

No. 17-1393

In The
Supreme Court of the United States

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MARISA N. PAVAN, et al.,

Petitioners,

v.

NATHANIEL SMITH, M.D., MPH,

Respondent.

—————◆—————
**On Petition For A Writ Of Certiorari
To The Arkansas Supreme Court**

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BRIEF OF RESPONDENT IN OPPOSITION

—————◆—————
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QUESTION PRESENTED

On remand from this Court, the Arkansas Supreme Court issued an opinion reversing the trial court’s judgment and remanding for entry of judgment consistent with this Court’s opinion in *Pavan v. Smith*, 137 S. Ct. 2075 (2017). Despite arguing throughout the pendency of the case that the trial court was the proper court to consider any request for attorney’s fees, Petitioners subsequently moved for appellate attorney’s fees in the Arkansas Supreme Court. That motion was denied in an unreasoned order, as is the usual practice of that court.

The trial court later noted that “[t]he actions of [Petitioners’] counsel indicate that she is totally unfamiliar with the Rules of Civil Procedure and the Rules of Appellate Procedure relating to procedural matters involving the award of attorney’s fees.” “It facially appears that the [Petitioners’] request at the appellate level was denied because it was procedurally improper, that all of the requested fees and costs should have been submitted to this court for a factual determination, and that . . . the [Petitioners] have forfeited their ability to request the award of any additional fees or costs by not properly and timely submitting them to this court for adjudication.”

This Court will not review a decision of a state court if the decision of that court rests on a state law ground independent of any federal question, whether that state law ground is substantive or procedural. See *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

The question presented is:

Where the Petitioners’ request for appellate attorney’s fees was procedurally defaulted on state law

QUESTION PRESENTED – Continued

grounds, and their motion for appellate fees was subsequently denied in an unreasoned order, is there any federal question for this Court to review?

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OPINION BELOW

The Arkansas Supreme Court's order denying Petitioners' "Protective Motion for Appellate Attorney's Fees and Expenses" (Pet. App. 1a-2a) is unreported.



JURISDICTION

The judgment of the Arkansas Supreme Court was entered on January 4, 2018. The petition for a writ of certiorari was filed on April 4, 2018. Petitioners assert that this Court has jurisdiction under 28 U.S.C. 1257, but as Respondent explains below, this case presents no federal question for this Court to review.



INTRODUCTION

This unusual appeal stems from Petitioners' state law procedural default of their ability to seek appellate attorney's fees. Despite claiming at every juncture that their motion for any attorney's fees should have been considered by the trial court, they filed their motion for appellate fees in the Arkansas Supreme Court, filing out of time even if that forum was proper. After that motion was denied, Petitioners changed their position and now argue that the Arkansas Supreme Court was the appropriate court to consider their motion all along.

The trial court later excoriated Petitioners' counsel for what it described as a total unfamiliarity with

the procedural rules governing attorney's fee requests in Arkansas courts. The trial court explained that the Arkansas Supreme Court's denial of Petitioners' motion for appellate fees stemmed from the fact that Petitioners filed their fee motion in the wrong court, and by that point, well outside the time period for filing it in the proper court. Instead of owning up to their mistakes and accepting the over \$70,000 the trial court awarded in fees, Petitioners sought to cover up their mistakes by filing a motion asking the trial court to modify its opinion to omit its discussion of Petitioners' procedural default of their ability to seek appellate attorney's fees. Shortly after the trial court denied that motion, Petitioners filed their petition with this Court.

Petitioners now seek review of the Arkansas Supreme Court's order denying their motion for appellate fees, despite the fact that the order gives no indication it rested on federal grounds, rather than Petitioners' state law procedural default. The Arkansas Supreme Court's denial of Petitioners' procedurally defaulted attorney's fee request presents no federal question for this Court to review, and accordingly, the Petition should be denied.

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STATEMENT

1. *Proceedings in the Trial Court.* This Court is familiar with the underlying state court litigation, which is discussed in the Court's prior decision in *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam).

Petitioners sued Respondent in state court, challenging Ark. Code Ann. 20-18-401 on the ground that it prohibited same-sex married couples from being listed on their child's birth certificate on the same terms as opposite-sex married couples. *Id.* at 2077.

