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United States District Court, N.D. Illinois, Eastern Division.

UNITED STATES of America ex rel. Mervin GREEN, individually and on behalf of all others similarly situated, Petitioner,
v.
Howard PETERS, etc., et al., Respondents.

Nos. 93 C 7300, 93 C 5671, 93 C 5672 and 93 C 5673.[1]
|
Jan. 8, 1994.

MEMORANDUM OPINION AND ORDER

SHADUR, Senior District Judge.

***1** All too often the representatives of the Illinois Attorney General's Office appear in the federal court system wearing false—or at least misleading—colors. As lawyers for the "People of the State of Illinois" (that is not only the way in which every state criminal prosecution proceeds, though such prosecutions are brought by State's Attorneys, but more importantly it is the way in which the Attorney General is both authorized and commanded to act by the Illinois Constitution[2]), their duty is not to win at all costs but rather to represent *all* of the people.[3] Less than 18 months ago our Court of Appeals reconfirmed that responsibility of the Attorney General—*United States ex rel. Walker v. O'Leary,* 973 F.2d 521, 525 (7th Cir.1992) flatly rejected that official's answer to a habeas corpus action in which he disclaimed any duty other than to be passive in response to clear violations of a convicted prisoner's constitutional rights:

> We realize, of course, that resentencing only can be accomplished by a court of law. But that fact of constitutional government does not imply that the state attorney general—who represents the respondent in this action—simply can sit and wait for judicial order. The attorney general has a duty not just to keep dangerous criminals locked up, but to see that prisoners' sentences be lawful. In *People v. Finnegan,* 378 Ill. 387, 38 N.E.2d 715 (1941), the Supreme Court of Illinois declared:
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> > The office of Attorney General, as it existed at the common law, is one of ancient origin. He was the only law officer of the Crown. The prerogatives which pertained to the Crown of England under the common law, in this country are vested in the people and the necessity for the existence of a public officer charged with the protection of public rights and the enforcement of public duties, by proper proceedings in the courts of justice, is just as imperative here as there.
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> *Id.* 38 N.E.2d at 717. *See also People v. Illinois Racing Board,* 54 Ill.2d 569, 301 N.E.2d 285, 288 (1973).
>
> Given this broad obligation to protect public rights, we hold that due process requires the attorney general to take a less passive approach to the resentencing mandate of ¶ 1008–2–4.

As in *Walker,* the Attorney General's duty sometimes compels the recognition that the least deserving among us—the criminal—is entitled to the full protection of the Constitution, just as is the most exalted law abiding individual. Yet unfortunately the zeal of the prosecutor mentality can, and even more unfortunately on occasion does, obscure that fundamental truth and, in doing so, leads to the pursuit of injustice rather than justice.

Half a century ago Illinois was a national byword for its relentless promotion of injustice to prisoners—its then Attorney General encouraged its courts (which were regrettably nothing loath in that respect) in erecting a labyrinthine maze of procedural dead ends for prisoners who claimed violations of their constitutional rights. Habeas corpus, common law writ of error, writ of error coram nobis—whichever remedy a prisoner would invoke was urged by the Attorney General and was then held by the Illinois courts to be the wrong path, so that it would typically take years before a hearing on the merits could be obtained by the prisoner (if at all). See the scathing denunciation of that procedural merry-go-round by Justice Rutledge, writing the concurring opinion for himself and Justices Douglas and Murphy, in *Marino v. Ragen,*

332 U.S. 561, 563 (1947).[4]

***2** But at least the Attorney General of that era occasionally acknowledged wrongdoing—the Supreme Court's per curiam order in *Marino*, vacating the judgment below and remanding the case, was the product of the Attorney General's confession of error in that case (332 U.S. at 561–63). By contrast, these current cases display the Attorney General—presumably carrying out office policy—engaged in the active pursuit of the same time-dishonored goal of throwing up roadblocks to criminal defendants' access to the justice system. This time those roadblocks seek to thwart the defendants' efforts, via these habeas corpus proceedings, to obtain consideration of their appeals in anything less than a several-year period, while defendants continue to be held in custody throughout those years (despite the fact that many of them may prove to have been wrongfully convicted[5]).

