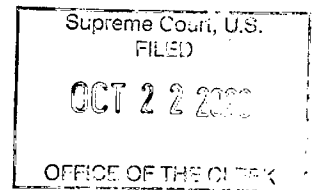


No. 20-6201



IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY THOMAS - PETITIONER

vs.

VICTOR CALLOWAY - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ANTHONY THOMAS
DANVILLE CORRECTIONAL CENTER
3820 E. MAIN ST.
DANVILLE, ILLINOIS 61834

QUESTIONS PRESENTED

1. Should a certificate of appealability have issued where the District Court incorrectly opined that claims raised by Mr. Thomas were matters of state law, overlooking that the preserved issues were argued and well-grounded under federal constitutional law?
2. Should a certificate of appealability have issued where the District Court incorrectly opined Mr. Thomas' perjury claim was procedurally defaulted, ignoring that state post-conviction appellate counsel inappropriately withdrew on state appeal, thereby stifling Mr. Thomas' continued attempts to have his claim considered in one complete round of state appellate review?
3. Are the integrity of the habeas proceedings compromised requiring remand back to the District Court where the court ruled on Mr. Thomas' petition without allowing him to respond to the State's answer, where Mr. Thomas never refused or failed to respond, but rather asked for help in responding, citing the difficulty in understanding the complex procedural doctrines made by attorneys who had significant advantage over him?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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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

The opinion of the United States court of appeals appears as Appendix A to this petition and is unpublished.

The opinion of the United States district Court appears at Appendix B to this petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was August 19, 2020.

No petition for rehearing was filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V¹

U.S. Const. Amend. VI

U.S. Const. Amend. XIV

28 U.S.C. § 2254

28 U.S.C. § 2253(c)(2)

Illinois Const. Art. I § 2

Illinois Const. Art. I § 8

Illinois Const. Art. I § 13

STATEMENT OF THE CASE

Immediate History

This matter arises from the denial of a certificate of appealability by the United States Circuit Court for the 7th Circuit and 28 U.S.C. § 2253(c)(2).

In March of 2019, Mr. Thomas sought habeas relief under 28 U.S.C. § 2254 challenging his Illinois state court conviction for the offense of aggravated criminal sexual assault. (IL Cook County Cir. No. 10-CR-0541001)(Doc. 1) Mr. Thomas asserted in his petition, in relevant part, that his constitutional rights were violated (1) through the admission of other-crimes evidence for propensity

¹ Due to COVID-19 restrictions at the Danville Correctional Center where Petitioner is confined, he was unable to access the institutional law library in order to retrieve and be able to recite verbatim the text of the Constitutional and Statutory Provisions Involved.

purposes (Doc. 1 at 15); (2) the total consecutive sentence was in excess and acted as a penalty for rejecting a plea offer for exercising his right to a trial; and (3) the prosecutor knowingly used false and inconsistent testimony from the victim.

The District Court then directed respondent to answer Mr. Thomas' petition. (Doc. 5) Respondent did so, asserting that the grounds raised were either not cognizable or procedurally defaulted. (Doc. 7, attached as Appendix C)

Then, Mr. Thomas motioned the court for attorney representation citing what he described as the "complicated response" from Respondent. (Doc. 13)

In response, the District Court entered an order denying the appointment of counsel, denying the petition itself without any input from Mr. Thomas, and denied a certificate of appealability. (Doc. 14, attached as Appendix B)

Facts Relevant to the Issues Raised Herein

While serving a 15-year sentence to a charge of aggravated sexual assault, in 2010, Mr. Thomas was charged with a separate offense of aggravated criminal sexual assault. Following trial by jury, the Illinois Circuit Court sentenced Mr. Thomas to a term of 15 years imprisonment, ordered to be served consecutive to the prior 15-year term then underway. See People v. Thomas, 2014 IL App (1st 130017-U)

Mr. Thomas took a direct appeal where he argued, inter alia, that the admission of "other crime evidence" for propensity purposes, and, imposition of a consecutive sentence greater than that offered in plea proceedings as a penalty for going to trial, both violated due process. (Excerpt pages of Mr. Thomas' Appellant's Brief included as Appendix D) The appellate court affirmed Mr. Thomas' conviction on these issues, and the Illinois Supreme Court denied leave to appeal challenging the Appellate Court's judgment on the issues. People v. Thomas, No. 118362 (Ill. Jan 28, 2015)

In 2015, Mr. Thomas filed a post-conviction petition alleging, inter alia, that the State suborned perjury at trial; that trial counsel was ineffective for failing to preserve his perjury claim; and, that appellate counsel was ineffective for failing to raise the issue on direct appeal. People v. Thomas, No. 10-CR-5410, at C. 39-58.

