ **§ 5-12-102. Robbery, defined**

APPENDIX J.

(a) A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately after committing a felony or misdemeanor theft, the person employs or threatens to immediately employ physical force upon another person.

(b) Robbery is a Class B felony.

CREDIT(S)

Acts of 1975, Act 280, § 2103; Acts of 1987, Act 934, § 1.

Formerly A.S.A. 1947, § 41-2103.

HISTORICAL AND STATUTORY NOTES

A.C.A. § 5-12-103

West's Arkansas Code Annotated Currentness

Title 5. Criminal Offenses (Refs & Annos)

Subtitle 2. Offenses Against the Person (Chapters 10 to 24)

Chapter 12. Robbery (Refs & Annos)

§ 5-12-103. Aggravated robbery

APPENDIX K.

(a) A person commits aggravated robbery if he or she commits robbery as defined in § 5-12-102, and the person:

- (1) Is armed with a deadly weapon;
- (2) Represents by word or conduct that he or she is armed with a deadly weapon; or
- (3) Inflicts or attempts to inflict death or serious physical injury upon another person.

(b) Aggravated robbery is a Class Y felony.

CREDIT(S)

Acts of 1975, Act 280, § 2102; Acts of 1979, Act 1118, § 1; Acts of 1981, Act 620, § 13; Acts of 1995, Act 1296, § 2.

Formerly A.S.A. 1947, § 41-2102.

HISTORICAL AND STATUTORY NOTES

Arkansas Code Revision Commission

Technical changes were made in 2006 to conform with the official Arkansas Code of 1987 as approved by the Arkansas Code Revision Commission.

CROSS REFERENCES

WESTLAW**Simpson v. State**

Supreme Court of Arkansas. | November 2, 1981 | 274 Ark. 188 | 623 S.W.2d 200 (Approx. 6 pages)

274 Ark. 188

Supreme Court of Arkansas.

James David SIMPSON, Jr., Appellant,

v.

STATE of Arkansas, Appellee.

No. CR 81-8.

Nov. 2, 1981.

APPENDIX L.**Synopsis**

Defendant was convicted in the Circuit Court, Pulaski County, Lowber C. Hendricks, J., of capital murder and one count of aggravated robbery. He appealed. The Supreme Court, Hickman, J., held that: (1) trial court erred in failing to allow defense to pursue issue of bias of State's key witness and error could only be corrected by new trial; (2) it was not improper to charge defendant with capital felony-murder with aggravated robbery as underlying felony; (3) first-degree murder statute and capital murder charge were not unconstitutionally vague; (4) trial court erred in not inserting in its instructions on lesser offense of first-degree murder specific underlying felonies; (5) court did not err in failing to instruct jury on elements of aggravated robbery and robbery in conjunction with instructions on first-degree murder; and (6) defendant could not be convicted of both capital murder and aggravated robbery.

Reversed and remanded.

Adkisson, C. J., filed dissenting opinion in which Hays, J., joined.

West Headnotes (6)[Change View](#)**1 Criminal Law  Witnesses****Witnesses  Particular witnesses in general**

In criminal prosecution, trial court erred in failing to allow defense to pursue issue of bias of State's chief witness and error could only be corrected by new trial.

12 Cases that cite this headnote

2 Homicide  Robbery

It was not improper to charge defendant with capital felony-murder with aggravated robbery as underlying felony when statute only listed robbery as one of seven felonies that could support such a charge. Ark. Stats. § 41-1501(1)(a).

7 Cases that cite this headnote

3 Homicide  Validity

First-degree murder statute and capital murder charge were not unconstitutionally vague, although defendant contended they overlapped in such a way that an accused could be charged with either for precisely the same conduct.

5 Cases that cite this headnote

4 Criminal Law  Sufficiency in general

Trial court erred in not inserting in its instructions on lesser offense of first-degree murder specific underlying felonies of either aggravated robbery or simple robbery; trial judge had merely inserted the words "a felony."

State (162 Ark. 154, 258 S.W. 116), *supra*; *Boyd v. State* (215 Ark. 156, 219 S.W.2d 623), *supra*. See also *Campbell v. State*, 169 Ark. 286, 273 S.W. 1035; *Alford v. U. S.* (282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1930)), *supra*. The test is the expectation of the witness and not the actuality of a promise. *State v. Little* (87 Ariz. 295, 350 P.2d 756), *supra*; *Spaeth v. United States*, 232 F.2d 776, 62 A.L.R.2d 606 (6 Cir., 1956).

The right of a defendant to show the bias of a witness does not lie within the court's discretion. *Wright v. State*, 133 Ark. 16, 201 S.W. 1107....

Denial of cross-examination to show the possible bias or prejudice of a witness may constitute constitutional error of the first magnitude as violating the Sixth Amendment right of confrontation. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

1 We conclude that the trial court erred in failing to allow the defense to pursue the issue and the error can only be corrected by a new trial. It may be the court did not precisely understand the appellant's posture in this regard, but the record reflects the request was clearly made several times.

2 There are several other alleged errors which we must discuss. The defense argues that it was improper to charge Simpson with capital felony murder with aggravated robbery as the underlying felony when the statute only lists robbery as one of seven felonies that can support such a charge. See Ark.Stat.Ann. s 41-1501(a) (Repl.1977). The defense argues that Simpson should have been charged with first degree murder which can be supported by any felony. Ark.Stat.Ann. s 41-1502. The General Assembly could not conceivably have intended that robbery, which may involve no force, would support a charge of capital murder, while aggravated robbery, an inherently dangerous crime, would not.

