

Case No. _____

In The Supreme Court Of The United States

DOUGLAS COLEY, Petitioner,

vs.

STATE OF OHIO, Respondent.

On Petition for Writ of Certiorari to the Ohio
Court of Appeals for the Sixth Appellate District

Petition For Writ Of Certiorari

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Capital Case

Question Presented for Review

Petitioner Douglas Coley is the only known, Ohio death row prisoner who wanted, but did not receive, a post-conviction review of his convictions and death sentence. Mr. Coley is not at fault because two occurrences denied him a state post-conviction review. First, Mr. Coley's appointed counsel abandoned him by not doing any work on the post-conviction case. Second, the trial court abdicated its duty to control its own docket and safeguard Mr. Coley's statutory right to seek post-conviction review of his capital conviction and death sentence.

As a death row prisoner under Ohio's system, Mr. Coley was entitled to appointed counsel for state post-conviction review, and the trial court appointed such counsel for Mr. Coley. However, appointed counsel simply abandoned Mr. Coley. His appointed counsel failed to investigate, consult with Mr. Coley, or file a post-conviction application on his behalf.

Upon discovering that failure, Mr. Coley sought to redress his situation by filing a motion with the trial court to provide new and functional counsel, but the trial court denied his request as moot based on the prior appointment order that it had issued. The trial court also put an entry on its docket denying a post-conviction petition that was never even filed. Mr. Coley counted on the trial court to provide him with counsel for post-conviction review, but the trial court failed him because it abdicated its duty to manage its own appointment order.

Following the trial court's abdication of its duty to appoint functional counsel, Mr. Coley then tried, on his own, to secure counsel. Yet, no counsel was available to litigate off-the record issues for Mr. Coley until his present counsel was appointed for clemency review in April, 2016. Without a first post-conviction review, Mr. Coley had to meet the extraordinary hurdles placed on untimely or successive collateral review claims.

Mr. Coley eventually sought review in the Supreme Court of Ohio, asserting that he was blameless in, and actually prejudiced by, the state's irrational refusal to provide him with a first, collateral review process. The Supreme Court of Ohio denied relief, and Mr. Coley now raises the following question for this Court's review:

Can a state provide a rational basis to deny a death row prisoner his right to the state's first collateral, conviction, review process, where the prisoner wanted, and diligently pursued, his right to such collateral review, but he was denied collateral review due to counsel's abandonment, and the trial court's failure to manage its docket?

List of Parties

The caption to this petition contains the only parties to this petition for writ of certiorari.

Corporate Disclosure

There are no corporate disclosures necessary for this case.

List of Proceedings

1. **Direct Appeal:** *State v. Coley*, 754 N.E.2d 1129 (Ohio 2001).
2. **Federal Habeas:** *Coley v. Bagley*, 706 F.3d 741 (6th Cir. 2013);.
3. **Successive Federal Habeas:** *In Re: Douglas L. Coley*, 871 F.3d 455 (6th Cir. 2017).
4. **First Motion for Order or Relief:** *State v. Coley*, 78 N.E.3d 906 (6th Cir. 2017).
5. **New Trial Motion:** *State v. Coley*, No. L-19-1004, 2019 WL 6816938 (Ohio App. 6th Dist., Dec. 13, 2019); *State v. Coley*, 144 N.E.3d 451 (Ohio 2021).
6. **Second Motion for Order for Relief:** *State v. Coley*, 167 N.E.3d 989 (Ohio 2021).

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Case No. _____

In The Supreme Court Of The United States

DOUGLAS COLEY, Petitioner,

vs.

STATE OF OHIO, Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

Douglas Coley respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court.

Citations to Opinions Below

The Ohio Supreme Court issued the opinion under review in this petition in *State v. Coley*, 167 N.E.3d 989 (Ohio 2021), and that opinion is found in the Appendix at A-1.

Jurisdictional Statement

The Supreme Court of Ohio summarily denied Mr. Coley's Motion for Order for Relief, on May 12, 2021. This Court has jurisdiction to review the state court judgment issued below under 28 U.S.C. §1257(a).

Constitution and Statutory Provisions

United States Constitution, Fourteenth Amendment, Section 1, in pertinent part:

“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.”

