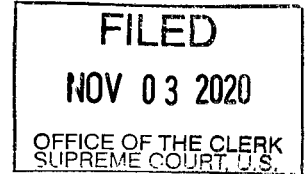


20-7371 ORIGINAL

No. 19-7760



IN THE

SUPREME COURT OF THE UNITED STATES

Chase A. Marsh — PETITIONER
(Your Name)

vs.

Leslie Fleming — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals 4th Cir
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Chase A. Marsh
(Your Name)

329 Dell Brook Lane
(Address)

Independence, VA 24348
(City, State, Zip Code)

N/A
(Phone Number)

IN THE SUPREME COURT OF THE UNITED STATES

CHASE A. MARSH

Petitioner,

LESLIE FLEMING

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE FOURTH CIRCUIT COURT OF Appeals

PETITION FOR WRIT OF CERTIORARI

CHASE A. Marsh
River North Corr Center
329 Dell Brook Lane
Independence, VA 24348

Pro se,

Question Presented

Mr Marsh alleged that his Habeas Corpus was properly filed entitling him to statutory tolling under 28 U.S.C section 2244 (D) (2) and rendering his section 2254 petition timely filed under 28 U.S.C section 2244 (D) (1) (A)

The district courts procedural ruling "that Marsh's section 2254 petition is time-barred by the AEDPA's statute of limitations which rests upon it's erroneous conclusion that "Marsh's state Habeas Petition was filed in the wrong state court on November 14, 2016 which does not render his [section] 2254 petition timely,"

Did the Fourth Circuit err in time-barring Mr. Marsh's section 2254 petition tho he properly filed his state Habeas petition with another circuit court showing by Affidavit or other evidence probable cause to believe that he is detained without lawful authority.

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PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

The petitioner Chase A. Marsh A state prisoner respectfully prays that A writ of Certiorari issue to review the judgement and opinion of the Fourth Circuit Court of Appeals rendered in these proceedings on May 21, 2020

OPINION BELOW

The Fourth Circuit Court of Appeals grants respondent's motion to dismiss and dismissing Marsh's 28 U.S.C section 2254 (2018) petition. The Opinion is unpublished, and is reprinted in the Appendix to this petition At page 1A.

JURISDICTION

The Original opinion of the Fourth Circuit Court of Appeals was entered May 21, 2020. A timely motion to that court for rehearing was overruled on and filed on August 5, 2020.

STATEMENT OF THE CASE

Mr. Marsh was convicted by a jury on June 3, 2013 in the Circuit Court of Caroline County of abduction with the intent to defile, and sodomy and oral sodomy. Final Judgment was entered on July 23, 2013. Commonwealth v. Marsh case No's CR12-245, CR12-246 and CR12-247. Marsh appealed his convictions.

B. Direct Appeal

On December 17, 2015 the supreme court of Virginia denied Marsh's petition for appeal. Marsh v. Commonwealth, Record No: 150705.

C. State Habeas Corpus Proceedings

1. Circuit Court

On November 14, 2016, Marsh filed a pro se petition for a writ of Habeas pursuant to VA. Code section 8.01-654 (A) (1) in the Circuit Court of the City of Richmond. By order dated April 12, 2017, the Richmond circuit court transferred the case to the circuit court for Caroline County. Marsh v. Fleming, No. CL16-5069 (VA. Cir. Ct. April 12, 2017). Speaking through it's

transfer order, the court started in pertinent part as follows

A pursuant to VA. Code [section] 8.01-654 (B).

(1) 'only the circuit court which entered the original judgment order of conviction or convictions complained shall have Authority to issue writ of Habeas corpus.

Id, However, VA. Code section 8.01-654 (B) (1) provides in pertinent part that "with respect to any... petition [For a writ of Habeas corpus ad subiciendum] Filed by a petitioner held under criminal process and subject to the provisions of subsection C of this section and of [section] 17.1-310, only the circuit court which entered the original judgment order of conviction or convictions complained of in the petition shall have Authority to issue writ's of Habeas corpus ... code section 8.01-654 (B) (1). (underline added for emphasis).

At the time Marsh filed his section 8.01-654 (A) (1) petition in the Richmond circuit court, he was not subject to the provisions of subsection C of section 8.01-654 or of section 17.1-310. Moreover, it is important to note the Richmond circuit court gave no explanation as to why it waited more than five months to transfer Marsh's state Habeas

petition to the Caroline Circuit Court. See Marsh
v. Fleming, No CL 16-50.

