No. 23-6879

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
FEB 21 2024
OFFICE OF THE CLERK

Christopher Sean Burrus — PETITIONER
(Your Name)

vs.

The State of Washington — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Court of Appeals of the State of Washington, Division I
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Christopher Sean Burrus #421114
(Your Name)
Washington State Penitentiary
1313 N. 13th Ave.
(Address)

Walla Walla, WA 99362
(City, State, Zip Code)

N/A
(Phone Number)

Questions Presented

1. Washington's personal restraint petition system forces claims which rely on evidence outside the trial record into post-conviction proceedings where the burden of proof is both shifted to the petitioner and raised from a standard of harmless error to actual and substantial prejudice. In addition, indigent petitioners are denied appointment of counsel and investigative funds and services until the chief judge determines that the issues raised in the petition are not "frivolous" (RCW 10.73.150(4)); (Appendix E, p.5). However, the Court of Appeals also requires petitioners to demonstrate that their claims are not frivolous with "competent, admissible evidence" that is often impossible for indigent, incarcerated petitioners to acquire without the help of counsel, investigators, experts, and/or the powers to subpoena witnesses and obtain discovery (In re Rice). Does this nearly insurmountable evidentiary burden deprive indigent petitioners of their 5th Amendment right to due process of law, and/or their 14th Amendment rights to due process of law and/or equal protection of the laws under the U.S. Constitution?

2. Do the evidentiary requirements imposed by In re Rice violate the equal protection guaranty of the 14th Amendment of the U.S. Constitution for indigent personal restraint petitioners?

Questions Presented, continued

3. Can the erroneous denial of an indigent defendant's pre-trial access to expert psychiatric services under Ake v. Oklahoma damage the constitutional framework of a criminal trial to such an extent as to qualify the error as structural?

4. Can the erroneous denial of an indigent defendant's pre-trial access to expert psychiatric services under Ake v. Oklahoma give rise to a conclusive presumption of prejudice on collateral review?

5. Did the Ake error in Petitioner's case deny Petitioner his rights to: due process of law under the 5th and/or 14th Amendments of the U.S. Constitution, equal protection of the laws under the 14th Amendment, and/or compulsory process and/or effective assisstance of counsel under the 6th Amendment?

6. Does the decision of the Washington Court of Appeals dismissing Petitioner's PRP as frivolous conflict with the U.S. Supreme Court's decisions in Ake v. Oklahoma and McWilliams v. Dunn, and/or the U.S. Court of Appeals decisions in McWilliams v. Comm'r, and/or Seidel v. Merkle and/or McShane v. Cate?

Questions Presented, continued

7. Did the chief judge of the Court of Appeals err when he or she dismissed Petitioner's PRP as frivolous instead of ordering an evidentiary hearing?

8. Did the trial court abuse its discretion when it denied Petitioner's motion for a continuance to obtain expert psychological services which were critical to his defense, as provided by Ake v. Oklahoma and McWilliams v. Dunn?

9. Did defense counsel render ineffective assistance to Petitioner by neglecting to investigate his mental health prior to trial despite being aware of his diagnoses, failing to obtain an expert opinion in support of her preferred strategy of diminished capacity, failing to include supporting evidence she had in her possession in her motion for a continuance to hire an expert, citing inapposite case law in that motion, and/or failing to present any of the extant mental health evidence to the jury in support of her defense of general denial due to lack of the intent to kill?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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– Suzanne Lee Elliott, Washington Appellate Project
June, 2022

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Washington Supreme Court court appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was 8/23/23. A copy of that decision appears at Appendix C.

[X] A timely petition for rehearing was thereafter denied on the following date: 1/3/24, and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution Amendment 5: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensatio

U.S. Constitution Amendment 6: 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 Assisstance of Counsel for his defence.

U.S. Constitution Amendment 14: Sec. 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 o 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.

STATEMENT OF THE CASE

Petitioner was convicted of attempted first degree murder with a deliberate cruelty aggravator in October 2019 due to an incident in November 2017 in which he poured gasoline on his friend Kasey Busch and threw a lit road flare at him, causing him to catch fire. Petitioner received an exceptional sentence of 300 months despite his lack of criminal history due to the jury's finding of the aggravating factor. The Court of Appeals affirmed his conviction on direct appeal in 2021 (State v. Burrus).

While awaiting trial petitioner was prescribed anti-depressant and anti-psychotic medications by jail mental health staff and was evaluated by a psychologist hired by his first attorney for mitigation purposes. During trial scheduling on September 12, 2019, the attorney who represented petitioner at trial filed a motion for a continuance to retain the services of a mental health expert to present testimony in support of a diminished capacity defense, based on psychological disorders diagnosed in the mitigation report from October 2018. The motion was denied by the court due to the age of the case and the fact that the trial date had already been continued seven times. The court did not address whether delaying trial to investigate petitioner's mental state at the time of the offense would prejudice or even inconvenience the state, or weigh the factor of delay against petitioner's constitutional rights to due process, compulsory process, assisstance of counsel and equal protection of the laws, or the extreme material significance of a complete neuropsychological examination to his defense (McWilliams v. Dunn). Even when these topics were brought up by defense counsel during the motion hearing, the court specifically declined to address them.

