

Supreme Court of the United States

No. 22-5438

USAP4 No. 21-7413

Winfred Scott Simpson, Petitioner

v.

N.C. Dept. of Public Safety, Respondent

Petition for Rehearing
of writ of certiorari

Pursuant to Rule 44 of the Rules of the Supreme Court of the United States, Petitioner, filing pro se and In Forma Pauperis, respectfully requests rehearing of his writ of certiorari for the reading of his habeas corpus petition. Petitioner requests that the order to dismiss be reversed or modified in Petitioner's favor, and that Petitioner be granted the requested relief that appears in his habeas.

The grounds of this petition are limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented. I certify that this petition is presented in good faith and not delay.

In accordance with Rule 15(8), Petitioner also submits a supplemental brief with further conclusions of law and findings of fact pertaining to the questions presented in this case. (Appendix A).

Respectfully submitted, November 26, 2022.

I Winfred Scott Simpson swear that the contents of this motion are true to my knowledge.

W. Scott Simpson

Warren, C.J.

P.O. Box 728

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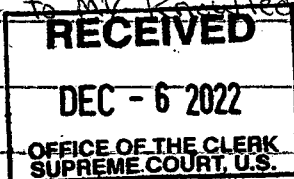


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Reasoning For Granting Rehearing

Winfred Scott Simpson, Petitioner respectfully requests rehearing of his certiorari and his habeas corpus to review decisions of the U.S. Court of Appeals for the 4th Circuit, the Federal District Court for the Middle District of N.C., and the N.C. Supreme Court. These courts have entered decisions that conflict with other courts of the same or higher level, and the U.S. Supreme Court has given a decision that conflicts with its own past decisions and the intent of Congress.

Petitioner believes a presumption of correctness has been given erroneously to the State based on its unreasonable interpretation of law. Petitioner has presented a timely habeas on constitutional violations that is based on federal law, and its denial would be a travesty of justice.

Not claiming actual innocence of any charge, Petitioner contends that he violated the law in a most horrendous manner and deserves to be punished. However, he was convicted of the wrong charge and deserves to pay for the crime he did commit, not the one he did not. A change in law since Scott's trial presents a charge that meets his actions and the evidence.

Petitioner received a wrongful conviction by a jury that was both prejudiced and ignorant of all the evidence. For these reasons Scott is entitled to a rehearing and the relief sought in his habeas. If a brief in opposition was made by the State, Petitioner never received proper proof of service from Respondent or a copy of the response, so he could prepare a reply to it.

Argument Against AEDPA Disqualification

AEDPA was established to deter terrorism, provide for more effective death penalties, and to shorten the time between state and Federal appeals. It was not invoked to prevent the filing of a federal habeas motion, or to prevent the correction of state's unconstitutional mistakes, undermining the means of justice.

A federal habeas petitioner must exhaust all state remedies before being able to file for federal habeas relief. AEDPA tolling of the 1-year time limit exists to give state courts and petitioners sufficient time to remedy a state's unconstitutional mistakes. The controversy of the time limit comes in how states and federal district courts define the word "pending" as it applies to 28 U.S.C. 2244(d)(2).

A few state and federal district courts have adopted the "gap theory," that "pending" does not apply to the time between a lower state courts decisions and filing in a higher state court. However, on-the-whole, this is a false interpretation. The prevailing view or trend in the Federal Court of Appeals and the SCOTUS is that "pending" also applies to the time in between state court appeals in which an appeal is being prepared.

All 12 federal circuit courts agree and have addressed the issue directly to mean the entire period of post-conviction proceedings, including the time between state appeals, not just the periods between a filing and its decision.

(Pending includes the time in which an appeal is being prepared, including the time interval from a lower court decision to the filing

of an appeal in a higher court.) See Barnett v. Lemaster, 167 F.3d 1321, 1323 (10th Cir. 1999); Currie v. Matesanz, 281 F.3d 261 (1st Cir. 2002); Melancon v. Kaylo, 259 F.3d 401 (5th Cir. 2001); Williams v. Bruton, 299 F.3d 981 (8th Cir. 2002); Nino v. Galaza, 183 F.3d 1003 (9th Cir. 1999); Schwartz v. Meyers, 204 F.3d 417 (3rd Cir. 2000); Wade v. Battle, 379 F.3d 1254 (11th Cir. 2004).

