

FEDERAL HABEAS MANUAL NOTE

Recent Cases Supplementing the Federal Habeas Manual

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Law school taught me one thing: how to take two situations that are exactly the same and show how they are different. — Hart Pomerantz, Canadian Lawyer and Entertainer

RECENT FEDERAL DECISIONS



Statute of Limitations: Finality. After petitioner's state conviction for burglary became final, the state appellate court in state habeas proceedings granted petitioner the right to file an out-of-time appeal. Later, it affirmed petitioner's conviction. The petitioner then sought federal habeas relief, but the district court dismissed the petition as untimely. In making its timeliness calculation, the district court concluded that the AEDPA's one-year limitations period under 28 U.S.C. § 2244 (d)(1)(A) commenced running on the date that petitioner's conviction first became final, as opposed to the date when time expired for seeking certiorari review of the decision in his out-of-time appeal.

The Supreme Court in *Jimenez v. Quarterman*, ___ U.S. ___, 129 S. Ct. 681 (2009), reversed. The Court held that “where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not yet ‘final’ for purposes of § 2244(d)(1)(A).” In such a case, finality occurs at “the conclusion of the out-of-time direct appeal, or the expiration of the time for seeking review of that appeal.” The Court explained that once the state appellate court reopened direct review, petitioner's conviction was no longer final. Under state law, the order granting an out-of-time appeal restored the pendency of the direct appeal, “and petitioner's conviction was again capable of modification through direct appeal to the state courts and to this Court on certiorari review.”

The Court made clear, however, that the mere bringing of a motion to file an out-of-time appeal would not reset the limitations period. “[T]he possibility that a state court may reopen direct review ‘does not render convictions and sentences that are no longer subject to direct review nonfinal.’” 129 S. Ct. at 685 n.4 (quoting *Beard v. Banks*, 542 U.S. 406, 412 (2004)). The Court

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A Second Bite at the Apple: Allowing State Courts the Opportunity to Make Omitted Findings of Fact or Conclusions of Law

By Brian R. Means

Considerations of state-federal comity underlying the writ of habeas corpus require that state courts be given an opportunity to correct alleged violations before federal courts step in. Thus, where a state court has failed to make the necessary findings of fact or conclusions of law, it is an appropriate alternative for a federal court to “take steps to require the State's own judicial system to make the factual findings in the first instance.” *Cabana v. Bullock*, 474 U.S. 376, 390 (1986), *overruled in part on other grounds*, *Pope v. Illinois*, 481 U.S. 497, 503 n.7 (1987).

The Supreme Court in *Cabana* discussed the appropriateness of allowing state courts the opportunity to make omitted factual or legal determinations. The petitioner in that case had raised a claim based on the violation of the rule established in *Enmund v. Florida*, 458 U.S. 782 (1982) (the Eighth Amendment forbids the imposition of the death penalty on “one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed”). The state courts had failed to make any findings regarding this criteria. In addressing the appropriate course of action, the Court stated:

“Two possibilities come immediately to mind. The federal court could itself make the factual determination whether the defendant killed, attempted to kill, or intended to kill, and either grant or deny the writ depending on the outcome of that

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stated that it was not departing from that rule, but was merely holding “that, where a state court has in fact reopened direct review, the conviction is rendered nonfinal for purposes of (d)(1)(A) during the pendency of the reopened appeal.” *Id.* See Brian R. Means, *Federal Habeas Manual*, § 9A:18 (Thomson-West) (2008).



Merits Adjudication. The deferential review standards of 28 U.S.C. § 2254(d)

(1) applicable to habeas petitions filed by state prisoners governs the disposition of “any claim that was *adjudicated* on the merits in State court proceedings.” (Emphasis added.) The Seventh Circuit in *Sturgeon v. Chandler*, 552 F.3d 604, 611-12 (7th Cir. 2009), held that even where the state court only addressed the federal claim in the course of resolving a different issue, the federal claim was nevertheless considered to have been “adjudicated on the merits” for purposes of § 2254(d)(1).

The petitioner in *Sturgeon* argued that the state appellate court had not reached the merits of his due process claim concerning his right to a competency hearing. Although the state court mentioned the due process claim and the “bona fide doubt” standard for determining whether a competency hearing was required, the court ultimately merged the statutory and constitutional bases of petitioner’s right-to-a-hearing claim and resolved the issue against him on statutory grounds. Nevertheless, the state court evaluated whether the evidence established a bona fide doubt as to the petitioner’s competency when it resolved a separate claim of ineffective assistance of appellate counsel. Specifically, the state court held that no bona fide doubt existed about petitioner’s competency to stand trial and therefore he had not established his claim of ineffectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984). The Seventh Circuit concluded that the state court “could not have decided the same ‘bona fide doubt’ question any differently in the context of [petitioner’s] due-process claim, so the merits were reached.” See Brian R. Means, *Federal Habeas Manual*, § 3.14 (Thomson-West) (2008).



Statute of Limitations: Equitable Tolling. Petitioners sought equitable tolling

of the one-year limitations period under 28 U.S.C. § 2255, arguing they were charged with, pled guilty to, and were sentenced to a nonexistent offense. Petitioners had pled guilty to making false statements to the Secretary of Agriculture, acting through the Farm Service Agency (“FSA”) in violation of 18 U.S.C. § 1014. But at the time the offenses were committed, § 1014 stated that it was unlawful to make false statements to the Farmers Home Administration (“FHA”), an agency that had previously been abolished. It was only after the offenses were committed that § 1014 was amended to include the phrase “or successor agency” so as to include the FSA.

The First Circuit held that the petitioners failed to meet their burden of demonstrating grounds warranting equitable tolling: “Their argument that their convictions themselves constitute an extraordinary circumstance erroneously focuses only on their underlying criminal cases. They fail to raise any extraordinary circumstances arising after their sentencings which caused them to miss § 2255’s one-year filing deadline. The claims raised in their § 2255 petitions were always available to the petitioners. They were fully aware of the charges in the informations at the time of their pleas and sentencings, the informations charged them under § 1014, and the statutory language was apparent. Their failure to contemplate their claim that the informations may have charged them with a nonexistent offense is neither an extraordinary circumstance, nor a circumstance which was out of their hands.”

The court also held that the petitioners were not entitled to equitable tolling because they had not acted diligently. Petitioners admittedly became aware of their claims three months before the earliest § 2255 one-year limitations period expired, and seven months before the latest limitations period expired. “The petitioners provide no explanation as to why they were prevented from filing their § 2255 petitions during this time.”

The court also rejected the petitioners’ argument that their petitions should be heard on the merits because they were actually innocent of the charges. Citing to *David v. Hall*, 318 F.3d 343, 347 (1st Cir. 2003), the court stated: “We have not adopted an actual innocence exception to § 2255’s one-year limitations period in this circuit.” In any event, the court concluded, the petitioners failed to make the requisite showing of actual innocence. The petitioners argued that they were actually innocent because their conduct did not violate § 1014, as it was written when they were charged. But, the court explained, this raised “a purely legal argument concerning an issue of statutory interpretation. The petitioners do not present any evidence to show their ‘factual innocence.’”