On December 1, 2015, the trial court entered summary judgment in favor of Petitioners, holding portions of Section 20-18-401 unconstitutional. *See* Order, Pulaski Cty., Ark. Cir. Ct., No. 60CV-15-3153 (Dec. 1, 2015). ARK. R. CIV. P. 54(e)(2) provides that "a motion for attorney's fees must be filed no later than 14 days after entry of judgment." Accordingly, Petitioners' motion for attorney's fees was due on December 15, 2015. The parties agreed to, and the trial court granted, an extension of time for Petitioners to file their motion for attorney's fees until December 21, 2015. *See* Order Granting Pls.' Unopposed Mot. for Ext. of Time, Pulaski Cty., Ark. Cir. Ct., No. 60CV-15-3153 (Dec. 17, 2015).

On December 21, 2015, Petitioners filed their motion for attorney's fees and costs in the trial court, requesting \$47,012.50 for 188.05 hours Petitioners' counsel claimed to have expended in the case before that court. *See* Pls.' Mot. for Att. Fees and Costs, Pulaski Cty., Ark. Cir. Ct., No. 60CV-15-3153 (Dec. 21, 2015). Respondent replied to Petitioners' motion, arguing that, given the Arkansas Supreme Court's stay of the trial court's order pending appeal, the best course of action was to hold Petitioners' fee request in abeyance pending resolution of the appeal by the Arkansas Supreme Court. Def.'s Resp. to Pls.' Mot. for Att. Fees

and Costs and Incorp. Br., Pulaski Cty., Ark. Cir. Ct., No. 60CV-15-3153 (Jan. 5, 2016). Respondent also argued that Petitioners' fee request was excessive and unreasonable for a number of reasons.¹ *Id.* at 3. In passing, Respondent cited authority for the proposition that the Arkansas Supreme Court, not the trial court, would be the proper court to consider any request for appellate fees. *Id.* at 8. Despite being afforded a reply by the Arkansas Rules of Civil Procedure, Petitioners chose not to file one. ARK. R. CIV. P. 6(c). The trial court did not rule on Petitioners' fee request at that time, and the matter sat dormant while the case was on appeal.

2. *Proceedings on Appeal.* The Arkansas Supreme Court reversed the trial court's order granting summary judgment. *Smith v. Pavan*, 505 S.W.3d 169 (Ark. 2016). This Court summarily reversed the Arkansas Supreme Court's decision. 137 S. Ct. 2075. On October 19, 2017, on remand from this Court, the Arkansas Supreme Court "reverse[d] the [trial] court's [original] order" and "remand[ed] for entry of a final judgment consistent with the mandate of" this Court. Pet. App. 15a.

¹ For example, Petitioners' counsel routinely billed .2 hours for *each* text message to and from her clients, many of which occurred in group messages, resulting in huge quantities of "billable" time for conversations that likely took seconds. See Def.'s Resp. to Pls.' Mot. for Att. Fees and Costs and Incorp. Br. at 8–9, Pulaski Cty., Ark. Cir. Ct., No. 60CV-15-3153 (Jan. 5, 2016). Recognizing Petitioners' counsel had grossly overbilled for those messages, the trial court later substantially reduced Petitioners' requested award as "unreasonable." Supp. App. 25.

3. *Proceedings in the Arkansas Supreme Court Regarding Appellate Fees.* On November 2, 2017, Petitioners filed a motion asking the Arkansas Supreme Court to “clarify when issuing its mandate that the [trial] court may consider on remand, in the first instance, all appellate fees and expenses.” Supp. App. 2. Petitioners argued that Respondent’s suggestion from nearly two years prior—that appellate fees should be awarded by the appellate court—was incorrect. Supp. App. 2. Instead, Petitioners argued, “the [trial] court should consider awarding appellate fees and costs after entry of th[e] judgment.” Supp. App. 2. Petitioners’ motion for clarification was not submitted for consideration until November 9, 2017, *see* Docket Sheet, Ark. S. Ct., No. CV-15-988. Consequently, it is not at all clear that the Arkansas Supreme Court considered Petitioners’ motion for clarification prior to issuing its remand mandate on November 7, 2017.

