

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	▲ COURT USE ONLY ▲ Supreme Court Case No: 2021 SC 832
Certiorari to the Court of Appeals, 2017CA1182 District Court, Arapahoe County, 2005CR2945	
Petitioner: Sir Mario Owens, v. Respondent: The People of the State of Colorado.	
<i>Alternate Defense Counsel</i> Blain Myhre, #23329 Blain Myhre LLC P.O. Box 3600 Englewood, Colorado 80155 Telephone: (303) 250-3932 blainmyhre@gmail.com Jonathan D. Reppucci, #30069 Reppucci Law Firm, P.C. 1544 Race St. Denver, Colorado 80206 Telephone: (303) 333-5166 jiccupper@gmail.com	
MOTION TO CLARIFY THE MEANING OF C.A.R. 51.1(a), WHICH, AS AMENDED, IS FACIALLY AMBIGUOUS	

Petitioner Sir Mario Owens, through counsel and pursuant to C.A.R. 27(a), respectfully moves the Court to clarify the meaning of the current version of C.A.R. 51.1(a), by confirming that when an appellant in a criminal case seeks certiorari on one or some claims, but not on others, the latter claims as to which certiorari is not being sought are deemed to be fully exhausted by their resolution in the underlying Court of Appeals decision. As grounds:

BACKGROUND

1. This is an appeal from the denial of a criminal defendant's motion for post-conviction relief pursuant to Crim. P. 35(c), wherein Mr. Owens challenged his convictions for first-degree murder and other serious charges, based on, *inter alia*, constitutional claims of error, including violations of *Brady v. Maryland*, 373 U.S. 83 (1963), ineffective assistance of counsel, juror bias and misconduct, and cumulative error. In a lengthy decision, the Court of Appeals recently denied all of the claims Mr. Owens presented for its review. *People v. Owens*, 2017CA1182 (October 7, 2021) (Not Published Pursuant to C.A.R. 35(e)).

2. C.A.R. 52 and 53 authorize the filing of a petition for a writ of certiorari.¹ Mr. Owens intends to file such a petition and seeks to exhaust all of the

¹ Mr. Owens has contemporaneously filed a motion to extend the current filing deadline for the certiorari petition (November 18, 2021).

federal constitutional claims that he presented to the Court of Appeals. As set forth below, however, that endeavor is complicated by ambiguities in C.A.R. 51.1(a), thus necessitating this motion, which is authorized by C.A.R. 27(a).

GROUND FOR RELIEF AND SUPPORTING LEGAL ARGUMENT

3. C.A.R. 51.1 pertains to the exhaustion of state remedies requirement in criminal cases. Under the federal Antiterrorism and Effective Death Penalty Act (“AEDPA”), a state prisoner must exhaust available state remedies before presenting his claim to a federal habeas court. *See generally* 28 U.S.C. § 2254(b)(1)(A).

4. The former version of C.A.R. 51.1(a) stated:

(a) Exhaustion of Remedies. In all appeals from criminal convictions or post-conviction relief matters from or after July 1, 1974, a litigant shall not be required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when a claim has been presented to the Court of Appeals or Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies.

C.A.R. 51(a) (2017) (emphasis added). The plain language of this version of the Rule was unambiguous: a Colorado criminal defendant was *not* required to present “a claim” to this Court in order to exhaust it for purposes of AEDPA exhaustion, so long as the claim was presented to the Court of Appeals.

5. Addressing “a question of first impression,” in *Ellis v. Raemisch*, 872 F.3d 1064 (10th Cir. 2017), the Tenth Circuit Court of Appeals approved the Rule, concluding that (a) Colorado had made it plain that it did not wish to require discretionary review applications to this Court before defendants may seek federal habeas relief, and (b) the Rule permitted defendants to exhaust all available state remedies *without* seeking discretionary relief from this Court. *Id.* at 1077-82; *see also Bruce v. Clementi*, No. 15-CV-01653-REB, 2016 WL 660120, at *10 (D. Colo. Feb. 17, 2016) (review by the Colorado Supreme Court “is not required to exhaust state remedies if the claim in question was presented fairly to and relief was denied by the” Colorado Court of Appeals); *Al-Yousif v. Trani*, 11 F.Supp.3d 1032, 1047-48 (D. Colo. 2014) (same), *rev’d on other grounds*, 779 F.3d 1173 (10th Cir. 2015).

