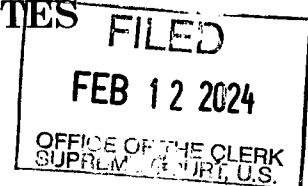


23-6833 ORIGINAL
No. 24-

IN THE
SUPREME COURT OF THE UNITED STATES



Jason Matthew Karr,

Petitioner,

vs.

Colorado,

Respondent.

On Petition for Writ of Certiorari
in the United States Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Colorado Supreme Court held the Petitioner to a standard for pleading deficient performance and prejudice in his claims of Ineffective Assistance of Counsel, which was higher than the standard established by this Court's holding in *Strickland v. Washington*?
2. Whether the Colorado Supreme Court unreasonably applied the governing principles of clearly established federal law created by this Court's holding in *Strickland v. Washington*?
3. Whether the state courts decisions should be reversed and case remanded for an evidentiary hearing, and appointment of counsel in order to address the Petitioner's meritorious ineffective assistance of counsel claims?

RELATED PROCEEDINGS TO THIS CASE

1. Colorado Supreme Court:
Karr v. Colorado, No. 23SC425 (Nov. 14, 2023)
2. Colorado Court of Appeals:
People v. Karr, No. 21CA1377 (May 4, 2021)
3. Teller County (Colo.) District Court:
People v. Karr, No. 17CR108 (Feb. 26, 2018)

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- C. Decision of the Colorado Court of Appeals (Case No. 21CA1377)**

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PETITION FOR A WRIT OF CERTIORARI

Jason Matthew Karr respectfully petitions for a writ of certiorari to review the judgment of the Colorado Supreme Court and the Colorado Court of Appeals.

OPINIONS BELOW

The opinions of both the Colorado Supreme Court and Colorado Court of Appeals are unpublished.

JURISDICTION

The Colorado Supreme Court entered its judgment on November 14, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

U.S. Constitution, Sixth Amendment

U.S. Constitution, Fourteenth Amendment

Colorado Revised Statutes, C.R.S., § 21-1-3.....3

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STATEMENT OF THE CASE

The Government charged Mr. Karr with two counts of sexual assault and false imprisonment. The information alleged that Karr was in an intimate relationship with the complaining witness, RMB, and as such, classified the case as one of domestic violence. In the instant case, Karr consistently maintained his innocence. Karr informed his attorneys that the crimes that were actually committed in this case are false reporting to authorities and perjury in the first degree both committed by the complaining witness. Nevertheless, a jury wrongfully convicted Karr on all counts being charged and the trial court sentenced him to an indeterminate sentence of two-years to life and four-years to life with a concurrent one-year jail sentence to be served in the Colorado Department of Corrections.

The information alleged that RMB and Karr first met on an online dating website and after communicating by text and telephone Karr agreed to meet RMB for a date. A week later the two not only began an intimate sexual relationship but started living together at the home of RMB in Woodland Park, Colorado. RMB (who was significantly older than Karr) was married and had two sons. At the time of this (alleged assault) RMB was mentally unstable suffering with numerous mental health disorders. Additionally, she was under the influence of both alcohol and narcotics, mixing several different varieties of alcohol and drugs abusing her prescription medications with alcohol and other illegal drugs.

Mr. Karr has continuously maintained his innocence since his arrest in 2017. In this case, Karr wished to raise an “actual innocence” defense, however, at the trial his attorneys

choose to use a different type of defense. As a result of their decision and multiple other instances of ineffective assistance of counsel (IAC) and due to numerous serious errors made by the courts and the prosecution during Karr's trial he was wrongfully convicted for crimes he did not commit. In the specific case there is actually, in fact, more available exculpatory evidence proving innocence, than available evidence proving guilt. Today, the most important issue before this Court is if a fundamental "miscarriage of justice" would result from the courts failure to entertain Karr's claim of "actual innocence". (Emphasis added).