Finally, the court rejected the petitioners’ claim that they were entitled to coram nobis relief. “To obtain relief under a writ of error coram nobis, the petitioner must 1) explain her failure to seek relief from judgment earlier, 2) demonstrate continuing collateral consequences from the conviction, and 3) prove that the error is fundamental to the validity of the judgment.” (Internal quotation marks omitted.) The court held that the petitioners failed to meet the first requirement. As the court had previously stated, the petitioners failed to demonstrate that their § 2255 petitions could not have been filed within the one-year limitations period. And a “petitioner may not resort to coram nobis ‘merely because he failed to meet the AEDPA gatekeeping requirements.’” (Quoting *Matus-Leva v. United States*, 287 F.3d 758, 761 (9th Cir. 2002).) *Barreto-Barreto v. United States*, 551 F.3d 95, 100-01 (1st Cir. 2008). See Brian R. Means,

Federal Habeas Manual, §§ 1:30, 9A:82, 9A:144 (Thomson-West) (2008).



Effect of New Evidence Admitted in the Federal Proceeding.

The Sixth Circuit held that whenever new, substantial evidence supporting a habeas claim comes to light during the federal proceedings, AEDPA deference does not apply to an earlier, state court adjudication of the claim. While the court recognized that a petitioner seeking to admit new evidence in the federal district court must not be at fault for failing to have developed the evidence in state court (or satisfy one of the exceptions in § 2254(e)(2)), it concluded that the petitioner had made that showing. Petitioner filed two motions in state court to develop the evidence, both of which were denied. And he sought to obtain the new evidence from a therapist, but the therapist refused in the absence of a court order to provide the information. This evidence only became available to the petitioner in the federal proceeding when the district court received the therapist's notes, reviewed them *in camera*, and then provided them to the parties. Thus, the petitioner was not at fault for failing to develop the record in state court proceedings, and the state court's decision was not entitled to deference. *Brown v. Smith*, 551 F.3d 424, 429 (6th Cir. 2008). See Brian R. Means, *Federal Habeas Manual*, § 3:28 (Thomson-West) (2008).



Second or Successive Petitions: The Prima Facie Requirement.

Petitioner moved for an order from the circuit court authorizing the district court to consider a second or successive habeas petition under 28 U.S.C. § 2244(b)(2)(B) (ii), asserting that newly discovered evidence revealed violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959). The new evidence showed that another individual also had a possible motive to commit the murders, and that the new evidence undermined the credibility of identification testimony.

The Sixth Circuit held that the petitioner had not made a prima facie showing that the application satisfied the requirements of § 2244(b)(2). "Prima facie" in this context, the court explained, "means simply sufficient allegations of fact together with some documentation that would warrant a fuller exploration in the district court." The court need not find that petitioner's claims compel relief as written, but must determine whether his allegations "require a district court to engage in additional analysis in order to ascertain whether but for the constitutional error, no reasonable factfinder would have found [him] guilty." (Internal quotation marks omitted.)

Even considering the new evidence without reference to the rest of the record, the court held that it was a stretch to say that it constituted clear and convincing evidence that no

reasonable fact finder could have returned a guilt verdict. Moreover, the court explained, the new evidence did not contradict the "core of the case" against petitioner: a eyewitness that placed him at the scene; a partial match of a license plate; and a matching gun casing. The court stated that while other cases describe the prima facie requirement as "lenient" or "not a difficult showing," those cases "involved new evidence that went to the heart of a guilt determination or directly contradicted the government's case-in-chief." The petitioner's allegations did not rise to this level and warrant "additional analysis" to determine whether he met the statutory requirements. The new evidence did "not contradict *any* evidence that directly proves guilt." The court concluded that although another individual may have had a motive and the police witness may have testified incorrectly, "those propositions, taken at face value, do not mean that no reasonable fact finder would find [petitioner] guilty." *Keith v. Bobby*, 551 F.3d 555, 557-59 (6th Cir. 2008) (2-1 decision). See Brian R. Means, *Federal Habeas Manual*, § 11:84 (Thomson-West) (2008).



Exhaustion; Clearly Established Law Requirement.

The Eleventh Circuit held that the petitioner had not exhausted his claim that he was constructively denied the assistance of counsel at a second competency hearing in state court. Petitioner had not alleged in the state proceeding that he was entitled to counsel at the second competency hearing; instead, he argued that his standby counsel provided ineffective assistance at the competency hearing. And, the court continued, even if petitioner raised the constructive denial of counsel claim to the Florida Supreme Court, it still would not be exhausted because an "issue may not be raised for the first time on appeal of a Rule 3.850 motion."

In addition, the Eleventh Circuit held that petitioner's claim was barred by the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). The court stated that the district court erred in finding that clearly established federal law entitled petitioner to counsel at the second competency hearing. "The Supreme Court has not held that a court must appoint counsel for a competency hearing after a defendant had been found competent and waived his right to counsel." There is no clearly established precedent that "specifically imposes a duty on standby counsel to advocate for a *pro se* criminal defendant who had been previously found competent to waive the right to counsel." *Porter v. Attorney General*, 552 F.3d 1260, 1268-69 (11th Cir. 2008) (*per curiam*). See Brian R. Means, *Federal Habeas Manual*, §§ 7:37, 9C:20 (Thomson-West) (2008).



Second or Successive § 2255 Motions and § 2241 Petitions.

Years after his conviction had become final and after a § 2255 motion had been denied, petitioner filed a § 2241 petition seeking a reduced punishment. Petitioner argued that after

sentence was imposed in his federal case, one of his state convictions was vacated. True enough, recalculating his criminal record in light of the state's decision could have resulted in a lower federal penalty. And the Supreme Court in *Johnson v. United States*, 544 U.S. 295 (2005), held that the post-sentencing vacatur of a state conviction that affects the federal sentence may in principle support relief under § 2255. The Court in *Johnson* also held that vacatur is a new “fact” that opens the one-year window to seek collateral relief under the governing statute of limitations.

But the Seventh Circuit concluded that petitioner's previously unsuccessful § 2255 motion “block[ed] access to the kind of review authorized by *Johnson*.” The court explained that § 2255 allows only one collateral attack absent newly discovered evidence of innocence or a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court. Petitioner did not argue that *Johnson* established a new rule of constitutional law and the vacatur of his state conviction, “although a new ‘fact’ under *Johnson*, is not one that shows him innocent of the drug crime.” Thus, the petitioner had not established that he fell within one of the two exceptions for filing a second or successive motion under § 2255(h).

