ORIGINAL

No. 21-7940

IN THE SUPREME COURT OF THE UNITED STATES

JASON P. THOMAS, PETITIONER

VS

TAMMY FERGUSON, SUPERINTENDENT BENNER TOWNSHIP, SCI, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS FOR THE ORDER ENETERED ON FEBRUARY 25, 2022.

PETITION FOR WRIT OF CERTIORARI

Submitted by,

Jason P. Thomas, pro se
LZ-3692
301 Institution Drive
Bellefonte, Pa. 16823

QUESTIONS PRESENTED

I. Whether the District Court, without holding an evidentiary hearing erred in disposing of Petitioner's trial counsel's ineffectiveness surrounding the failure to litigate a valid double jeopardy violation when Petitioner presented exculpatory evidence suggesting the State fabricated the venire panel sheet?

II. Whether the District Court erred when it determined that Petitioner was not prejudiced by trial counsel's failure to object to a faulty jury instruction on the charge of second-degree murder when in fact a second-degree murder conviction would have resulted in a lesser sentence?

LIST OF PARTIES

1. Jason P. Thomas ("Petitioner/Thomas") is the Petitioner in this matter. He's a *pro se* litigant and is currently confined a SCI Benner Township under inmate number LZ-3692.

2. Tammy Ferguson is the former Superintendent of SCI Benner Township which is located in Bellefonte Pennsylvania. Tammy Ferguson is represented by the Commonwealth of Pennsylvania. In particular, the District Attorney's Office of Erie County Pennsylvania.

TABLE OF CONTENTS

APPENDICES

Attached Affidavit stating facts with Records

TABLE OF AUTHORITIES

CASES PAGES

STATUES AND RULES

OPINIONS BELOW

The opinion of the United States District Court for the Western District appears at **Appendix A** to the petition and is unpublished at **Jason P. Thomas v Tammy Ferguson**, 2021 U.S. Dist. Lexis 7479, 2021 WL 121046 (W.D. Pa. 2021).

On May 21, 2021, without issuing an opinion, the Third Circuit Court of Appeals denied Petitioner Jason Thomas' ("Petitioner/Thomas") request for a Certificate of Appealabilty ("COA"). This appears at **Appendix B** to the petition.

On February 25, 2022, without issuing an opinion, the Third Circuit Court of Appeals denied Thomas' request for a rehearing. This appears at **Appendix C** to the petition.

JURISDICTION

This is an appeal from a final order issued by the Third Circuit Court of Appeals on February 25, 2022. This appears at **Appendix C** to the petition.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"No person shall be ... twice put in jeopardy of life or limb, ... nor be deprived of life, liberty, or property, without due process of law ..." **U.S. Const. 5th Amendment**

"In all criminal prosecutions, the accused shall enjoy ... the assistance of counsel for his defence." **U.S. Const. 6th Amendment**

"No State shall make or enforce any laws ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws." **U.S. Const. 14th Amendment**

Habeas corpus relief is appropriate when the state court's decision are "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," **28 U.S.C. § 2254(d)(1)**, or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State court proceeding." **28 U.S.C § 2254(d)(2)**.

STATEMENT OF THE CASE

On April 8, 2014, a robbery took place at 1257 East 27th Street in Erie Pennsylvania-the residence of Thomas and the victim in this case, Stephon Bibbs ("Bibbs"). In the course of the robbery, Thomas was shot in his leg while Bibbs was shot and stabbed to death.

After the intruders left the residence, Thomas called the Erie County Police who arrived at the scene. Once at the scene, the Erie County Police Department began their investigations by collecting evidence from the crime scene.

Subsequently, Thomas was placed in an ambulance and transported to the hospital so he could be treated for his injury. Due to the seriousness of Thomas' injury, he was immediately rushed into surgery and when he awoke from surgery, he was cuffed to the bed. Accordingly, without providing a *Miranda* warning, the Erie County Police Department began to interrogate him.