Karr filed an appeal but the Colorado Court of Appeals affirmed the convictions against him. The Colorado Supreme Court then denied his petition for writ of certiorari. Karr's appellate attorney then filed a motion for reconsideration which was denied by the Teller County District Court.

Karr then filed a pro se motion for post-conviction relief pursuant to Colorado Rules of Criminal Procedure Rule 35(c) and a combined request for appointment of counsel pursuant to C.R.S., 21-1-103 and 21-1-104. On August 19, 2021, the district court erred by summarily denying Karr's post-conviction motion for relief and request for the appointment of counsel without an evidentiary hearing. Then Karr filed an appeal due to the summary denial of his pro se post-conviction Rule 35(c) petition. In the appeal, Karr's attorney failed to properly present all of his issues and only raised three of his claims. Karr asserted fifty-eight claims in his lengthy pro se post-conviction motion and due to his appellant attorney's failure to properly reassert those claims on appeal the issues have now been ignored, unresolved and abandoned.

The Colorado Court of Appeals affirmed the order denying the pro se post-conviction petition and the request for appointment of counsel and the Colorado Supreme Court then denied his petition for writ of certiorari. In the instant case, the Petitioner has suffered numerous serious violations of his Constitutional rights due to IAC, outrageous governmental conduct of the Teller County Sheriff's Office law enforcement officials 4th Judicial District Attorney's Office and due to several serious errors made by the State courts.

REASONS FOR GRANTING THE WRIT

The United States Supreme Court should grant review in the case before this Honorable Court because the Colorado courts have continued to disregard the authority of this Court by failing to follow its precedents.

- The State courts have failed to follow this Court's precedents in important cases, such as, *Strickland v. Washington*.
- The State courts decisions are contrary to and involve an unreasonable application of clearly established Federal law, as determined by the United States Supreme Court.
- The state courts rulings and opinions have caused numerous serious violations of the Petitioner's Constitutional Rights.

The Sixth Amendment to the U.S. Constitution guarantees all criminal defendants the right to counsel to assist in their defense. Additionally, the Due Process Clause provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." This Court has held that the Due Process Clause protects individuals against two types of government action, violations of substantive due process and procedural due process. The U.S. Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause.

The Equal Protection of U.S. Constitution Amendment XIV provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

In this case, the Petitioner, raised several specific claims of ineffective assistance of counsel (IAC), therefore a hearing should have been held for the factual development of those claims. See *Massaro v. United States*, 538 U. S. 500 (2003). Here, because the petitioner filed his post-conviction motion pro se without the help of competent legal counsel the district court had a duty in the interest of "justice" to adopt any means appropriate for inquiry into the legality of the petitioner's motion in order to ascertain all possible grounds

upon which the petitioner might claim to be entitled to relief. See *Anders v. United States*, 373 U.S. 1 (1963).

The United States Supreme Court has established the legal principles that govern claims of IAC. A proper application was articulated in the case of *Williams v. Taylor*, 529 U.S. 362 (2000), this Court determined that: "A refusal by a state's highest court to properly apply Strickland is a decision that was "contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court's holding in *Strickland v. Washington*."

This test qualifies as clearly established federal law as determined by the Supreme Court, where (a) the Supreme Court's precedent dictated that the state court apply the *Strickland v. Washington* test at the time that the state court entertained the accused's ineffective assistance claim, and (b) it can hardly be said that recognizing the right to effective counsel breaks new ground or imposes a new obligation on the states; and the state court's decision was both (a) contrary to such clearly established federal law, insofar as the state court's decision turned on an erroneous view that a "mere" difference in outcome is not sufficient to establish constitutionally IAC, and (b) an unreasonable application of such federal law, insofar as (i) the state court's analysis concerning a "mere" difference in outcome relied on an inapplicable exception to *Strickland v. Washington*.

The Court's precedent "dictated" that the State court apply the Strickland test to Karr's claims of IAC. In the case of *Strickland v. Washington*, this Court established the legal

principles that govern claims of IAC. Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. See *Strickland v. Washington*, 466 U.S. 668 (1984).

