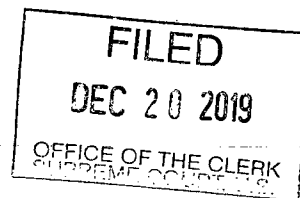


ORIGINAL

19-7742
No. _____



IN THE

SUPREME COURT OF THE UNITED STATES

Derrick L. Lewis Sr. — PETITIONER
(Your Name)

vs.

Warden Walter Berry — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Ware Superior Court (Georgia)
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Derrick L. Lewis Sr. 995981
(Your Name)

Autry State Prison P.O. Box 648
(Address)

Pelham, GA 31779
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. What remedies are available for Petitioner when the State Courts' habeas proceedings are erroneous and contrary to the laws of justice?
2. How is it possible for the federal courts to require a petitioner to exhaust his State remedies and be subject to the provisions thereof, but then rule that he is untimely by filing his Federal petition within one-year of said exhaustion?
3. Of the Rules Governing Section 2254 Cases, what judgment is to be given when a respondent fails to comply with Rules 5(b) and (d)(1)? What relief is available to the petitioner being injured thereby?
4. What judgment is to be given when a party fails to answer a claim (i.e. Fed. R. Civ. P. 8(b)(6)? What relief would a party moving for default judgment be entitled to? How could Respondent not be in default concerning Petitioner's claim of a 14th Amendment violation?
5. How can a court deny a petition on procedural grounds, and also deny the certificate of appealability based on a meritorious standard that concerns "whether the petition states a valid claim?"

6. What is the purpose for a Court to take judicial notice? How do the parties know when judicial notice has been taken? What is the remedy when a court refuses to take judicial notice?

7. When the circumstances invoke Fed. R. App. P. Rule 4(a)(6), what effect does a court not issuing an order pursuant thereto have upon the proceedings? Is a party prejudiced, harmed, or deceived if no such order is issued? What relief is warranted?

8. If Equitable Tolling is still good doctrinal law, how can it be said that Petitioner did not exercise due diligence and toll his time until March 17, 2016?

9. If a district court accepts and docket a petition, how can the merits of the petition be ignored if "pleadings must be construed to do justice"?

10. Is a motion for Summary judgment allowed in a habeas proceeding?

11. Can this Court exercise its authority to vacate and void Petitioner's Conviction/Sentence, granting him immediate relief?

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:

RELATED CASES

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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.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits 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 _____ 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.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 1, 2019.

☐ 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: September 25, 2019, and a copy of the order denying rehearing appears at Appendix A.

☐ 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).

☐ For cases from **state courts**:

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

☐ A timely petition for rehearing was thereafter denied 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

O.C.G.A. 9-14-1 et seq.

28 USC 2254

28 USC 2244

Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA")

28 USC 2253 (c)(2)

14th Amendment to the U.S. Constitution

STATEMENT OF THE CASE

i. An accurate history of the entire State² proceedings was partially provided by Respondent's Notice of Filing (ECF No. 16). Additionally, Petitioner shows that he pursued relief all the way to the U.S. Supreme Court, March 17, 2016 being the end of that pursuit (listed as ECF No. 20, Attachment: Pet. Ex. 3).

A. Petitioner submitted his 28 USC 2254 habeas petition on March 13, 2017 (ECF No. 1). The original four grounds of ineffective assistance of counsel were cited.

B. Following the Order of August 10, 2017 (ECF No. 9), Petitioner's amended claim for federal habeas relief on September 15, 2017 (ECF No. 13). Twelve unalleged possible constitutional errors or deprivations were raised¹ in addition to the original grounds.

C. Respondent's Answer-Response and Motion to Dismiss were filed October 10, 2017 (ECF Nos. 14 and 15). HOWEVER, Respondent failed to satisfy the Order of August 10, 2017 by not complying with Rules 5(b) and (d)(1) of the Rules Governing Section 2254 Cases, in which no response to Petitioner's 14th Amendment claim was given.

D. Thus, in addition to his Brief in Opposition to Motion to Dismiss, Petitioner Contemporaneously filed a Notice of Default along with a Consolidated Motion and Application for Judgment on the Pleadings and Default Judgment, all of which was filed on December 6, 2017 (ECF Nos. 18, 19, and 20).

E. Petitioner also filed Motion for Summary Judgment, March 20, 2018 (ECF No. 21), and a Proposed Report and Recommendation, July 3, 2018 (ECF No. 22).

F. On July 31, 2018, Magistrate Stephen Hyles issued his Report and Recommendation ("R&R") to dismiss as untimely and that a certificate of appealability ~~be~~ denied. (ECF No. 23).

G. Following Petitioner's Objection to ~~that~~ R&R (ECF No. 24), the Court approved, adopted, and made [the R&R] the Order of the Court on September 17, 2018 (ECF Nos. 25 and 26).

H. Petitioner then filed Motion to Alter or Amend Judgment, docketed on October 19, 2018 (ECF No. 27). Magistrate's R&R followed on October 29, 2018 (ECF No. 28), and Petitioner's Objection came on November 14, 2018 (ECF No. 29).

I. Magistrate's R&R was adopted by the court on December 27, 2018 (ECF No. 30). HOWEVER, copy of the Order sent to Petitioner was returned as undeliverable; Entered on January 14, 2019 (ECF No. 31).

J. Petitioner was finally notified of said Order via letter from the clerk dated April 30, 2019 (ECF No. 33). HOWEVER, the court failed to issue an order as required in this situation pursuant to Fed. R. App. P. 4(a)(6); 28 USC 2017(c).

K. Petitioner's Notice of Appeal was docketed on May 28, 2019 (ECF No. 34).

L. The 11th Circuit Court of Appeals eventually declined to hear the appeal and denied a Motion for Reconsideration on September 25, 2019 (Appendix A).