Statement of the Case

A grand jury returned a multi-count indictment against Mr. Coley in January 1997. That indictment did not contain any death specifications. After the Toledo Police Department criticized the prosecutor in the local newspaper, however, a second grand jury convened. The State presented another indictment with death specifications and the grand jury returned an eight-count indictment that made Mr. Coley eligible for the death penalty.

A jury returned a guilty verdict for three counts of the aggravated murder of Samar El-Okdi, under R.C. §§ 2903.01(A), and, R.C. §2929.04(A)(7) (kidnapping or robbery), with capital specifications under R.C. §2929.04(A)(7). The jury also returned guilty verdicts for both the aggravated robbery and kidnapping of Ms. El-Okdi. §2911.01(A)(2); R.C. §2905.01(A)(2). Mr. Coley was also found guilty of the attempted aggravated murder of David Moore, R.C. §§2923.02, 2903.02, plus the aggravated robbery and kidnapping of Mr. Moore. R.C. §2911.01(A)(1). §2905.01(A)(2). The mitigation phase began, and ended, one day later when the jury recommended the death penalty. The trial court accepted the jury's sentencing recommendation and it imposed the death sentence under R.C. §2929.03(D)(3).

The court appointed Joseph Benevidez to Mr. Coley's direct appeal. Mr. Benevidez filed the notice of appeal with the Ohio Court of Appeals, instead of the Supreme Court of Ohio. *See State v. Smith*, 684 N.E.2d. 668 (Ohio 1997), ("The courts of appeals shall not accept jurisdiction of any case in which the sentence of death has

been imposed for an offense committed on or after January 1, 1995.”). Mr. Benevidez subsequently filed a proper notice of appeal.

While the direct appeal was pending, Mr. Coley filed a *pro se* motion requesting the appointment of counsel to pursue post-conviction relief in the Appendix at A-2 to A-3. Motion Ex. A, Motion to Appoint Counsel Pursuant To Ohio Revised Code Section 2953.21(I)(1). The trial court granted that motion. in the Appendix at A-4, Motion Ex. B, Decision and Judgment Entry. Joseph Benevidez was again appointed to handle Mr. Coley’s post-conviction case. However, Mr. Benevidez did not file a post-conviction petition for Mr. Coley.

This prompted Mr. Coley to again move the trial court to appoint post-conviction counsel. in the Appendix at A-5 to A-7, Motion Ex. C, Motion for Appointment of Counsel. The trial court denied Mr. Coley’s motion as “moot.” in the Appendix at A-8, Motion Ex. D, Judgment Entry.

After Mr. Coley learned of Mr. Benevidez’s failure to file a post-conviction petition, he contacted the Ohio Public Defender’s Office for assistance. in the Appendix at A-9 to A-13, Motion Ex. E, Affidavit of Douglas Coley. The Ohio Public Defender had represented Mr. Coley’s codefendant, Joseph Green, though, and a conflict of interest precluded it from representing Mr. Coley. *See id.*; *State v. Green*, 738 N.E.2d 1208 (Ohio 2000). Mr. Green, who was also convicted of aggravated murder and sentenced to death, received post-conviction relief and is no longer on death row.

The Supreme Court of Ohio affirmed Mr. Coley's convictions and imposition of the death sentence on appeal. *State v. Coley*, 754 N.E.2d 1129 (Ohio 2001). In December of 2001, volunteer counsel filed for Mr. Coley an application to re-open the direct appeal case based on ineffective appellate counsel. The Supreme Court of Ohio denied Mr. Coley's application. *State v. Coley*, Case No. 98-1474 (March 4, 2002).

Mr. Coley timely filed a notice of intent to pursue federal habeas corpus relief in the United States District Court for the Northern District of Ohio. The federal courts denied habeas relief and the United States Supreme Court denied his petition for a writ of certiorari. *Coley v. Bagley*, 706 F.3d 741 (6th Cir. 2013), *cert. denied sub. nom.*, *Coley v. Robinson*, 571 U.S. 992 (2013).

During the pendency of Mr. Coley's habeas, counsel had the opportunity to resurrect the post-conviction claims by asserting state post-conviction counsel's failures as cause and prejudice to excuse the procedural default of such claims under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). Yet, habeas counsel refused to do so in the Appendix at A-15 to A-19, Motion to Leave.