This Court has repeatedly established the legal principles that govern claims of IAC, an ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. To establish deficient performance, a petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. The Court has declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that the proper measure of attorney performance remains simply reasonableness under prevailing professional norms. See *Wiggins v. Smith*, 539 U.S. 510 (2003).

A decision by a state court is "contrary to" the United States Supreme Court's clearly established law if it applies a rule that contradicts the governing law set forth in the

Supreme Court's cases or if it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from the Supreme Court's precedent. See *Ford v. Cockrell*, 315 F. Supp. 2d 831(U.S. Dist.2004)

Here, the state courts held the petitioner to a standard for pleading constitutionally deficient performance and prejudice in a claim of IAC which was higher than the standard established by this Court in *Strickland v. Washington*. Furthermore, the State courts have made decisions that are contrary to and involve an unreasonable application of clearly established Federal law created by this Court's holding in *Strickland*.

Additionally, the State courts abused its discretion by failing to appoint counsel and provide an evidentiary hearing for meritorious claims of IAC and other potential claims for relief. When a meritorious reason exists for further review, the assistance of counsel in a post-conviction proceeding makes it possible for the convicted defendant to receive a full review of all issues pertaining to possible violations of his Constitutional rights and at the same time provides the criminal justice system with a method to inject finality into criminal proceedings.

In the State of Colorado, the current procedure for a pro se litigant in a post-conviction proceeding is an unfair and irrational process, which does not provide the defendant with a constitutional right to post-conviction counsel.

There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in state post-conviction proceedings. *Coleman v. Thompson*, 501 U.S. 722 (1991). In Coleman, the Court announced that "[t]here is no constitutional right to an attorney in state post-conviction proceedings."

While the right to trial counsel is well-established, there is no similar right to post-conviction counsel. Some states automatically appoint post-conviction counsel, other states simply refuse. So, depending on the state a person resides in determines if they will get counsel to assist them in a post-conviction proceeding. There should be a National norm.

The Colorado Supreme Court holds that while there is no constitutional right to counsel in post-conviction proceedings, there exists a limited statutory right to post-conviction counsel in Colorado, *if* a defendant's Colo. R. Crim. P. 35(c) motion has arguable merit.

Furthermore, in order to give meaning to that limited statutory right, post-conviction counsel must provide effective assistance of counsel as measured by the Strickland standard. Currently, there is no constitutional right to post-conviction counsel under either the United States Constitution or the Colorado Constitution. *See e.g. Silva v. People*, 156 P.3d 1164 (Colo. 2007). The United States Supreme Court has long held that there is no constitutional entitlement to counsel in post-

conviction proceedings. *See Netting v. State*, 129 So. 3d 429 (2013).

Neither the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of meaningful access requires the state to appoint counsel for indigent prisoners seeking state post-conviction relief. The Sixth and Fourteenth Amendments to the U.S. Constitution assure the right of an indigent defendant to counsel at the trial stage of a criminal proceeding, and an indigent defendant is similarly entitled as a matter of right to counsel for an initial appeal from the judgment and sentence of the trial court. *See Giarratano v. Murray*, 492 U.S. 1 (1989).

But the right to counsel is the right to the *effective* assistance of counsel. And when trial counsel is ineffective, the right to post-conviction counsel must extend or else the right to counsel is essentially meaningless. The Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." *Strickland v. Washington*.

The United States Supreme Court evaluates state criminal procedures one at a time, as they come before the court, while leaving the task of crafting appropriate procedures to the laboratory of the states in the first instance; the court will not cavalierly impede the states' ability to serve as laboratories for testing solutions to novel legal problems.

The Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment largely converge to require that a state's procedure afford adequate and effective appellate review to indigent defendants. A state's procedure provides such review so long as it reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal. *Smith v. Robbins*, 528 U.S. 259, 277 (2000).