Subsequently, on November 21, 2017, Petitioners filed what they styled a “Protective Motion for Appellate Attorney’s Fees and Expenses” in the Arkansas Supreme Court, requesting approximately \$220,000 in fees and \$6,000 in expenses. Petitioners took the position that there is no “rule requiring fee motions” to be submitted to the Arkansas Supreme Court “within a particular time[,]” yet also noted that Arkansas Rule of Civil Procedure 54(e)(2) “provides that a motion for attorney’s fees must be filed no later than 14 days after entry of judgment.” Supp. App. 6. At the same time, Petitioners filed a motion to “transfer” their fee motion to the trial court for consideration. Supp. App. 7.

Petitioners cited no authority for this request, and no Arkansas rule of procedure provides for the transfer of a motion from an appellate court to the trial court.

Respondent tendered a belated response to Petitioners' motion on December 6, 2017. Respondent (1) disputed Petitioners' status as prevailing parties; (2) noted that Petitioners' fee motion was unsupported by any evidence; and (3) argued that Petitioners' fee request was excessive and unreasonable. Resp. Opp. to Appellees' Fee Mot., Ark. S. Ct., No. CV-15-988 (Dec. 6, 2016). Respondent also argued that Petitioners' request to transfer their fee motion to the trial court should be denied because only the Arkansas Supreme Court may award appellate attorney's fees and costs on appeal. *Id.*

Petitioners tendered a reply on December 8, 2017. Petitioners took the position that "it is unclear whether Arkansas Rule of Civil Procedure 54 applies to [Petitioners'] motion for appellate fees and expenses in [the Arkansas Supreme] Court." Supp. App. 12. Petitioners argued that if "Rule 54 does not apply . . . there is no governing procedure" for attorney's fee motions before the Arkansas Supreme Court. Supp. App. 13. Petitioners further asserted that "[w]here . . . the appellate mandate remands for further proceedings and entry of a new final judgment, the [trial] court should award appellate fees after entry of that judgment." Supp. App. 15. Petitioners argued that *Race v. National Cashflow*

*Systems, Inc.*²—the case Petitioners now argue stands for the position that their motion for appellate fees was properly filed in the Arkansas Supreme Court—“is in-apposite” because the appellate court in that case “remanded the case solely for enforcement of the trial court’s pre-existing judgment.” Supp. App. 16 (emphasis omitted). Petitioners argued that, because the Arkansas Supreme Court “remanded the case for entry of a *new* final judgment consistent with” this Court’s mandate, the trial court should consider attorney’s fees in the first instance. Supp. App. 16 (emphasis added). Petitioners’ fee and transfer motions were submitted on December 14, 2017. *See* Docket Sheet, Ark. S. Ct., No. CV-15-988. Both motions were denied without comment on January 4, 2018. Pet. App. 2a.

4. *Proceedings in the Trial Court on Remand.* On January 8, 2018, Petitioners filed a supplemental motion in the trial court, seeking fees for an additional 106.75 hours of time Petitioners’ counsel claimed to have expended in the case before the trial court. Pls.’ Supp. Mot. for Att. Fees and Costs Incurred in the Cir. Ct., Pulaski Cty., Ark. Cir. Ct., No. 60CV-15-3153 (Jan. 8, 2018). Petitioners did not request any fees for appellate work “[d]ue to the Arkansas Supreme Court’s ruling . . . denying [Petitioners’] request for appellate attorney fees and motion to transfer the issue of appellate fees” to the trial court. *Id.* ¶ 5.

² 810 S.W.2d 46 (Ark. Ct. App. 1991), *aff’d*, 817 S.W.2d 876 (Ark. 1991).

Respondent filed a response to Petitioners' motion on January 25, 2018, arguing that Petitioners' fee request was excessive and unreasonable. Def.'s Resp. in Opp. To Pls.' Supp. Mot. for Att. Fees and Costs and In-corp. Br., Pulaski Cty., Ark. Cir. Ct., No. 60CV-15-3153 (Jan. 25, 2016). As in his response to Petitioners' first fee motion in the trial court, Respondent took issue with Petitioners' counsel's billing practices, including, for instance, Petitioners' counsel's billing over twelve hours (\$3,600 at her requested rate) for completing her own timesheets. *See id.* at 2.