On April 20, 2016, Mr. Coley moved *pro se* for the United States District Court to remove his appointed habeas counsel. His appointed habeas counsel then moved to withdraw from the case. By Margin Order (no document) issued on April 25, 2016, the district court appointed the Federal Public Defender for the Northern District of Ohio to represent Mr. Coley in further actions.

With new counsel, he filed a second habeas petition in the district court alleging a violation of his Sixth Amendment right to capital sentencing by a jury

under *Hurst v. Florida*, 577 U.S. 92 (2016). The district court transferred the case to the Sixth Circuit, and that court denied relief on September 11, 2017. *In Re: Douglas L. Coley*, 871 F.3d 455 (2017).

Mr. Coley filed a Motion For Order Or Relief in the Supreme Court of Ohio on May 19, 2017. He alleged this Court directed a verdict on the R.C. §2929.04(A)(7) alternatives of “principal offender” and “prior calculation and design.” He further alleged his death sentence rested on an unindicted capital specification. This Court denied Mr. Coley’s motion. *State v. Coley*, 78 N.E.3d 906 (Ohio 2017).

Next, he filed a Motion for Relief from the federal habeas judgment under Federal Civil Rule 60(b) alleging a defective process undercut the review of his habeas case. Specifically, Mr. Coley had no off-the-record claims developed for him because he had no state post-conviction review at all. The district court construed Mr. Coley’s motion to be a successive habeas petition and transferred it to the Sixth Circuit. On April 22, 2019, the Circuit held that Mr. Coley’s motion was a Rule 60(b) motion whose transfer was unwarranted, but that it failed. *Coley v. Bagley*, Case No. 17-4233 (6th Cir.).

Mr. Coley filed a Motion for Leave under Criminal Rule 33(B) seeking permission from the trial court to file a substantive New Trial Motion under Criminal Rule 33(A)(6). The trial court denied the Motion for Leave, *State v. Coley*, Case No. CR 1997-01449 (Lucas Common Pleas, Dec. 12, 2018), and Mr. Coley timely appealed. The Ohio Court of Appeals affirmed the denial of Mr. Coley’s threshold Motion for Leave on December 13, 2019, *State v. Coley*, 6th Dist. Lucas No. L-19-1004, 2019-

Ohio-5143. The Supreme Court of Ohio declined jurisdiction. *State v. Coley*, 144 N.E.3d 451 (Ohio 2021).

Finally, Mr. Coley filed a second Motion for Order or Relief in the Supreme Court of Ohio, alleging that he was denied equal protection of the law because he is the only known Ohio death row prisoner that wanted, but did not receive, state post-conviction review. He argued that he was entitled to file a first post-conviction petition in the state trial court due to this deprivation of his constitutional right to equal protection. The Supreme Court of Ohio denied the motion in a summary order on May 12, 2021. *State v. Coley*, 167 N.E.3d 989 (Ohio 2021). This petition for writ of certiorari follows.

Reasons for Granting the Writ

There is no rational basis for Mr. Coley's classification as the only Ohio death row prisoner who was never afforded the opportunity to present first post-conviction review claims to the State Court. This irrational treatment of Mr. Coley by the Ohio courts denied him the equal protection of law as guaranteed by the Fourteenth Amendment.

The rational basis test

"No State shall 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." U.S. Const. Amend XIV § 1. The Equal Protection Clause "requires the government to treat similarly situated people alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). The states cannot make distinctions which either burden a fundamental right, target a suspect class, or intentionally treat one differently from others similarly situated without any rational basis for the difference. *Vacco v. Quill*, 521 U.S. 793, 799 (1997).