On May 27th, 2014, Thomas was charged with the murder of Bibbs. Within a messily eight (8) months, on January 20th, 2015, Thomas selected a jury and on the same day, the jury was sworn in. Accordingly, Thomas's trial was to commence on January 21st, 2015. However, for reasons unknown to Thomas, his trial did not commence on January 21, 2015. Instead, on February 3, 2015, Thomas received a motion in the mail indicating that, at the behest of Erie County's District Attorney Jack Daneri, his trial was continued. See, **Appendix D**. The record is void in that, Thomas consented to the dismissal of the jury that were selected and sworn in on January 20th, 2015. In addition, the record is void in that trial counsel motioned the court to dismiss the panel that were sworn in and therefore, continued the trial for a later date. On February 3, 2015, without

objection or a clear assertion of consent, the State's request to dismiss the panel and to continue Thomas' trial was granted. See, **CP-25-CR-1973-2014**.

On March 2nd, 2015, Thomas appeared for jury selection and a panel was selected and sworn in. Notably, Thomas' trial commenced the same day. On March 5th, closing arguments occurred and the state court provided constitutionally infirmed instruction regarding the charge of second-degree murder. Along this line, the jury wrestled with this matter as several questions were posed by them. Rather than cure the problem, the state court simply provided the defective second-degree murder charge instruction again.

Consequently, among other things, on March 5th, 2015, Thomas was found guilty of first-degree murder and robbery. On April 22, 205, for the charge of first-degree murder, Thomas was sentence to life in prison. In regards to the robbery conviction, the states court imposed a consecutive sentence of 7 ½ to 15 years.

As Thomas was unsuccessful in the state court, pursuant to **28 U.S.C. § 2254**, in the Western District of Pennsylvania, Thomas filed a habeas petition in the District Court on October 2, 2018. See, **Jason P. Thomas v Tammy Ferguson**, 2021 U.S. Dist. Lexis 7479, 2021 WL 121046 (W.D. Pa. 2021). Before this petition was filed and in attempt to obtain information surrounding his double jeopardy argument, Thomas's family hired a private investigator. In particular, Brian Baker ("P.I. Baker").

On September 21, 2018, P.I. Baker provided a report of the investigation which will be referred to as the "Baker Report". See, **Appendix E**. Said report was attached to the habeas petition as such was material to his claim. As Thomas provided material evidence supportive of the claim raised in the initial habeas petition, Thomas filed a motion for discovery. Therein,

Thomas moved to have the State produce material evidence that was relevant to his double jeopardy claim. Notwithstanding, on February 21, 2020, the District Court denied Thomas' motion for discovery. See, **Thomas v. Ferguson**, 1:18-cv-307, (Doc. 24).

On January 13, 2021, without conducting an evidentiary hearing, Thomas's petition as well as a COA were denied. See, **Appendix A**. Thereafter, Thomas sought a COA, however, the Third Circuit Court Appeals erred when disposing of this request as such was treated as an appeal of right rather than permission for review. Consequently, the matter was scheduled to be briefed. When the Court of Appeals realized it error, it nevertheless dismissed Thomas's request for review on May 21, 2021. See, **Thomas v. Superintendent Benner Township**, SCI, 2020 U.S. App. Lexis 24753 (3d Cir. 2021). See, **Appendix B**. Afterwards, Thomas filed a petition for rehearing which was denied on February 25, 2022. See, **Appendix C**. This brief now follows.

REASONS FOR GRANTING THIS PETITION

This Court has reminded the States of their duty to "exhibit regard for fundamental rights and respect for prisoners as people." **Rosales-Mireles v. United States**, 138 S. C.t 1897, 1907 (2018). Jason Thomas is a *pro se* prisoner actively serving a life sentence. The premise for the unconstitutional confinement, Thomas was deprived of two (2) constitutional rights, the right to effective assistance of counsel and the right not to be placed in jeopardy twice. The Double Jeopardy Clause is an ancient rule which protects a criminal defendant's "valued right to have his trial completed by a particular tribunal." **Oregon v. Kennedy**, 456 U.S. 667, 671-672 (1982).