On February 16, 2018, the trial court entered an order partially granting Petitioners' motion for attorney's fees. The trial court noted that "[b]oth [Petitioners'] original *Motion* and *Supplemental Motion*, together with the supporting documentation, can be fairly characterized as reflecting inferior craftsmanship. If the two motions were analyzed on a classic grading scale, they would receive a C- or a D+." Supp. App. 21. "The actions of [Petitioners'] counsel indicate that she is totally unfamiliar with the Rules of Civil Procedure and the Rules of Appellate Procedure relating to procedural matters involving the award of attorney's fees and costs." Supp. App. 21.

The trial court went on to explain that "counsel for [Petitioners] has made a number of procedural errors concerning the award of attorney's fees and costs." Supp. App. 24. As a result, that court explained, Petitioners "are now ineligible to request the large amount of attorney's fees and costs that were legitimately incurred while this case was on appeal. . . ." Supp. App.

24. It concluded that “[i]f [Petitioners’] counsel had understood and followed the proper procedures for requesting the award of attorney’s fees and costs, the taxpayers might have had to pay a substantially larger amount to [Petitioners].” Supp. App. 24. The trial court determined that “[i]t facially appears that [Petitioners’] [fee] request at the appellate level was denied because it was procedurally improper, that all of the requested fees and costs should have been submitted to this court for a factual determination, and that under the Arkansas Rules of Civil and Appellate Procedure that [Petitioners] have forfeited their ability to request the award of any additional fees or costs by not properly and timely submitting them to this court for adjudication.” Supp. App. 26.

The trial court went on to grant Petitioners’ motion for trial-level attorney’s fees, but it reduced the award from the \$88,440 in fees Petitioners sought to \$70,637.50. Supp. App. 28.

On March 6, 2018, Petitioners filed a motion for partial reconsideration of the trial court’s order concerning attorney’s fees. Supp. App. 29. Rather than take issue with the trial court’s determination of the amount of fees, Petitioners instead asked the trial court to modify its order to *omit* its discussion of Petitioners’ procedural default of their ability to seek appellate fees. App. 30. Petitioners defended the procedural steps they had taken in the trial court and the Arkansas Supreme Court with regard to attorney’s fees. Specifically, Petitioners argued that they filed their fee motion in the Arkansas Supreme Court “in

compliance with the 14 day deadline to file fee motions contained in Rule 54(e)” because it was filed fourteen days after that court’s mandate issued. Supp. App. 32.

Petitioners’ motion for partial reconsideration was denied on March 30, 2018. Order, Pulaski Cty., Ark. Cir. Ct., No. 60CV-15-3153 (Mar. 30, 2018). Petitioners filed this Petition on April 4, 2018.



REASONS FOR DENYING THE PETITION

I. This Court does not review a decision of a state court when that decision rests on a state law ground, rather than federal law.

“This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.” *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). “This rule applies whether the state law ground is substantive or procedural.” *Id.* “In the context of direct review of a state court judgment,” this doctrine is “jurisdictional” because “resolution of any independent federal ground . . . would . . . be advisory.” *Id.*

In some cases where questions of both state and federal law are decided by a state court, it is difficult to discern whether a state court’s decision rested on federal or state law. In cases where “a state court decision fairly appears to rest primarily on federal law,” this Court will presume it rested solely on federal law,

absent a clear statement to the contrary by the state court. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). But the opposite presumption applies “[i]n the absence of a clear indication that a state court rested its decision on federal law. . . .” *Coleman*, 501 U.S. at 739–40. “That presumption grows out of the principle that there must be some affirmative showing that a federal question was presented to the state court and that a decision on such question was necessary to a determination of the cause.” Stephen M. Shapiro, et al., *Supreme Court Practice* 213 (10th ed. 2013).

In cases such as this, “[w]here the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground, this Court will not take jurisdiction to review that judgment.” *Durley v. Mayo*, 351 U.S. 277, 281 (1956) (quoting *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952)). Petitioners argue that it is never permissible for a state court to rule on a fee motion brought under 42 U.S.C. 1988 without also issuing an opinion, but they are mistaken. Pet. 16–17. While Petitioners may find it preferable for state courts to issue opinions each time they rule on a motion, this Court has recognized that “federal courts have no authority to impose mandatory opinion-writing standards on state courts. . . .” *Johnson v. Williams*, 568 U.S. 289, 300 (2013). This is especially true where a state court summarily denies a motion due to a party’s procedural default.