6. This Court subsequently amended C.A.R. 51.1(a), effective July 1, 2018. The Rule now provides:

(a) Exhaustion of Remedies. In all appeals from criminal convictions or post conviction relief matters from or after July 1, 1974, a litigant is not required to petition for rehearing and certiorari following an adverse decision of the intermediate appellate court in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, the litigant will have exhausted all available state remedies when a claim has been presented to the intermediate appellate court ***and*** the supreme court, and relief has been denied ***or*** when relief has been denied in the intermediate appellate court ***and*** the time for petitioning for certiorari review has expired.

See C.A.R. 51.1(a) (2021) (emphasis added). The amendment’s insertion of the phrase “when a claim has been presented to the intermediate appellate court and the supreme court” is the main cause of confusion, exacerbated by the location of the comma within the sentence. If the comma were moved to immediately precede the “or,” it would more clearly signal that the amendment was trying to set forth two different paths “a claim” could follow to exhaustion: (1) “presented to the intermediate appellate court and the supreme court[,] and relief has been denied[,]” *or* (2) “when relief has been denied in the intermediate appellate court and the time for petitioning for certiorari review has expired.” Absent from the amended language is a clear statement that a defendant must present all claims or none when seeking certiorari. It is not an all-or-nothing proposition – a defendant’s claims may follow distinct paths to exhaustion, with one or more claims following the certiorari route, and other potential claims exhausted by the Court of Appeals decision.

7. The changes between the 2018 version and its predecessor can be seen as follows:

(a) Exhaustion of Remedies. In all appeals from criminal convictions or post-conviction relief matters from or after July 1, 1974, a litigant ~~is~~ shall not ~~be~~ required to petition for rehearing and certiorari following an adverse decision of the ~~intermediate appellate court~~ ~~Court of Appeals~~ in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, the litigant will have exhausted all available state remedies when a claim has been presented to the ~~Court of Appeals~~ intermediate appellate court ~~and~~ ~~or~~ ~~the~~ ~~Supreme~~ ~~Court~~, and relief has been denied or when relief has been denied in the intermediate appellate court and the time for petitioning for certiorari review has expired, ~~the litigant shall be deemed to have exhausted all available state remedies.~~

8. To date, neither this Court nor the federal courts have addressed the meaning or effect of C.A.R. 51.1(a), as amended.

9. This Court retains plenary authority to promulgate and interpret the Colorado Rules of Appellate Procedure. Colo. Const. art. VI, § 21. The interpretation of a procedural rule is a question of law. *Kazadi v. People*, 2012 CO 73, ¶ 11. To ascertain the appropriate construction of a procedural rule, the Court employs the same interpretive rules applicable to statutory construction. *Id.* The fundamental responsibility in construing a rule is to ascertain and give effect to this Court's purpose and intent in enacting it. *Id.* The Court first reads the language of a rule consistent with its plain and ordinary meaning, and, if it is unambiguous, it applies the rule as written. *People v. Angel*, 2012 CO 34, ¶ 17. If, however, the rule is unclear on its face, then the Court must attempt to resolve any ambiguity so as to make application of the rule consistent with the intent behind it. *Id.* In this endeavor, the Court may consider other aids to statutory construction, including the

object sought to be attained, the circumstances under which the rule was enacted, the procedural history, any stated declaration or purpose, and the consequences of a particular construction. *See* § 2-4-203(1), C.R.S. (2021); *see also, e.g., McCoy v. People*, 2019 CO 44, ¶ 38. The Court must avoid constructions that “lead to illogical or absurd results.” *McCoy, supra*.

