

FILED
08-19-2022
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

No. 2021AP1100

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALBERTO E. RIVERA,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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This Court should deny Alberto E. Rivera's petition for review. Rivera petitions from a decision of the court of appeals affirming the circuit court's denial of Rivera's Wis. Stat. § 974.06 motion without a hearing. The court of appeals rejected Rivera's appeal on procedural grounds, i.e., because the claims raised in his section 974.06 motion were not clearly stronger than those raised in his direct appeal. (Pet-App. A16.)¹

Review is not warranted because Rivera's petition does not satisfy the statutory criteria for granting a petition. Rivera advances fact-specific disputes governed by established law, not open legal questions that require resolution by this Court.

The first issue involves whether Rivera was denied counsel at his post-charging, pre-trial lineup when he was allegedly denied his retained counsel and instead supplied a public defender to represent him. (Pet. 1–5.) While this question involves constitutional rights, it does not present any significant, unanswered questions. Moreover, Rivera leaves out the important factual distinction that at the time of the lineup, he had been charged only with being a felon in possession of a firearm (and thus was only guaranteed the presence of counsel on that charge), not the homicide charges that followed and for which he is ultimately seeking relief.

Given those facts, the court of appeals correctly held that substitute counsel, which Rivera had here, satisfied his right to counsel under *United States v. Wade*, 388 U.S. 218, 237 n.27 (1967). (Pet-App. A14–A15.) Alternatively, the court

¹ Normally, the State cites to the electronic filing page numbers. But as of this writing, there is no electronically filed petition for review or appendix available in this matter. Thus, the State cites to the printed page numbers in Rivera's petition. Rivera's appendix is not paginated, so the State cites to the exhibit letter and printed page number on the documents in the appendix.

correctly held that Rivera failed to show that he was prejudiced by any failure to raise the issue. The Sixth Amendment right to counsel is offense-specific. Rivera, at the time of the lineup, only had a right to counsel on the felon-in-possession charge. (Pet-App. A15.) Accordingly, since Rivera had stipulated to his previous felony convictions and the jury ultimately found him guilty of the homicide charges, there was no reasonable probability that a Sixth Amendment challenge to the lineup would have changed the verdict on the felon-in-possession charge. (Pet-App. A15–A16.)

Rivera next asks this Court to clarify the law on police show-up procedures. (Pet. 6–10.) But the issue is not novel, nor does it beg clarification. Indeed, this Court has addressed this issue recently in *State v. Roberson*, 2019 WI 102, 389 Wis. 2d 190, 935, N.W.2d 813. Rivera does not identify any open questions in that area of law.

Thus, Rivera requests fact-specific error correction, but there is no error to correct. As the court of appeals correctly concluded, any motion by trial counsel to suppress B.J.'s identification of Rivera based on the show-up would have failed, under either the standard in *Dubose* or *Roberson*. At the time of Rivera's trial, it was unsettled whether the *Dubose* standard applied to show-up procedures, which meant that counsel could not be deficient for failing to raise an objection. (Pet-App. A8–A11.) Moreover, the procedure used here satisfied the *Roberson* standard. The record reflected that the officer's showing B.J. Rivera's photo was not impermissibly suggestive under circumstances where B.J. personally knew Rivera, she had seen him before, she had provided a physical description of him, and Rivera's identity as a suspect was independently corroborated. (Pet-App. A10–A14.)

Finally, Rivera identifies the issue whether the claims raised postconviction were clearly stronger than those raised in his direct appeal. (Pet. iii.) Rivera correctly acknowledges

that this ground does not satisfy the criteria for review.
(Pet. 30 n.12.)

CONCLUSION

This Court should deny the petition for review.

Dated this 19th day of August 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 642 words.

Dated this 19th day of August 2022.



SARAH L. BURGUNDY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

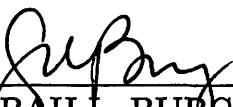
I have submitted an electronic copy of this response, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition or response is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this response filed with the court and served on all opposing parties.

Dated this 19th day of August 2022.



SARAH L. BURGUNDY
Assistant Attorney General