The circuit court dismissed the petition as frivolous and patently without merit. (Id. at C.110-119) Mr. Thomas appealed the decision, however appointed counsel moved to withdraw pursuant to Pennsylvania v. Finley, 481 U.S. 551 (1987). People v. Thomas, 1-16-1221. The appellate court then granted the Finley motion thereby affirming the circuit court's judgment. (Nov. 2, 2018)

Then, Mr. Thomas proceeded to the Illinois Supreme Court arguing that his appellate counsel was ineffective for moving to withdraw under Finley. In January 2019, the court denied leave to

appeal. People v. Thomas, No. 124263 (Jan. 31, 2019)

Leaving the Illinois court system, Mr. Thomas instituted federal habeas proceedings in March of 2019 asserting nine (9) total grounds for relief, of which were that his constitutional rights were violated by the Illinois trial court (1) through the admission of other crimes for propensity purposes (Doc. 1 at 5); (2) the imposition of a consecutive sentence greater than that offered in plea proceedings as a penalty for going to trial (Id. at 6-7)²; and (3) that the prosecutor knowingly used false and inconsistent testimony from the alleged victim. (Id. at 25)

The District Court then directed Respondent to answer the petition. (Doc. 5)

On June 14, 2019, Respondent filed an Answer to Mr. Thomas' petition. Respondent claimed, in pertinent part, that Mr. Thomas's claim that the admission of the other-crimes evidence and sentence issues amounted to state-law challenges and were procedurally defaulted nonetheless. (Doc. 7 at p. 6, Appendix C) With respect to the perjury, though Respondent acknowledged post-conviction appellate counsel moved to withdraw on appeal, causing Mr. Thomas to argue his post-conviction appellate counsel's incompetency in a PLA

² The District Court merely framed this issue as "consecutive sentences violated state law" (Doc. 14, p. 3, App. B), but this is a reframing, which significantly narrowed the scope and federal constitutional value of the claim Mr. Thomas made in his direct appeal brief. (Appendix D)

in the Illinois Supreme Court, Mr. Thomas failed to exhaust his state remedies. (Id. at p. 7)

Then, although Mr. Thomas was allowed to file a response, he first moved for the appointment of counsel citing difficulty with Respondent's "complicated response." (Doc. 13)

On November 12, 2019, the District Court entered an order noting that in lieu of a response, Mr. Thomas instead moved for the appointment of counsel. (Doc. 14, fn. 1, Appendix B) The Court then denied Mr. Thomas' request citing that the appointment of counsel would not change the outcome of his petition. (Id. at p. 1, fn. 1) Then, without any consideration to sua sponte order an extension of time to understand and file an appropriate response, the court denied the petition, then declined to issue a certificate of appealability. (Id. at pgs. 1, 7-8)

On August 19, 2020, the 7th Circuit Court of Appeals denied a renewed request for a certificate of appealability where he raised the three questions now presented to this Court. (Appendix A)

REASONS FOR GRANTING THE PETITION

- I. A certificate of appealability should have issued where the District Court incorrectly opined that claims raised by Mr. Thomas were only matters of state law, overlooking that the preserved issues were argued and premised under federal constitutional law.

To obtain a certificate of appealability, a habeas petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This demonstration "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

Initially, it should be noted that the District Court found the issues regarding the trial court's admission of other crimes evidence, and, imposition of a consecutive sentence greater than previously offered as a penalty for going to trial, were exhausted through complete rounds of state review. (Doc. 14, at. p. 4, Appendix B) Mr. Thomas asserts, however, that the District Court erred in finding the issues were merely matters of state law in concluding they were not cognizable in federal habeas proceedings. (Id.)³

As this Supreme Court well knows, the remedial power of a federal habeas

³ To avoid redundancy, the substantial basis of these claims were argued in the state direct appeal brief, excerpts of which are included as Appendix D to this petition.