3 Simpson contends that the first degree murder statute and capital murder charge are unconstitutionally vague because they overlap in such a way that an accused may be charged with either for precisely the same conduct. That *194 argument has been raised before and we have decided that there is no constitutional infirmity in the statute. *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981); *Cromwell v. State*, 269 Ark. 104, 598 S.W.2d 733 (1980).

4 Simpson also argues that the court was wrong in not inserting in its instructions on the lesser offense of first degree murder the specific underlying felonies of either aggravated robbery or simple robbery. Instead the trial judge inserted the words "a felony."

****204** When we adopted the Arkansas Model Criminal Instructions we said in a per curiam opinion that any variation from them must be explained in writing by the trial judge. 264 Ark. 967 (1978). AMCI 1502(a) provides that the court should insert the "applicable felony" that supports the charge of first degree murder. The trial judge should have done so.

5 The defense contends that the court should have instructed the jury on the elements of aggravated robbery and robbery in conjunction with its instructions on first degree murder. The court had already instructed the jury on the elements of those crimes when it gave the charge of capital murder. It may have been the better practice to instruct again on the elements of those charges as suggested by the defense, but the court's failure to do so did not amount to prejudicial error.

The old issue of "death qualified" juries is raised, no doubt for posterity's sake. We have repeatedly ruled that such a jury is not unconstitutional. *Ruiz v. State*, 273 Ark. 94, 617 S.W.2d 6 (1981); *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980). The argument is slightly different in that the defense says it was denied an opportunity to put on evidence of the fact that such a jury is prone to find a defendant guilty. Evidently the trial court did not take the request seriously, nor do we. There was no genuine proffer of proof.

6 The sentence imposed was improper according to *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981), and in *195 this case Simpson cannot be convicted for both capital murder and aggravated robbery.

Reversed and remanded.

ADKISSON, C. J., and HAYS, J., dissent.

ADKISSON, Chief Justice, dissenting.

The majority have held that the trial court committed prejudicial error by failing to let the defense cross-examine a witness, Gilmore, about his leaving town before his scheduled trial on five criminal charges. They conclude that "the defense wanted to ask what deal, if any, had been made for his testimony against Simpson," thereby proving Gilmore was biased. The record in no way substantiates this conclusion reached by the majority.

Rather, the record reflects that what we have here is an objection by the defense to its not being allowed to cross-examine the witness as to specific acts of felonious misconduct under Rule 608, Uniform Rules of Evidence, s 28-1001 Ark.Stat.Ann., Vol. 3A (Repl.1979). One of the acts of misconduct with which the defense sought to impeach Gilmore was the charge of Felony Failure to Appear resulting from his leaving town before his scheduled trial.

At the beginning of the hearing on this issue the trial court stated that the hearing was on defense counsel's motion "to inquire of Carl Gilmore as to whether or not he is guilty of having committed certain criminal offenses." The entire proceeding and conversation centered on this issue. The trial court ruled on the issue at page 805 of the record by stating:

You can attack his general credibility as a witness by showing evidence of previous convictions under Rule 609. Now, that's unquestionable. But, under 608(b) in order to go into specific instances of conduct you must show specific instances of conduct which would be the type of conduct to go to the truthfulness or untruthfulness. The mere fact that somebody may have been guilty of a drug offense or of an assault and battery *196 or even of a murder does not go to the question of truthfulness or untruthfulness.

Later, the court further stated in regard to this issue:

... During the time that (Gilmore) was under cross-examination the defense counsel wanted to ask him certain questions on cross-examination and I refused to let him do that. And the questions as I understand it were to go to his credibility.

After the jury had returned a verdict of guilty but before it fixed the punishment, the defense apparently asked that the record **205 be kept open for purposes of making a proffer of proof regarding this issue. In the hearing that followed there was no indication that the ground for objection was other than was originally presented.

The issue of bias was not raised. It is obvious from reading the record in this case that the trial judge could not have understood that appellant sought to prove bias by cross-examining Gilmore about leaving the state. Appellant never mentioned bias in the trial court, but if so, this fact should be set out in the majority opinion. We do not have a plain error rule in this state except for certain limited exceptions not applicable here. Wicks v. State, 270 Ark. 781, 606 S.W.2d 366 (1980); Singleton v. State, 274 Ark. 126, 623 S.W.2d 180 (1981).

An objection is not sufficient unless it specifically states the grounds relied on so that the ruling may be made understandingly and the objection obviated if possible. General conversation which merely mentions the word "credibility" as the basis for an objection is not sufficient. This Court has consistently held that in order to preserve an objection for review on appeal it is necessary that the objection at trial be sufficiently specific to apprise the trial court of its basis. Wicks, *supra*; Turkey Express v. Skelton Motor Co., 246 Ark. 739, 439 S.W.2d 923 (1969); Goodwin v. State, 263 Ark. 856, 568 S.W.2d 3 (1978); Cf. Rules 46 and 51 Ark.Rules Civ.Proc., Vol. 3A (Repl.1979); Rule 13, *197 Uniform Rules for Cir. & Chan.Courts, Ark.Stat.Ann., Vol. 3A (Supp.1981).

APPENDIX M.

Not Reported in S.W.3d, 2013 Ark. 360, 2013 WL 5436626 (Ark.)

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

Supreme Court of Arkansas.
Eric C. BURGIE, Appellant

v.
Ray HOBBS, Director, Arkansas Department of Correction, Appellee.

No. CV-13-41.
Sept. 26, 2013.

