


In the
Supreme Court of the United States



LYNEAL WAINWRIGHT, WARDEN,

Petitioner,

v.

JASON S. SEXTON,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Despite the fact that Ohio courts treat delayed appeals under Rule 5(A) of the Ohio Rules of Appellate Procedure motions as direct appeals rather than postconviction proceedings, are Ohio's delayed appeals considered postconviction proceedings for federal habeas petitions?

2. If Ohio's delayed appeal proceedings are considered state-postconviction proceedings, can federal courts award habeas relief based on errors in state-postconviction proceedings?

3. If the error in a state-postconviction proceeding or direct appeal is that the state-court failed to allow the petitioner to file his delayed appeal, is that failure a "necessary factual predicate" pursuant to 28 U.S.C. § 2244(d)(1)(D) such that a federal habeas petitioner's obligation to exercise due diligence does not commence until after the aforementioned state-court's failure?

PARTIES TO THE PROCEEDINGS

The petitioner is Lyneal Wainwright, Warden of the Marion Correctional Institution. The respondent is Jason S. Sexton, an inmate in the Marion Correctional Institution.

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JURISDICTIONAL STATEMENT

Respondent does not dispute that this Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1) but denies that this case meets the standards elucidated in Supreme Court Rule 10. Petitioner filed her Petition for Writ of Certiorari on October 29, 2020.



COUNTERSTATEMENT OF THE CASE

1. On October 10, 1997, Respondent Jason S. Sexton (“Respondent” or “Mr. Sexton”) pled guilty to aggravated murder and aggravated robbery pursuant to a plea agreement. Pet.App.35a. In accordance with the terms of the plea agreement, on October 15, 1997, a trial court judge sentenced Mr. Sexton to 20 years to life for the aggravated murder charge, and 10 to 25 years for the robbery. Pet.App.17a. However, Mr. Sexton’s sentencing violated Ohio law which required that Mr. Sexton could only be sentenced by a three-judge panel. Pet.App.17a-18a. In addition, throughout his original court proceedings, neither the trial court nor Mr. Sexton’s counsel informed him of his right to appeal, the time limit to appeal, or that his sentencing by a single judge violated Ohio law. *Id.* Nor did the trial court inform Mr. Sexton of his right to appeal or any deadlines on the judgment entry, during his sentencing, or in any other notifications from the trial court. *Id.* Mr. Sexton did not directly appeal his October 15, 1997 conviction. *Id.*

On December 22, 1998, Mr. Sexton filed a petition for postconviction relief pursuant to Ohio law, and moved for the appointment of counsel. Pet. App.18a. the state appellate court denied Mr. Sexton's petition for postconviction relief on January 28, 1999 "because it was untimely and lacked merit." *Id.* Mr. Sexton also did not directly appeal the denial of postconviction relief. *Id.*

2. In June 2017, in a conversation with an inmate law clerk, Mr. Sexton discovered that Ohio law required his sentencing to be meted by a three-judge panel, that he had the right to appeal his sentence, and that he had the right to an attorney on that appeal. Pet. App.3a. Thus, on July 23, 2017 Mr. Sexton filed his application for leave to file a delayed appeal in the state-appellate court pursuant to Rule 5(A) of the Ohio Rules of Appellate Procedure. Pet.App.18a-19a. Contrary to Petitioner's assertions at Pet.5, Ohio courts treat delayed appeals as direct appeals rather than postconviction relief. *See State v. Hill*, 827 N.E.2d 351, 330-31 (Ohio Ct. App. 2005).

On September 21, 2017, the Ohio Appellate Court denied Mr. Sexton's application for leave to file a delayed appeal. Pet.App.19a. Respondent appealed the September 21, 2017 denial to the Ohio Supreme Court, but the Ohio Supreme Court refused to exercise jurisdiction over the appeal on January 31, 2018. *Id.* Three months later, on April 25, 2018, Mr. Sexton filed his petition for a writ of habeas corpus in federal court. Pet.App.20a. Among other things, Mr. Sexton's petition alleged that the Ohio Appellate Court violated his due process and equal protection rights when it denied his application for a delayed appeal on September 21, 2017. Pet.App.36a.