Erie County's District Attorney Office is notorious for subverting the truth determining process. See e.g., **Haskell v. Superintendent Greene SCI**, 866 F.3d 139 (3d Cir. 2017) (granting habeas relief where the Erie County District Attorney's Office failed to correct perjured testimony). At the behest of a private investigator, Thomas obtained and presented physical exculpatory evidence suggesting the State fabricated the venire panel sheet. See, **Miller v. Pate**, 386 U.S. 1, 7 (1967) (the "Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."). Along this line, Thomas faithfully moved for discovery in the District Court. Nevertheless, his request was denied and the State was not compelled to provide evidence suggesting the venire panel sheet was not altered or fabricated. **Mayer v. City of Chicago**, 404 U.S. 189, 198 (1971). Although Thomas presented physical evidence in support of his habeas claim, without holding an evidentiary hearing, the District Court denied habeas relief. See, **Miller-El v. Cockrell**, 537 U.S. 322, 346 (2003) (a state fact-finding may qualify as unreasonable where "the state court ... had before it, and apparently ignored" evidence supporting the habeas petitioner's claim).

While the prosecutor may strike hard blows, "he is not at liberty to strike foul ones." **Berger v. United States**, 295 U.S. 78, 88 (1935). The process implemented in this matter was fundamentally unfair and it's reasonable to conclude that the unfairness is attributed to Thomas' *pro se* prisoner status. As the present circumstances "seriously affects the fairness, integrity or publicly reputation of judicial proceeding" **Rosales-Mireles**, ***supra***., this petition should be granted.

Moreover, this petition contains a plain error as proscribed by **Rosales-Mireles**. Had the State properly instructed the jury on the second-degree murder charge and Thomas been convicted of the lesser included offense, the State would not have been allowed to impose a consecutive sentence of 7 ½ to 15 years for the robbery conviction. **Commonwealth v. Adams**, 39 39 A.3d 310 (Pa. Super. 2012). See also, **Glover v. United States**, 531 U.S. 198 (2001) ("any amount of [additional] jail time has Sixth Amendment significance").

I. TRIAL COUNSELS INEFFECTIVENESS RESULTED IN A DOUBLE JEOPARDY VIOLATION.

Strickland set forth a two-prong test to assess claims of ineffective assistance of counsel. First, counsel's performance must be deficient. **Strickland v. Washington**, 466 U.S. 668, 687 (1984). "Performance is deficient if counsel's efforts 'fell below an objective standard of reasonableness' under 'prevailing professional norms.'" **Strickland**, 466 U.S. at 688. Second, counsel's deficient performance must have prejudiced the defendant. "To demonstrate prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." **Strickland**, 466 U.S. at 694.

The Sixth Amendment of the United States Constitution guarantees that in "all criminal prosecutions, the accused shall enjoy ... the assistance of counsel for his defence." **U.S. Const. 6th Amendment**. Pennsylvania is such a state which requires ineffective assistance of counsel claims be raised on collateral review. See, **Cox v. Horn**, 757 F.3d 113, 124 n.8 (3d Cir. 2014) (citing **Commonwealth v. Grant**, 813 A.2d 726, 738 (Pa. 2002)). Thomas concedes that this claim was procedurally defaulted but such was reviewable under **Martinez v. Ryan**, 566 U.S. 1 (2012) since, "(1) collateral attack counsel's failure itself constituted ineffective assistance of counsel under **Strickland**, and (2) the underlying ineffective assistance [of trial counsel] claim is a substantial one." **Bey v. Superintendent Greene SCI**, 856 F.3d 230, 237-238 (3d Cir. 2017).

Before Thomas filed a habeas petition in the District Court, "to locate information regarding Jury Selection on January 20, 2015", his family hired "Private Detectives Brian Baker and Dennis Lagan." See, **Appendix E at 1-2**. As such Thomas argued that on January 20th, 2015, he appeared in the Court of Common Pleas of Erie County Pennsylvania where a jury was selected, sworn in and his trial was to commence on January 21st, 2015.