Courts will generally not review a state practice with strict scrutiny unless it interferes with a fundamental right or discriminates against a suspect class of individuals. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976). If neither a fundamental right nor a suspect class is at issue, a petitioner's claim is reviewed under the rational basis standard. *Id.* Under rational basis scrutiny, government action amounts to a constitutional violation only if it is so unrelated to the achievement of any legitimate state purpose that the court can only conclude that the

government's actions were irrational. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

Under precedent, courts will generally not review a state practice with strict scrutiny unless it interferes with a fundamental right or discriminates against a suspect class of individuals. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976). If neither a fundamental right nor a suspect class is at issue, a petitioner's claim is reviewed under the rational basis standard. *Id.* Under rational basis scrutiny, government action amounts to a constitutional violation only if it is so unrelated to the achievement of any legitimate state purpose that the court can only conclude that the government's actions were irrational. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

The rational basis test requires the reviewing court to identify a valid interest supporting the state action, and then whether the method of means by which the state has chosen to implement that interest is rational. *See, Scweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States RR. Retirement Bd. v. Fritz*, 449 U.S. 166, 175-77 (1980).

Mr. Coley was denied equal protection of the law

Even applying this lowest level of scrutiny to Mr. Coley's class of one, he prevails on his equal protection claim under both prongs of this test. First, there is no valid state interest in preventing Mr. Coley from pursuing his post-conviction claims. Mr. Coley is the sole death row inmate who was prevented from pursuing relief through off-the record claims, despite repeated and diligent efforts to do so.

There is no articulable justification or state interest in singling out one person and denying them legal process that all other similarly situated individuals have been afforded.

Should the State rely on an assertion that the justification is the state's interest is finality, that argument does not hold merit. The state's interest in finality cannot outweigh Mr. Coley's life interest in not being put to death without ever having had the opportunity to present his off-the-record claims. Treating Mr. Coley differently than all others in his class is, by definition, a violation of his equal protection rights. And, there is no reasonably conceivable interpretation of facts to provide a rational basis for why Mr. Coley would have been denied the ability to litigate his post-conviction claims while every other death row inmate from the time of reinstatement of the Ohio death penalty has been able to proceed with those claims.

This case is similar to *Pirkel v. Burton*, 970 F.3d 684 (6th Cir. 2020), where the petitioner's equal protection rights were violated by inadequate legal representation. In *Pirkel*, the court held that an indigent criminal appellant was denied adequate and effective appellate counsel through unconstitutional procedures. *Id.* at 698. There, the petitioner was appointed appellate counsel who advised the petitioner that he found "no issue of even colorable merit to pursue," and then asked the petitioner to withdraw. *Id.* at 688. Appellate counsel then filed a motion to withdraw in the trial court which the court granted. *Id.* The petitioner filed a motion to appoint new appellate counsel, but that motion was denied. *Id.* at 689.

The State of Michigan's procedures were clearly invalid under this Court's existing precedent. *Id.* First, there was no determination *by the appellate court* whether there were any appealable issues. *Id.* at 697. Instead, the trial court, who has little incentive to find any error warranting an appeal, was the same court that allowed appellate counsel to withdraw. *Id.* Additionally, appellate counsel failed to file a brief drawing attention to anything in the record that might arguably support the petitioner's appeal. *Id.* Finally, the trial court failed to conduct an independent determination of the merits and instead entirely relied on appellate counsel's determination. These flawed procedures prevented the petitioner from having adequate and effective appellate review, violating his equal protection rights. *Id.*

Similarly, Mr. Coley very much wanted to pursue post-conviction relief and was diligent about trying to pursue that end by filing two pro se motions to appoint counsel. Indeed, Mr. Coley is not at fault for missing the first post-conviction review deadlines. The trial court appointed counsel, and Mr. Coley justifiably relied on appointed counsel to file the application for him. Upon discovering that appointed counsel did no actual work for him, on February 24 1999, Mr. Coley again moved the trial court for post-conviction counsel. Rather than manage its docket, on that same date the trial court denied the second motion as moot, based on its prior appointment entry. Subsequently, the trial court even put an entry on its docket denying a post-conviction application that Mr. Coley never filed his record demonstrates that the trial court failed in its duty to safeguard Mr. Coley's basic rights. *See, Powell v. Alabama*, 287 U.S. 45, 52 (1932).

Mr. Coley is also not at fault because his appointed counsel abandoned him. *See, Maples v. Thomas*, 565 U.S. 266, 280-83 (2012). Mr. Coley attempted on several occasions to maintain contact with his appointed counsel, Mr. Benavidez, but was thwarted in his efforts by his own attorney, who misled Mr. Coley, giving him the false sense of security that his interests were being looked after by counsel. Mr. Coley had no idea that Mr. Benavidez had abandoned him until May of 2000 when his post-conviction filing deadline had already expired. As a result, Mr. Coley had no post-conviction counsel, no off-the-record post-conviction claims, and was not afforded the opportunity to pursue post-conviction relief. Mr. Coley's equal protection rights were violated by these deeply flawed procedures.

