

No. 23 - 7062

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SUPREME COURT, U.S.

In The  
Supreme Court of the United States

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Clark D. Thomas,  
*Petitioner,*

v.

McKendley Newton, Jr., Warden of the Allendale Correctional Institution,  
Alan M. Wilson, Attorney General of South Carolina,  
*Respondents.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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Petitioner Clark D. Thomas, *pro se*, respectfully petitions this Court for a writ of *certiorari* to review the judgment of the Fourth Circuit in this case.

Clark D. Thomas, *Pro Se*  
Prisoner No. 187845  
Ridgeland, C.I. / Beaufort B-21  
P.O. Box 2039  
Ridgeland, South Carolina 29930

### **Questions Presented**

- I.** Whether the Fourth Circuit erred in denying a certificate of appealability
- II.** on Petitioner's claims that:
  - A) The district court violated Petitioner's Due Process rights under the Fourteenth Amendment to Equitable Tolling of the *habeas* limitations period is where Petitioner diligently pursued confidential medical records protected by HIPAA for 8½ years through every available channel;
  - B) Petitioner has shown actual innocence based on new evidence of the prosecuting witness's perjury, withheld records rebutting her claims, and the prosecution's fabrication of evidence in violation of Petitioner's Due Process rights under the Fourteenth Amendment warranting review of otherwise defaulted claims;
  - C) Trial counsel violated Petitioner's Sixth Amendment rights to the effective assistance of counsel in failing to object to the prosecution vouching for the prosecuting witness's credibility through false evidence manufactured after the fact; and,
  - D) Requiring Petitioner to register as a sex offender despite acquittal on those charges violates the Fifth Amendment's Double Jeopardy Clause.
- II. Whether the lower courts violated Petitioner's Fourteenth Amendment rights to Due Process in denying Petitioner's requests for discovery, record expansion, and appointment of conflict-free counsel to develop claims.

### **Parties to the Proceeding**

**Petitioner** Clark D. Thomas was the *pro se* petitioner in the district court and *pro se* appellant in the Fourth Circuit.

**Respondents** McKendley Newton, Jr., and Alan M. Wilson were the respondents in the district court and appellees in the Fourth Circuit. Counsel of record is Alan M. Wilson, P.O. Box 11549, Columbia, South Carolina 29211.

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**Opinions Below:**

- 1- The unpublished opinion of the United States Court of Appeals for the Fourth Circuit denying certificate of appealability (Appendix A).
- 2- The unpublished opinion and order of the United States District Court for the District of South Carolina denying *habeas* relief and a certificate of appealability (Appendix B).

**Jurisdiction:**

The Fourth Circuit denied a certificate of appealability on June 16, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### Statement of the Case

In July 2008, a South Carolina jury convicted Petitioner for kidnapping and criminal domestic violence of a high and aggravated nature (CDVHAN) based solely on the inconsistent and perjured testimony of the prosecuting witness who was legally married to Petitioner and living with him at the time.. The prosecution falsely claimed that the prosecuting witness's tattered clothing was found at the "crime scene," and the prosecution withheld the chain of custody report because the clothes were provided by the prosecuting witness's mother eight months after Petitioner's arrest.<sup>1</sup> Respondents also withheld the prosecuting witness's medical records, which directly contradicted her testimony about alleged injuries inflicted by Petitioner. Although the jury acquitted Petitioner of criminal sexual conduct charges, he is nevertheless required to register as a sex offender.

For over eight years in state post-conviction relief (PCR) proceedings, Petitioner diligently pursued the wrongfully withheld medical records, and has yet to receive other exculpatory evidence also sought through FOIA requests, subpoenas, discovery motions, and demands directed at multiple agencies, officials, and courts. Petitioner faced active obstruction by Respondents, who concealed evidence and destroyed his properly filed state-court filings. PCR counsel also obstructed Petitioner's access to the medical records by refusing to issue the subpoena for their production in time enough before the PCR evidentiary hearing to have a medical expert prepared to testify to their findings.<sup>2</sup>

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<sup>1</sup> Petitioner filed dozens of requests, pursuant to both state and federal FOIA statutes, for the chain of custody report of the clothing marked State's Exhibits 1 and 2. The presiding court in a subsequent *pro se* action Petitioner litigated for three years to enforce his requests compelled the arresting agency to produce the report.