The Circuit Court of Caroline County, which
filed Marsh's state Habeas petition on April 17, 2017,
dismissed the petition on January 4, 2018; and
Marsh timely filed a notice of appeal on January
8, 2018. See Case No: CL 17000298.
2. Appellate Court Proceedings

On March 26, 2018, Marsh mistakenly mailed a
petition for appeal to the Court of Appeals of
Virginia seeking leave to appeal the Circuit Court
final order denying habeas corpus relief. However,
the Court of Appeals did not transfer the
petition for to the supreme court in accordance
with law. By letter dated July 8, 2018, addressed
to the clerk of Caroline County Circuit Court, a
deputy clerk of the supreme court of Virginia
informed the clerk as follows:

"Because no petition for appeal has been filed and
the time allowed by law within which to do so has
expired, I am returning here with the record in
the case of Chase Adam Marsh v. Commonwealth
of Virginia, Circuit Court No. CL 17000298-00.
This is a digital record."

By letter dated July 9, 2018, addressed to Marsh, a deputy clerk of the supreme court of Virginia informed Marsh that "Rule 5:17 of the supreme court of Virginia states that 'A petition for appeal must be filed with the clerk of this court. Unfortunately, the filing of your petition in another court does not constitute timely filing in the supreme court of Virginia. Please note that under Rule 5:5(A) and the deadline for the filing of a petition for appeal are mandatory and the greatest extension of time that the court may grant is thirty days.' In its letter dated July 9, 2018, the deputy clerk makes no reference to VA code section 8.01-677.1 (Appeals filed in inappropriate appellate court) section 8.01-677.1 provides as follows:

Notwithstanding any other provision of this code no appeal which was otherwise properly and timely filed shall be dismissed for want of jurisdiction solely because it was filed in either the supreme court or the court of appeals and the appellate court which it was filed thereafter Rules that it should have been filed in the other court. In such event, the appellate

Court having appropriate jurisdiction for further proceeding in accordance with the rules of the latter court. The parties shall be allowed reasonable time to file such additional or amended pleading as may be appropriate to proceed with the appeal in the appropriate court to which the appeal is transferred.

D. Federal Habeas Corpus Proceeding in the District Court

On January 31, 2019, Marsh filed in the United States District Court for the Eastern District of Virginia a petition for a writ of Habeas Corpus under 28 U.S.C. section 2254, the judgment of conviction imposed by the circuit for Caroline County, Virginia entered on June 23, 2013. The petition asserts a number of grounds for habeas relief including Ground One: Abduction "Insufficiency of the evidence."

On October 11, 2019, the district court, the Honorable Robert E. Payne, Judge issued a memorandum opinion and resultant final order, by Judge Payne, in accordance with his memorandum opinion. (1) Granted Respondent's motion to dismiss;

(2) Denied Marsh's [Section] 2254 Petition; (3) Denied a Certificate of Appealability; and (4) Dismissed the Action. In his memorandum opinion, Judge Payne granted respondent's motion to dismiss on grounds that the present action is barred by the statute of limitations set forth in section 2244 (D) (1) (A), because; (1) "Marsh's state Habeas petition filed in the wrong state court on November 14, 2016 does not render his [Section] 2254 petition timely"; (2) "Marsh's state petition for a writ of Habeas Corpus which initially was filed in the wrong court, did not toll the limitations period under 28 U.S.C. [Section] 2244 (D) (2)"; (3) "By the time that petition was filed in the proper court on April 17, 2017, one-year limitation period had expired." and (4) Marsh fails to demonstrate his entitlement to equitable tolling of the limitation period. Memo op., at 5-6.

On October 18, 2019 Marsh noted his appeal to the United States Court of Appeals from the district court's final order.

As of December 31, 2019, a separate document setting forth the district court's judgment had not been entered as required by Federal Rule of Civil Procedure 58 (A).

REASONS FOR GRANTING THE WRIT

1. Legal standards for issuance of a Certificate of Appealability.

Under the antiterrorism and effective death penalty act of 1996 ("AEDPA"), a certificate of appealability ("COA") must be obtained before an appeal can be taken from the denial of a section 2254 petition. See 28 U.S.C. section 2253(c). A COA may issue only if the habeas petitioner "has made a substantial showing of the denial of a Constitutional Right." 28 U.S.C. section 2253(c)(2). This requires a showing that "reasonable jurists could debate... whether... The petition should have been resolved in a different manner or that the issue presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

When, as here, the district court denied the habeas petition on procedural grounds, a COA should issue if the habeas petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a Constitutional Right and, that jurists of reason would find it debatable

Whether the district court was correct in its procedural ruling: SLACK, 529 U.S. at 484.