10. A statute or rule is ambiguous when it is reasonably susceptible of multiple interpretations. *Id.*; *see also Bostelman v. People*, 162 P.3d 686, 690-91 (Colo. 2007).

11. C.A.R. 51.1(a) plainly does not require a criminal defendant to file a petition for certiorari in order to exhaust claims of error. C.A.R. 51.1(a) (“... or when relief has been denied in the intermediate appellate court and the time for petitioning for certiorari review has expired”). With regard to a criminal defendant who *does* file a petition for certiorari, however, the Rule is ambiguous. It is susceptible of two opposing interpretations: (1) it could be construed consistently with its predecessor language as interpreted in *Ellis*, *Bruce*, and *Al-Yousif, supra*, to allow defendants to pursue one or more claims via a petition for certiorari in this Court *without* jeopardizing exhaustion requirements as they relate to claims that are not raised in the petition; or (2) it could be construed to require the defendant to raise *all* claims of federal constitutional error in a petition for certiorari in order to

exhaust them for federal habeas. By this Motion, Mr. Owens seeks confirmation that when he files a petition for certiorari, he is not required to raise *any and all* claims that he seeks to exhaust, and that litigation in the Court of Appeals of claims not raised in his petition for certiorari satisfies exhaustion requirements.

12. Because the plain language of the Rule is susceptible to contrary meanings, it is ambiguous. The Court should therefore consider other aids of statutory construction to resolve the ambiguity and to make application of the Rule consistent with the intent behind it. *McCoy, supra*. Those aids support a construction that does *not* require a criminal defendant to raise *all* potential claims of error in a petition for certiorari in order to exhaust *each* potential claim for purposes of federal habeas review, such that a claim (or claims) presented in a petition for certiorari is (are) deemed exhausted when the petition is denied or, if granted, when the Court denies the claim (or claims) presented therein, and any other claims not raised in the petition are deemed exhausted when the time in which to raise a certiorari petition would otherwise expire.

13. The only publicly-available procedural history regarding the 2018 amendments to C.A.R. 51.1(a) indicates that this Court's Advisory Committee on the Rules of Appellate Procedure intended "Stylistic changes" *only*, rather than a substantive and jarring change in the Rule's meaning. *See Minutes of Meeting*,

May 14, 2018, attached as Appendix 1; Minutes of Meeting, November 1, 2018 (approving May 14, 2018 minutes), attached as Appendix 2.

14. Construing the current Rule to have the same meaning as the former Rule would promote both consistent application and judicial economy, insulating this Court from bombardment by petitions for certiorari that are not limited to significant or important issues or issues of first impression, but rather include numerous claims solely for purposes of exhausting and preserving them for federal review. This scattershot approach is exactly what successful and effective petitions should seek to avoid. *See, e.g.*, 18 Colo. Prac., Appellate Law & Practice § 16:6 (3d ed.); R. Gabriel, *Tips for the Certiorari Process & Effective Advocacy in the Colorado Supreme Court*, at 2-3 (Bench-Bar-program, Sept. 14, 2017) (“Don’t raise a lot of issues.”).

15. A contrary interpretation – by which a defendant would be required to present *all* of his federal constitutional claims of error in a petition for certiorari in order to exhaust them – would be a trap for the unwary and would result in increased, presumably unwelcome burdens on this Court by subjecting it to constant petitions raising numerous issues. Not only would such an interpretation be inconsistent with the purposes for which the Court implemented C.A.R. 51.1(a)

in the first place, it would, in practice, lead to undesirable consequences and illogical results.

16. When interpreting a statute or rule, this Court may substitute “or” for “and,” or vice versa, to avoid an absurd or unreasonable result. *Waneka v. Clynke*, 134 P.3d 492, 494 (Colo. App. 2005).