Background: After defendant was convicted of capital murder and aggravated robbery and was sentenced to life imprisonment without parole, defendant's convictions and sentence were affirmed by the Supreme Court. Defendant subsequently filed petition for writ of habeas corpus. The Circuit Court, Jefferson County, Jodie Raines Dennis, J., denied petition. Defendant appealed.

Holdings: The Supreme Court held that:

- (1) claims challenging sufficiency of information did not warrant issuance of writ;
- (2) sentences for both capital murder and underlying predicate felony did not violate double jeopardy; and
- (3) ex post facto claims did not warrant issuance of writ.

Appeal dismissed; petition moot.

West Headnotes

[1] KeyCite Citing References for this Headnote

- 197 Habeas Corpus
 - 197II Grounds for Relief; Illegality of Restraint
 - 197II(B) Particular Defects and Authority for Detention in General
 - 197k474 k. Indictment, Information, Affidavit, or Complaint.

Defendant's claims in petition for writ of habeas corpus challenging the sufficiency of the felony information in capital murder prosecution did not call into question the jurisdiction of the trial court or demonstrate facial invalidity of the judgment, and therefore were not cognizable in a habeas corpus petition, where defendant claimed that he was charged with aggravated robbery, which, at the time of the commission of the crime, was not specifically enumerated by statute as a predicate felony to capital murder, and that he was sentenced as a habitual offender although the felony information failed to charge him as a habitual offender.

[2] KeyCite Citing References for this Headnote

- 135H Double Jeopardy
 - 135HV Offenses, Elements, and Issues Foreclosed
 - 135HV(A) In General
 - 135Hk139 Particular Offenses, Identity of
 - 135Hk150 Homicide
 - 135Hk150(1) k. In General.

Sentencing of defendant for capital murder and underlying felony that supported the capital murder charge, aggravated robbery, did not violate double jeopardy, where trial courts had specific authority to sentence a defendant for the underlying felony supporting a capital-murder charge, as well as the felony of capital murder itself. U.S.C.A. Const. Amend. 5.

[3] KeyCite Citing References for this Headnote

⇒ 197 Habeas Corpus

⇒ 197II Grounds for Relief; Illegality of Restraint

⇒ 197II(B) Particular Defects and Authority for Detention in General

⇒ 197k463 Authority for Detention Under Statute or Ordinance

⇒ 197k463.1 k. In General.

Defendant's claims in petition for writ of habeas corpus that convictions and sentences amounted to ex post facto application of the law did not challenge the facial validity of the judgment or demonstrate a lack of the trial court's jurisdiction, and, therefore, did not warrant issuance of writ.

Pro Se Petition for Writ of Mandamus and Pro Se Motions for Appointment of Counsel, for Leave to File Brief with Extended Page Limit, and to File Supplemental brief with Extended Page Limit [Jefferson County Circuit Court, 35CV-12-495, Jodie Raines Dennis, Judge]. Eric.C. Burgie, pro se appellant.

No response.

PER CURIAM.

*1 In 2001, appellant Eric C. Burgie was convicted of capital murder and aggravated robbery in the Garland County Circuit Court, and an aggregate sentence of life imprisonment without parole was imposed. We affirmed. *Burgie v. State*, CR-02-90 (Ark. Feb. 20, 2003) (unpublished per curiam).

On August 30, 2012, appellant filed in the Jefferson County Circuit Court, the county where he was incarcerated, a pro se petition for writ of habeas corpus and three supplemental petitions for the writ pursuant to Arkansas Code Annotated sections 16-112-101 to -123 (Repl.2006). FN1 The circuit court denied appellant's request for relief, and appellant filed a timely notice of appeal. Appellant also filed a motion for reconsideration of the circuit court's order denying his request for the writ and a motion for order in which he requested an order directing the circuit clerk to return file-marked copies of the felony information and amended felony information. FN2

FN1. As of the date of this opinion, appellant remains incarcerated in Jefferson County.

FN2. The circuit court did not rule on appellant's motions for reconsideration and for

Now before us are appellant's motions to appoint counsel, for leave to file an appellate brief with extended page limit, and to file a supplemental brief with extended page limit, as well as his petition for writ of mandamus requesting that we order the circuit clerk to return file-marked copies of the felony information and amended felony information. While not entirely clear, it also appears that appellant requests in his petition for writ of mandamus that we order the Arkansas Department of Correction to respond to his petition for writ of habeas corpus. We dismiss appellant's appeal and find his remaining motions and petition for writ of mandamus moot.

After the motions to appoint counsel and for leave to file an appellate brief with extended page limit were filed, appellant timely tendered a brief that conforms to the rules of this court, as well as a conforming reply brief. As appellant has filed the brief-in-chief and perfected the appeal, the motions to appoint counsel and for leave to file an appellate brief with extended page limit are moot. We need

not address the merits of appellant's remaining motion to file a supplemental brief with extended page limit and petition for writ of mandamus because it is clear from the record that appellant could not prevail on appeal even if the motion and petition were granted. Accordingly, the appeal is dismissed, and the motions and petition are moot.