The Sixth amendment to the United States Constitution and article II, section 16 of the Colorado Constitution guarantee a criminal defendant the right to counsel. That right is a fundamental component of our criminal justice system. *United States v. Cronic*, 466 U.S. 648, 653 (1984). It is now universally accepted that lawyers representing defendants in criminal cases are "necessities, not luxuries." *Gideon v. Wainwright*, 372 U.S. 335, 344, (1963). Their presence is essential because they provide the means through which the other rights of the defendant are secured. Without counsel, the right to a trial itself would be "of little avail." *Cronic*, 466 U.S. at 653; *Powell v. Alabama*, 287 U.S. 45, 68 (1932). Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects the defendant's ability to assert any other rights he may have. For that reason, it has been recognized that the right to counsel includes the right to effective assistance of counsel. Both the federal and state constitutions envision the role of counsel as critical to the ability of the adversarial system to produce just results. *Strickland*, 466 U.S. at 685. The premise of the right to effective assistance of counsel --

indeed, the premise of our adversary system in general -- is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. Without the help of sufficiently competent attorney, an individual will have difficulties vindicating a substantial IAC claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, an individual asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, an individual likely needs an effective attorney. But some states will simply refuse to appoint counsel for post-conviction proceedings.

The same would be true if the State did not appoint an attorney to assist someone in a direct appeal or the initial-review collateral proceeding. The person, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive and crucial details of federal constitutional law. While confined, he is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record. His inability to present a claim of trial error is of particular concern when the claim is one of IAC.

The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an "obvious truth" the idea that "any person hauled into court,

who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Indeed, the right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S. Ct. 55 (1932) ("[The defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence"). See *Martinez v. Ryan*, 566 U.S. 1 (2012).

Today, this Court is faced with an important question: Should this Court established a federal constitutional right for post-conviction counsel?

By extending the right to counsel to defendants in post-conviction proceedings, this Court can embrace what the Court originally declared in *Gideon*: that the "noble ideal" of the Sixth Amendment "cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him."

In *Martinez*, the Court almost completely ignored this idea, instead focusing almost exclusively on the claim of ineffective assistance of trial counsel, even while extolling the right to counsel, at least at trial, as "a bedrock principle

in our justice system." The Court does point out why it believes it unnecessary to declare a constitutional right to post-conviction counsel, noting that at least twenty-one states and the District of Columbia do appoint post-conviction counsel in some circumstances.

Guaranteeing a defendant the right "to have the Assistance of Counsel for his defense," the Sixth Amendment so demands. With individuals liberty and, in capital cases, life at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt. The Sixth Amendment guarantees to each criminal defendant the assistance of counsel for his defense. The accused may insist upon representing themselves, but the right to defend is personal, and a defendant's choice in exercising that right must be honored out of that respect for the individual which is the lifeblood of the law. See *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

In a long line of cases that includes *Powell v. Alabama*, 287 U.S. 45 (1932), *Johnson v. Zerbst*, 304 U.S. 458 (1938), and *Gideon v. Wainwright*, 372 U.S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." *Strickland*, *supra*, at 684-685.

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf are essential to due process. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense--a right to his day in court--are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel. See *Chambers v. Miss.*, 410 U.S. 284(1973).

Strickland recognized "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S., at 686.

The goal of a just result is not divorced from the reliability of a conviction, see *United States v. Cronic*, 466 U.S. 648, 658, 104 S. Ct. 2039 (1984); but here the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance. See *Lafler v. Cooper*, 566 U.S. 156 (2012).

The right to counsel under U.S. Const. amend. IV exists in order to protect the fundamental right to a fair trial. Thus, the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. See *Lockhart v. Fretwell*, 506 U.S. 364(1993).

In addition, cases such as *Nix v. Whiteside*, 475 U.S. 157, 106 S. Ct. 988 (1986), and *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838 (1993), do not justify a departure from a straightforward application of Strickland when the IAC does deprive the defendant of a substantive or procedural right to which the law entitles him. In the instant case, it is undisputed that Karr had a right—indeed, a constitutionally protected right—to effective assistance of counsel.