Nor could petitioner proceed under § 2241. Under § 2255(e), the so-called savings clause, a federal prisoner may resort to § 2241 to challenge his conviction or sentence if the “remedy by motion [under § 2255] is inadequate or ineffective to test the legality of his detention.” But the fact that petitioner's second § 2255 motion was barred by the second or successive motion restriction of § 2255(h) did not make § 2255 inadequate or ineffective.

In addition, the court held that § 2255 is inadequate or ineffective “only when a prisoner is unable to present a claim of actual innocence.” If, after the limitations period expires, “the Supreme Court interprets a statute underlying the conviction in a way that shows that the defendant did not commit a crime, § 2255 is unavailable—for even though such a statutory decision supports collateral relief . . . , § 2255 (f) and (h) do not authorize new (or belated) collateral attacks in response to statutory interpretations.” The court recognized that it had made an exception to this rule where new and retroactively statutory decisions showed that the defendant did not actually commit a crime. (Citing *In re Davenport*, 147 F.3d 605 (7th Cir. 1998).) But the court explained that in the present case, there was no new Supreme Court retroactive statutory decision to be applied to petitioner's circumstances. Moreover, petitioner did not claim to be innocent of the offense of conviction; he argued only that his sentence was too high. That, the court held, was not sufficient. *Unthbank v. Jett*, 549 F.3d 534, 535-36 (7th Cir. 2008). See Brian R. Means, *Federal Habeas Manual*, §§ 1:29, 11:19 (Thomson-West) (2008).



AEDPA Deference. The Sixth Circuit held that where the Supreme Court establishes a new rule of constitutional law after the petitioner's conviction has become final on direct appeal, the petitioner must show that the state court's rejection of his claim was objectively unreasonable under both the current and prior controlling Supreme Court standards. *Doan v. Carter*, 548 F.3d 449, 457 (6th Cir. 2008).

The petitioner in *Doan* argued that the state trial court violated his rights under the Confrontation Clause by admitting testimony by the murder victim's family and friends. This testimony concerned statements made to them by the victim about physical abuse inflicted by petitioner. Petitioner argued that the testimony was inadmissible under the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004) (holding that the testimonial statement of a witness who is absent from trial is admissible only if the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness).

The Sixth Circuit, applying *Teague v. Lane*, 489 U.S. 288 (1989), held that *Crawford*, as a newly promulgated rule, did not apply retroactively to cases on collateral review. Thus, the law that applied prior to *Crawford*, *Ohio v. Roberts*, 448 U.S. 56 (1980) (permitting hearsay testimony if it falls within a “firmly rooted hearsay exception” or has “particularized guarantees of trustworthiness”), provided the controlling standard. Petitioner was therefore required to show that the state court's decision was contrary to, or an unreasonable application of, *Ohio v. Roberts*.

But the petitioner was *also* required to show that the state court's decision was contrary to, or a misapplication of, *Crawford*. “This is because AEDPA allows a writ of habeas corpus to issue on behalf ‘of a person in custody pursuant to the judgment of a State court only on the ground that he *is in custody in violation of the Constitution* or laws, or treaties of the United States.’ 28 U.S.C. § 2254(a).” “[A] showing that the state court misapplied *Roberts* is ‘a necessary, but not sufficient, condition for habeas relief,’ because ‘[t]he goal of the great writ is not to correct the misapplication of overruled precedents.’” *Doan*, 548 F.3d at 457 (quoting *Desai v. Booker*, 538 F.3d 424, 428, 430 (6th Cir. 2008).) See Brian R. Means, *Federal Habeas Manual*, § 3:69 (Thomson-West) (2008).



Cognizability; State Law Issues. Petitioner argued that there was insufficient evidence to sustain his conviction for aggravated stalking. The evidence established that petitioner went to the victim's house and demanded to know her whereabouts. On a separate occasion, the victim arranged a meeting with petitioner at the request of police. A few minutes after the victim arrived at the meeting place,

inquiry. Alternatively, the federal court could take steps to require the State's own judicial system to make the factual findings in the first instance. Such findings would, of course, be presumptively correct as a result of 28 U.S.C. § 2254(d) in any subsequent federal habeas proceedings.”

The Court continued that while either alternative would, in theory, be adequate to remedy any hypothesized Eighth Amendment violation, “the second course of action is the sounder one.” The Court offered two rationales. “First, to the extent that *Enmund* recognizes that a defendant has a right not to face the death penalty absent a particular factual predicate, it also implies that the State's judicial process leading to the imposition of the death penalty must at some point provide for a finding of that factual predicate. Accordingly, Bullock ‘is entitled to a determination [of the issue] in the state courts in accordance with valid state procedures.’” *Cabana*, 474 U.S. at 390-91 (citing *Jackson v. Denno*, 378 U.S. 368, 393 (1964)). “Second, the State itself has a weighty interest in having valid federal constitutional criteria applied in the administration of its criminal law by its own courts. Considerations of federalism and comity counsel respect for the ability of state courts to carry out their role as the primary protectors of the rights of criminal defendants; these same considerations indicate the appropriateness of allowing the Mississippi courts an opportunity to carry out in the first instance the factual inquiry called for by *Enmund*. To paraphrase our opinion in *Jackson v. Denno*, it is Mississippi, therefore, not the federal habeas corpus court, which should first provide Bullock with that which he has not yet had and to which he is constitutionally entitled—a reliable determination as to whether he is subject to the death penalty as one who has killed, attempted to kill, or intended that a killing take place or that lethal force be used.” *Cabana*, 474 U.S. at 390-91.

The principle of giving state courts the opportunity to correct constitutional errors by making new or omitted factual or legal determinations has been applied in a wide variety of situations. For example, the Supreme Court in *Pope v. Illinois*, 481 U.S. 497, 504 (1987), remanded the case to the Illinois state court to consider whether a constitutional error was harmless under *Chapman v. California*, 386 U.S. 18 (1967). Although the Supreme Court recognized it had the authority to make this determination, it stated that it exercised this right “sparingly.” In *Waller v. Georgia*, 467 U.S. 39, 50 (1984), the Supreme Court held that the state trial court had violated the defendant’s right to a public suppression hearing. The Supreme Court decided that the appropriate remedy was to remand the case to the state court to determine what portions of the proceeding should be closed, if any, and a new hearing conducted. *See also Hoi Man Yung v. Walker*, 468 F.3d 169, 178 (2d Cir. 2006) (remanding for an evidentiary hearing in state court on the issue of whether the trial court’s exclusion of two witnesses violated the petitioner’s right to a public trial because “consideration of comity weigh heavily in favor of the state forum . . .”). The Supreme Court has taken a similar approach in cases where the state court committed constitutional error in conducting a hearing on whether the defendant’s confession was voluntary. *Sigler v. Parker*, 396 U.S. 482, 484 (1970) (*per curiam*) (ordering state court to be given the opportunity to correct the error in new proceedings addressing the voluntariness of the petitioner’s confession); *Jackson v. Denno*, 378 U.S. 368, 394 (1964) (where the method used by the state court in determining the voluntariness of the defendant’s confession was unconstitutional, the state court was given the opportunity to conduct a new, constitutionally permissible hearing). Lower courts have also applied this comity principle in a variety of circumstances. *See, e.g., U.S. ex rel Fisher v. Driber*, 546 F.2d 18, 22 (3d Cir. 1976) (where the state court violated defendant’s due process rights by not conducting a hearing on the admissibility of in-court identification testimony, the proper remedy was to issue a writ conditioned on the state conducting a new hearing); *Patterson v. Lockhart*, 513 F.2d 579, 581 (8th Cir. 1975) (*per curiam*) (ordering the district court to request the State of Arkansas to schedule a plenary hearing “upon all questions pertaining to the validity of the search warrant, as well as to the other constitutional issues alleged in the

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petitioner got out of a van and started walking toward the victim’s car. Petitioner waved to and motioned for her to come towards him. Instead, she drove away and petitioner was promptly arrested by police waiting nearby.