3. Shortly after Mr. Sexton filed his petition for habeas relief, Petitioner, Lyneal Wainright (“Petitioner” or the “State”) filed a motion to dismiss in the district court. Pet.App.16a. On, September 17, 2018, the district court Magistrate Judge issued a Report and Recommendation, recommending that Mr. Sexton’s petition be dismissed as untimely. *Id.* Mr. Sexton then filed motions to expand the record and in opposition to the State’s motion to dismiss and, also filed objections to the Report and Recommendation. *Id.* In response to Mr. Sexton’s filings, the Magistrate Judge withdrew the Report and Recommendation that he issued on September 17, 2018 and issued a new Report and Recommendation on October 4, 2018. *Id.* In the new Report and Recommendation, the Magistrate Judge denied the State’s motion to dismiss with respect to Mr. Sexton’s claim that the Ohio Appellate Court violated his due process and equal protection rights when it denied his application for a delayed appeal on September 21, 2017, but granted the State’s motion with respect to Mr. Sexton’s other claims (which are not at issue in this appeal). Pet.App.16a-17a. Both Mr. Sexton and the State filed objections to the second Report and Recommendation. Pet.App.17a.

On October 29, 2018, the Magistrate Judge again withdrew his Report and Recommendation, and filed a Substituted Report and Recommendations that reversed his second report and granted Respondent’s motion to dismiss in its entirety. *Id.* On March 22, 2019, the district court adopted and affirmed the Magistrate Judge’s Substituted Report and Recommendation, dismissed Mr. Sexton’s action, and declined to issue a Certificate of Appealability. *Id.* Then, Mr. Sexton filed a motion with the United States Court of

Appeals for the Sixth Circuit (“Sixth Circuit”) for a certificate of appealability and for the appointment of counsel. Pet.App.4a. The Sixth Circuit granted Mr. Sexton’s motions, and on appeal vacated the district court’s dismissal of Mr. Sexton’s habeas petition on timeliness grounds and remanded the case to the district court for it to consider the merits of Mr. Sexton’s habeas petition. Pet.App.15a.

4. The issue on appeal before the Sixth Circuit was whether Mr. Sexton’s claim, that he was denied due process and equal protection of the law when the Ohio Court of Appeals denied his motion for leave to file a direct appeal, was timely under 28 U.S.C. § 2244(d). Pet.App.4a-5a. Section 2244(d)(1) indicates that a state prisoner has a one-year period of limitation to file for habeas relief in federal court. 28 U.S.C. § 2244(d)(1). The limitation period begins to run on the latest of four dates. *Id.* The date relevant to Mr. Sexton’s claim was that the limitations runs from “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D).

Mr. Sexton argued that the date that the limitations period began to run was September 21, 2017, which was the date the Ohio Court of Appeals denied his application for leave to file a delayed appeal. Pet.App.5a. On the other hand, the State claimed that Mr. Sexton was incorrect and could not rely on § 2244(d)(1)(D) because he did not act diligently prior to the Ohio Court of Appeal denial. *Id.*

5. In finding for Mr. Sexton, the Sixth Circuit differentiated Mr. Sexton’s claim from that which this Court reviewed in *Johnson v. United States*, 544 U.S. 295 (2005). Pet.App.10a-12a. The Sixth Circuit held

that Mr. Sexton's claim that the Ohio Court of Appeals denied him due process and equal protection of the law when it denied his motion for leave to file a direct appeal was timely, because the appellate court's denial was a "necessary factual predicate" of his claim Pet.App.13a. In other words, the Sixth Circuit held that it would have been impossible for Mr. Sexton to claim the Ohio Appellate Court acted unconstitutionally until after the appellate court denied his motion for leave to file a direct appeal. Thus, the Sixth Circuit vacated the district court's judgment and remanded it for the court to consider Mr. Sexton's claim on the merits. Pet.App.15a.

6. The State timely filed a petition for a writ of certiorari.



REASONS FOR DENYING THE PETITION

I. THIS CASE IS NOT SUITABLE FOR INTERPRETING THE APPLICATION OF FEDERAL HABEAS REVIEW TO STATE POSTCONVICTION RELIEF.

Petitioner, Lyneal Wainright (“Petitioner”) seeks this Court’s review based on a circuit split regarding the reviewability of the denial of state postconviction relief under 28 U.S.C. § 2254. Pet.1. However, it is uncertain both (1) whether a circuit split exists, and (2) whether this case even involves federal review of state postconviction relief.