Nevertheless, the state courts failed to properly apply the governing principles found in Strickland. There was no inquiry of counsel's deficient performance. Furthermore, there was no evidentiary hearing or appointment of counsel

in order for Karr to have an opportunity to establish the ineffective assistance of counsel claims.

Furthermore, this Court has made it clear time and time again that under the "unreasonable application" clause, a federal court may grant relief if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies those principles to the facts of the petitioner's case. See *Williams v. Taylor*, *supra*.

The Sixth Amendment's requirement that "the accused shall enjoy the right ... to have the Assistance of Counsel for his defense" is made obligatory on the States by the Fourteenth Amendment. See *Anders v. California*, 386 U.S. 738, 742 (U.S. May 8, 1967); the United States Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), unanimously held that the Sixth Amendment to the United States Constitution, which is applied to the states through the Due Process Clause of the Fourteenth Amendment, requires the appointment of counsel at public expense to indigent defendants in state felony trials.

The Colorado Supreme Court said that the right to counsel must be extended to all contempt proceedings, whether labeled civil or criminal, which result in the imprisonment of the witness. The Colorado Supreme Court then articulated the principle that the Sixth Amendment secures to indigent people the right to appointed counsel in every contempt proceeding where imprisonment is a real threat. The possibility of imprisonment arising out of

contempt proceedings, whether civil or criminal, has been held to trigger the Sixth Amendment right to counsel. *In re A.C.B.*, 507 P.3d 1078 (Colo. Ct. App. 2022).

Both the United States and Colorado Constitutions guarantee a defendant the right to counsel "at every critical stage of a criminal proceeding." *Key v. People*, 865 P.2d 822, 825 (Colo. 1994) (first citing U.S. Const. amend. VI; then citing Colo. Const. art. II, § 16; then citing *United States v. Cronic*, 466 U.S. 648, 659 (1984)). *People v. Wright*, 498 P.3d 1147 (Colo. Ct. App. 2021).

In accordance with current Colorado law Karr was entitled to an evidentiary hearing and appointment of counsel. Thus, the Colorado courts have made it clear time and time again that a defendant need not set forth the evidentiary support for his allegations in his Colo. R. Crim. P. 35 motion; instead, the defendant need only assert facts that if true would provide a basis for relief. *People v. Brack*, 796 P.2d 49, (Colo. Ct. App. 1990).

The statutes and rules of Colorado provide a criminal defendant with an adequate opportunity to develop the required record to establish ineffective assistance. Colo. Rev. Stat. § 18-1-410 (2002); Colo. R. Crim. P. 35(c). A motion for post-conviction relief pursuant to Colo. R. Crim. P. 35(c) may be denied without an evidentiary hearing only where the motion, files, and record in the case clearly establish that the allegations presented in the defendant's motion are without merit and do not warrant post-conviction relief. Colo. R. Crim.

P. 35(c)(3). See *Ardolino v. People*, 69 P.3d 73 (Colo. 2003); A defendant need not set forth the evidentiary support for his allegations in his initial Rule 35 motion; instead, a defendant need only assert facts that if true would provide a basis for relief under Rule 35. See *White v. Denver Dist. Court*, 766 P.2d 632 (Colo. 1988).

In fact, even if the defendant's allegations seem unbelievable or improbable is not the test set forth in the Rule for determining whether a hearing should or should not be afforded. Unless the motion itself, the files or the record of the case show that the individual is not entitled to relief, he must be given an opportunity to support his allegations with evidence presented at a hearing. See *Roberts v. People*, 158 Colo. 76 (1965).