(Post-conviction processes should be tolled until final disposition by the highest state court or until time for further state review expires.) See Benett v. Artuz, 199 F.3d 116 (2d Cir. 1999); Martin v. Administrator New Jersey State Prison, 23 F.4th 261 (3rd Cir. 2002); Williams v. Cain, 217 F.3d 303 (5th Cir. 2000); Mills v. Norris, 187 F.3d 881, 884 (8th Cir. 1999); Fernandez v. Sternes, 227 F.3d 977 (7th Cir. 2000); Cramer v. Sec'y, Dept. of Corr., 461 F.3d 1380 (11th Cir. 2006); Head v. Wilson, 944 F.Supp.2d 40 (D.C. Cir. 2013).

Even the 4th Circuit, where Scott's habeas was denied agrees. See Taylor v. Lee, 186 F.3d 557 (4th Cir. 1999); Escalante v. Watson, 488 Fed. Appx. 694 (4th Cir. 2012); Crawley v. Catoe, 257 F.3d 995 (4th Cir. 2003).

Most federal district courts agree in rejecting the "gap theory." In fact (According to Westlaw), the only federal district court to adopt the "gap theory" in a published opinion is the District Court for the Middle District of North Carolina, Moseley v. French, 961 F.Supp. 889, 892 (M.D.N.C. 1997). This is the very same court where Scott's habeas began and was rejected because the State claims AEDPA time has expired.

All the Federal District Courts of N.C. have repeatedly misinterpreted Hernandez v. Caldwell, 225 F.3d 435, 438 (4th Cir. 2000) to mean that the gap between a courts decision and filing for

relief at the next state level counts against the 1-year AEDPA period of limitation. See, e.g., Greene v. Stancil, 2011 WL 861692 (E.D.N.C.); Pearson v. North Carolina, 2001 WL 113791 (W.D.N.C.); Floyd v. Perry, 2017 WL 2275016 (M.D.N.C.). However, it says just the opposite and agrees with the other Circuit Courts.

Several Circuit Courts have published their rejection of the "gap theory." See Taylor v. Lee, 186 F.3d 557 (4th Cir. 1999); Nino v. Galaza, 183 F.3d 1003 (9th Cir. 1999); Hernandez v. Caldwell, 225 F.3d 435 (4th Cir. 2000); Francis v. South Carolina DPP, 2013 WL 567076 (D.C.S.C.F.D.); Mayne v. Hall, 122 F.Supp.2d 86 (D.C.D.M., 2000); Meade v. Lavigne, 265 F.Supp.2d 849 (D.C.E.D.Mich.2003).

The SCOTUS has reinforced the decisions of the rejected "gap theory" courts, saying that a habeas petitioner must "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the state's established appellate review process." O'Sullivan v. Boerskel, 526 U.S. 838 (1999); See also, Duncan v. Walker, 121 S.Ct. 2120 (2001).

The Court has further said "we believe that tolling the entire period of state proceedings upholds 'the principle of comity that underlies the exhaustion doctrine.'" Murray v. Carrier, 477 U.S. 478, 489 (1986).

(The time that an application for state post-conviction review is "pending" includes the periods between (1) a lower court's adverse determination, and (2) the prisoner's filing of a notice of appeal.) Carey v. Saffold, 536 U.S. 214 (2002); Evans v. Chavis, 126 S.Ct. 846 (2006).

The Saffold court explained that "an application is "pending"

as long as the state collateral review process is in continuance, "Id.

Congress itself recognized tolling during the pending of appeal proceeding in state courts, explicitly providing: "The time during which a properly filed application of State [appeal] is pending shall not be counted toward any period of limitation, 28 U.S.C. 2244(d)(2).

Under 28 U.S.C. 2244, the AEDPA 1-year limitation period runs from the date on which judgement becomes final by the conclusion of "direct review." However "direct review" is not necessarily the same as "direct appeal." Neither Congress nor Black's Law Dictionary defines "Direct Review" under AEDPA, so it is under interpretation. (The AEDPA statute of limitations is not an inflexible rule requiring dismissal whenever its clock has run.) Day v. McDonough, 126 S.Ct. 1675 (2006),

(We think most lawyers would regard a case as "pending" during the whole time period [of appeal], including the time between a court's [denial in a lower court] and filing notice of appeal [in a higher court]. To think otherwise is unrealistic.) Peterson v. Gammon, 200 F.3d 1202 (8th Cir. 2000).

All Scott's appeals were "timely." No timeliness violation was ever raised in state court on direct or collateral appeals.

(An appellate application is "properly filed" when it is delivered and accepted in compliance with the applicable laws and rules governing filing.) (Any state appeal that addresses the petitioner's claim on the merits has made a "proper" use of state court post-conviction relief procedures and is "timely.")

Nino v. Galazo, 183 F.3d 1003 (9th Cir. 1999); See also Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998); Villegas v. Johnson, 184 F.3d 467

(5th Cir. 1999),

(A "reasonable time" distinction in a state statute does not make a distinction for AEDPA tolling purposes. "Lack of Diligence" is not the same as [untimely] Evans v. Chavis, 126 S.Ct. 846 (2006).