A. It Is Unclear Whether a Circuit Split Exists.

Whether a circuit split exists regarding the application of § 2254 to state postconviction relief is debatable. Petitioner is correct that, unlike most circuits, the First and Seventh Circuits have not adopted a per se rule that § 2254 does not permit federal review of state collateral postconviction relief claims. Pet.1. Rather, the First and Seventh Circuits allows habeas review of state postconviction relief claims only “when state collateral review violates some independent constitutional right . . .” *Flores-Ramirez v. Foster*, 811 F.3d 861, 866 (7th Cir. 2016), quoting *Montgomery v. Meloy*, 90 F.3d 1200, 1206 (7th Cir. 1996). However, this distinction, to the extent that it can be called a circuit split, is largely academic and substantially insignificant. The different applications of § 2254 do not really create any substantial uncertainty in the law since state postconviction proceedings may only be

reviewed if an independent constitutional right is violated.

B. This Case Does Not Involve Federal Review of State Postconviction Relief.

Even if Petitioner is correct, and a material and irreconcilable circuit split exists regarding the reviewability of state postconviction proceedings under § 2254, this case is not a suitable vehicle to address it because this case does not involve the federal review of state postconviction relief. Instead, the habeas petition at issue in this case is based on the Ohio Court of Appeals' denial of Mr. Sexton's direct appeal rights. Pet.App.3a-4a.

In 2018, Mr. Sexton learned that he had been improperly sentenced under Ohio law and had been misinformed by both the court, and his counsel, regarding his appellate rights. *Id.* Thus, Mr. Sexton filed a motion for leave to file a delayed appeal pursuant to Rule 5(A) of the Ohio Rules of Appellate Procedure. *Id.* Rule 5(A) gives a defendant the right to seek direct appellate review specific proceedings upon a showing of good cause. In its entirety, Rule 5(A) indicates as follows:

- (1) After the expiration of the thirty day period provided by App. R. 4(A) for the filing of a notice of appeal as of right, an appeal may be taken by a defendant with leave of the court to which the appeal is taken in the following classes of cases:
 - (a) Criminal proceedings;
 - (b) Delinquency proceedings; and

- (c) Serious youthful offender proceedings.
- (2) A motion for leave to appeal shall be filed with the court of appeals and shall set forth the reasons for the failure of the appellant to perfect an appeal as of right. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App. R. 3 and shall file a copy of the notice of the appeal in the court of appeals. Ohio App. R. 5(A).

Thus, the delayed appeal procedure requires the movant to file a notice of appeal and follow the same procedures prescribed for all other direct appeals. *Id.*

In 2008, the Ohio Supreme Court reviewed Ohio App. R. 5(A), and held that “substantively and procedurally, there is no discernable difference between a direct appeal and a delayed appeal. They differ only in the timeliness of the filing.” *State v. Silsby*, 894 N.E.2d 667, 670 (Ohio 2008); *see also State v. Williams*, 10th Dist. No. 06AP-842, 2006-Ohio-5415, ¶ 7-8 (Ohio Ct. App. 2006) (holding that “where leave to appeal is granted pursuant to App. R. 5(A), appellate review of the judgment of conviction occurs in the same manner as when a timely appeal has been taken . . .”). In other words, Ohio law indicates that that delayed appeals are direct appeals, both in terms of substance and procedure.

The Petitioner relies on a single line in *Searcy v. Carter*, 246 F.3d 515 (6th Cir. 2001) to claim that a delayed appeal under Ohio App. R. 5(A) constitutes postconviction relief and is thus barred from review. Pet.4-5. The Court in *Searcy* examined whether a

motion for a delayed appeal under Ohio App. R. 5(A) tolled the statute of limitations for filing a habeas petition under § 2244. *Searcy v. Carter*, 246 F.3d 515, 516 (6th Cir. 2001). As such, the court held that a motion to re-open an appeal, “though part of the direct appeal process, will not delay the starting of the statute of limitations.” *Id.* at 519. In coming to this decision, the *Searcy* court relied on an Ohio Court of Appeals decision that stated that Ohio law “was unclear on whether ‘delayed appeals’ should be treated as ‘direct appeals.’” *Id.* at 519, citing *State v. Bird*, 741 N.E.2d 560, 563 (Ohio Ct. App. 2000). But *Searcy* and *Bird* were decided before the Ohio Supreme Court’s decision in *Silsby*. Thus, to the extent Ohio law was unclear when the *Searcy* court addressed it in 2001, the Ohio Supreme Court decision in *Silsby* has eliminated any doubt.