17. Pure logic supports the interpretation that the amended Rule does not require a defendant to raise all claims in a certiorari petition in order to exhaust them. Taking as a starting point the Rule’s clear statement that claims are already exhausted by dint of the intermediate appellate court decision, it is nonsensical to suggest that the raising of a claim (or claims) in a certiorari petition constitutes a forfeiture or abandonment of the exhaustion that occurred in the Court of Appeals. It would be an absurd result to interpret the Rule to say all claims are exhausted, *but not if* further review in this Court is sought on any one claim.

18. Had this Court and the Rules Committee intended to implement such a significant departure from the predecessor rule, they surely would have done so in much clearer terms. *See generally Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 926 (Colo. 1997).

19. This Court is the final arbiter of state law, *see, e.g., Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶ 34, and “the ultimate authority on the

meaning of Colorado law.” *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 778 (2005) (Stevens, J. dissenting). Unquestionably, it is important for criminal defense and appellate practitioners to have a clear understanding of what C.A.R. 51.1(a) requires. Ambiguity in the amended version of C.A.R. 51.1(a) injects uncertainty and confusion where they do not belong. The case at bar is exceptionally voluminous and complex, and Mr. Owens and his undersigned counsel desire to be targeted in their approach to petitioning for certiorari. Respectfully, they should not have to guess at the meaning of C.A.R. 51.1(a), nor should any other criminal defendants or their attorneys.

20. To the extent that the intent of the 2018 amendment matters to resolve the facial ambiguity in the language of the Rule, only this Court – as author of the amendment – knows that intent. A federal court reviewing the language of the amendment would not be able to divine from its language the intent behind it.

21. This issue presented is real, immediate, and appropriate for this Court’s resolution. It is not a hypothetical scenario – the Rule’s interpretation is determinative of the content in Mr. Owen’s petition for certiorari. The question boils down to whether, in an abundance of caution, Mr. Owens must raise all of his constitutional claims in the petition in order to exhaust and preserve them for federal habeas review; or whether instead, Mr. Owens can focus in his petition

solely on the precise issues most appropriate for review by this Court, with comfort of knowing the claims winnowed from the petition remain exhausted for purposes of federal habeas.

22. In short, there is ambiguity in the amended Rule, and that ambiguity has real consequences and practical implications for this particular case.

23. The crux of the issue is that Mr. Owens wants to be sure to exhaust all of his federal constitutional claims for federal habeas review, but because of the language of the amended Rule, is unclear on the steps that must be taken to do so. Given the ambiguity created by the amended language, presently Mr. Owens runs the risk of misconstruing the Rule and being told later that he did not properly exhaust his claims in state court.

24. To the extent that the intent of the amendment was to avoid or discourage attempts by criminal defendants to constitutionalize their claims for the first time in a petition for certiorari, that concern is not present here. Mr. Owens fully litigated his constitutional claims below and the Court of Appeals rendered its decision on those claims.

WHEREFORE, the Petitioner, Sir Mario Owens, respectfully moves the court to confirm that C.A.R. 51.1(a), as amended, does not require a criminal defendant to raise all potential claims in a petition for certiorari, and that any

potential claims not raised in the petition are deemed exhausted when the time for filing a petition for certiorari would have expired, had a petition never been filed.

Respectfully submitted this 18th day of November, 2021.

/s/ Jonathan Reppucci
Jonathan Reppucci

/s/ Blain Myhre
Blain Myhre

Attorneys for Sir Mario Owens

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of November, 2021, a true and correct copy of the foregoing **MOTION TO CLARIFY THE MEANING OF C.AR. 51.1(a), WHICH, AS AMENDED, IS FACIALLY AMBIGUOUS** was served upon the following through the Colorado Courts E-filing system:

Katharine Gillespie, Assistant Attorney General
Jillian J. Price, Assistant Attorney General
Office of the Colorado Attorney General
1300 Broadway, Ninth Floor
Denver, Colorado 80203

/s/ Jonathan Reppucci