

STATE OF ILLINOIS )  
 ) SS  
COUNTY OF LAKE )

**FILED**  
1998

IN THE CIRCUIT COURT OF THE NINETEENTH  
JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

*[Signature]*  
CIRCUIT CLERK

PEOPLE OF THE STATE OF ILLINOIS, )

vs. )

NO. 94 CF 2389

CHRISTOPHER THOMAS, )

**ORDER**

This matter coming on to be heard pursuant to a Petition for Post Conviction Relief, 725 ILCS 5/122-2.1(a)(2), State's motion and supplemental motion to dismiss Post Conviction Petition, State represented by Assistant State's Attorney Michael Mermel and the defendant represented by his attorneys, Scott Turow, John Koski, Brett Hart, law firm of Sonnenschein, Nath & Rosenthal, and the Court having reviewed said motions, the Petition for Post-Conviction Relief and the attached exhibits, and having heard oral arguments on the motion to dismiss find as follows:

1. The Amended Petition for Post-Conviction Relief was filed in this court on September 14, 1998.

2. The Court has reviewed the Petition, and its exhibits, the common law record, the transcript of the proceedings in the trial court, and memoranda and case law filed. The court has heard arguments by both parties concerning the State's motion to dismiss said petition.

3. Many of petitioner's claims concern the ineffective assistance of both trial and appellate counsel (Count I, Count II, Count III). A defendant will prevail on a claim of ineffective assistance of counsel only when the test set forth in Strickland v. Washington, 466 U.S. 688 104 S.Ct. 2052 (1984) is satisfied. Under the Strickland test, the defendant must prove that counsel's representation fell below an objective standard of competence. In addition, the defendant must prove that but for counsel's unprofessional errors, there is a reasonable probability that the result would have been different. People v. Hall, 157 Ill.2d 324, 626 N.E.2d 131, 136 193 Ill.Dec. 98 (1993).

Petitioner's amended petition for post conviction relief in Count I alleges constitutional errors based on ineffective assistance of counsel. This court finds that the items discussed in **Count I A** that a conflict interest arose as a result of defense counsel's previous prosecution of defendant's aunt, Marlene Weekly, is not substantiated and there is no case law to clearly present this theory. This court finds that in **Count I A.2** that petitioner failed to demonstrate a conflict of interest resulting in any financial gain to the defense attorneys. Petitioner further alleges ineffective assistance of counsel in **Count I B** that his lawyers failed to file appropriate pretrial motions. Petitioner has failed to substantiate any constitutional or due process claim with respect to this issue.

4. Petitioner alleges in **Count II** that he was sentenced to death because of constitutional errors in the sentencing process which has gone unremedied. Neither trial counsel or appellate counsel considered this issue on direct appeal. Further, that petitioner was denied the protection of the 5<sup>th</sup>

Amendment against self-incrimination. This court finds that petitioner rights were violated with respect to the Illinois Mental Health and Developmental Disabilities Confidentiality Act (740 ILCS 110/10(a) and established case law under People v. Bean, 137 Ill. 2d 65, 560 N.E. 2d 270 (1990) and Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866. The court further finds from the record the following:

Petitioner did not place the issue of mental health into the record at the trial court or sentencing phase; while generally sentencing courts consider mental health records in any type of sentencing hearing it is usually with the consent of defendant and can be considered as both mitigation and aggravation; defendant did not consent to waiving his privilege to confidentiality; fitness was never an issue in this matter and all psychological records pertained to matters other than the case on which the defendant was being sentenced; defendant was never advised that the records could be used against him. Defendant was in custody of the Department of Corrections at the time of the report of Dr. Vallabhaneni. Finally, the sentencing judge may have sentenced petitioner to death even if the records were not considered but the record may indicate a consideration of those records and therefore the petitioner may have been prejudiced by trial court's consideration of Dr. Vallabhaneni's report and his diagnosis as to the petitioner's antisocial personality. Although there are factual differences cited in Baumann v. United States, 692 F. 2d 565 (9<sup>th</sup> Circ. 1982) it does seem clear that a substantial difference exists in

utilizing a psychiatric examination of the defendant during a capital case and at a non-capital sentencing. Further, this court finds that the entire record does not support any facts indicating that the defendant either initiated a psychiatric evaluation not attempted to introduce any psychiatric evidence. (Buchanan v. Kentucky, 483 U.S. 402, 97 L.Ed2d 336). In People v. Nicklaus, 147 Ill. App. 3d 632, 101 Ill.Dec. 429 (2<sup>nd</sup> Dist. 1986) involving a non-capital murder case the appellate court held that a court appointed psychologist should not have testified at the sentencing hearing concerning statements made by the defendant during his competency examination.

5. Petitioner alleges ineffective assistance of counsel concerning their inability to bifurcate the sentencing as to petitioner's eligibility consistent with the Illinois Criminal Code, 720 ILCS 5/9-1D. Petitioner has failed to clearly substantiate this claim as to ineffectiveness of counsel and as to any constitutional violations and the court would grant the State's motion to strike this claim.

6. Petitioner claims in **Count II D** that he received ineffective assistance of counsel due to his attorneys failing to offer evidence of an alleged accidental nature of the shooting. Both the trial record, the jury's finding and the findings of the Supreme Court indicate the sufficiency of proof beyond a reasonable doubt as to the charge of murder. Petitioner fails to state an effective claim under the Post Conviction Relief Act and would grant the State's motion to dismiss this claim.