In this case, the state's procedures were irrational. Mr. Coley is the only known Ohio death row prisoner who wanted but did not receive a first state post-conviction review. As an unfortunate class of one, Mr. Coley had no off-the-record claims developed on his behalf until his present counsel attempted to litigate for him. *See Coley v. Bagley*, ND Ohio No. 1:02-cv-457, 60(b) Motion, Oct. 25, 2017, ECF# 113; *In re: Douglas Coley*, CA 20-3570, Successor Habeas Petition, 6th Cir, June 2, 2020, Doc. No. 1-2; *State v. Coley*, 97-1449, Motion for Leave to File a Motion for New Trial, Lucas County Court of Common Pleas, Apr. 20, 2018.

Those efforts were to no avail because the state court's denial of first post-conviction review forced Mr. Coley to file untimely claims, and the standards for untimely claims—such as those in a delayed new trial motion or successor post-conviction application—are much tougher to meet. Consequently, Mr. Coley lost any

review under *Strickland v. Washington*, 466 U.S. 668 (1984), because his claims did not satisfy the hurdles put in place for late filings.

In a timely post-conviction application, the trial court would have just addressed his ineffective assistance of counsel claims under *Strickland*. Indeed, Mr. Coley's case stands in stark contrast to *State of Ohio v. Lance Hundley*, Case No. 2015-CR-1132 (Mahoning Common Pleas, Sept. 29, 2020), where the Mahoning County, the trial court granted a motion to allow appointed attorneys to file a first post-conviction petition, even though the statute of limitations had expired and any petition filed without such permission would ordinarily be considered under the successor standard. In that case, the trial court took extraordinary action to prevent Hundley from being disadvantaged in the way that Mr. Douglas Coley has been disadvantaged, in the Appendix at A-14, Ex. G, *State v. Hundley*, Order from Mahoning County).

Likewise, it would be patently unfair to say that any claims presented in a first post-conviction review would be res judicata because Mr. Coley never received review of his claims in a first post-conviction petition, without the added varnish of Ohio's standards for successive or lately filed claims. To that end, Douglas Coley has been repeatedly denied the same access to post-conviction review that every single other death row inmate in Ohio has been afforded in violation of his right to equal protection under the United States Constitution and importantly under the State of Ohio's Constitution.

Mr. Coley's equal protection claim meets the rational basis test. There can be no justification for his extreme disparate treatment by the Ohio courts. His right to the equal protection of the law under the Fourteenth Amendment was violated under these circumstances. The remedy is specific performance. Mr. Coley should have the opportunity to file a first post-conviction petition in the Ohio courts.

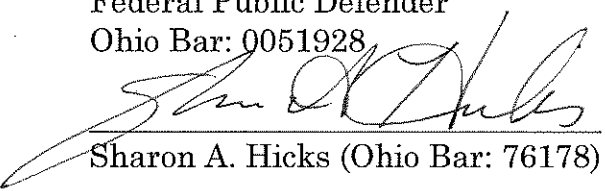
Conclusion

Mr. Coley was abandoned by his appointed state post-conviction counsel and the trial court failed to manage its own appointment order. Consequently, Mr. Coley had no opportunity to litigate even one round of off-the-record constitutional claims, as guaranteed by Ohio law. These events, for which Mr. Coley is not at fault, put him in the unique position of being the only Ohio, death row inmate that wanted but did not receive, a first post-conviction review of his capital conviction and death sentence.

Mr. Coley merely wants equal footing with all the other Ohio, death row prisoners who were able to litigate their off-the-record constitutional claims during the regular course of Ohio's system of review. Ohio's treatment of Mr. Coley violates the Equal Protection Clause, as there is no rational justification to deny Mr. Coley a first, post-conviction review. For relief, Mr. Coley should be permitted leave to file a first post-conviction petition in the Ohio trial court.

Respectfully submitted,

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