An appeal from an order that denied a petition for postconviction relief, including an appeal from an order that denied a petition for writ of habeas corpus, will not be permitted to go forward where it is clear that the appellant could not prevail. Roberson v. State, 2013 Ark. 75 (per curiam). In appeals of postconviction proceedings, we will not reverse a circuit court's decision granting or denying postconviction relief unless it is clearly erroneous. Pan kau v. State, 2013 Ark. 162. A finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Id.*

*2 In his petition and supplemental petitions for writ of habeas corpus, appellant alleged that the judgment-and-commitment order was invalid on its face and that the circuit court lacked jurisdiction. In support of this allegation, appellant asserted seven grounds: (1) that at the time of the commission of the crime, aggravated robbery was not specifically enumerated by statute as a predicate felony to support a capital-murder conviction, only robbery was, see Ark. Code Ann. § 5-10-101 (Repl.1997); (2) that Arkansas Code Annotated section 5-10-110 (Repl.1997) only authorizes separate convictions for capital murder and the predicate felony, which he contends did not include aggravated robbery; (3) that his due-process rights were violated because the circuit court sentenced him as a habitual offender although the felony information did not charge him as a habitual offender; (4) that his conviction of capital murder amounted to an ex post facto application of the law; (5) that because it did not specify whether the predicate felony of robbery included aggravated robbery; (6) that his conviction of capital murder, wherein the underlying felony was aggravated robbery, and his conviction of aggravated robbery placed him in double jeopardy; and (7) that the prosecutor violated the separation-of-powers doctrine by charging him for capital murder with the supporting felony of aggravated robbery when the legislature did not intend to include aggravated robbery as a predicate felony of capital murder.

A writ of habeas corpus is proper only when a judgment of conviction is invalid on its face or when a trial court lacked jurisdiction over the cause. Girley v. Hobbs, 2012 Ark. 447 (per curiam); Abernathy v. Norris, 2011 Ark. 335 (per curiam). The burden is on the petitioner in a habeas-corpus face; otherwise, there is no basis for a finding that a writ of habeas corpus should issue. Young v. Norris, 365 Ark. 219, 226 S.W.3d 797 (2006) (per curiam). Under our statute, a petitioner who does not allege his actual innocence and proceed under Act 1780 of 2001 Acts of Arkansas must plead either the facial invalidity or the lack of jurisdiction by the circuit court and must additionally make a showing by affidavit or other evidence of probable cause to believe that he is illegally detained. Ark. Code Ann. § 16-112-103(a)(1); Murphy v. State, 2013 Ark. 155 (per curiam); Murry v. Hobbs, 2013 Ark. 64 (per curiam). Proceedings for the writ are not intended to require an extensive review of the record of the trial proceedings, and the court's inquiry into the validity of the judgment is limited to the face of the commitment order. Murphy, 2013 Ark. 155.

[1] Appellant's first and third grounds asserted in support of his petition for the writ challenge the sufficiency of the felony information. Specifically, appellant claimed that he was charged with aggravated robbery, which, at the time of the commission of the crime, was not specifically enumerated by statute as a predicate felony to capital murder, and that he was sentenced as a habitual offender although the felony information failed to charge him as a habitual offender. Claims of defective charging documents are cognizable in habeas proceedings only in limited circumstances when the claims call into question the jurisdiction of the circuit court. Bryant v. May, 2013 Ark. 168 (per curiam). A nonjurisdictional challenge to the sufficiency of an information is an assertion of trial error and is not cognizable in a habeas proceeding. Van v. Hobbs, 2011 Ark. 287 (per curiam); see Ray v. State, 344 Ark. 136, 40 S.W.3d 243 (2001) (citing McNeese v. State, 334 Ark. 445, 976 S.W.2d 373 (1998)). A deficiency within a felony information does not render a judgment invalid on its face. Bryant, 2013 Ark. 168; see Goins v. Norris, 2012 Ark. 192 (per curiam) (affirming the denial

of a petition for writ of habeas corpus where the appellant alleged that his sentence was "facially illegal, invalid, and unconstitutional" on the grounds that the felony information failed to mention that he was a habitual offender, but the judgment of conviction indicated that he was convicted and sentenced as a habitual offender); Willis v. Hobbs, 2011 Ark. 509 (per curiam) (holding that claims of failure to include sufficient information to identify the crime are not cognizable in a habeas-corpus petition): Because appellant's claims did not call into question the jurisdiction of the circuit court or demonstrate the facial invalidity of the judgment, they were not cognizable in a habeas-corpus petition and could not have supported issuance of the writ.

*3 [2] In his second and sixth grounds in support of his petition for the writ, appellant asserted that he was placed in double jeopardy when he was charged, convicted of, and received separate sentences for capital murder and aggravated robbery. Specifically, he argued that the legislature only intended to allow separate convictions and sentences for capital murder and the underlying felony supporting capital murder, which, he maintained did not include aggravated robbery. Some claims of double jeopardy are cognizable in a habeas proceeding; however, where a double-jeopardy claim does not allege that, on the face of the commitment order, there was an illegal sentence imposed on a conviction, the claim does not implicate the jurisdiction of the court to hear the case, and the claim is not one cognizable in a habeas proceeding. Murphy, 2013 Ark. 155.

The circuit courts have specific authority to sentence a defendant for the underlying felony supporting a capital-murder charge, as well as the felony of capital murder itself. Jackson v. State, 2013 Ark. 19 (per curiam); see also Clark v. State, 373 Ark. 161, 282 S.W.3d 801 (2008) (citing Walker v. State, 353 Ark. 12, 110 S.W.3d 752 (2003)). While aggravated robbery was not specifically enumerated by statute at the time of the commission of the crime, this court has held that aggravated robbery will support a charge of capital murder. See Nooner v. State, 322 Ark. 87, 907 S.W.2d 677 (1995); Simpson v. State, 274 Ark. 188, 623 S.W.2d 200 (1981) ("[T]he General Assembly could not conceivably have intended that robbery, which may involve no force, would support a charge of capital murder, while aggravated robbery, an inherently dangerous crime, would not."). Thus, the circuit court did not act outside its jurisdiction when it entered the judgment-and-commitment order convicting and sentencing appellant for the separate offenses of capital murder and aggravated robbery.