7. Petitioner claims in **Count II E and F** that trial counsel were ineffective concerning their presentation of defendant's background and mitigation evidence in that petitioner makes a blanket claim of other alleged claims of ineffective assistance of counsel. This court finds that it would have been a better practice for trial court counsel to have presented the mitigation and witnesses attached as exhibits to the amended petition for post conviction relief. Since this court had already made findings in above paragraph 4 that warrant an evidentiary hearing on other court proceedings, the issue concerning any ineffective assistance of counsel is not being determined. This court is not making any specific findings as to this issue and therefore will grant the State's motion to dismiss said **Count II E and F**.

8. Petitioner has failed to establish his claims of ineffective assistance of appellate counsel as stated in **Count III**. Petitioner claims the ineffective assistance of his appellate attorney. Petitioner failed to allege sufficient facts on this issue to merit a constitutional claim violation. The constitutional guarantee of the effective assistance of counsel extends to both the trial court level and on appeal. Evitts v. Lucey, 469 U.S. 387, 396-97, 83 L.Ed 2d 821, 105 S.Ct. 830. The Strickland test is also used to assess the adequacy of appellate counsel's performance. People v. Mahaffey, 165 Ill.2d 445, 457-458, 651 N.E.2d 179, 209 Ill.Dec. 246 (1993). It is established that appellate counsel is not required to raise every conceivable issue on appeal. Jones v. Barnes, 463 U.S. 745, 75-753, 77 L.Ed 2d 987, 103 S.Ct. 3308. Experienced advocates often weed out weaker issues and focus on one central issue if possible. Again, ineffective

assistance is established by showing both deficient performance and the resulting prejudice. People v. Tenner, 175 Ill.2d 372, 677 N.E.2d 859, 222 Ill.Dec. 325 (1997).

9. Petitioner has failed to establish his claim in **Count IV A-C** as to the unconstitutionality of the death penalty statute. Further, petitioner has failed to establish consistent with Strickland, supra, that both trial and appellate counsel were ineffective for failure to present this issue. State's motion to dismiss as to this issue is granted.

10. Petitioner Christopher Thomas has failed to establish a denial of due process with respect to **Count V** and said count is dismissed.

11. To merit an evidentiary hearing on a post-conviction petition, a defendant must make a substantial showing based on factual allegations that his constitutional rights have been violated. People v. Phillips, 183 Ill. App. 3d 417, 539 N.E. 2d 804, 870-808, 132 Ill. Dec. 241 (2<sup>nd</sup> Dist. 1989). A non-meritorious petition may be dismissed without a hearing on the basis of what is contained in the petition and what is revealed in the record of the trial or other proceedings. People v. Stein, 255 Ill.App.3d 847, 625 N.E.2d 1151, 1153 193 Ill.Dec. 30.

This court grants the State's motion to dismiss as to Count I A and B; Count II A, Count II C 1 and 2, D, E and F and Count III, Count IV and Count V, but grants an evidentiary hearing as to Count II(1), (2) and (3).

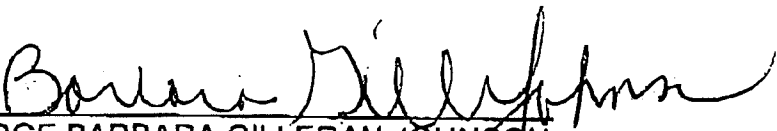
12. This court hereby grants an evidentiary hearing only on the issue presented in Count II (1), (2) and (3), and limits hearing concerning the usage of Dr. Vallabhaneni's reports at the sentencing phase. Specifically, the matter

concerning the introduction and/or use of the mental health records utilized by the trial court in the imposition of the death penalty. This issue was not fully discussed in the Illinois Supreme Court's decision in People v. Thomas, 178 Ill. 2d 215, 687 N.E.2d 892 227 Ill. Dec. 892 (1997). Further, the petition for rehearing based on this issue was denied. It is important to note that the post conviction petition is not a continuation of the trial and appellate process but is a method to contest constitutional claims outside of the trial court record. As a result, the pleadings and affidavits of petitioner differ from those considered by the Illinois Supreme Court in this instant cause. This court has determined that trial counsel should have made an objection to the use of the records not on the basis of hearsay or relevance but as to the confidential nature of the proceedings consistent with Illinois Mental Health and Developmental Disabilities Confidentiality Act (740 ILCS 110/10(a) and as to petitioner's 5<sup>th</sup> Amendment privilege against self-incrimination. This court is confident that the trial court would have refused their admission on the basis of confidentiality and consistent with Estelle v. Smith. Trial counsel's failure to object accordingly is not a per se determination that trial court counsel were ineffective, but does go to this court's consideration and ultimate decision concerning the granting of an evidentiary hearing on the limited issue of consideration of mental health records. This court believes that the trial court considered many other factors consistent with 720 ILCS 5/9-1 3(h) and accordingly sentenced the defendant to death consistent with applicable statutory criteria and individual consideration of all the circumstances contained in the petitioner's case. This court further finds that

because the trial court utilized the psychological reports in its finding for the death penalty that violations of the 5<sup>th</sup> and 14<sup>th</sup> Amendments may exist and the petitioner is entitled to a further evidentiary hearing.

WHEREFORE, IT IS HEREBY ORDERED that the State's motion to dismiss the post conviction petition is granted as to Counts I, Count IIA, C, D, E and F, Count III, Count IV and Count V and is denied as to Count II, 1, 2 and 3. Said counts are dismissed as failure to state a claim for post conviction relief. A copy of this order shall be served on the petitioner by certified mail. A copy shall also be mailed to Attorney for Petitioner and State if said parties are not served with a copy in open court.

ENTER:

  
 JUDGE BARBARA GILLERAN JOHNSON

Dated at Waukegan, Illinois  
 this 28<sup>th</sup> day of September, 1999.

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