Under Illinois law, a person is guilty of aggravated stalking if he, among other things, “places another person under surveillance on at least two occasions. . . .” A person places another “under surveillance” by “remaining present outside” the victim’s home, work, school, or vehicle. Petitioner maintained that the State did not prove a second act of surveillance; specifically, that arriving at a location where the victim had agreed to meet him was not an act of surveillance. And he argued that the State did not prove beyond a reasonable doubt that he “remained present” outside of the victim’s car. According to petitioner, because he was arrested as he was approaching the victim’s car, he could not have possibly “remained” outside of it.

But the Seventh Circuit concluded that petitioner was “really taking issue with the state court’s interpretation of state law, specifically what it means to ‘remain present’ outside a vehicle” for purposes of the statute. The Illinois appellate court concluded that the statute did not require the State to prove that petitioner remained present outside of the victim’s car for a set amount of time or that he stopped, stayed, or waited outside the car. And the court explained that whether a particular set of circumstances constitutes “surveillance” under the statute was a question of fact for the jury. Essentially, the Seventh Circuit concluded, the petitioner was “impermissibly attempting to use a petition for writ of habeas corpus to press his preferred interpretation of Illinois law.” But, as the court explained, a federal court may not review state-court interpretations of state law. “And petitioners cannot avoid this limitation by recasting their arguments as challenges to a state court’s application of *Jackson v. Virginia*, 443 U.S. 307 (1979).” *Curtis v. Montgomery*, 552

petition. . . In the event of compliance the habeas petition should be dismissed without prejudice to the state court proceeding; in the event on noncompliance the petition should be granted and a writ of habeas corpus issued") (footnote omitted); *United States v. ex rel. Harvin v. Yeager*, 428 F.2d 1354, 1358-59 (3d Cir. 1970) (new state suppression hearing); *United States ex rel. Montgomery v. Brierly*, 414 F.2d 552, 560 (3d Cir. 1969) (same); *Arrington v. Maxwell*, 409 F.2d 849, 851 (6th Cir. 1969) (remanding to the state court to have that court determine the voluntariness of petitioner's admissions applying proper standards); *Salem v. Yukins*, 414 F. Supp. 2d 687, 697-98 (E.D. Mich. 2006) (conditional writ granted to afford habeas petitioner a new public entrapment hearing after the first entrapment hearing had been closed to the public); *Dickens v. Jones*, 203 F. Supp. 2d 354, 364 (E.D. Mich. 2002) (conditional writ granted to afford the petitioner a juvenile waiver hearing in state court to determine whether petitioner should have been tried as an adult); *Kelly v. Meachum*, 950 F. Supp. 461, 476 (D. Conn. 1996) (conditional writ granted and case remanded to state court for a new rape-shield hearing); see *Mack v. Caspari*, 92 F.3d 637, 647 (Heaney, J., dissenting) (suggesting the federal court remand the case to the state court for a hearing on juror bias).

Courts have found it particularly appropriate to allow the state court an opportunity to remedy the constitutional violation where the issue is of a kind that would be more properly considered by the judge who experienced the trial first hand. *United States ex rel. McQueen v. Wangelin*, 527 F.2d 579, 581 (8th Cir. 1975). But where the state courts previously denied the petitioner's requests for a hearing and the state trial judge was not in a superior position to decide the constitutional issue, the federal court have been less inclined to give state courts an additional opportunity to remedy the constitutional violation through further state proceedings. *Grigsby v. Mabry*, 637 F.2d 525, 528-29 (8th Cir. 1980) (declining to remand to state court to conduct hearing on whether prospective jurors were disqualified because of their death penalty views; state had three times previously denied request for a hearing, the issues in the case were "not the kind more properly considered by the judge who experienced the trial first hand" and the federal district court was well acquainted with the record); see also *Keller v. Petsock*, 853 F.2d 1122, 1129-30 (3d Cir. 1988) (stating that there is no requirement that states be given a second opportunity to adjudicate petitioner's claims).

In the context of a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), federal courts have the option of either holding a reconstruction hearing regarding the circumstances surrounding the prosecutor's use of the peremptory challenges, or returning the case to the state trial court on a conditional writ so that the state court can conduct the inquiry on its own. *Jones v. West*, 555 F.3d 90 (2d Cir. 2009); accord *Mahaffey v. Page*, 162 F.3d 481, 486 (7th Cir. 1998) (where no court had addressed the issue of the prosecutor's reasons for exercising peremptory challenges, writ granted unless state court conducts new *Batson* hearing); *Coulter v. Gilmore*, 155 F.3d 912, 922 (7th Cir. 1998) (where trial court failed to inquire into the prosecutor's use of peremptory challenges as required by *Batson*, federal court ordered petitioner released unless the state court conducted a new *Batson* hearing); *Tankleff v. Senkowski*, 3 F. Supp. 2d 278, 280 (E.D.N.Y. 1998) (case remanded to state court on a conditional writ of habeas corpus for the sole purpose of holding a hearing on petitioner's *Batson* claim). But if the state court previously denied the petitioner an evidentiary hearing on the issue, the district court may choose to conduct the hearing itself. *Hardcastle v. Horn*, 368 F.3d 246, 259-60 (3d Cir. 2004) (where record did not reveal prosecutor's justification for striking African-American venirepersons, an evidentiary hearing was necessary to resolve *Batson* analysis; in ordering the hearing be conducted by the district court, the circuit court stated that it lacked the authority to remand a case to state court, and that the state court had previously denied to conduct an evidentiary on the *Batson* issue). If the reconstruction hearing on the *Batson* issue is not feasible, however, perhaps because of the length of time that has elapsed since trial or the unavailability of trial participants, the federal court may order a new trial. *Jones v. West*, 555 F.3d 90 (2d Cir. 2009).

F.3d 578, 582 (7th Cir. 2009). See Brian R. Means, *Federal Habeas Manual*, § 1:43 (Thomson-West) (2008).