In addition, *Searcy* merely holds that a delayed appeal does not toll the statute of limitations for filing a habeas petition. *Searcy*, 246 F.3d at 519. Mr. Sexton’s case and *DiCenzi v. Rose*, 452 F.3d 465 (6th Cir. 2006)—the case on which the Sixth Circuit relied in Mr. Sexton’s case—dealt with when a constitutional injury accrued for purposes of the running of the statute of limitation. *See DiCenzi*, 452 F.3d at 472 (remanding to the district court the question of when, “acting with due diligence for AEDPA statutory purposes, the defendant would have discovered his right to an appeal.”)

Regardless, even if Ohio law were to regard a “delayed appeal” as something other than a “direct appeal” it is plainly not the same as “state post-conviction relief” as used in the cases cited by the Petitioner. State postconviction relief—the type of

proceedings rejected as unreviewable in most federal circuit courts—is a collateral attack on a judgment created by state statute. *See State v. Calhoun*, 714 N.E.2d 905, 909 (Ohio 1999) (“a postconviction proceeding is not an appeal of a criminal conviction, but rather, a collateral, civil attack on a criminal judgment.”); *see also Word v. Lord*, 648 F.3d 129, 131-32 (2nd Cir. 2011) (holding that a federal habeas petition is not the proper method of challenging state postconviction proceedings). The Ohio legislature codified the state’s postconviction regime in Ohio Rev. Code § 2953.21, which is distinctly different than delayed appeals pursuant to Ohio App. R. 5(A).

In addition, Ohio courts repeatedly have noted the distinction between delayed appeals and postconviction relief proceedings. *See State v. Hill*, 827 N.E.2d 351, 357 (Ohio Ct. App. 2005); *Silsby*, 894 N.E.2d at 670. If Ohio courts believed—as Petitioner contends—that a delayed appeal is merely another form of state postconviction review, the courts certainly would indicate as such.

In fact, Ohio appellate courts have explained the distinction between a direct-albeit delayed appeal and collateral challenges and noted that they are two separate procedures:

Under the Ohio Rules of Appellate Procedure, an appellant may, by means of an appeal by right, a delayed appeal, or a reopened appeal, bring before an intermediate appellate court a direct, as opposed to a collateral, challenge to his judgment of conviction. Thus, the postconviction statutes, by their terms, plainly afford a postconviction petitioner who has timely filed an appeal by right, who has been

granted a delayed appeal, or whose appeal has been reopened, 180 days from the date on which the trial transcript is filed in his appeal.

State v. Fuller, 870 N.E.2d 255, 267 (Ohio Ct. App. 2007).

To support its position, Petitioner also ignores the multitude of Ohio and federal decisions where postconviction relief was denied because the petitioner had failed to exhaust his remedies through the delayed appeal process. *See e.g. Hill*, 827 N.E.2d at 356; *Albertson v. Johnson*, 440 F.2d 1201, 1201 (6th Cir. 1971); *Dombkowski v. Johnson*, 488 F.2d 68, 70 (6th Cir. 1973). These cases show that a delayed appeal is a different and separate remedy from state post-conviction relief—it is instead akin to a direct appeal. Moreover, in discussing exhaustion requirements, federal courts have expressed that delayed appeals and state post-conviction relief are two separate avenues by which a petitioner could exhaust his state remedies. *See Aleman v. Bowers*, 861 F.2d 719 (6th Cir. 1988) (“it is uncertain whether petitioner still has available to him a mechanism, either in the form of a motion for delayed appeal or some proceeding for post-conviction relief, by which he might bring his challenges to his convictions.”)

Therefore, before this Court can determine whether a circuit split exists regarding the applicability of 28 U.S.C. § 2254 to state postconviction proceedings, it must decide, contrary to Ohio law, that Ohio’s delayed appeal proceedings are post-conviction relief. This required review of Ohio law makes this case a particularly poor vehicle to resolve the circuit split that the Petitioner claims.



CONCLUSION

The Court should not grant Petitioner's petition for certiorari.

Respectfully submitted,

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