II. The Arkansas Supreme Court's order denying Petitioners' fee motion does not fairly appear to rest on federal law, rather than Petitioners' state law procedural default.

While federal substantive law governs attorney's fee requests under 42 U.S.C. 1988, Arkansas procedural rules govern whether a fee request is time-barred and whether it was filed in the proper court. *See Hart, The Relations between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954) ("The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them."). Petitioners do not argue otherwise. *See* Pet. 14–15 (acknowledging Arkansas's procedural rules regarding attorney's fees). Under Arkansas law, where a party "fail[s] to comply with Rule 54(e) of the rules of civil procedure," which Petitioners concede governs attorney's fee requests, she "is not entitled to receive attorney's fees or other expenses." *Norman v. Norman*, 66 S.W.3d 635, 640 (Ark. 2002); *see also Morehouse v. Lawson*, 206 S.W.3d 295, 300 (Ark. Ct. App. 2005) (reversing trial court's award of attorney's fees where motion was untimely under Rule 54(e)).

Here, Petitioners failed to comply with Arkansas's procedural rules governing attorney's fee requests and therefore forfeited any ability to seek the fees they requested. In the proceedings below, Petitioners argued that the trial court was the proper court to consider Petitioners' request for appellate attorney's fees. Yet they actually submitted their request for appellate fees

to the Arkansas Supreme Court—which denied their motion—and never submitted their fee request to the trial court within the time period provided by ARK. R. CIV. P. 54(e). Now, committed to that course, Petitioners argue that the Arkansas Supreme Court was the proper court in which to file their fee motion and that their motion was timely filed. But that is incorrect as a matter of Arkansas law. Nevertheless, as explained below, even if the Arkansas Supreme Court were the proper court to consider Petitioners’ fee request, their motion was filed nineteen days late and that procedural default precludes any fee award.

Yet no matter which of the various positions Petitioners have taken is correct, there is an adequate and independent state law ground accounting for the Arkansas Supreme Court’s denial of their motion for appellate fees. The Arkansas Supreme Court’s unreasoned denial of Petitioners’ motion following Petitioners’ procedural default does not mention federal law at all, let alone “fairly appear[.]” to rest on it. *Long*, 463 U.S. at 1040. On the contrary, there is every reason to believe Petitioners’ motion was denied due to their state law procedural default, rather than on the federal law considerations governing the merits of their motion.

For example, Respondent initially did not file a response to Petitioners’ fee motion in the Arkansas Supreme Court. Respondent subsequently requested leave to file a belated response to Petitioners’ motion and tendered his response disputing Petitioners’ fee request under the governing law. Rather than consider

Respondent's position on Petitioners' fee motion, the Arkansas Supreme Court denied Respondent's request to file a belated response. Supp. App. 2a. Moreover, the court denied Petitioners' motion before Petitioners were required to submit timesheets and other evidence in support of their fee request. Thus, the court had no basis for evaluating whether the estimated fee requested by Petitioners was reasonable under federal law. Given those circumstances, it is inappropriate to simply assume—as Petitioners must in seeking this Court's review—that the Arkansas Supreme Court's order denying fees rested on federal law considerations absent from the face of the Arkansas Supreme Court's order and which it appears that the court never considered. Instead, it is clear that decision rested on state law.

Because the Arkansas Supreme Court's decision is supported by the adequate and independent state law ground of Petitioners' procedural default, this Court should deny the petition for lack of jurisdiction. See *N.C.P. Mktg. Grp., Inc. v. BG Star Prods., Inc.*, 129 S. Ct. 1577, 1578 (2009) (statement of Kennedy, J., respecting the denial of certiorari) (even where a petition for certiorari raises an important question of federal law, it is not a suitable case for resolution of that question if it would require the Court to “resolve . . . antecedent questions under state law”); *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) (“When a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court.”); *Wolf v. Weinstein*, 372 U.S. 633, 636

(1963) (dismissing writ of certiorari as improvidently granted where a controversy “primarily implicate[d] questions of [state] law and present[ed] no federal question of substance”).