Statute of Limitations: Equitable Tolling.

Sixteen months after petitioner was sentenced in federal district court, he filed a § 2255 motion alleging that trial counsel was ineffective for failing to file a direct appeal despite his requests of counsel to do so. In response to the government's motion to dismiss on statute of limitations grounds, petitioner argued that he did not discover counsel's failure to file an appeal until after the one-year filing deadline passed. Specifically, he alleged that he was repeatedly transferred to various holding facilities during the first five months after sentencing, and he was therefore

unable to communicate with anyone about his appeal during that time. He further alleged that he did not contact his attorney for a while thereafter because he believed he was supposed to wait to hear from him, and that by the time he found someone willing to help him contact his attorney, the one-year filing deadline had passed. Finally, petitioner argued that extraordinary circumstances, including his lack of knowledge of the English language and inadequate access to the prison library, prevented him from filing a timely motion. Petitioner sought an evidentiary hearing to develop these equitable tolling allegations.

Section 2255(f)(4) allows a prisoner the opportunity to file a § 2255 petition within one year of the date on which the facts supporting the claims presented could have been discovered in the exercise of due diligence. But to fall within this

provision, the petitioner must show both the existence of a new fact and that he acted with diligence to discover the new fact. (Citing *E.J.R.E. v. United States*, 453 F.3d 1094, 1097 (8th Cir. 2006)). “[S]ection 2255 does not require the maximum feasible diligence, only due, or reasonable, diligence.” (Quotation marks omitted.) “Due diligence therefore does not require a prisoner to undertake repeated exercises in futility or to exhaust every imaginable option.” (Quoting *Aron v. United States*, 291 F.3d 708, 712 (11th Cir. 2002)). “But it does at least require that a prisoner make *reasonable* efforts to discover the facts supporting his claims.” Thus, the proper task was “to determine when a duly diligent person in petitioner’s circumstances would have discovered that no appeal had been filed.”

The Eighth Circuit held that it was apparent that a duly diligent person in petitioner’s circumstances would have discovered counsel’s failure to notice an appeal well over a year before he filed his § 2255 motion, and that the district court did not abuse its discretion in dismissing the motion as time-barred without an evidentiary hearing. Petitioner had alleged that

(1) he “was not able to communicate with anyone” during the first five months after sentencing, due to repeated transfers; (2) he thereafter believed an appeal had been filed and “all that was required of him [] was [to] wait”; (3) at some point, he began to suspect that no appeal had been filed and “sent a certified/registered letter to [his attorney] requesting copies of the record” (but not, apparently, directly asking whether an appeal had been filed); and (4) “[his attorney] sent a copy of the Judgment and commitment Order;” but (5) by the time he finally attempted to contact his attorney, “[his] filing date for [his] § 2255 motion had already passed.”

The court held that these allegations were not indicative of a reasonably diligent quest for information. Indeed, petitioner “neither explained why he was ‘unable to communicate with anyone’ about his appeal while in transit, nor described any thwarted attempts to check on the status of his appeal during that period.” Instead, petitioner admitted he waited an entire year to even contact his attorney regarding his appeal. Moreover, there was every reason to believe that more prompt action on petitioner’s part would have revealed counsel’s failure to notice an appeal more than one year before he filed his § 2255 motion. “That an appeal had not been filed was a matter of public record. And we think it clear from the face of the motion and record here that a duly diligent person in [petitioner’s] circumstances could have unearthed that information anytime after the deadline for filing the appeal passed.” The court recognized that its determination put it “at odds” with the Second Circuit’s conclusion in *Wims v. United States*, 225 F.3d 186, 190-91 (2d Cir. 2000), where the court held that it was not unreasonable to think that it would take even a duly diligent person at least five months to discover counsel’s failure to notice an appeal. *Anjulo-Lopez v. United States*, 541 F.3d 814, 818 (8th Cir.

2008). See Brian R. Means, *Federal Habeas Manual*, § 9A:34 (Thomson-West) (2008).



Exhaustion: Proper Presentation. The Supreme Court has held that “where [a] claim has been presented for the first and only time in a procedural context in which its merits will not be considered unless there are special and important reasons therefor, [it will not] constitute fair presentation” and, in turn, will not satisfy the exhaustion requirement. *Castille v. Peoples*, 489 U.S. 346, 351 (1989). The question presented in *Chambers v. McDaniel*, 549 F.3d 1191 (9th Cir. 2008) (2-1 decision) was whether the petitioner’s filing of a Petition for an Extraordinary Writ in the Nevada Supreme Court satisfied the *Castille* “fair presentation” requirement.

Following the conclusion of direct appeal and state collateral review, petitioner sought federal habeas relief. The district court dismissed the petition for lack of exhaustion. Petitioner then filed a Petition for Extraordinary Writ with the Nevada Supreme Court alleging four unexhausted grounds for relief. The Nevada Supreme Court denied the petition, stating:

This is a proper petition for an extraordinary writ. Petitioner challenges the validity of his judgment of conviction and sentence. We have considered the petition on file herein, and we are not satisfied that this court’s intervention by way of extraordinary relief is warranted at this time. Accordingly, we order the petition denied.

The district court reopened the case and petitioner filed a second amended petition asserting the claims previously presented to the Nevada Supreme Court in the Petition for Extraordinary Writ. The State moved to dismiss the petition arguing that petitioner had failed to properly exhaust his state remedies. The motion was denied.

The Ninth Circuit agreed that the claims raised in the Petition for Extraordinary Relief were fairly presented to the Nevada Supreme Court and, thus, were exhausted. The Nevada Supreme Court did not deny the petition without comment. Instead, it issued an order stating that it had “considered the petition” and that its intervention was not warranted at the time. And the Nevada Supreme Court reiterated in a footnote that it “had considered” all the documents submitted, and that it “concluded that the relief requested is not warranted.” The Ninth Circuit went on to state that

[a] fair and plausible reading of the Nevada Supreme Court’s order of denial is that the court considered the merits of [petitioner’s] claim, but was not persuaded as to its validity. The court did not state that it would not consider the claim, but rather that it would not “intervene.” In fact, in a footnote, the court explicitly

stated that it had considered all the documents filed with the court, and that it had reached the conclusion that relief was not warranted. The most logical reading of this sparse text is that the Nevada Supreme Court had considered the arguments of the parties and the documentation filed by them and came to a conclusion about the merits. For a court to consider all the materials filed in conjunction with a petition for a writ and to “conclude” that relief is not warranted strongly suggests that such a “conclusion” is on the merits. This order cannot be fairly characterized as merely procedural.