[3] Finally, in his fourth, fifth, and sixth grounds for issuance of the writ, appellant asserted that his convictions and sentences amounted to an ex post facto application of the law because, at the time of the commission of the crime, aggravated robbery was not specifically enumerated as a predicate felony of capital murder, FN3 that the statute under which he was convicted was vague and indefinite in its terms because it did not specify whether robbery included aggravated robbery, and that the prosecutor infringed upon the duties of the legislature by charging him with capital murder and aggravated robbery, which was not specifically enumerated by statute as an underlying felony of capital murder at the time of the commission of the crime. Such claims are not cognizable in a habeas proceeding because they do not call into question the jurisdiction of the circuit court. Moreover, the type of factual inquiry necessary to address appellant's claims is one that goes beyond the face of the judgment-and-commitment order and is not the kind of inquiry to be addressed by a proceeding for the writ. See Friend v. Norris, 364 Ark. 315, 219 S.W.3d 123 (2005) (per curiam).

FN3. In 2007, the General Assembly amended section 5-10-101 to include aggravated robbery as a predicate felony supporting a capital-murder charge. See Act of Apr. 2, 2007, No. 827, § 19, 2007 Ark. Acts 4380, 4386. As previously discussed, however, this court held, prior to the 2007 amendment and, notably, prior to the commission of the crimes of which appellant was convicted, that aggravated robbery would constitute a predicate felony to support a charge of capital murder. See Simpson, 274 Ark. 188, 623 S.W.2d 200.

*4 Because his claims did not challenge the facial validity of the judgment and failed to demonstrate a lack of the trial court's jurisdiction, they were not cognizable in a petition for habeas-

corpus relief. Culbertson v. State, 2012 Ark. 112 (per curiam); Skinner v. Hobbs, 2011 Ark. 383 (per curiam). Therefore, appellant did not meet his burden of demonstrating a basis for a writ of habeas corpus to issue. McArtv v. Hobbs, 2012 Ark. 257 (per curiam); Henderson v. White, 2011 Ark. 361 (per curiam).

Appeal dismissed; petition and motions moot.

Ark., 2013.

Burgie v. Hobbs

Not Reported in S.W.3d, 2013 Ark. 360, 2013 WL 5436626 (Ark.)

END OF DOCUMENT

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A.C.A. § 5-4-401

West's Arkansas Code Annotated CurrentnessTitle 5. Criminal Offenses (Refs & Annos)

Subtitle 1. General Provisions (Chapters 1 to 9)

Chapter 4. Disposition of Offenders Subchapter 4. Imprisonment ⇒ **§ 5-4-401. Felonies, incarceration****APPENDIX N.**

(a) A defendant convicted of a felony shall receive a determinate sentence according to the following limitations:

- (1) For a Class Y felony, the sentence shall be not less than ten (10) years and not more than forty (40) years, or life;
- (2) For a Class A felony, the sentence shall be not less than six (6) years nor more than thirty (30) years;
- (3) For a Class B felony, the sentence shall be not less than five (5) years nor more than twenty (20) years;
- (4) For a Class C felony, the sentence shall be not less than three (3) years nor more than ten (10) years;
- (5) For a Class D felony, the sentence shall not exceed six (6) years; and
- (6) For an unclassified felony, the sentence shall be in accordance with a limitation of the statute defining the felony.

(b) A defendant convicted of a misdemeanor may be sentenced according to the following limitations:

- (1) For a Class A misdemeanor, the sentence shall not exceed one (1) year;
- (2) For a Class B misdemeanor, the sentence shall not exceed ninety (90) days;
- (3) For a Class C misdemeanor, the sentence shall not exceed thirty (30) days; and
- (4) For an unclassified misdemeanor, the sentence shall be in accordance with a limitation of the statute defining the misdemeanor.

CREDIT(S)

Acts of 1975, Act 280, § 901; Acts of 1977, Act 474, § 3; Acts of 1981, Act 620, § 8; Acts of 1983, Act 409, § 2.

Formerly A.S.A. 1947, § 41-901.

HISTORICAL AND STATUTORY NOTES

Arkansas Code Revision Commission

Technical changes were made in 2006 to conform with the official Arkansas Code of 1987 as approved by the Arkansas Code Revision Commission.

CROSS REFERENCES

Adult-oriented businesses in proximity to locations frequented by children, criminal penalties,
see § 14-1-306.

Fines, restitution and imprisonment, punishment for misdemeanors and felonies generally, see § 5-4-104.

Probation generally, revocation, see § 16-93-308.

Treason, see § 5-51-201.

LAW REVIEW AND JOURNAL COMMENTARIES

Bailey, When Did Shoplifting a Can of Tuna Become a Felony? A Critical Examination of Arkansas's Breaking or Entering Statute, 63 Ark. L. Rev. 269 (2010).

McMullen, A Brief Summary of Decisions from the Arkansas Supreme Court Affecting Gays and Lesbians, 34 U. Ark. Little Rock L. Rev. 337 (2012).

White, Comment: Criminal Consequences of Wi-Fi Joyriding: Whose Interests Should Arkansas Protect?, 62 Ark. L. Rev. 125 (2009).

LIBRARY REFERENCES



GARLAND COUNTY CIRCUIT COURT
DOCKET SHEET
18TH EAST CIRCUIT DIVISION I
STATE V ERIC BURGIE

APPENDIX O.