In *People v. Chalchi-Sevilla*, 454 P.3d 359 (Colo. Ct. App. 2019) the post-conviction court summarily denied the defendant's two post-conviction claims and his request for the appointment of counsel. The Colorado Court of Appeals determined that the post-conviction court erred by denying one of the claims without appointing counsel and conducting an evidentiary hearing. Here, the same state court has failed to appoint counsel and provide Karr with an opportunity to prove his factual allegations at an evidentiary hearing, as the law in Colorado clearly mandates is required.

Further, the lower court erred by summarily denying Karr's post-conviction motion without the appointment of counsel and an evidentiary hearing. The court abused its discretion by failing to appoint counsel to investigate

potential claims for relief, and if warranted, to pursue such claims. The right to assistance of counsel has been interpreted as an affirmative constitutional right. Not only must a court allow a defendant to have an attorney by his or her side, but it also must provide a defendant with an attorney if he or she cannot afford one. Furthermore, the Sixth Amendment guarantees the "assistance of counsel". An appointment cannot be merely formal but must provide real aid to the defendant to satisfy the constitutional guarantee. The answers regarding how the right to counsel interacts with the Colorado procedures is far from certain, but the need for litigation presenting these questions is long overdue.

Currently, Colorado has a double standard when it comes to appointing counsel in post-conviction petitions. The current process creates a two-tiered system for post-conviction cases: those with the financial resources to hire counsel and those without such resources. That, of course, makes a mockery of any claim of equal justice for all.

In cases when a criminal defendant can afford counsel, the courts will grant a defendants post-conviction relief. Colorado Crim. P. 35(c)(3)(IV) and (V) require a post-conviction court to allow appointed counsel, when requested, to respond to all claims raised in a pro se motion if the "motion" cannot be summarily denied because it contains at least one claim that is not subject to denial under Crim. P. 35(c)(3)(IV). ("[T]he procedures mandated by Crim. P. 35(c)(3)(V) inure to the defendant's benefit"); ("[T]he district court's decision not to send [the defendant's] post-

conviction motion to the public defender's office deprived [the defendant] of the opportunity to have the public defender's office respond or add any claims with arguable merit.").

Contrary to the People's assertion, nothing in Crim. P. 35(c)(3)(IV) permits a court to partially resolve a post-conviction motion by summarily denying some claims and initiating Crim. P. 35(c)(3)(V)'s procedures for other claims. Rather, if a defendant's post-conviction motion contains at least one claim that is not subject to summary denial under Crim. P. 35(c)(3)(IV), then the motion cannot be summarily denied, and the complete copy of the motion must be subjected to the procedures of Crim. P. 35(c)(3)(V). The People also argue that interpreting Crim. P. 35(c)(3)(V) to require a post-conviction court to forward an entire motion containing some potentially meritorious claims and some wholly unfounded claims to the public defender's office conflicts with the law on the statutory right to post-conviction counsel because a defendant is entitled to representation by counsel only on a "motion [that] contains claims that are not wholly unfounded." See §§ 21-1-103, -104, C.R.S. 2022. We disagree.

In *Silva v. People*, 156 P.3d 1164 (Colo. 2007), the Colorado Supreme Court recognized "a limited statutory right to post-conviction counsel for meritorious Crim. P. 35(c) motions." Id. at 1168. The court held that "the statutory right is limited to cases where a Crim. P. 35(c) petition is not wholly unfounded as judged by the trial court." The court then noted that Crim. P. 35(c)(3)(V) requires the public defender to review a "complete copy of said motion" and to state "whether [it] intends to enter on behalf of the defendant." The court

thus held that "the statutory right is also limited if the state public defender's office finds the Crim. P. 35(c) motion without merit." The court concluded that, "the [S]tate public defender's office must find that a defendant's Crim. P. 35(c) motion has arguable merit before the statutory right to post-conviction counsel is triggered." Contrary to the People's argument, then, Crim. P. 35(c)(3)(IV) and (V) demonstrate that the statutory right to post-conviction counsel is triggered when the "motion" or "petition" is not wholly unfounded. Thus, if a motion survives summary denial under Crim. P. 35(c)(3)(IV) because it contains at least one potentially meritorious claim, the motion is not wholly unfounded, even though it may contain some wholly unfounded claims. Therefore, forwarding the motion to the public defender's office under Crim. P. 35(c)(3)(V) would not run afoul of Silva. See *People v. Nozolino*, 533 P.3d 966 (Colo. Ct. App. 2023).