The Ninth Circuit added that even if the order was curt and ambiguous, the ambiguity militated in favor of ruling that the petition was denied on the merits. Relying on *Harris v. Superior Court*, 500 F.2d 1124, 1128-29 (9th Cir. 1974) (en banc), the court held that “unless a court expressly (not implicitly) states that it is relying upon a procedural bar, we must construe an ambiguous state court response as acting on the merits of a claim, if such a construction is plausible.” The Nevada Supreme Court had not expressly stated that it was relying on procedural grounds for denying the petition. Indeed, it stated that it had “considered” all materials filed by the parties, “which indicates that it not only read the materials, but ruminates as to their merits.” The Nevada Supreme Court also said that it had “concluded” that intervention was unnecessary. “A conclusion that intervention is not necessary based on a consideration of all documents filed is not a decision based on a procedural irregularity, but rather a decision on the merits.” *Chambers v. McDaniel*, 549 F.3d at 1196-98. See Brian R. Means, *Federal Habeas Manual*, § 9C:17 (Thomson-West) (2008).



Equitable Tolling. The Third Circuit held that equitable relief was warranted where the district court *sua sponte* dismissed petitioner’s mixed petition without notice at a time when the limitations period had already expired. *Urcinoli v. Cathel*, 546 F.3d 269 (3d Cir. 2008).

Petitioner filed a § 2254 petition in which five of the eight claims were unexhausted. The district court dismissed the petition without prejudice for lack of complete exhaustion. At the time of the dismissal, the AEDPA one-year limitations period had already expired. The district court did not offer petitioner the option of deleting the unexhausted claims and proceeding on those that were exhausted. And petitioner did not attempt to refile his petition with only the three exhausted claims. Six weeks following the dismissal, petitioner filed a post-conviction review petition in state court. When the petition was denied, he filed his second § 2254 petition in federal court which contained all eight exhausted claims. The district court dismissed the second petition as untimely.

The Third Circuit held that petitioner was entitled to

equitable relief in order to ensure he had the opportunity to have the court evaluate the claims originally presented. In *Rose v. Lundy*, 455 U.S. 509, 519, 522 (1982), the Court stated that no federal court may hear a petition containing both exhausted and unexhausted claims. But the Court also stated that a prisoner bringing a mixed petition has two choices: he may accept a dismissal and return to state court to exhaust any unexhausted claims, or he may delete the unexhausted claims from the petition and proceed only with the remaining exhausted claims. The district court’s dismissal, without notice to petitioner, prevented him from using the deletion option to achieve a fair hearing on his properly exhausted claims. The lack of notice, the court stated, was particularly problematic because petitioner, being *pro se*, “was less likely to foresee the exhaustion issue on his own or know how to avoid it.”

The court distinguished *Pliler v. Ford*, 542 U.S. 225 (2004), where the Supreme Court ruled that district courts are not required to warn habeas petitioners presenting mixed petitions when the AEDPA’s limitations period has expired. The Third Circuit stated that it was not granting equitable tolling based on any failure by the district court to determine that petitioner’s window for filing a second petition had expired and to advise him that a return to state court would be futile. Instead, it was granting equitable tolling because petitioner was deprived of the ability to choose for himself whether deletion of his unexhausted claims or an attempt to fully exhaust all of his claims would be his best option.

In addition to concluding that petitioner was prevented from pursuing his rights in some extraordinary way, the court held that he had established that he had exercised reasonable diligence in attempting to exercise those rights. Petitioner promptly sought initial state post-conviction relief, brought his first habeas petition, filed a state post-conviction motion for his unexhausted claims after the petition was dismissed, and returned to federal court with his second § 2254 petition. While petitioner did not fully exhaust all of his claims before bringing them to federal court in the first § 2254 petition, “that lapse does not indicate a lack of diligence on [petitioner’s] part, but rather a lack of knowledge as to his obligation to exhaust.” *Urcinoli*, 546 F.3d at 269 (3d Cir. 2008). See Brian R. Means, *Federal Habeas Manual*, §§ 9A:107, 9C:66 (Thomson-West) (2008).



Statutory Tolling: “Pending.” Statutory tolling of the one-year AEDPA limitations period is available only during the period that the application for State post-conviction or other collateral review with respect to the pertinent judgment or claim was “pending.” 28 U.S.C. § 2244(d)(2). An application is pending for purposes of § 2244(d)(2) “as long as the ordinary state collateral review process is ‘in continuance’ – i.e., ‘until the completion of’ that process. In other words, until the application has achieved final resolution through the State’s

post conviction procedures, by definition it remains ‘pending.’” If the petitioner unreasonably delays between state court petitions, however, there is no tolling for that interval period. *Carey v. Saffold*, 536 U.S. 214, 219-20 (2002).

The Ninth Circuit, applying *Evans v. Chavis*, 546 U.S. 189 (2006), held that the “petitioner’s unexplained delay of six months between the denial by one California state court and a new filing in a higher California court was too long to permit tolling of the federal limitations period on the ground that state court proceedings were ‘pending.’”

The court also held that the district court did not abuse its discretion in granting the State leave to amend its answer to assert the statute of limitations defense. “Nothing in the record indicates that the State sought the amendment in bad faith or that the amendment would have been futile.” And any prejudice petitioner may have suffered as a result of the amendment was mitigated by the opportunity for him to respond to the amended answer. Also, the State had not previously amended its answer. Finally, the State did not unduly delay; its amended answer was prompted by the Supreme Court’s recent decision in *Evans. Waldrip v. Hall*, 548 F.3d 729, 731-32, 735 (9th Cir. 2008). See Brian R. Means, *Federal Habeas Manual*, §§ 8:33, 9A:60 (Thomson-West) (2008).



Statute of Limitations: § 1983 Method of Execution Claims.

Hours before his scheduled execution, plaintiff filed a § 1983 action seeking a stay of the execution on the ground that the State’s methods were unconstitutional. The district court denied the stay on the ground that the underlying § 1983 action was time-barred, rejecting plaintiff’s argument that the statute of limitations on his claims restarted anew in 2007 when Florida adopted additional safeguards in its lethal injection protocols.

The Eleventh Circuit affirmed. Florida adopted lethal injection as a method of execution in 2000. A § 1983 action in Florida is governed by the State’s four-year personal injury statute of limitations. Because petitioner had not brought his action by 2004, it was untimely. The court also held that the statute of limitations was not reset in 2007 when Florida adopted changes in its lethal injection program. The changes were limited and provided petitioner with additional safeguards. In any event, the district court did not abuse its discretion in concluding that petitioner was not entitled to a stay based on his undue delay in filing his § 1983 action on the eve of his execution based on laches. Petitioner waited not only eight years after Florida adopted its lethal injection protocols, but almost 13 months after the 2007 revisions to the protocols were made to file his § 1983 action. *Henyard v. Secretary, DOC*, 543 F.3d 644, 647-49 (11th Cir. 2008) (*per curiam*). See Brian R. Means, *Federal Habeas Manual*, § 2:13 (Thomson-West) (2008).



Statute of Limitations; “Properly-Filed” Requirement.