Under this 2 part standard, a COA "should issue" in this case, as demonstrated below.

B. Reasonable Jurists would conclude, or at least find debatable that Marsh section 2254 petition states a valid claim of the Denial of a Constitutional Right.

In Ground One of his section 2254 petition, Marsh claims that the evidence was insufficient to sustain his conviction of Abduction in violation of code section 18.2-48. At the preliminary hearing a Judge of the District Court refused to certify abduction to the grand jury for indictment. Nonetheless, the prosecutor sought and obtained a direct indictment charging Marsh with abduction with the intent. It is significant to note that the District Court failed to recognize that Marsh's petition asserted his claim as a ground for relief.

Under the Due process clause of the Fifth Amendment, the prosecution is required to prove beyond a reasonable doubt every element of the

Crime with which a defendant is charged.

See *in re Winship*, 397 U.S. 358, 364 (1970); The Winship beyond -A- reasonable doubt standard applies in both state and Federal proceedings. See *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993).

The reasonable doubt requirement applies to elements that distinguishes a more serious crime from a lesser one, as well as to those elements that distinguish criminal from non-criminal conduct. See *Apprendi v. New Jersey*, 530 U.S. 466, 488-92 (2000). The government's failure to meet its burden of proof results in the defendant's acquittal at trial or reversal of the conviction on appeal. See *Winship* 397 U.S. at 363; See e.g., *United States v. Bannor*, 648 F.3d 209, 214 (4th Cir. 2011) prosecution's failure to prove beyond a reasonable doubt that the defendant was linked to the robbery when identity in dispute required acquittal.

In assessing the sufficiency of the evidence to sustain a conviction, the test is "whether, after reviewing the evidence in the light most favorable to prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." See *Jackson v. Virginia*, 443

U.S. 307, 319 (1979). See e.g., *Moreland v. Bradshaw*, 699 F.3d 908, 921 (6th Cir. 2012) (due process not violated because rational trier of fact could have found beyond a reasonable doubt that petitioners committed murder with prior calculation). But see e.g., *O'Laughlin v. O'Brain*, 568 F.3d 287, 304, 308 (1st Cir. 2009) (due process violated because only evidence linking defendant to the crime scene was circumstantial and inferences of guilt were speculative).

C. Reasonable Jurists would Conclude That The District Court's Procedural Ruling Is Incorrect Or, At Least, Debatable.

The district court's procedural ruling that Marsh's section 2254 petition is time-barred by the AEDPA's statute of limitations rests upon its erroneously conclusion that "Marsh's State Habeas petition filed in wrong state court on November 14, 2016 does not render his [Section] 2254 petition timely," Memo. Op. at 5 which conclusion, in turn rest upon the court's findings (1) that; the Richmond Circuit Court in its transfer order of April 12, 2017 observed that

"Pursuant VA. Code [Section] 8.01-654 (B) (1) only the circuit court which entered the original judgment order of conviction or convictions complained of in the petition shall have authority to issue writ of Habeas Corpus and (2) that "On April 17, 2017, the circuit court of Caroline County filed Marsh's petition for a writ of habeas corpus." Memo. op at 2.

While the district court's said findings are correct, its conclusion that Marsh filed his state habeas in the wrong state circuit court is wrong, since:

(1) Marsh properly filed his state habeas petition in the circuit court for the City of Richmond on November 14, 2016 pursuant to VA. Code section 8.01-654 (A) (1), which provides in pertinent part that the "Writ of Habeas Ad Subjiciendum shall be granted forth with by the supreme court or ~~any~~ circuit court, to any person who shall apply for the same by petition showing by affidavit or other evidence probable cause to believe that he is detained without lawful authority". *Id.* see *Sigmon v. Dir. of*

Dept. of Corrs, 285 VA. 526, 530, 739 S.E. 2d 905, 907 (2013); *In Re Vauter* 292 VA. 761, 767, 793 S.E. 2d 792, 798 (2016) (Generally, Any Circuit Court, has subject matter jurisdiction to hear a petition for a writ of Habeas Corpus); and

(2) Marsh is not subject to the provisions VA. Code section 8.01-654 (B) (1) because code section only applies to prisoners who have been sentenced to death, see *In Re Vauter*, supra, and Marsh was not sentenced to death.