<sup>2</sup> Respondents drafted the order of dismissal erroneously stating that the prosecuting witness's medical records essentially supported her testimony. However, the medical records were not

The prosecuting witness's confidential medical records showing her testimony about her injuries was perjured were entered into evidence during the evidentiary hearing) but it took Petitioner an additional six months to acquire them. Armed with compelling new evidence of perjury and misconduct, Petitioner properly filed a timely new-trial motion and subsequent PCR application in December 2015 before the initial PCR application was dismissed. However, Petitioner had to refile these documents after they were admittedly "unfiled" by the clerk of court and removed from court records. The new-trial motion is still pending almost 9 years later, and the subsequent PCR application is to be summarily dismissed, according to Respondents, when a hearing can be scheduled.

The petition for *habeas* review was filed after it was determined that Petitioner would not receive a meaningful opportunity to exhaust state remedies on the issue of withheld medical records before completing his 20-year sentence. Petitioner had 11 months left to serve before his release from prison at the time of this writing, and both the new-trial motion and subsequent PCR application filed nine years ago have been dormant for over four years. However, the district court improperly found no diligence or entitlement to equitable tolling, no probability of acquittal based on actual innocence, and no debatable constitutional issues.

Petitioner properly and timely filed a motion for reconsideration of the district court's dismissal within 28 days pursuant to Rule 59(e), FRCP. However, the Fourth Circuit found the subsequent appeal untimely, incorrectly relying on the motion's filing date rather than its mailing date. Documents are considered filed on the date they are placed in the U.S. Mail system pursuant to *Supreme Court Rule 29(2)*, not the date received by the court. Petitioner declares under penalty of perjury that the motion for reconsideration was mailed from a U.S. Post Office

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examined during the proceedings before or after they were entered into evidence

to the district court on April 24, 2021, within 28 days of the March 24 dismissal order, making it timely under Rule 59(e). The timely Rule 59(e) motion then tolled the deadline to appeal until the July 14 order denying reconsideration, rendering the August 6 notice of appeal timely.

### **Reasons for Granting the Petition**

#### **I. Certificates of Appealability Should Have Issued:**

##### **A) Equitable Tolling is Warranted:**

The *habeas* statute of limitations is subject to equitable tolling where a petitioner shows: “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010).

Both factors are satisfied here:

First, Petitioner diligently pursued the prosecuting witness’s medical records, essential to demonstrating perjury and actual innocence, through FOIA requests, subpoenas, motions to compel, and other demands directed at multiple agencies and courts over more than a decade. Despite making exhaustive attempts through every available channel, Petitioner faced active obstruction by Respondents concealing evidence and destroying his properly filed state-court filings. These diligent actions meet *Holland*’s reasonable diligence standard.

Second, the strict limitations under HIPAA on obtaining the prosecuting witness’s confidential records constituted an extraordinary circumstance preventing a *pro se* prisoner like Petitioner from accessing this key evidence earlier. Courts have equitably tolled limitations periods when official obstruction impeded discovering withheld Brady<sup>3</sup> material, further supporting tolling where Respondents’ misconduct obstructed obtaining the medical records here. Moreover, because Petitioner diligently pursued his rights and any delay was caused solely

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<sup>3</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

by application of the mailbox rule, equitable tolling of the appeal deadline is warranted. The COA should have issued for further consideration of whether dismissal of the appeal as untimely was proper. At minimum, reasonable jurists could debate the timeliness of the appeal, warranting a COA under *Slack v. McDaniel*, 529 U.S. 473 (2000).

Additionally, the egregious government misconduct in withholding exculpatory evidence and destroying properly filed court documents constituted extraordinary circumstances beyond Petitioner's control that prevented timely filing. At minimum, reasonable jurists could debate whether equitable tolling is warranted, so a COA should have issued for further consideration. The lower courts' refusal to do so warrants this Court's review for probable due process violations.