A. Petitioners failed to properly file their motion for appellate fees in the trial court after the entry of final judgment and forfeited any ability to seek those fees.

Contrary to Petitioners’ claim that the Arkansas Supreme Court flouted federal law in denying their motion for attorney’s fees, Petitioners forfeited their ability to seek appellate fees by failing to follow Arkansas’s procedural rules. ARK. R. CIV. P. 54(e)(2)—which Petitioners concede governs motions for attorney’s fees—provides that such motions must be filed “no later than 14 days after the entry of judgment[.]” The Arkansas Supreme Court has held that “[a] final judgment under ARK. R. CIV. P. 54(a) is ‘one that dismisses the parties, discharges them from the action, or concludes their rights to the subject matter in controversy.’” *Jones v. Flowers*, 283 S.W.3d 551, 554 (Ark. 2008) (quoting *Looney v. Looney*, 986 S.W.2d 858, 861 (Ark. 1999)) (reversing the trial court’s denial of attorney’s fees under 42 U.S.C. 1988 after remand from this Court). Rule 54(e)’s fourteen-day time period begins to run “upon an entry of judgment that finally concludes the controversy for which attorney’s fees are sought.” *Id.* at 555. “Only upon [a] final resolution of the respective parties’ rights [is] a motion for attorney’s fees appropriate.” *Id.*

On October 19, 2017, the Arkansas Supreme Court issued its opinion “revers[ing] the [trial] court’s [original] order” and “remand[ing] for entry of a final judgment consistent with the mandate” of this Court. Pet. App. 15a. The mandate issued on November 7, 2017, returning jurisdiction to the trial court. Docket Sheet, Ark. S. Ct., No. CV-15-988. The trial court entered the final judgment directed by the Arkansas Supreme Court on December 8, 2017, when the trial court entered its injunction requiring Respondent to “issue birth certificates to all same sex spouses and opposite sex spouses in accordance with the mandate from the United States Supreme Court and the Arkansas Supreme Court.” Pet. App. 6a. Therefore, under Rule 54(e), any motion for attorney’s fees—including for time expended at the appellate level—was due on December 22, 2017.

Petitioners did not file a motion for appellate fees in the trial court by that deadline. Instead, they filed a “protective” motion for appellate fees in the Arkansas Supreme Court on November 21, 2017. Supp. App. 5. This was procedurally deficient for two reasons. *First*, as noted earlier, a motion for attorney’s fees is only appropriate *after* the entry of a final judgment. *See Jones*, 283 S.W.3d at 555. Final judgment would not be entered for several weeks from Petitioners’ fee motion, and the issue was therefore not ripe for consideration. *Second*, the Arkansas Supreme Court’s mandate had already issued by the time Petitioners filed their fee motion, returning jurisdiction over the case to the trial court.

Petitioners separately asked the Arkansas Supreme Court to “transfer” consideration of their fee motion to the trial court if—as they argued—the motion should have been filed in the trial court in the first place. Pet. 7. However, neither the Arkansas Rules of Appellate Procedure nor the Rules of the Arkansas Supreme Court and Court of Appeals provide for the “transfer” of motions from an appellate court to the trial court. There is no basis under Arkansas law for a party to file a motion in the wrong court, while asking that court to correct the party’s procedural mistake. Moreover, by the time Petitioners’ fee motion and transfer motion were submitted to and decided by the Arkansas Supreme Court, Petitioners’ time to file a fee motion in the correct court—the trial court—had already run. Petitioners’ fee motion was accordingly properly denied.

The trial court subsequently agreed, noting that “[t]he actions of [Petitioners’] counsel indicate that she is totally unfamiliar with the Rules of Civil Procedure and the Rules of Appellate Procedure relating to procedural matters involving the award of attorney’s fees.” Supp. App. 21. “It facially appears that the [Petitioners’] request at the appellate level was denied because it was procedurally improper, that all of the requested fees and costs should have been submitted to this court for a factual determination, and that . . . the [Petitioners] have forfeited their ability to request the award of any additional fees or costs by not properly and timely submitting them to this court for adjudication.” Supp. App. 26.