Filed: 12-JUL-2000 Security Level: 1 Sealed Ind (3 is SEALED): 1 Reason:

Court: 26 GARLAND Location: CI CIRCUIT Case Type: DI FELONY

PARTIES

APA - MICHELLE COE LAWRENCE
J - 18TH EAST CIRCUIT DIVISION I
P - STATE OF ARKANSAS
D - ERIC C BURGIE

EVENTS

DOCKETS

12-JUL-00 - MOF DIRECT - BURGIE, ERIC - TRIAL TYPE: J

12-JUL-00 - CRIMINAL INFORMATION SHEET - BURGIE, ERIC

09-JUL-01 - MOD JUDGMENT/DECREE/ORDER - BURGIE, ERIC - TRIAL TYPE: J

05-MAR-10 - LEGACY DOCKET SHEET - BURGIE, ERIC

28-OCT-11 - ORDER OTHER - BURGIE, ERIC - FORMAL ORDER - SUPREME COURT - Pro Se Motion and supplemental Motion for Rule on Clerk denied

cc: PA, FRAISER

11-MAY-12 - ORDER OTHER - BURGIE, ERIC - FORMAL ORDER - Pro Se Motion for Rule on Clerk is Dismissed

cc: PA, FRAISER

31-AUG-12 - LETTER FROM COURT - Letter to deft. from the court dated 8-30-12.

21-SEP-12 - AFFIDAVIT FILED - BURGIE, ERIC - AFFIDAVIT RE: FREEDOM OF INFORMATION ACT

21-SEP-12 - PETITION - BURGIE, ERIC - PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS SUBMITTED BY MAIL BY DEFT.

21-SEP-12 - AFFIDAVIT IN FORMA PAUPERIS - BURGIE, ERIC - AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS SUBMITTED BY DEFT BY MAIL.

20-NOV-12 - AFFIDAVIT FILED - BURGIE, ERIC - Affidavit with Letter to Prosecutor filed.

CC: PA

13-JAN-15 - NOTICE OF APPEAL - BURGIE, ERIC

13-JAN-15 - AFFIDAVIT FILED - BURGIE, ERIC

02-APR-15 - LETTER - letter from DC to deft enclosed with copy of Appeal per Denial of Petition of Writ of Certiorari; original to Supreme Court/Court of Appeals Clerk

09-APR-15 - LETTER - BURGIE, ERIC - LETTER FROM SUPREME COURT TO DEF

21-SEP-15 - FORMAL ORDERS - SC - motion to dismiss appeal granted

13-OCT-15 - AFFIDAVIT OF INDIGENCY - BURGIE, ERIC - AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS FILED BY DEFT P

13-OCT-15 - AFFIDAVIT FILED - BURGIE, ERIC - PRO SE

CC: PA, DEFT

13-OCT-15 - PET FOR WRIT OF CERTIORARI - BURGIE, ERIC - PRO SE

APPLICATION FOR THE WRIT OF CERTIORARI

13-OCT-15 - ORDER OTHER - ORDER DENYING APPLICATION FOR WRIT OF CERTIORARI

CC: PA, DEFT

19-OCT-15 - NOTICE OF APPEAL - BURGIE, ERIC - PETITIONERS NOTICE OF APPEAL FOR HIS APPLICATION FOR THE WRIT OF CERTIORARI

10-NOV-15 - PETITION - BURGIE, ERIC - PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND AFFIDAVIT

10-NOV-15 - PETITION - BURGIE, ERIC - PETITION TO CORRECT ILLEGAL SENTENCE

10-NOV-15 - PETITION - BURGIE, ERIC - SUPPLEMENTAL PETITION TO CORRECT ILLEGAL SENTENCE

23-NOV-15 - PETITION - BURGIE, ERIC - SUPPLEMENTAL PETITION TO CORRECT AN ILLEGAL SENTENCE PURSUANT TO ARK. CODE. ANN. 16-90-111

CC: PA

25-NOV-15 - ORDER OTHER - ORDER DENYING PETITION TO CORRECT ILLEGAL SENTENCE FILED

CC: PA, DEFT

25-NOV-15 - LETTER - letter to deft

INFORMATION REQUESTED MAILED TO DEFT

02-DEC-16 - NOTICE OF APPEAL - BURGIE, ERIC - PETITIONER'S NOTICE OF APPEAL FOR HIS PETITION TO CORRECT AN ILLEGAL SENTENCE

20-DEC-16 - ORDER OTHER - ORDER DENYING LEAVE TO PROCEED IN FORMA PAUPERIS

CC: PA, DEFT

03-JAN-17 - CERTIFICATE - Reporter's Certificate

13-FEB-17 - LETTER - BURGIE, ERIC - LETTER FROM DEFT TO JUDGE

INFORMATION REQUESTED HAS BEEN MAILED TO DEFT

13-FEB-17 - LETTER - LETTER FROM DEFT

COPIES WERE MAILED TO HIM THIS DATE

16-FEB-17 - LETTER - LETTER FROM SUPREME COURT TO DEFT

24-APR-17 - FORMAL ORDERS - SC - BURGIE, ERIC - MOTION FOR RULE ON CLERK, DENIED

13-NOV-17 - FORMAL ORDERS - SC - BURGIE, ERIC - PETITION DENIED

02-APR-18 - PET PROCEED IN FORMA PAUPER

02-APR-18 - AFFIDAVIT IN FORMA PAUPERIS

02-APR-18 - PETITION - PETITION FOR DECLATORY JUDGMENT IN HTE CIRCUIT COURT UNDER ARKANSAS CODE ANNOTATED SECTION 16-111-111-111