Pursuant to 28 U.S.C. section 2244 (D) (1), A one-year period of limitation applies to a state prisoner's application for a writ of Habeas Corpus. In this case, the period of limitation started running when Marsh's conviction "became final" either "by the conclusion of direct review or [by] the expiration of the time for seeking such review." *Id.* see 2244 (D) (1) (A); If no petition for a writ of Certiorari is filed in the United States supreme court, then the limitation period begins running when the time for doing so - 90 days - has elapsed. *Hill v. Braxton*, 277 F.3d 701, 704 (4th Cir. 2002) (Citation omitted)

Gonzalez v. Thaler, 132 S.Ct. 641 (2012). The running of the one-year limitation period, however, is tolled for "the time during which a properly filed Application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244 (2)(2) moreover, the one-year limitation period is also subject equal tolling in appropriate cases Holland v. Florida, 560 U.S. 631, 645 (2010); Harris v. Hutchinson, 209 F.3d 325, 329-30 (4th Cir. 2000)

In this case, the one-year limitations period began to run on March 16, 2016 when Marsh's conviction became final. The period of limitation stopped running, however, on November 14, 2016 when Marsh filed his State Habeas Corpus petition ad subsidendum pursuant to VA. Code section 8.01-654 (A)(1) in the circuit court for the City of Richmond which waited until April 17, 2016 to transfer his petition to the circuit court for Caroline County.

The Caroline County Circuit Court denied Marsh's State Habeas Corpus petition on January 4, 2018, Marsh filed a timely notice, he also filed a

timely petition for appeal, which he mistakenly filed in the court of appeals of Virginia, which for some inexplicable reason failed to rule it lacked jurisdiction and to transfer the petition for appeal to the supreme court of Virginia as required by law under VA. Code section 8.01-677.1 "Under code section 8.01-677.1 if an appeal is otherwise proper and untimely but the appellable court in which it was filed rules it should have been filed in the other appellate court, the court so ruling shall transfer the appeal to the other court." Commonwealth v. Southernly, 262 VA. 294, 299, 551 S.E. 2d 650, 653 (VA. 2001).

On January 31, 2019 Marsh placed his section 2254 petition in the prison mail system for mailing to the clerk of the United States District Court for the Eastern District of Virginia by certified mail return receipt requested and the district court deemed the section 2254 petition filed on January 31, 2019.

Because the Court of Appeals of Virginia failed to transfer Marsh's appeal of the denial of Habeas corpus relief there has been no resolution of that appeal in the supreme court of Virginia. As a result proceedings upon Marsh's state application

for a writ of Habeas Corpus is still pending entitling Marsh to statutory tolling between November 14, 2016 when Marsh timely filed his state Habeas petition in a Virginia circuit court pursuant to VA. Code section 8.01-654 (A) (1) and January 31, 2019 (when Marsh filed his section 2254 petition in a Federal District court).

Statutory tolling is available only during the period that the application for state post-conviction or other collateral review with respect to the pertinent judgment or claims was "pending," 28 U.S.C. section 2244.(D)(2). An application is pending as long as the ordinary state collateral review process is "in continuance" - i.e. - "until the completion of" that process. In other words, until the application has achieved final resolution through the state's post-conviction procedures, by definition it remains "pending". Carey v. Saffold, 536 U.S. 214, 219-20 (2002) quoting Webster's Third New International Dictionary 1669. (1993).

Under the facts and circumstances of his case, and considering Virginia's law in *In Re Vauter*, supra and *Commonwealth v. Southern*, supra, the one-year limitations period had run for 243 days when Marsh timely filed his state application

for a writ of Habeas Corpus in a Virginia Circuit Court on November 14, 2016, pursuant to VA. Code section 8.01-654 (A)(1). Thus, at the time Marsh filed his section 2254 petition in a Federal District Court on January 31, 2019, 122 days remained to file a timely Federal Habeas Corpus petition, in a Federal District.

For the foregoing reasons, reasonable jurists would conclude that the district court's procedural ruling is incorrect, or at least, debatable.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit Court of Appeals.

Respectfully Submitted
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