Background[6]

There has been a systemic breakdown in the Illinois appellate system's First District for the large percentage of convicted defendants who cannot afford to hire private lawyers. Although Illinois law guarantees every defendant the right to one appeal (Ill. Const. art. 6, §§ 4(b) and 6; 730 ILCS 5/5–5–4.1), in the First District that guaranty is currently honored more in the breach than in the observance because Illinois lacks enough lawyers in the Office of the State Appellate Defender and in the appeals division of the Office of the Cook County Public Defender (collectively "Defender Systems") to handle the volume of appeals with which they are overwhelmed. And although Illinois law expressly allows the appointment of members of the private bar to handle the appeals of indigent defendants (725 ILCS 5/121–13), that option has not been exercised by the Illinois Appellate Court for the First District (at least not in the vast majority of cases)—on the contrary, in each of the cases before this Court and over a hundred other cases, the Appellate Court has expressly rejected the effort of the Office of the State Appellate Defender to withdraw (in order to permit substitution by an appointed private counsel) because of the enormous backlog and delays that Office faces.[7]

Mervin Green's prospective representative action (Case No. 93 C 7300) and each of the three earlier-filed individual Complaints (in Case Nos. 93 C 5671, 5672 and 5673) tell essentially the same story. Although the Defender Systems are operating efficiently, they are hopelessly understaffed. Because of the tremendous volume of unbriefed cases, no staff attorney can file an opening brief for some two years from the date of conviction. That means that indigent criminal defendants may expect on average at least a three-year delay between their respective conviction dates and the dates of resolution of their appeals. Under the Illinois system of day-for-day good time credit, many defendants will thus have served a substantial portion of their terms of incarceration before their appeals are decided. Indeed, many will have served all or virtually all of their terms—thus rendering their statutory right of appeal a nullity.

***3** Initially the Attorney General sought to dismiss the three earlier-filed individual petitions on the asserted ground that they were not ripe for adjudication and were therefore not within the Article III case or controversy limitation on federal jurisdiction. This Court swiftly rejected that bogus argument with a brief written opinion, partially but not wholly on the basis of the then-just-issued opinion from our Court of Appeals in *Allen v. Duckworth*, 6 F.3d 458 (7th Cir.1993).

Next, on October 28, 1993 the Attorney General made the Catch–22 argument that habeas corpus does not lie because petitioners have not exhausted their available state remedies![8] This Court immediately (and understandably) rejected that position, but it also expressed its view that the state Appellate Court first ought to be given the opportunity to cure the problem by availing itself of its statutory right to appoint counsel. To that end this Court directed petitioners' counsel and the Attorney General's Office (as counsel for respondents) to communicate with the Appellate Court jointly in an effort to unblock the logjam. Here are relevant excerpts from the October 29 transcript (Tr. 3–5) (emphasis added):

> [I]t seems to me that the appropriate thing is for the Attorney General's Office, in the exercise of its responsibilities, to join in with the counsel for the petitioner in requesting information *immediately* from that court as to what kind of time would in the regular course be required for expedited consideration and treatment of that case, so I can find out what kind of timetable to set for that instead of the 90 days, for example, that are suggested by the petition.

> With respect to the other three [i.e. the petitions filed by Messrs. Joy, Sanchez and Odell], it seems to me once again that the Attorney General's Office has a role and an important responsibility.

> What I can do, however, is—because the members of the Attorney General's Office who are of record here are members of this bar as well, direct that they join with the counsel in each of those cases in requesting promptly from the Illinois Appellate Court the granting of these motions, that have been routinely denied, to provide private counsel.

> And I expect that what is going to happen in the interim is that action will be taken swiftly so that you will have a constructive report for me on what the progress has been. Understood?

To its continuing discredit, the Attorney General's Office stonewalled—its November 15 response to petitioners' motion for a rule to show cause advanced some less-than-makeweight observations that did not speak to the issues at all. This excerpt is typical of the pap offered up by the Attorney General—a complete misstatement of this Court's request in the interests of comity and federalism (Attorney General's Nov. 15 filing at 5):

> On the basis of both the facts known and the wealth of facts unknown at this stage the respondents (Director, Wardens and the Attorney General) are not in a position to abandon law, comity, and separation of powers to presume to attempt to tell the Illinois Supreme Court, the Illinois General Assembly and the County of Cook how scant resources, both financial and of time, should be allocated. It is particularly problematic for the Attorney General, who is the ultimate appellate prosecutor in Illinois, to intervene uninvited into the strategic process of allocating defense resources.

***4** When that position too was rejected by this Court, the Attorney General drafted and submitted a form of letter to be sent to the Appellate Court that was in candor worse than no communication at all. It disavowed the entire purpose sought to be accomplished by drawing the matter to that Court's attention, reading in part:

> Counsel for the Illinois Attorney General has signed this letter pursuant to the order of Judge Shadur and in light of the possibility of a finding of contempt. We have been fully prepared to defend against the imposition of a writ of habeas corpus in these matters and will continue to do so. We are of the opinion that we have no right to request information from the appellate court, inquire as to the court's motives or comment on the proceedings before the court to which the Attorney General is neither a party nor counsel.[9]

Accordingly this Court accepted the suggestion of petitioners' counsel that they alone pose the issue to the Appellate Court, and they did so by letter.