court is limited to violations of the petitioner's federal rights "so only if a state court's errors have deprived the petitioner of a right under federal law can the federal court intervene." Perruquet v. Briley, 390 F.3d 505, 511 (7th Cir. 2004). A petitioner must draw enough connection between his rights to due process and the trial court's alleged state law errors for the claim to be cognizable on habeas review. Perruquet, 390 F.3d at 512. To make this determination, the Court must consider whether the state court was "sufficiently alerted" to the federal constitutional nature of the issue to permit it to resolve that issue on a federal basis. Whatley v. Zatecky, 833 F.3d 762, 771 (7th Cir. 2016). The Seventh Circuit in Whatley set forth various factors to consider in whether the state court was "sufficiently alerted," amongst which are "whether the petitioner relied on state cases which apply a constitutional analysis to similar facts" or "whether the petitioner framed the claim in terms so particular as to call to mind a specific constitutional right." Id. at 771. The Court must consider the specific circumstances of each case. Id.

In the District Court's opinion, it claimed that Mr. Thomas has not met this standard, stating:

"Both grounds one and two are expressly based on violations of state law. Thomas never argued in state court that these violations of state rise to the level of federal due process violations. [] Thomas did not in any way cite or implicate a specific constitutional right in his state court briefing. Nor did he cite federal or state cases applying a constitutional analysis in his state court briefing. Indeed, his state court papers did not even touch on broader principles of constitutional due process." (Doc. 14 at 6, Appendix B)

Respectfully, the District Court is flat-out wrong. Specifically, in his direct appeal brief, with respect to his argument that the trial court erred in allowing the State to admit other-crimes evidence for propensity purposes,

Mr. Thomas specifically set forth the constitutional basis of his claim in the "Standard of Review" section:

"The improper admission of other crimes evidence violates a defendant's right to due process and a fair trial by an unbiased jury. U.S. Const. amends. V, VI, XIV; Ill. Const. Art. I §§ 2, 8, 13; People v. Roberts, 100 Ill.App.3d 469, 474-76 (1st Dist. 1981); People v. Lindgren, 79 Ill.2d 129, 141-44 (1980)." (Direct Appeal Brief, excerpt p.14, Appendix D)

Here, Mr. Thomas specifically couched his claim by citing the federal due process clause, then cited two State cases that applied a constitutional analysis to similar facts. But then he went further by examining the early history of common law, stating:

"Early in history of the common law, a rule of evidence developed prohibiting the introduction of other-crimes evidence in criminal cases; such evidence was barred "not because it had no appreciable probative value, but because it had too much." 1 Wigmore, Evidence, 3d Ed., § 194; See also Michelson v. United States, 335 U.S. 469, 475-76 (1948)" (Direct Appeal Brief, excerpt p.15, Appendix D)

Here, Mr. Thomas framed the claim in terms so particular as to call to mind a specific constitutional right. This is even more so since he began with earlier U.S. Supreme Court precedent on the issue.

With respect to his argument that the trial court improperly sentenced him to a consecutive term in excess of what he was offered on a plea as a penalty for his choice to go to trial, Mr. Thomas was also clear in his brief, stating:

"The Fourteenth Amendment provides, in pertinent part, "[N]o State shall...deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. See also Ill. Const. Art. I, § 2. It is long held that a sentence imposed on a defendant as punishment because he exercised the right to a trial by jury is a constitutional deprivation. See People v. Martin, 47 Ill. 2d 331, 340 (1970) []; see also People v. Moriarty, 25 Ill.2d 565, 567 (1962) (same)." (Direct Appeal Brief, excerpt p. 27, Appendix D)

Again, Mr. Thomas not only cited the federal due process clause, he also cited

two State cases that applied constitutional analysis to similar facts.

These references are not made merely in passing, or made in the slight as a means to subvert federal habeas review, but rather were apparent, complete, and articulate in their constitutional basis, and the District Court erred in finding otherwise.

Mr. Thomas also emphasizes to this Supreme Court that the District Court framed this issue as but a mere "consecutive sentence" issue (Doc. 14 at 3, Appendix B), which, if true, would indeed have been a state law issue. But the District Court re-framed the claim made (and confirmed exhausted) by significantly narrowing the scope and federal constitutional value of the claim Mr. Thomas made in his direct appeal brief. It was not a mere "consecutive sentence" issue. What elevated the matter to a federal constitutional issue was that the state court offered no reason for its length, which led one to think it was a penalty for going to trial. In more explicit and express words, the state court **retaliated** against Mr. Thomas for asserting his innocence to a jury. The government retaliating against any individual for exercising a constitutional right is a cornerstone issue of constitutional law.