Despite defense counsel's admission that she reviewed the psychological mitigation evaluation and presented it to the trial deputy in January 2019, she failed to move the court for a thorough psychiatric examination which was critical to her preferred defense strategy of diminished capacity until the eve of trial in September 2019. Defense counsel's motion requesting these vital services failed to include a copy of the mitigation evaluation upon which her argument relied, petitioner's mental health records from jail, and the names of the two experts she claimed to have already contacted in relation to the case. Additionally, the only case law cited by defense counsel in her motion was Pirtle v. Morgan, which involves facts similar to Petitioner's case but distinct legal issues, and does not provide basis for relief. Defense counsel argued vehemently in pre-trial motions and motions in limine that effective defense for petitioner required a diminished capacity expert and that failure to explore that defense would be ineffective assisstance of counsel. However, she also failed to present any mental health evidence to the jury which could have supported her defense of general denial due to lack of intent to kill.

In his State Personal Restraint Petition, petitioner argued that his counsel's failure to assert a diminished capacity defense was not a strategic decision, and that her failure to thoroughly investigate petitioner's mental health prior to trial fell below the "diligence and promptness" required by Washington's Rule of Professional Conduct 1.3 and the objective standard of competent representation required by RPC 1.1.

In his PRP, petitioner further argued that whether the erroneous denial of his pre-trial access to expert psychiatric services under Ake v. Oklahoma and WA Superior Court CrR 3.1(f) was ultimately caused by the trial court's abuse of discretion or defense counsel's ineffective assisstance, the error denied him his 5th and 14th Amendment rights to due process, his 14th Amendment right to equal protection of the laws, and his 6th Amendment rights to compulsory process and assisstance of counsel. Throughout State post-conviction proceedings petitioner asserted that these reversible Constitutional errors occurred because sufficient evidiendtiary foundation existed to order an examination of his mental state yet he was denied the opportunity to investigate a potentially meritorious defense by the court's insistence on expedience and his lawyer's lack of diligence. In his motion for discretionary review petitioner also

argued that the Ake error in his case constituted presumptively prejudicial structural error based on the rationale provided by the 11th Circuit in McWilliams v. Comm'r.

Petitioner's PRP and motion for State Supreme Court review were dismissed as frivolous because, despite his diligence, petitioner could not fully develop evidence to prove that he was prejudiced by the errors and therefore that his claims were not frivolous due to his indigence and incarceration. Prison mental health staff refused to perform a forensic examination, private psychologists could not be contacted through the prison phone system, and when petitioner was finally able to reach relevant experts through a third party, they both refused to accept clients who were not represented by counsel and estimated that their services would be far more expensive than petitioner could afford. In re Rice requires petitioners to prove their claims with admissible evidence before they can gain access to an evidentiary hearing, counsel, and discovery, raising the burden for relief far beyond the requirements of RAP 16.7(2) (Appendix E, p. 1-4). Although petitioner required an attorney to hire an expert whose opinion could demonstrate prejudice, RCW 10.73.150(4) prevents petitioners from obtaining appointment of counsel until the chief judge has determined that the issues raised in their petition are not frivolous (Appendix E, p. 5-6).

Statement of the Case, continued

In all of his State post-conviction filings Petitioner requested an evidentiary hearing to enable him to develop evidence to support his claims and resolve factual disputes, but was denied due to the Court's requirement that he somehow obtain an expert psychological opinion without the attorney or the funds he needed to do so (Appendix A, p. 4-6; Appendix C, p. 2-3).

Reasons for Granting the Petition

The United States Supreme Court should grant review of the questions presented in this petition because, pursuant to Supreme Court Rule 10 (b) and (c): the decision of the Washington Court of Appeals dismissing Petitioner's PRP as frivolous conflicts with the U.S. Supreme Court's decisions in Ake v. Oklahoma and McWilliams v. Dunn, and the U.S. Court of Appeals decisions in McWilliams v. Comm'r, Seidel v. Merkle, and McShane v. Cate. In addition, the U.S. Supreme Court should settle the question of whether Ake errors are structural and/or presumptively prejudicial in certain contexts, as the federal circuit courts are apparently divided on this issue. See McWilliams v. Comm'r, Tiffany v. Legrand, White v. Johnson, Tuggle v. Netherland, Brewer v. Reynolds, Starr v. Lockhart and Hicks v. Head.

The decision dismissing Petitioner's PRP as frivolous also merits review by this Court because it incorporates Constitutional rights deprivations faced by all post-conviction litigants in Washington State (Appendix E). Further, because mental illness, drug addiction, homelessness (or indigency) are epidemic in our Nation's communities and often coincide with crime, this Court should clarify the

Reasons for Granting the Petition, Continued

Constitutional protections which exist for indigent defendants whose trials are rendered fundamentally unfair by the erroneous denial of the expert psychological assistance to which they are entitled under Ake v. Oklahoma and McWilliams v. Dunn.

Additional argument on these points is presented in Petitioner's Personal Restraint Petition, Motion for Discretionary Review, and Motion to Modify the Order of the Deputy Commissioner of the Washington Supreme Court denying review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
Christopher Sean Burrus
Chris Burrus

Date: 2/12/24