03-APR-18 - NO ACTION TAKEN - 18TH EAST CIRCUIT DIVISION I

07-MAY-18 - AFFIDAVIT FILED - PLEADINGS MAILED DIRECTLY TO THE COURT

07-MAY-18 - PETITION - PETITION FOR DECLATORY JUDGMENT IN THE CIRCUIT COURT UNDER ARKANSAS CODE ANNOTATED 116-111-111-111 (PLEADINGS MAILED DIRECTLY TO THE COURT)

07-MAY-18 - AMENDED PETITION - PETITIONERS AMENDED PETITION FOR DECLATORY JUDGMENT (PLEADINGS MAILED DIRECTLY TO THE COURT)

10-MAY-18 - AMENDED PETITION - PETITIONER'S AMENDED PETITION FOR DECLARATORY JUDGMENT

10-MAY-18 - AFFIDAVIT FILED

21-MAY-18 - ORDER OTHER - ORDER DENYING MOTION

28-JUN-18 - PET PROCEED IN FORMA PAUPER

28-JUN-18 - AFFIDAVIT FILED - AFFIDAVIT IN SUPPORT

Printed: 12/6/2022

29-JAN-19 - LETTER - LETTER FROM DEFT

30-JAN-19 - LETTER - LETTER FROM SCT

11-FEB-19 - PETITION - PETITION TO CORRECT ILLEGAL SENTENCE DENIED

11-FEB-19 - ORDER PETITION DENIED

15-FEB-19 - LETTER - LETTER FROM DEFT

(COPY OF LETTER FROM SCT MAILED TO DEFT)

28-FEB-19 - MOTION OTHER - MOTION FOR RULE ON CLERK

28-FEB-19 - AFFIDAVIT FILED

28-FEB-19 - CLERK NOTE - EVERYTHING FILED IN THIS CASE SINCE 10-19-18 A COPY HAS BEEN MAILED TO DEFT.

10-JUN-19 - ORDER OTHER - FORMAL ORDER SCT.

10-JUN-19 - FILING - OTHER - OPINION

10-JUN-19 - FILING - OTHER - DISSENTING OPINION

05-AUG-19 - ORDER OTHER - FORMAL ORDER SCT

23-APR-20 - PETITION - PETITION TO CORRECT ILLEGAL SENTENCE PURSUANT TO ARK. CODE ANN. SECTION 16-90-111

23-APR-20 - MOTION APPOINT COUNSEL

23-APR-20 - AFFIDAVIT IN FORMA PAUPERIS

27-MAY-20 - ORDER PETITION DENIED - 18TH EAST CIRCUIT DIVISION I - ORDER DENYING PETITION TO CORRECT ILLEGAL SENTENCE PURSUANT TO ARK. CODE ANN. SECTION 16-90-111

23-JUN-20 - NOTICE OF APPEAL - PETITIONERS NOTICE OF APPEAL WITH REGARD TO CIRCUIT COURTS DENIAL OF PETITION TO CORRECT AN ILLEGAL SENTENCE UNDER ACA 16-90-11

26-JUN-20 - LETTER - LETTER FROM SCT CLERK TO DEFT

26-JUN-20 - LETTER - LETTER FROM SCT CLERK TO DEFT

02-JUL-20 - PET FOR WRIT OF MANDAMUS

02-JUL-20 - MOTION OTHER - MOTION FOR RULE ON CLERK

02-JUL-20 - MOTION OTHER - PETITIONER'S MOTION FOR ORDER CONCERNING PETITION TO CORRECT AN ILLEGAL SENTENCE DENIED BY THIS COURTS MAY 26, 2020 ORDER

02-JUL-20 - NOTICE OF APPEAL

02-JUL-20 - PETITION - AMENDED PETITION FOR REQUEST MADE UNDER THE FREEDOM OF INFORMATION ACT PURSUANT TO ACA SECTION 25-19-101 TO ACA SECTION 25-19-107

30-JUN-22 - AFFIDAVIT IN FORMA PAUPERIS

30-JUN-22 - FILING - OTHER - ENVELOPE

04-AUG-22 - ORDER OTHER - Order Denying In Forma Pauperis

28-OCT-22 - MOTION APPOINT COUNSEL

28-OCT-22 - PET PROCEED IN FORMA PAUPER

28-OCT-22 - AFFIDAVIT IN FORMA PAUPERIS

08-NOV-22 - ORDER OTHER - ORDER DENYING PETITION TO PROCEED IN FORMA PAUPERIS AND PETITION TO CORRECT ILLEGAL SENTENCE

16-NOV-22 - MOTION OTHER - MOTION FOR JUDGMENT AS A MATTER OF LAW ON THE PLEADINGS

16-NOV-22 - FILING - OTHER - DEFENDANTS RETURN ADDRESS

05-DEC-22 - LETTER - LETTER FROM DEFENDANT

APPENDIX P.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ERIC BURGIE

PETITIONER

V.

CASE NO. 22-2866

DEXTER PAYNE, Director,
Arkansas Division of Correction

RESPONDENT

RESPONSE TO APPLICATION FOR PERMISSION TO FILE
A SUCCESSIVE HABEAS CORPUS PETITION

Comes now the Respondent, Dexter Payne, Director, Arkansas Division of Correction, by and through counsel, Leslie Rutledge, Attorney General, and Pamela Rumpz, Senior Assistant Attorney General, and for his response, states:

Procedural History

On July 30, 2001, a Garland County, Arkansas jury convicted Eric Burgie of capital murder and aggravated robbery. He was sentenced to life imprisonment without parole in the Arkansas Division of Correction. His convictions were affirmed on direct review, *see Burgie v. State*, 2003 WL 367733 (Ark. Feb. 20, 2003), and he also unsuccessfully sought state post-conviction relief.