This reframing and narrowing of the scope of the issue is especially important, in that, the District Court continued in *arguendo*, stating that even if Mr. Thomas alerted the state court to the constitutional nature of the two claims, they would fail on the merits nonetheless. (Doc. 14 at p. 6, Appendix B) Specifically, the Court stated:

"The Court is not aware of any constitutional right that a sentence imposed after trial be no longer than the sentence in exchange for a guilty plea. Neither does admission of "other crimes" evidence implicate the constitution. See Lieberman v. Washington, 128 F.3d 1085,

1095 (7th Cir.1997) []; Butler v. Richards, 947 F.2d 948 (7th Cir.1991)" (Doc. 14 at p. 7, Appendix B)

The District Court is wrong for two reasons. First, and again, the Court failed to note the entire scope of the inappropriate sentence claim which specified it was a "penalty" for rejecting a lighter sentence and instead going to trial. (Direct Appeal Brief, excerpt pgs. 26, 30, Appendix D) Second, both claims astutely cited constitutional cases rebutting the caselaw premises relied on by the District Court. Because Mr. Thomas correctly relied on cases in his Appellate Brief showing merit to his position, the District Court erred in claiming otherwise.

In sum, a reasonable jurist could debate whether the District Court erred in finding his claims lacked an adequate constitutional basis and lacked actual merit. Mr. Thomas' Direct Appeal Brief belies the District Court's findings, and as such, the issues presented were adequate to deserve encouragement to proceed further. Slack, 529 U.S. at 483-84.

II. A certificate of appealability should have issued where the District Court incorrectly opined Mr. Thomas' perjury claim was procedurally defaulted, where it ignored that state post-conviction appellate counsel inappropriately withdrew on the state appeal, thereby stifling Mr. Thomas' continued attempts to have his claim considered on one complete round of state appellate review.

Mr. Thomas asserted as Ground 8 in the habeas petition that the prosecutor knowingly used false and inconsistent testimony from the victim at trial. (Doc. 1 at 25, Doc. 14 at p. 3, Appendix B; Doc. 7 at p. 5, Appendix C) Both Respondent

and the District Court opined that the claims were procedurally defaulted (Doc. 7 at p. 7, Appendix C; Doc. 14 at p. 4, Appendix B), but the factual basis in what the record supports conflicts with each other, and, ignores crucial facts beyond Mr. Thomas' control.

More specifically, the District Court concluded that the perjury claim was "never raised in the state court, and are denied for that reason." (Doc. 14 at p. 4, Appendix B) In other words, the District Court infers that Mr. Thomas made no attempt to raise the claim at any state court level.

Conversely, Respondent noted, correctly, that Mr. Thomas raised his subornation of perjury claim in his state post-conviction petition. (Doc. 7 at p.3, Appendix C) The State continued to note the state court record showed: 1) the circuit court dismissed the petition as frivolous and patently without merit; 2) That on appeal Mr. Thomas' appointed counsel moved to withdraw pursuant to Pennsylvania v. Finley, 481 U.S. 551 (1987); 3) The Appellate Court granted counsel's Finley motion and affirmed the circuit court's judgment; and 4) Mr. Thomas proceeded to the Illinois Supreme Court alleging the incompetency of his post-conviction appellate counsel in withdrawing from the appeal under Finley. (Doc. 7 at p.4, Appendix C) In other words, the State infers that Mr. Thomas in fact made an attempt to raise his claim in state court, but argued that he did not present it "in one complete round of the State's established appellate review process" because it was never presented to the state supreme court. (Doc. 7 at p.7, Appendix C)

These discrepancies between the district court findings, and Respondent's Answer are of import to whether or not a fair review (or fair conclusion for that matter) that a procedural default actually occurred. This is particularly so

because the District Court opted to deny Mr. Thomas' request for the appointment of counsel, instead relying on Respondent's arguments regarding procedural exhaustion and fair presentment doctrines. (Doc. 14 at p. 1, fn. 1, Appendix B) The conflict in the District Court's reasoning should lead a jurist of reason to conclude that the subornation of perjury issue "deserves encouragement to proceed further." Slack, 529 U.S. 483-84.

What could be gained by proceeding further? Particularly, the habeas record is devoid of any consideration of the substance of the perjury claim presented in the State court, or what premise post-conviction appellate counsel offered to the state appellate court to justify withdrawal on the appeal. However, one thing is clear: Mr. Thomas did not stop fighting to resolve the claim because he went to the Illinois Supreme Court to argue the threshold claim of the inappropriate withdrawal of counsel by the state appellate court. The state supreme court ~~also~~ elected to deny leave to appeal as acknowledged by Respondent (supra), leading to the instant habeas proceeding. The record should be developed to determine the reliability of the state court proceeding.