There is no tolling of the AEDPA statute of limitations during the period a state proceeding is pending if the state application was not “properly filed.” The State argued that a motion for reargument filed in state court by petitioner was not entitled to statutory tolling of the AEDPA limitations period because it was not necessary to exhaust state remedies.

The Third Circuit rejected the State’s argument, finding that “[n]othing in the text of AEDPA suggests that Congress intended any such linkage.” Indeed, the court found that the text actually undermined the Commonwealth’s attempt to read exhaustion into the statute’s tolling requirements. *Kindler v. Horn*, 542 F.3d 70, 77-78 (3d Cir. 2008). See Brian R. Means, *Federal Habeas Manual*, § 9A:47 (Thomson-West) (2008).



Statute of Limitations; Method of Execution Claims.

Plaintiffs sentenced to death filed a civil rights action under 42 U.S.C. § 1983 challenging the constitutionality of Mississippi’s lethal injection protocol, and sought a preliminary injunction to prevent the State from executing them during the pendency of their action. Plaintiffs argued that their § 1983 action was unlike a typical tort action, but was instead a suit in equity. They stressed that they did not seek monetary damages, only prospective relief. For these reasons, they claimed that the statute of limitations did not apply to their action; instead, they argued that the timeliness of their action was governed by the doctrine of equitable laches.

The Fifth Circuit disagreed, holding that the statute of limitations generally applicable to actions brought under § 1983 “applies with equal force on method-of-execution actions, notwithstanding the kind of relief they request.” The court then turned to the question of when the causes of action accrued and concluded that a § 1983 method-of-execution action is most appropriately filed after a plaintiff’s conviction and sentence have become final on direct review. Thus, “the limitations period begins to accrue on the date direct review of a plaintiff’s conviction and sentence is complete.” The court noted, however, that “in the event a state changes its execution protocol after a death-row inmate’s conviction has become final, the limitations period will necessarily accrue on the date that protocol change becomes effective.”

Finally, the court rejected the plaintiffs’ argument that the limitations period was tolled until the Supreme Court issued its opinions in *Hill v. McDonough*, 547 U.S. 573 (2006), and *Baze v. Rees*, ___ U.S. ___, 128 S. Ct. 1520 (2008). According to petitioners, they did not know they could bring their action under § 1983 until these cases were decided. But the court responded that “although *Hill* permitted method-of-execution challenges under § 1983, it did not have the effort

of restoring otherwise untimely method-of-execution actions.” The court added that “the fact that the scrutiny to be applied in method-of-execution cases was previously unclear should not have precluded the plaintiffs from filing their actions.” *Walker v. Epps*, 550 F.3d 407, 411-16 (5th Cir. 2008). See Brian R. Means, *Federal Habeas Manual*, § 2:13 (Thomson-West) (2008).



Statute of Limitations: Proper Filing Requirement.

There is no statutory tolling under 28 U.S.C. § 2244(d)(2) of the one-year limitations period of AEDPA if the state application was not “properly filed.” The Eleventh Circuit held that a state court petition dismissed for failing to comply with the state’s verification requirement did not satisfy the “properly filed” requirement and, therefore, did not toll the limitations period. The court rejected the argument that because the state verification requirement is a non-jurisdictional defect, subject to waiver and curable by amendment, it was not a filing requirement for purposes of § 2244(d)(2). The court also concluded that, although petitioner filed an amended verified petition in state court correcting the error, it came too late; the limitations period ended before the amended state petition was filed and, thus, “any collateral application filed after that date had no tolling effect.”

In addition, the court concluded that petitioner was not entitled to equitable tolling. Petitioner had alleged that “his post-conviction attorneys did not tell him that his initial [petition challenging his conviction] was dismissed, his attorneys missed deadlines, and they did not adequately communicate with him about the status of his case.” Petitioner also faulted his attorneys for not filing a timely notice of appeal from the denial of his petition for post-conviction relief. The court held that these assertions, even if true, “did not rise to the level of egregious attorney misconduct warranting equitable tolling.” There were no allegations that counsel “acted in bad faith, were dishonest, had a divided loyalty, or were mentally impaired.” The fact that counsel missed deadlines was not enough. “Even combined with his attorneys’ alleged failure to communicate about the status of his case, no egregious misconduct has been shown.” *Melson v. Allen*, 548 F.3d 993, 997-1001 (11th Cir. 2008). See Brian R. Means, *Federal Habeas Manual*, §§ 9A:43, 9A:47, 9A:86 (Thomson-West) (2008).



Clearly Established Law.

The Sixth Circuit denied petitioner relief on his claim that his constitutional rights were violated when jurors saw him shackled in a courthouse hallway. The court explained that the “Supreme Court has not held that a defendant’s constitutional rights are violated when jurors see him shackled during transport to or from the courtroom. . . . Consequently, the predicate for his claim—

“clearly established federal law, as determined by the Supreme Court of the United States”—is absent here.” *Mendoza v. Berghuis*, 544 F.3d 650 (6th Cir. 2008). See Brian R. Means, *Federal Habeas Manual*, § 3:51 (Thomson-West) (2008).



Exhaustion. Petitioner filed a mixed petition—one consisting of both exhausted and unexhausted claims. But the district court evidently overlooked the unexhausted claims and granted petitioner relief on one of the exhausted claims.

This Sixth Circuit ruled that this was error. In these types of situations, the circuit court stated that it typically would vacate the district court’s order granting the writ and remand the case to allow the district court to do one of the following: (1) dismiss the mixed petition in its entirety; (2) stay the petition and hold it in abeyance while the petitioner returned to state court to raise his unexhausted claims, (3) “permit the petitioner to dismiss the unexhausted claims and proceed with the exhausted claims”; or (4) “ignore the exhaustion requirement altogether and *deny* the petition on the merits if *none* of the petitioner’s claims has any merit.” But the present case was unique: petitioner agreed on appeal to dismiss with prejudice any unexhausted claims, and the State in response did not insist that the case be remanded before the circuit court address the merits of the exhausted claims. The court concluded that “[i]n the unusual setting of this case—where the district court apparently overlooked unexhausted claims and the State on appeal has identified no interest supporting a remand for dismissal of those claims or for that matter urged us to remand the case for that purpose—there is good reason for permitting the parties to move immediately to the substance of the dispute at the expense of its traditional form.” The court therefore permitted petitioner to abandon his unexhausted claims and proceed on the merits of the exhausted claims. *Harris v. Lafler*, 553 F.3d 1028, 1031-32 (6th Cir. 2009).



Second or Successive Petitions: New Rules.