On August 2, 2006, Burgie sought federal habeas corpus relief in the District Court for the Eastern District of Arkansas. In his petition, he raised numerous claims for relief. *See Burgie v. Norris*, No. 5:06CV00205 (Doc. #2). Burgie also alleged he was actually innocent. Respondent moved to dismiss the petition

arguing that Burgie's claims were all barred by the expiration of the statute of limitations.

On May 9, 2007, the magistrate judge agreed and recommended that Respondent's motion to dismiss be granted and Burgie's petition be dismissed with prejudice. On May 21, 2007, the district court adopted the findings and recommendations of the magistrate judge in their entirety and dismissed Burgie's petition with prejudice. *See Burgie v. Norris*, No. 5:06CV00205 (Doc. #21).

On April 1, 2008, Burgie again initiated a habeas action in the district court of the Eastern District of Arkansas seeking to have the court reverse and vacate a disciplinary conviction that he received on December 19, 2005, while he was incarcerated in the Varner Super Max Unit of the Arkansas Division of Correction. *See Burgie v. Norris*, No. 5:08CV00089 (Doc. #1). Respondent moved to dismiss the petition again arguing that Burgie's claims were barred by the statute of limitations.

On or about September 26, 2008, while a decision on the former filing was pending, Burgie filed an application seeking permission to file a successive habeas corpus petition. *See Burgie v. Norris*, No. 08-3223 (8th Cir.) In that application, Burgie alleged numerous claims of ineffective assistance of counsel, police and prosecutor misconduct as well as trial court error. This Court denied Burgie's application. *Burgie v. Norris*, No. 08-3223 (Judgment, Nov. 21, 2008).

On January 27, 2009, the magistrate judge issued a recommendation in Burgie's still pending petition advising that Respondent's motion to dismiss should be granted and Burgie's petition concerning the disciplinary action dismissed with prejudice. On February 13, 2009, the district court adopted the findings and recommendations of the magistrate judge in their entirety and dismissed Burgie's petition without prejudice. *See Burgie v. Norris*, No. 5:08CV00089 (Docs. #29, 32, 33). This Court denied Burgie's request for a certificate of appealability on July 2, 2009. *See Burgie v. Norris*, No. 09-1425 (8th Cir. 2009).

On May 5, 2012, Burgie filed in this Court a second application seeking permission to file a second or successive habeas corpus petition. *Burgie v. Norris*, No. 12-2165 (8th Cir. May 5, 2012). In that application, Burgie raised claims of ineffective assistance of counsel, prosecutorial misconduct, and trial court error. This Court denied Burgie's application. *Burgie v. Norris*, No. 12-2165 (8th Cir. Aug. 31, 2012).

In 2014, Burgie filed a third application seeking permission to file a second or successive habeas corpus petition. *Burgie v. Hobbs*, No. 14-2963. In that application he asserted that aggravated robbery was not an underlying felony for capital murder and, thus, he was actually innocent, both as a substantive matter under *Herrera v. Collins*, 506 U.S. 390 (1993) and under *McQuiggin v. Perkins*, 569 U.S. 383 (2013), so as to excuse the expiration of the AEDPA statute of

limitations which had operated to bar his original habeas claims in 2006. This Court denied the application. *Burgie v. Hobbs*, No. 14-2963 (8th Cir. Jan. 29, 2015).

Three times unsuccessful in this Court, Burgie then returned to the district court and filed a habeas corpus petition directly in that court, raising the claim that he could not be convicted of capital murder because aggravated robbery was not a valid underlying felony. *Burgie v. Kelley*, No. 5:16-CV-000196 (Doc. #2-0). It was dismissed without prejudice for Burgie to obtain permission from this Court to seek successive habeas corpus relief in the district court. *Burgie v. Kelley*, No. 5:16-CV-000196 (Doc. #3-0).

Current Application

In this fourth application, Burgie realleges that his convictions for capital murder and aggravated robbery violate due process because aggravated robbery could not be used as the underlying felony for capital murder at the time he was convicted.¹ Section 2244(b)(1) states, “A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.” Thus, the grounds Burgie proposes to raise

¹ Burgie has raised this issue of state law in state court, where the Arkansas Supreme Court reaffirmed its holding that aggravated robbery (which has all the elements of robbery) could be used as the underlying felony supporting the charge of capital murder and also constituted a separate offense. *See Burgie v. State*, 2013 Ark. 360, at 6.

are subject to mandatory dismissal in this application just as they have been in numerous prior applications. *See* 28 U.S.C. § 2244(b)(1).

WHEREFORE, Burgie's application for permission to file a successive petition for writ of habeas corpus should be denied.

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Pamela Rumpz, hereby certify that on September 14, 2022, I electronically filed the foregoing with the Clerk of the Court for the Eighth Circuit using the CM/ECF system, and mailed a copy of same by U.S. Mail, postage prepaid, to the following non CM/ECF participant:

Mr. Eric Burgie
ADC #120956
East Arkansas Max Unit
P.O. Box 970
Marianna, AR 72360

/s/Pamela Rumpz
Pamela Rumpz

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this document consists of six (6) pages, and is therefore in compliance with the page limitation specified in Eighth Cir. R. 22B(d).

/s/ Pamela Rumpz
Pamela Rumpz