In sum, a reasonable jurist could debate whether the District Court erred in finding Mr. Thomas' subornation of perjury claim was procedurally defaulted where the court conflicted with Respondent on its reasoning and interpretation of the record. As a result, the record was never adequately developed to consider the correctness of the State appellate process, and, for that matter, the ultimate merit of the perjury claim itself. On this, the perjury issue presented was adequate to deserve encouragement on whether procedural default in fact occurred, and if not, the ultimate merit of the claim. Slack, 529 U.S. at 483-84.

III. The integrity of the habeas proceedings are compromised requiring remand back to the District Court where the court ruled on Mr. Thomas' petition without allowing him to respond to the State's answer, where Mr. Thomas never refused or failed to respond, but rather asked for help in responding, citing the difficulty in understanding the complex procedural doctrines made by attorneys who had a significant advantage over him.

Mr. Thomas asserts that the District Court erred in not appointing counsel to assist him in responding to the Warden's Answer, and without the benefit of a response, the Court denied the petition. The denial had the effect of penalizing Mr. Thomas for asking for help prior to filing a response, which prejudiced him in the outcome of the habeas proceedings.

Respondent filed his Answer in June of 2019. (Doc. 7, Appendix C) Therein, the Respondent acknowledged the differing claims that Mr. Thomas made, but set forth defenses of (1) State law violation not qualifying for habeas relief; (2) Procedural default; and, (3) Failure to exhaust state remedies. (Id. at pgs. 6-8) To any lawyer, judge, or mere legal technician, these doctrines are substantially complex to comprehend. Mr. Thomas recognized his own difficulty in comprehension, and, realizing that the Warden had a tactical advantage, he asked the court for help specifying the need due to the "complicated response" from Respondent. (Doc. 13) In denying the request for counsel, the District Court noted "[r]ather than file a response to the Warden's answer, Thomas filed a motion for attorney representation due to what he described as the "Complicated Response" from the Warden." (Doc. 14 at p. 1, fn. 1, Appendix B) This is to suggest that Mr. Thomas did not do what the District Court expected of him, namely, to file a response

instead of anything else. But the very reason a response was not first filed was because Mr. Thomas needed to first alert the District Court to its complicated nature, thus impairing his ability to respond appropriately. The matter was circular in nature. But, instead of simply denying the request, and on its own motion continuing the case to allot Mr. Thomas suitable time to research, understand, and produce a pro-se response, the District Court decided to forego any consideration of what he would respond to, in lieu of trusting the Respondent's Answer and the record alone. This had the effect of usurping the integrity of civil proceedings where a party ordinarily has the right to respond to pleadings and defenses of an opposing party.

To be clear, this is not a situation where Mr. Thomas notified the court that he was refusing to file a response, and nothing in the record would support this scenario. Rather, Mr. Thomas, as an untrained litigant, took responsible action by first asking for help. To deny the request, whether correct or not, then to simply deny habeas relief, was effectively a penalty for asking for such help.

Mr. Thomas was certainly prejudiced without the benefit of the court considering any kind of response. In the court's order denying relief, it asserted that the "Warden made arguments regarding procedural exhaustion and fair presentation which are well-settled doctrines" and the appointment of counsel "would not change the outcome of the petition." (Doc. 14 at p. 1, fn. 1, Appendix B) In other words, the District Court is saying that any response by Mr. Thomas would not change the outcome of the petition. If this is sensible, how can it be accounted for the differing conflicts between Respondent and the Court in terms of what

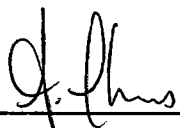
claims are exhausted, procedurally defaulted, fairly presented, or what the record shows, as demonstrated in the prior subsections; supra?

In sum, by not appointing counsel, or otherwise ordering a continuance so Mr. Thomas can submit a pro-se response, in lieu of denying the petition, the district court effectively penalized Mr. Thomas for asking for help. The decision to deny relief without the benefit of a response by Mr. Thomas should cause a reasonable jurist to debate whether the petition should have been resolved in a different manner. Slack, 529 U.S. at 483-84.

CONCLUSION

Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,



Anthony Thomas

OCTOBER 19, 2020
Dated