At the next status conference on December 7, this Court directed the parties to submit their respective views as to what remedial action should be taken, on the assumptions that petitioners have adequately alleged both a basis for federal habeas corpus jurisdiction and a constitutional deprivation based on the inordinate appellate delays. Now counsel for petitioners and the Attorney General have done so, and the matter is ripe for consideration.

Appropriate Next Steps

In his latest submission the Attorney General continues to

be faithless to his role as attorney for the "People of the State of Illinois." It is truly astonishing to encounter his continued advancement of the position that "inordinate delay in a state appellate court does not constitute a violation of due process" (Dec. 30 Mem. at 2). That position is asserted in the face of the same Memorandum's acknowledgement that no fewer than five decisions (four in the Second Circuit and one in the Ninth) have held to the contrary—and of course the Attorney General makes no mention of the statement by our Court of Appeals in *Allen*, 6 F.3d at 459–60:

> We can assume, as a number of cases have held, though none in this circuit, e.g., *Cody v. Henderson*, 936 F.2d 715, 718–19 (2d Cir.1991); *Coe v. Thurman*, *supra*, 922 F.2d at 530, that excessive delay in the processing of a criminal defendant's state appeal can be a denial of due process of law. The defendant has no federal constitutional right to an appeal, *Ross v. Moffitt*, 417 U.S. 600, 611, 94 S.Ct. 2437, 2444, 41 L.Ed.2d 341 (1974), but a state is not permitted with one hand to grant such a right and with the other to take it away in an arbitrary fashion, as by denying an indigent a free transcript of the trial, *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956), or preventing a prisoner from filing a timely notice of appeal, *Burns v. Ohio*, 360 U.S. 252, 257, 79 S.Ct. 1164, 1168, 3 L.Ed.2d 1209 (1959)—or simply refusing to decide an appeal. So at least a number of courts have held, and we would have no occasion in this case to quarrel with them even if we were disposed to disagree, since the petitioner must lose in any event.[10]

***5** That lack of mention is all the more surprising because the Attorney General astonishingly cites to *Allen* as though that decision supported his position of noninvolvement. It clearly does not.[11] So it is that the Attorney General's stance of noninvolvement continues to abdicate his responsibility to serve justice, just as was true of his stance that our Court of Appeals rejected in *Walker*, 973 F.2d at 525.

To return to *Allen* as it is, and not as the Attorney General would portray it, this Court affirmatively holds what the Courts of Appeals decisions cited in *Allen* already have decided: that the existence of excessive delay in processing a criminal defendant's state appeal *does* deny such a defendant's right to due process of law. And because petitioners have moved in Case No. 93 C 7300 for the equivalent of certification of a class of such convicted and imprisoned defendants, the Attorney General is ordered to file a response to that motion on or before January 20, 1994 to enable this Court to determine the appropriateness of such certification and of a proper class-type definition.

But even if those questions are then answered promptly (as would certainly seem likely), this Court still does not have the necessary information to determine the appropriate remedy here. Petitioners' memorandum urges that:

> 1. If two years elapse after a notice of appeal without a decision, a hearing should ensue as to the justification for the delay.
>
> 2. If no justification is shown, the appealing defendant should be released on bond during the remaining pendency of the appeal.

As already indicated, the Attorney General not only has been of no help on his own but has also refused to cooperate in requesting information to facilitate an informed decision as to an appropriate remedy.

This Court has consistently demonstrated during the pendency of these proceedings that it has no desire to create a set of constraints that would place unreasonable or unrealistic burdens on the state appellate system. Yet it cannot of course ignore the mandate of the Constitution that convicted felons too are entitled to the protections of due process of law—in this case, the elimination of excessive delays in the appellate process. Accordingly the Illinois Appellate Court for the First District is respectfully requested to respond to these questions to enable this Court to fashion an appropriate remedy if a representative action is indeed authorized on behalf of a certified class:

1. How soon can (a) appointments of private counsel be made to represent appellants in the oldest cases on appeal that are not yet being actively worked on by the Defender Systems and (b) a structure and procedure be established for the systemic appointment of private counsel in cases that are beyond the capacity of the Defender Systems to handle on a reasonable schedule?
2. What would be a reasonable target to establish as a timetable for the disposition of appeals if something similar to the type of remedy urged by petitioners were to be adopted?[12]

***6** This Court trusts that a 21–day period is not unduly short for the formulation of such responses. If such expectations are unrealistic because of the Appellate Court's need to develop a collective response, this Court would appreciate an indication to that effect within the same time frame.

All Citations

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Footnotes

1 Individual actions in *United States ex rel. Odell v. Peters,* 93 C 5671, *United States ex rel. Sanchez v. Peters,* 93 C 5672 and *United States ex rel. Joy v. Peters,* 93 C 5673 preceded the filing of Case No. 93 C 7300 as a proposed representative habeas corpus action. Because no determination has yet been made as to whether this action may proceed in that matter (a subject discussed briefly later in this opinion), this memorandum opinion and order is being entered in all four pending cases.