(Delay is only unreasonable if it prejudices the party against whom relief is sought.) Black's Law Dictionary. The State of N.C. has not suffered any prejudice. They have answered all direct and collateral appeals without claim of prejudice or untimeliness.

[If Scott had filed his habeas within 1 year of his direct appeal, it would have been dismissed for not completing the entire course of state review. All of Scott's state appeals were made on time. There is no deadline for filing a Motion for Appropriate Release (MAR), which is the first collateral appeal in N.C. (At anytime after verdict, a noncapital defendant by motion may seek appropriate relief upon any grounds enumerated in this section.) N.C. G.S. 15A-1415(a). Conviction obtained in violation of the U.S. Constitution applies as acceptable grounds, N.C. G.S. 15A-1415 (b)(3).

[There was an extended period after Scott's direct appeal, where the cumulative effect of: (1) Scott being a legal layman, (2) not being assigned counsel after requesting it, (3) not having access to a law library, (4) having mental health issues, and (5) not receiving any assistance and being rejected for help repeatedly by N.C.'s legal aid "Prison Legal Services" prevented Scott from filing quickly, but his MAR was accepted.

Due to ineffective assistance of Scott's direct appeal counsel, there were several constitutional issues undiscovered in direct appeal

that were in his collateral appeals. So, even though the N.C. Supreme Court ruled on his direct appeal, they did not get a chance to rule on further issues until Scott's state certiorari. (Defendant is not required to raise the same claims on his state petitions, or his federal habeas petition.) Welch v. Newland, 267 F.3d 1013 (9th Cir. 2001). Under Swartz, Saffold, and Evans, any appeal that is accepted by the State constitutes a "timely" filed appeal for AEDPA "pending" definition.

(PCRA petition is "pending" until the date on which the time for appealing the ... denial of the PCRA petition expires.) Cotto v. Price, No. Civ. A. 98-6479, 1999 WL 601129 (E.D. PA.)

Long delays of state appellate filing are not unusual. See Evans v. Chavis, 126 S.Ct. 846 (2006) (3-years); Chavis v. Lemarque, 382 F.3d 921 (9th Cir. 2004) (3-years); Gaston v. Palmer, 417 F.3d 1030 (9th Cir. 2005) (4-years); Welch v. Newland 267 F.3d 1013 (9th Cir. 2001) (4 1/2-years).

There is no congressional directive under AEDPA that applies a temporal limitation to the length of state appellate reviews. (The issue of whether a post-conviction relief is "pending" is governed by state law and the temporal limits it sets by statute for applying for state appeals. See Jefferson v. Welborn, 222 F.3d 286, 288 (7th Cir. 2000).

Given the line of logical thought of most federal district courts, the Circuit Courts, SCOTUS, and Congress, the 1-year AEDPA time limit in Scott's case did not actually begin until after his state certiorari was denied by the N.C. Supreme Court. According to N.C. Prison Legal Service guidelines Scott's certiorari was properly filed and denied on June 3, 2020, and

his federal habeas motion was filed with the U.S. District Court for the Middle District of N.C. on Dec. 15, 2020, slightly over six months later, under the 1-year limit.

The state claims Scott did not file his state certiorari with the correct court, but Scott has shown in previous federal motions that most certiorari are filed with the N.C. Court of Appeals like the state claims, but according to the filing guidelines presented by N.C. Prison Legal Service, in Scott's case, because he has a Class A Felony, the motion was properly filed with the highest state court. So, the States claim of inexhausted state review is in error, and Scott has filed a timely habeas and should be given a fair hearing.

Regardless of AEDPA time constraints, Scott's habeas should be accepted on the merits of its constitutional violations. These violations resulted in decisions that were; (1) contrary to, or involved an unreasonable application of clearly established Federal law, and (2) based on unreasonable determinations of the facts in light of the evidence presented to the court.

Numerous courts have granted Certificates of Appealability (COA) regardless of whether the requirement of 28 U.S.C. 2253 (c)(2) was met or not. Flanagan v. Johnson, 154 F.3d 196, 197 (5th Cir. 1998); Hoggro v. Boone, 150 F.3d 1223, 1224 (10th Cir. 1998); Miller v. Marr, 141 F.3d 976, 977 (10th Cir. 1998); Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 617 (3^d Cir. 1998).

Examples of the Questions Presented and Arguments for those questions are available in the Supplemental Brief (Appendix A).

Proof of Service

 This is to certify that notification of this motion has been placed in the U.S. mail, postage prepaid, and properly addressed to the Office of the Attorney General for North Carolina, on November 28, 2022

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