Rule 640(A) of Pennsylvania Rules of Criminal Procedure states that, after "all jurors have been selected, the jury, including any alternatives, **shall be sworn** as body to hear the cause." **Pa. R. Crim. P. 640(A)**; see also, **Crist v. Bretz**, 437 U.S. 28, 35-38 (1978) (holding that jeopardy attaches once the jury is sworn in). However, Thomas' trial did not commence on January 21st, 2015. Instead, without Thomas' consent or a motion by trial counsel continuing the matter, the panel selected and sworn in on January 20th, 2015 was dismissed.

Subsequently, approximately two (2) weeks from the day in which Thomas' trial was to commence, on February 3rd, 2015, the State as opposed to trial counsel, filed a motion to continue the subsequent trial scheduled for February 9th, 2015. The premise for the continuance, the wife

of Thomas' attorney unexpectedly died. In accordance, "the Commonwealth and defense counsel Moore" moved to have the trial scheduled for February 9th, 2015 to be moved until "March 2, 2015." See, **Appendix D at 2**. Although the States motion explained the acts relevant to the subsequent trial scheduled for February 9th, 2015, the motion and the record before the District Court was void in that, trial counsel moved for the dismissal of the January 20th, 2015 jury or Thomas consented to the dismissal of that panel. Thus, the focal of this claim was whether the January 20th, 2015 panel was actually sworn in because if "the jury was not sworn in, jeopardy did not attach." **Thomas v. Ferguson**, 1:18-cv-307-RAL, Appendix A at 5.

The Double Jeopardy Clause "unequivocally prohibits a second trial following an acquittal." **Arizona v. Washington**, 434 U.S. 497, 503 (1978). To implement this rule, this Court has articulated a principle that a trial judge may not defeat a defendant's entitlement to "the verdict of tribunal he might believe to be favorably disposed to his fate" by declaring a mistrial before deliberation end, absent a defendant's consent or a "manifest necessity" to do so. **United States v. Jorn**, 400 U.S. 470, 486 (1971).

To substantiate his claim, Thomas provided the District Court with a Report from P.I. Brian Baker. Accordingly, the Baker's Report indicated that the date "of jury selection was listed as 01.20.2015. Voir Dire began at 11:42AM on January 20, 2015, and concluded at 1:10PM the same day. ... A copy of this form was provided to Investigator however the names of 13 jurors listed on this form were redacted with black marker. The existence of this form does confirm that the names are recorded in Erie County, Pa, and a subpoena or court order would be required to obtain those names for further investigation." Critically, the Baker Report indicated that "on the form that that the line 'Jurors Sworn In' is blank, indicating the jury was not sworn. However there are discrepancies as this form has a line at the bottom Prepared by: The individual listed as the

preparer of this record was Abigal Grasinger and the date of preparation was January 22, 2015. This is two days after the January 20, 2015 jury selection and one day following the scheduled start of the trial."

More troubling, the "form appears to have been prepared by two different individuals as two distinctive handwriting styles are evident. Investigator was not give opportunity to examine the original form and was only provided a redacted copy." **Appendix E at 3**.

This Court has long established that the Constitution forbids the fabrication of evidence and/or the use of false testimony to secure a criminal conviction. **Miller v. Pate**, 386 U.S. 1, 7 (1967). In **Miller**, the prosecutor claimed that the principle evidence used at trial, a pair of shorts, was stained with blood when he knew the substance on the shorts was in fact paint.

In correlation with the Baker Report which corresponds with Thomas' claim, Thomas filed a motion for the production of "the original [venire] form." See, **Mayer v. City of Chicago**, 404 U.S. 189, 198 (1971) (holding that due process requires States to make available "a record of sufficient completeness to permit consideration of [an indigent litigant's] claims"); **Dobbs v. Zant**, 506 U.S. 357, 359 (1993) (holding that the transcripts should have been considered in habeas review given its "relevance, for it calls into serious question the factual predicate" of petitioner's claim).

In spite of the evidence presented in Thomas' petition and the specificity of his request, the District Court denied his motion on February 21st, 2020. See, **Thomas v. Ferguson**, 1:18-cv-307 (Doc. 24).