2 Thus when any action is brought by the Attorney General to enforce or vindicate public rights, the case caption typically reads "People ex rel. Roland Burris, Attorney General of the State of Illinois...."

3 That has long been recognized in the context of the prosecutorial function. As the Comment to Rule 3.8 of the ABA Model Rules of Professional Conduct (also adopted by this District Court as part of its Rules of Professional Conduct) begins:

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.

That provision has carried forward the predecessor provision of EC 7–13 (one of the Ethical Considerations that formed part of the predecessor ABA Model Code of Professional Responsibility):

> The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.

Although the Illinois Supreme Court has never adopted either the accompanying Comments or the predecessor Ethical Considerations as part of its formal adoption of rules governing lawyer conduct, what is said in the quoted language simply repeats the long-understood role of the prosecutor in every jurisdiction.

4 This Court played a chance role in the public identification of Illinois' shameful record in that respect. As a second year law school student and member of the law review staff, he received a last minute assignment, in connection with a study of the Illinois Supreme Court, to write the criminal law segment of that study (the originally assigned writer having disappointed the editor). And that quickly-produced section of the study (15 U.Chi.L.Rev. 118–31 (1947)) was published just before the *Marino* decision came down—and when it did, a startled law student thus found that his work had just been cited and quoted in the Supreme Court reports (332 U.S. at 562, 568 n. 7, 569 n. 11).

5 Complaint ¶ 31 alleges (and the Attorney General's November 15 filing accepts) that in 1993 the Illinois First District Appellate Court (to which all of the current cases relate) granted some form of relief (reversal in whole or in part, remand in whole or in part, vacation in whole or in part, reduction of sentence or a remand for a new sentencing hearing) in fully 29% of the cases handled by the Office of the State Appellate Defender for that district!

6 For present purposes the allegations of the Complaints in these cases are accepted as true. Indeed, the Attorney General really does not dispute anything that has been said there.

7 This Court has no way of knowing whether that pattern of rejections stems from the state system's lack of a pool of experienced counsel available for appointment, or from a lack of funds for the payment of fees, or for some other reason. If the concern is for payment of fees, it would seem that the provision for allowing fees in a "reasonable amount" in 725 ILCS 5/121–13 could take the overall unavailability of funds into account in setting the award in each

case. It is worth observing that in addition to this District Court's ability to appoint counsel on a compensated basis under the Criminal Justice Act, 18 U.S.C. § 3006A, it imposes on members of its trial bar the requirement that they be available for appointment to render services to indigent litigants on a pro bono publico basis—without any payment of fees (General Rules 3.82–3.90), and our Court of Appeals similarly provides counsel for indigent parties in both civil and criminal appeals.

8 Perhaps "Kafkaesque" might be a more elegant and appropriate characterization than "Catch–22," given Kafka's *The Trial* and the judicial-system context in which the Attorney General has asserted his outrageous positions.

9 [Footnote by this Court] Indeed, the Attorney General's obstructionism extended so far as to assert before this Court a potential conflict of interest in participating in such a joint communication to the Appellate Court because that office served as lawyers for the Justices of that Court.

10 [Footnote by this Court] *Allen* was authored by Judge Posner on the last day before he became Chief Judge of the Circuit, and the opinion spoke unanimously for him and his fellow panel members, then Chief Judge Bauer and Circuit Judge Manion. It is also worth noting that the opinion had to be circulated to the full court under Circuit Rule 40(f) because it created a conflict with another circuit on another issue. No other judge of the Court of Appeals called for en banc hearing. Though of course that is not the same as if all the judges had expressly joined in the opinion as written, this Court's experience in sitting by designation with our Court of Appeals is that such circulation often leads to suggestions for revision of an opinion if *any* judge finds any portion of it troublesome.

11 Shakespeare said in *The Merchant of Venice,* act I, sc. 3, line 99:

> The devil can cite Scripture for his purpose.

That obviously applies only metaphorically and not literally to the current situation—its figure of speech does not of course suggest that the Attorney General has literally joined the forces of darkness.

12 This should not be mistaken as a ruling on the appropriate remedy. This Court is of course sensitive to the fact that decisions as to a defendant's release or imprisonment pending appeal are—or at least should be—made on a reasoned and individualized basis, taking all relevant factors into account. For that reason it is not an attractive prospect for a federal court to review and possibly to override such a decision just because an appeal has been delayed for an unconstitutionally excessive period. On the other hand, it must be remembered that the traditional habeas corpus remedy where there has been a violation of constitutional rights is actually to *release* the defendant (or to release the defendant unless a retrial is begun within a limited time)—the fundamental theory of habeas corpus being that a defendant is being deprived of his or her liberty unlawfully because of the constitutional violation.