Here, the state court should reconsider the holding in *Silva v. People*, 156 P.3d 1164 (Colo. 2007) that an indigent defendant only has a right to appointment of counsel if the defendant has made one or more claims in a *pro se* petition which have some arguable merit and are not wholly unfounded.

A post-conviction petition is a collateral attack that normally occurs only after a defendant has failed to secure relief through direct review of his or her conviction. States have no obligation to provide post-conviction review, and when they do, neither the Due Process Clause nor the Equal Protection guarantee of meaningful access requires states to

provide indigents legal representation to pursue those claims. *Barbour v. Haley*, 471 F.3d 1222 (2006).

In *Martinez*, the Court was presented with a great opportunity to answer the question upon which it passed in *Coleman*. The Court could have ruled in a number of ways, possibly establishing that there either is or is not a constitutional right to post-conviction counsel, in all or some situations. Instead, though, the Court carved out the exception envisioned in *Coleman*, but only while limiting it to the narrowest of circumstances: a prisoner may allege that they received ineffective assistance of post-conviction counsel and use that to have a federal court reexamine his or her claim on the merits, but only when that ineffective assistance relates to a substantial claim of ineffective assistance of trial counsel, and only if the post-conviction forum is the first opportunity to present a claim of ineffective assistance of trial counsel.

Despite the phrasing of the Sixth Amendment that the a defendant shall enjoy the assistance of counsel "[i]n all criminal prosecutions," the Supreme Court did extend both the right to assistance of counsel and the *effective* assistance of that counsel beyond the trial phase in *Douglas* and *Evitts*, albeit through equal protection and due process concerns. However, in three cases following *Evitts*, the Court made clear that the Constitution does not encompass a right to counsel beyond the first appeal as of right.

Then, in *Pennsylvania v. Finely*, the Court noted that it had "never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today."

In refusing to find a constitutional right to post-conviction counsel, the Court noted that counsel at trial primarily serves "as a shield to protect him against being 'hauled into court' by the State and stripped of his presumption of innocence." Thus, the Court viewed the justification for allowing the assistance of counsel and requiring the appointment of counsel at trial as far outstripping the justifications for doing the same in post-conviction review where counsel would serve "as a sword to upset the prior determination of guilt." Reiterating this view in *Murray v. Giarratano*, the Court applied the rule of Finley, which involved a non-capital defendant, to capital defendants, holding that the "additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are . . . sufficient to assure the reliability" of a capital conviction so as to not require the appointment of counsel in post-conviction proceedings.

Finally, in *Coleman v. Thompson*, a case that dealt much more extensively with the intricacies of federal habeas corpus review than the right to counsel, the Court connected the premises of McMann, Finley, and Giarratano in explicitly acknowledging that, when there is no constitutional right to counsel, there can be no constitutional claim of ineffective assistance of counsel.

The Court in *Martinez* had an opportunity to help put an end to this system of impediments, but it instead chose to carve out only a narrow exception that will provide little relief to prisoners who have been denied a full and fair opportunity to adjudicate their claims. *Martinez* was a missed opportunity for the Court, and it will do little to assist prisoners until the Court recognizes what *Martinez* called for: “A federal constitutional right to the assistance of post-conviction counsel”.

Today, neither the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of meaningful access requires the state to appoint counsel for indigent prisoners seeking state post-conviction relief. Because the *Martinez* Court did not overrule *Coleman*'s statement that there is no constitutional right to post-conviction counsel, it likewise did not conclude that a prisoner can raise a constitutional claim of receiving ineffective assistance of post-conviction counsel. The *Martinez* opinion demonstrates, were the Court to recognize a constitutional right to post-conviction counsel, the same framework for determining whether that counsel was constitutionally effective could be employed to evaluate the effectiveness of post-conviction counsel.