The general rule concerning habeas evidentiary hearings was set out before AEDPA in **Townsend v. Sain**, 372 U.S. 293 (1963). Except as modified by AEDPA, "[t]hat basic rule has

not changed." **Schriro v. Landrigan**, 550 U.S. 465, 473 (2007). Under **Townsend**, in relevant part, an evidentiary hearing is mandatory if:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole, ... (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state tries of fact did not afford the habeas applicant a full and fair fact hearing. **Townsend**, 372 U.S. at 313.

The claim before this Honorable Court satisfied the standard set forth by this Court in **Townsend**. Moreover, P.I. Baker was willing to testify had an evidentiary hearing been held.

On January 13th, 2021, without holding an evidentiary hearing, the District Court issued an order denying Thomas habeas relief. The premise for denying this claim in part, Thomas "consented to the continuation of the trial". **Jason P. Thomas v Tammy Ferguson**, 2021 U.S. Dist. Lexis 7479, 2021 WL 121046 (W.D. Pa. 2021). See, **Appendix A at 6**.

"Contrary to clearly established Federal law" means the state court applied a rule that contradicted the governing law set by the Honorable Court's precedent or that the state court confronted a set of facts that were materially indistinguishable from this Court's precedent and arrived at a different result. **Williams v. Taylor**, 529 U.S. 362, 405-406 (2000). The "unreasonable application" prong of the AEDPA applies when a "state court identifies the correct governing legal principle from [this Court's] decisions but unreasonable applies that principle to the facts." **Wiggins v. Smith**, 539 U.S. 510, 520 (2003).

Based upon the facts and the applicable holdings of this Court, the District Court's determinations were unreasonable and/or contrary to **Townsend**, **Mayer**, **Dobbs**, **Jorn** and **Crist**. Moreover, the factual basis are incorrect as the record does not contain a string of evidence which suggests that Thomas "consented to the continuation of the trial" that was scheduled for January

21st, 2015. In contrast, the only evidence regarding the alleged consent was a motion filed by the State on February 3rd, 2015 which indicates that "the Commonwealth and defense counsel Moore" moved to have the trial that was scheduled for February 9th, 2015, be moved until "March 2, 2015." See, **Appendix D at 2**. Accordingly, this does not constitute consent to the dismissal of the jury empanelled for January 21st, 2015 trial-the issue at hand. **Miller-El v. Cockrell**, 537 U.S. 322, 346 (2003) (a state fact-finding may qualify as unreasonable where "the state court ... had before it, and apparently ignored" evidence supporting the habeas petitioner's claim). As Thomas' claim possess merits, it was cognizable under **Martinez**. Moreover, Thomas was prejudiced by counsel's deficient performance as his constitutional right not to be tried twice was violated.

By means of the Double Jeopardy Clause which is ancient rule that protects a criminal defendant's "valued right to have his trial completed by a particular tribunal", **Oregon v. Kennedy**, 456 U.S. 667, 671-672 (1982), coupled with the fact that the State did not voluntarily provide the original venire form and it's a fact that that the State possess evidence but nevertheless, withheld material which substantiates Thomas's claim, the failure to consider this petition would constitute a miscarriage of justice. **Coleman v. Thompson**, 501 U.S. 722, 750 (1991).

II. THOMAS WAS PREJUDICED BY COUNSEL'S FAILURE TO OBJECT TO A FAULTY SECOND-DEGREE MURDER INSTRUCTION.

Thomas was charged with killing Bibb during the course of a robbery. Title 18 Section 2502(b) is Pennsylvania's codification of felony murder which defines second degree as a criminal homicide that "is committed while the defendant was engaged as a principle or an accomplice in perpetration of a felony" **18 Pa. C.S. § 2505(b)**.

In the course of deliberation, the jury sent several questions which no doubt, reflected their apparent struggle in their understanding and applying the proper instruction on the second-degree murder and robbery charge. During deliberation, the jury posed the following question:

> "If the robbery is committed after the murder, does that fall within the definition of second degree, or doe the robbery have to take place before or during the murder?"

In response to this question, the state court indicated that:

> "I think the jury meant does the theft have to take place before or during the robbery. In any event, I will instruct that jury on the definition of robbery once again." **N.T. 3/5/15 at 84**.