Petitioners failed to comply with Arkansas procedural rules and timely file their motion for appellate fees in the trial court. Petitioners thus forfeited their ability to seek those fees under state law, and the Arkansas Supreme Court was within its authority to deny Petitioners' motion without comment. *See Norman*, 66 S.W.3d at 640. Because Petitioners' procedural default is an adequate and independent state law ground for the denial of Petitioners' fee motion, this Court lacks jurisdiction to review that denial. The Petition should be denied.

B. If Petitioners were required to file their motion for appellate fees in the Arkansas Supreme Court, they did so nineteen days late and forfeited any ability to seek those fees.

Petitioners have taken the position before this Court—contrary to what they argued below—that their motion for appellate fees was properly filed in the Arkansas Supreme Court. Pet. at 13. Petitioners assert that Rule 54(e), which provides that a motion for attorney's fees must be filed “no later than 14 days after the entry of judgment” (ARK. R. CIV. P. 54(e)(2)), governs the timing of their appellate fee motion. Pet. at 13. Petitioners argue that their motion was timely because it was filed on November 21, 2017, fourteen days after the Arkansas Supreme Court's *mandate* issued. *Id.* But Petitioners are mistaken. Assuming Petitioners were required to file their appellate fees motion in the Arkansas Supreme Court in the time period provided

by Rule 54(e), they were required to file their motion within fourteen days of the issuance of the court’s *opinion*, not its mandate.

Rule 54(a) defines “judgment” as “a decree and any order from which an appeal lies.” ARK. R. CIV. P. 54(a). Applied to the Arkansas Supreme Court, Rule 54(e)’s fourteen-day limitations period attaches only to actions taken by that court “from which an appeal lies.” *Id.* In this case, the “judgment” as defined by Rule 54(a) is the Arkansas Supreme Court’s opinion issued on October 19, 2017. Pet. App. 13a–15a. An “appeal lies” only from that court’s opinion, not its mandate. *See* U.S. Sup. Ct. R. 13.3 (“The time to file a petition for certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate. . . .”). Indeed, the Rules of the Arkansas Supreme Court and Court of Appeals provide that the mandate cannot issue within “18 calendar days *after the judgment* is rendered” in ordinary circumstances. ARK. SUP. CT. R. 5–3(b) (emphasis added).³ Because the mandate cannot issue until judgment is rendered, the mandate cannot *itself* be the “judgment” which triggers Rule 54(e). Thus, for purposes of Rule 54(e), the “judgment” of the Arkansas Supreme Court which triggered the fourteen-day window for filing

³ Following this rule, the Arkansas Supreme Court’s mandate issued on November 7, 2017—nineteen days after the issuance of its October 19, 2017 opinion. Docket Sheet, Ark. S. Ct., No. CV-15-988.

attorney's fee motions was that court's opinion of October 19, 2017.⁴

Moreover, underscoring that Petitioners' time for filing ran from the date of the judgment—and not the date the mandate issued—the rule governing attorney's fees provided for *appointed representation* of indigent criminal appellants provides that such requests must be filed no later “than 30 days after the issuance of the *mandate*.” ARK. SUP. CT. R. 6–6(d) (emphasis added), as opposed to Rule 54(e)'s reference to “the judgment.”

Therefore, if Petitioners were required to file their motion for appellate fees in the Arkansas Supreme Court, and—as Petitioners concede—Rule 54(e) governed the time period for filing that motion, Petitioners' motion was due no later than November 2, 2017, fourteen days after the issuance of the court's opinion. Yet Petitioners' motion was not filed until November 21, 2017—33 *days* after the issuance of the opinion. Thus, Petitioners' motion was untimely, and Petitioners have forfeited any ability to seek appellate fees under state law. The Arkansas Supreme Court was consequently within its authority to deny Petitioners' motion without comment. *See Norman*, 66 S.W.3d at 640.

⁴ This Court similarly characterized its earlier opinion in this case as reversing “[t]he *judgment* of the Arkansas Supreme Court. . . .” *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (emphasis added); *see also* Pet. App. 13a (Arkansas Supreme Court describing this Court as having “reversed” that court's “judgment”).

In sum, as Petitioners' state law procedural default provides an adequate and independent state law ground for the denial of Petitioners' fee motion, this Court lacks jurisdiction to review that denial. The Petition should be denied.



CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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