**B) Actual Innocence:**

Petitioner has made a compelling showing of actual innocence under *Schlup v. Delo*, 513 U.S. 298 (1995) sufficient to pass through the gateway and obtain review of his underlying constitutional claims. The prosecuting witness's perjured, inconsistent testimony was the entirety of the case against him. Newly-discovered medical records conclusively demonstrate that she lied about supposed injuries inflicted by Petitioner. Additional withheld police reports contradict Respondents' manufactured narrative about the fabricated "crime scene" evidence.

Given the lack of any credible evidence of guilt, it is more likely than not that no reasonable juror would have convicted Petitioner in light of the new evidence exposing the extent of the prosecuting witness's perjury and the prosecution's misconduct in relying on falsified evidence. At minimum, reasonable jurists could debate the district court's conclusion otherwise. The COA should have issued for further consideration of whether Petitioner's persuasive actual innocence claim excuses any procedural defaults as a "miscarriage of justice"

under *Schlup*.

This case presents an ideal vehicle for the Court to resolve confusion over the precise actual innocence standard needed to obtain review of otherwise defaulted constitutional claims. The Court's guidance is needed on whether *Schlup* requires eliminating any possibility of guilt, or merely reaching a high probabilistic threshold that no reasonable juror likely would have convicted based on the new exculpatory evidence. Granting review here would provide clarification on this important unresolved issue.

#### **C) Ineffective Assistance of Counsel**

The prosecution falsely asserted during closing that police recovered critical physical evidence from the "crime scene" corroborating the prosecuting witness's claims, improperly vouching for her credibility. But trial counsel failed to object to these improper, factually untrue statements. Counsel's deficient performance violated Petitioner's Sixth Amendment right to effective counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).

Had counsel properly objected, it would have prevented the prosecution from brazenly enhancing the prosecuting witness's credibility through false assertions in summation. Moreover, an objection would have highlighted that Respondents' entire case rested on the prosecuting witness's inconsistent, perjured testimony. There is a reasonable probability that, absent counsel's error, at least one juror would have harbored reasonable doubt and acquitted Petitioner. The COA denial should be reversed.

#### **D) Double Jeopardy**

Petitioner's acquittal on the criminal sexual conduct charge establishes as a matter of law that the jury determined no sexual offense occurred. Requiring him to register as a sex offender

based solely on the kidnapping conviction effectively overturns the acquittal in violation of double jeopardy under *Green v. United States*, 355 U.S. 184 (1957).

At least four justices have recognized the serious double jeopardy concerns raised by sex offender registration requirements imposed absent conviction for a sexual offense. See *United States v. Kebodeaux*, 570 U.S. 387, 408 (2013) (Sotomayor, J., concurring). This case squarely presents an opportunity for the Court to determine whether collateral registration penalties contradict an acquittal.

## **II. Refusal to Allow Discovery and Counsel Should Be Reviewed:**

The district court denied Petitioner's request made pursuant to *Rule 6(a)*, *Rules Governing Section 2254 Cases in the United States District Courts*, for discovery materials critical to further establishing prosecutorial misconduct, actual innocence, and equitable tolling claims. The lower court also refused to appoint counsel, severely prejudicing Petitioner's ability as an indigent, incarcerated *pro se* litigant to develop an adequate factual record.

As Petitioner has demonstrated a compelling basis for his claims, the "good cause" standard for discovery under *Rule 6(a)* is likely satisfied, and denying evidence necessary to "fully develop the factual basis of his claim" likely constitutes an abuse of discretion. See *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997). Similarly, denying adequate representation where substantial claims warrant factual development arguably violates the Due Process Clause of the Fourteenth Amendment and statutes ensuring counsel for *habeas* petitioners. At minimum, Petitioner has made a debatable showing that the refusal to authorize discovery or appoint counsel despite complex issues warranting factual development was improper. The Fourth Circuit should have granted a COA for further review of this issue.

Conclusion

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Alternatively, the Court should summarily reverse the denial of a certificate of appealability.

Respectfully submitted,

Clark D. Thomas

Clark D. Thomas, *Pro Se*

Prisoner No. 187845

Ridgeland, C.I. / Beaufort B-21

P.O. Box 2039

Ridgeland, South Carolina 29930

March 8, 2024  
Ridgeland, South Carolina