Notably, the State also questioned the second-degree murder instruction provided to the jury as the following exchanges occurred:

> "[State]: With respect to the first question, and the definition of the robbery, I guess I'm a little concern that the – that the jury may take verbiage that robbery is – or felony murder is committed if a theft is committed while a person is fleeing. That if they take that literally, the defendant never fled the scene. And I guess I'm looking for direction from the Court because the case law is fairly clear that if you kill someone and then reach into their pocket and took their wallet that could constitute felony murder. ...
>
> THE COURT: Right. I just read them the definition I read them the first time and that they requested. I'm not sure I'm entitled to go any further that what they've asked for. And the law-what are you – I'm not sure what you're asking." **Id**.

What ensued thereafter was an extended discussion between the prosecution and the court regarding the various nuances between robbery, felony murder and the potential jury confusion:

> "THE COURT: I see what you're saying but I'm not sure that I end up confusing theme more than I have now." **Id**.

Based upon the above, there was uncertainty among the various participants as to juror's proper understanding of the legal instruction relative to the charges of second-degree murder and robbery in which Thomas contends led to an incorrect verdict.

Under Pennsylvania law, the State was required to prove that the murder was in furtherance of a felony to convict Thomas of murdering Bibbs. In failing to ensure that the jury understood the charges against Thomas, trial counsel exposed him to the danger of being convicted of a crime that the jury did not unanimously agreed upon beyond a reasonable doubt. "Jury instruction relieving states of this burden violates a defendant's due process rights as such direction subvert the presumption of innocence accorded to the accused." **Carella v. California**, 491 U.S. 263, 265 (1989).

Had the jury been properly informed of the elements of second-degree murder, there is a reasonable probability that Thomas would not have been convicted of first-degree murder. Therefore, this conviction is not reliable. **Strickland**, 466 U.S. at 687.

In disposing of this claim, the District Court concluded that while the state court "did not properly instruct the jurors as to the elements of second-degree murder, the prejudice that resulted in *Simmons* did not occur in this case." **Jason P. Thomas v Tammy Ferguson**, 2021 U.S. Dist. Lexis 7479, 2021 WL 121046 (W.D. Pa. 2021). See, **Appendix A at** 9

In contrast, Thomas argues that had the jury been correctly instructed, he would not have been convicted of first-degree murder which amounts to prejudice. Further, had Thomas been convicted on the charge of second-degree murder, (which is the lesser included offense) the state court would not have been allowed to impose a consecutive sentence of 7 ½ to 15 years for the robbery conviction as such would have merged with a conviction on second-degree murder. See, **Commonwealth v. Tarver**, 426 A.2d 569 (Pa. 1981) (holding that sentence for second-degree murder and robbery merges). Consequently, Thomas was prejudiced by counsel's deficient performance. **Glover v. United States**, 531 U.S. 198 (2001) ("any amount of [additional] jail time has Sixth Amendment significance"). Thus, the District Court's disposition of this claim conflicts

with **Strickland** and **Glover**. As stated by this Court in **Molina-Martinez**, when "a defendant is sentenced under an incorrect guideline ... the error itself, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." **Molina-Martinez v. United States**, 136 S. Ct. 1338 (2016). Under the plain error doctrine, review is appropriate under **Molina-Martinez**.

CONCLUSION

Based upon the facts, the applicable precedent of this Court and the seriousness of the constitutional violation, Thomas' petition should be granted.

Respectfully submitted,

Date: 5-16-2022

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing has been sent via First Class Mail Postage prepaid to: Erie County District Attorney's Office, John H. Daneri, Esquire, located at 140 West 6th Street, Erie Pa. 16501. This filing is pursuant to prisoner mailbox rule requirement, Houston V. Lack, 487 U.S, 266, 272 (1988)

Respectfully submitted,

Date: 5-16-2022

Jason P. Thomas, Pro se
301 Institution Drive
Bellefonte, Pa. 16823

Supreme Court of the United States
1 First St. NE,
Washington, DC, 20543