The extension of a constitutional right to post-conviction counsel would ensure that counsel is provided to prisoners in both state and federal post-conviction proceedings, a prisoner would likewise be able to claim that he or she received constitutionally ineffective assistance of that counsel in a

prior proceeding. And the "relief" that a prisoner would receive upon demonstrating what is required under *Strickland* would merely be the opportunity to have that claim heard again (or possibly for the first time) on its merits.

Unlike a claim of ineffective assistance of trial counsel, a successful claim of ineffective assistance of post-conviction counsel would not result in the vacation of a conviction, for obvious reasons: whereas the deficient performance of trial counsel undermines "the proper functioning of the adversarial process so that the trial cannot be relied on as having produced a just result," the deficient performance of post-conviction counsel only undermines the reliability of the post-conviction proceeding. A individual may have received ineffective assistance of trial counsel and thus requires a new trial, but the ineffectiveness of post-conviction counsel in presenting that claim does not in and of itself justify the new trial; all it does require is a new post-conviction proceeding so that the trial court can properly decide the claim of ineffective assistance of trial counsel on its merits.

The United States and Colorado Constitutions guarantee criminal defendants the right to counsel at all critical stages of a criminal proceeding. U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16. See *People v. Crabtree*, 519 P.3d 415 (Colo. Ct. App. 2022).

"As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a State, based upon a law

not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense". . . See *Moore v. Dempsey*, 261 U.S. 86 (1923).

Additionally, the Sixth and Fourteenth Amendments to the U.S. Constitution assure the right of an indigent defendant to counsel at the trial stage of a criminal proceeding, and an indigent defendant is similarly entitled as a matter of right to counsel for an initial appeal from the judgment and sentence of the trial court.

Today we ask this court to consider an extension to the Sixth Amendment right to counsel to include state post-conviction proceedings. Any person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

"In all criminal prosecutions the law of the land guarantees to every accused person a fair trial, see *Oaks v. People*, 150 Colo. 64 (Colo.1962). Equally important is the right to trial by jury guaranteed by Article II, Section 23 of the Constitution of Colorado: "The right of trial by jury shall remain inviolate in criminal cases." This right contemplates a fair and impartial jury to hear the case; such is the mandate of Article II, Section 16 of the Constitution: "That in criminal prosecutions the accused shall have the right to a fair trial by an impartial jury. The right to a fair trial and impartial jury "is all-inclusive; it embraces every class and type of person. Those for whom we have contempt or even hatred are equally entitled to its benefit. It will be a sad day for our system of government if the time should come when any person, whoever he or she may be, is deprived of this fundamental safeguard." See *United States v. Haupt*, 136 F.2d 661 (1943).

Here, the state prisoner is entitled to relief due to the fact that his detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution. (Emphasis added) See *Townsend v. Sain*, 372 U.S. 293 (1963).

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. *Marbury v. Madison*, 5 U.S. 137 (1803).

CONCLUSION

Today, the Petitioner, Jason Matthew Karr, ask this Honorable Court to make an exception on the basis of his claim of “actual innocence” and now request that this Court would grant writ of certiorari review in order to have his federal Constitutional claims considered based on the merits. Additionally, to ensure that justice will prevail in the case, the Petitioner, respectfully request the appointment of counsel for the purpose of making a proper showing of “actual innocence” and a fundamental “miscarriage of justice”. Furthermore, it is grounded in the system of American jurisprudence to see that federal constitutional errors do not result in the incarceration of innocent persons. This Court has an obligation to our founding fathers to ensure American citizens are protected by the United States Constitution and the established Constitutional law of our great Country, which provides protection to the citizen of the United States of America in order to prevent them from being wrongfully convicted by the Government without either due process or the equal protection of the law.

This petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted on this 12th day of February, 2024.