REASONS FOR GRANTING THE PETITION

A. State habeas court failed to do its own findings of fact and conclusion of law.

O.C.G.A. 9-14-49 states, "After reviewing the pleadings and evidence offered at the trial of the case, the judge of the superior court hearing the case shall make written finding of fact and conclusion of law upon which the judgment is based. The findings of fact and conclusion of law shall be recorded as part of the record of the case."

However, the judge did no such thing for he merely signed Respondent's proposed order. (Appendix G).

If a habeas court enters an order denying relief, but fails to make the requisite findings of fact and conclusions of law, the case must be vacated and remanded with instruction to the habeas court to enter a new order that complies with O.C.G.A. 9-14-49. Thomas v. State, 284 Ga. 327, 667 S.E. 2d. 375 (2008); Crosson v. Conway, 291 Ga. 220, 728 S.E. 2d 617 (2012).

B. District court's procedural ruling was erroneous.

The court dismissed the 2254 habeas petition as untimely. (Appendix E.). However, this Supreme Court says otherwise: 153 L. Ed. 2d. 981...

Purpose-- and perhaps chief on-- of falling under 28 USC 2244(d)(2) is to permit exhaustion of state remedies.

Also, (1) tolling provision provides powerful incentive for litigants to exhaust all available state remedies before proceeding in lower federal courts, and (2) tolling limitation period for all "collateral review" motions provides both litigants and states with opportunity to resolve objections at state level, potentially obviating need to resort to federal court. Wall v. Kholi (2011, US) 131 S. Ct. 1278, 179 L. Ed. 2d. 252.

Now as it relates to a Georgia petitioner challenging a guilty plea conviction, the Supreme Court explains in Caine v. State, 266 Ga. 421, 467 S.E. 2d. 570 (1996), "... the voluntariness of his plea and the alleged ineffective assistance of his counsel, could not be resolved on facts appearing in the existing record, he therefore was not entitled to file a notice of direct appeal." Cain further provides that "In either instance, the defendant would be relegated to the remedy of habeas corpus." [citing] Morrow v. State, 266 at 4; Jarrett v. State, 217 Ga. App. 627, 629 (1) (458 S.E. 2d 414) (1995).

The legislative intent of a habeas petition is for state remedy to be coextensive with federal remedy. O.C.G.A 9-14-40; Stewart v. Ricketts, 451 F. Supp. 911 (M.D. Ga. 1978); also see Peters v. Rutledge, 397 F. 2d. 731 (5th Cir. 1968).

And the record shows that Petitioner was timely in filing his State petition, the only available remedy. He diligently pursued relief until this very Court gave the final and ultimate denial on March 17, 2016. (ECF No. 1, Attachment: Affidavit of Filings; ECF No. 20, Attachment: Pet. Ex. 3).

Therefore, the district court erred in ruling the petition as untimely, for it was submitted on March 13, 2017, within the one-year statute of limitation. And because the district court dismissed the federal petition on the basis of procedure, the merits were never reached.

C. Merits of Petitioner's 2254 application were never reached.

This Supreme Court holds that a certificate of appealability ought to issue if the merits were not reached. See Slack v. McDaniel, 529 US 473 (2000).

D. Respondent failed to answer Petitioner's claim of a 14th Amendment violation.

In the Answer-Response (ECF No. 14), Respondent was silent as to Petitioner's claim of his 14th Amendment rights being violated. Respondent has had plenty time to amend his Answer if it contained any mistake or oversight, so the silence cannot be deemed as error.

Fed. R. Civ. P. Rule 8(b)(6) provides that "An allegation... is admitted if a responsive pleadings is required and the allegation is not denied." (See Rules 5(b) and 61(1) of the Rules Governing Section 2254 cases).

Thus, this ground alone is sufficient for granting Petitioner immediate relief, which is why Petitioner filed for Default Judgment. (ECF Nos. 19 and 20).

E. District Court failed to take Judicial Notice.

Petitioner requested for judicial notice to be taken in his first Objection to Magistrate's Recommendation (ECF No 24).

Rule 201 [Fed. R. Evid.] makes taking of judicial notice mandatory if Court is so requested and supplied with the necessary information. Haye v. United States (C.D. Cal. Dec. 13, 1978), 461 F. Supp. 1163, 3 Fed. R. Evid. Serv. (C.B.C.) 391.

Because Petitioner did provide necessary information in support of his request for judicial notice and it cannot be said that he did not, the district court is clearly in error for failing to do so. And Petitioner earnestly contends that such notice by prudent triers of fact will further substantiate that the petition was not untimely.

F. Two previous Orders were issued so as to protect Petitioner and inform him of certain rights before they were lost at critical stages during the proceedings

(ECF Nos. 8 and 17). However, the district court suffered prejudice to come upon Petitioner when it failed to issue an Order pursuant to Fed. R. App. P. 4(a)(6) and give notice of the 14 day deadline he was now facing, concerning the unusual appellate circumstances (i.e. ECF Nos 31-33).

As a result, Petitioner was further deprived of Due Process and Equal Protection.

WHEREFORE, Petitioner's right to Due Process was violated in that he did not receive a full and fair hearing on the petition in the state court, and that the merits were never reached in the federal courts. Thus the petition shall be Granted, whereas pleadings must be construed to do justice. Fed. R. Civ. P. Rule 8(e).

MOREOVER, improper applications of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") are causing many prisoners, especially in Georgia, to suffer and be deprived of their right to have their claims of federal constitution violations heard and reviewed by a Constitutional Court. Thus, by choosing to hear this case, this Court can address and correct this far-too-common manifest injustice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Devin L. Lewis Sr.

Date: December 20, 2019