The district court denied petitioner habeas relief and he appealed. During pendency of the appeal, the Supreme Court issued its decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), holding that the execution of mentally retarded individuals constitutes cruel and unusual punishment. The government argued that the *Atkins* claim failed because petitioner had not satisfied the requirements for filing a second or successive petition under 28 U.S.C. § 2244(b)(2)(A). That section provides that a successive petition raising claims not presented in a prior

application be dismissed unless “the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” The Eighth Circuit disagreed, stating that *Atkins* created a *previously unavailable* claim based on the unconstitutionality of executing the mentally retarded.” “Because *Atkins* teaches us [petitioner’s] future execution would violate the Eighth Amendment if [he] were mentally retarded, the application of *Atkins* to [petitioner’s] petition actually is prospective.” Thus, the requirement of § 2244(b)(2)(A) was met. *Sasser v. Norris*, 553 F.3d 1121, 1126 (8th Cir. 2009).

have known of any false statements. Thus, the “should have known” language in *Agurs* was dicta. Neither *Agurs* nor any other Supreme Court case decided prior to petitioner’s trial “clearly established,” by its holding, that a prosecutor’s failure to investigate testimony by a state witness that the prosecutor had reason to believe may be false is unconstitutional. Thus, under clearly established Supreme Court precedent, petitioner was required to show that the prosecutor actually knew of the witness’s false testimony. *Drake v. Portuondo*, 553 F.3d 230, 247 (2d Cir. 2009). See Brian R. Means, *Federal Habeas Manual*, § 3:51 (Thomson-West) (2008).



Clearly Established Law. The Second Circuit confronted the issue of what constituted “clearly established” law in the context of a claim based on the alleged admission of false testimony; more specifically, whether it is sufficient to establish a constitutional violation if the prosecutor only “should have known” of the perjury, as opposed to the prosecutor having actual knowledge that the testimony was false. The court recognized that in *United States v. Agurs*, 427 U.S. 97, 103 (1976), the Supreme Court identified the test as whether “the prosecutor knew, or should have known, of the perjury.” But in *Agurs*, there was no allegation that the prosecutor should



Heck Doctrine. Parents alleged in a § 1983 action that an investigation by school officials that led to the their child’s placement in a juvenile diversion program violated the child’s constitutional rights. The district court held that the action was barred by the favorable termination requirement of *Heck v. Humphrey*, 512 U.S. 477 (1994). The Sixth Circuit disagreed. The court held that where the plaintiff was neither convicted nor sentenced and, therefore, habeas-ineligible, the *Heck* doctrine is inapplicable. *S.E. v. Grant County Bd. of Educ.*, 544 F.3d 633, 639 (6th Cir. 2008). See Brian R. Means, *Federal Habeas Manual*, § 2:4 (Thomson-West) (2008).

UNITED STATES SUPREME COURT GRANTS OF CERTIORARI



McDaniel v. Brown, 08-559. At issue is the standard and process by which a federal habeas court, applying AEDPA, should assess a sufficiency-of-the-evidence claim under *Jackson v. Virginia*, 443 U.S. 307 (1979). Respondent Troy Brown was convicted by a jury of two counts of sexual assault on his nine-year-old niece, Jane, as well as one count of abuse. Jane’s mother, Pam, was at the Peacock Bar when the rape occurred. Shortly before 1 a.m., Jane called Pam at the bar and told her that a man had come to their trailer and hurt her. Troy Brown had been at the bar with Pam, but there was conflicting trial testimony regarding when he left. Pam said she last saw him between 11 p.m. and midnight; one bartender stated that he left the bar by 12:20 a.m.; and another bartender said she saw Brown at the bar at 1:30 a.m. Jane testified that her assailant had a mustache, wore dark jeans and a black jacket, wore boots, and smelled of “beer or puke,” all of which were consistent with Brown’s appearance that night. On the other hand, Jane also testified that the assailant’s jacket had “a zipper for sure”; Brown’s jacket was zipperless. And certain evidence pointed to Brown’s brother, Trent, who was Pam’s ex-husband. At trial, the prosecution presented a DNA expert (Renee Romero) who testified that Brown’s DNA matched the DNA found in Jane’s underwear, and that 1 in 3,000,000 people randomly selected from the population would also match that DNA. Romero then put it another way: that there was a 99.99967 percent chance that the DNA found in Jane’s underwear was from Brown’s blood. Romero also testified that there was only a 1 in 6,500 chance that one of Brown’s brothers would match his DNA at all five loci.

The Nevada Supreme Court denied Brown’s challenge to his conviction on both direct and post-conviction review. Brown then filed a federal habeas petition. The district court allowed Brown to expand the record, which he did by introducing a DNA expert’s report (the Mueller Report) that contested much of Romero’s testimony. The district court concluded that Romero’s testimony was unreliable and that, absent her testimony, no rational trier of fact could have concluded beyond a reasonable doubt that Brown was guilty. The court therefore granted habeas relief under *Jackson v. Virginia*. A divided panel of the Ninth Circuit affirmed. 525 F.3d 787. The Ninth Circuit held, first, that the Nevada Supreme Court’s decision was “contrary to” *Jackson* because the court looked to what a “reasonable” jury would do, not a “rational” jury, and because the court assessed Brown’s guilt wholesale, rather than assessing “the essential elements of the crime.” The Ninth Circuit held, secondly, that the Nevada Supreme Court’s decision was an “unreasonable application of” *Jackson*. The court stated that the Mueller Report was unchallenged, and that it showed that (1) Romero

erred when she stated there was a 99.99967 percent chance that the DNA found in Jane's underwear was from Brown's blood, and (2) the odds that one of Brown's brothers would have matched the DNA might have been as high as 1 in 66 (as opposed to Romero's assertion that the odds were 1 in 6,500). Turning to the rest of the evidence, the court stated that "it is [the state's] burden to establish guilt beyond a reasonable doubt for each and every element of the offense, a burden that [the state] ha[s] not carried here." The court pointed to the dispute as to when Brown left the bar; the conflict between aspects of Jane's description of her attacker and Brown's appearance that night; the fact that Jane twice identified Trent as her assailant; testimony by Brown's roommate that he did not see blood on Brown's boots that night; and testimony by an officer that he saw no marks on Brown's hands or blood on his clothing the next morning.

In its petition, the state attacks the Ninth Circuit's decision on several fronts. First, the Ninth Circuit misapplied Jackson by expanding the evidence and considering non-record evidence, and by reweighing the evidence and considering it in a light favorable to the defense. As Judge O'Scannlain's dissent explained, "the disputed facts . . . should have been viewed in the light most favorable to the government," and "considerable circumstantial evidence" pointed to Troy. In addition, just because Romero's presentation was flawed did not mean that no weight should have been given to the DNA evidence. Even under the Mueller Report, "it was extremely unlikely that a random person committed the crime" and there was only a 1 in 132 chance that Trent's DNA would have matched. Second, the Ninth Circuit erred because Brown never raised a claim in state court that the DNA evidence was unreliable. Third, under *Woodford v. Visciotti*, 537 U.S. 19 (2004), the Ninth Circuit erred by failing to presume that the Nevada Supreme Court applied the appropriate legal standard. Fourth, the Ninth Circuit's statement that "it is [the state's] burden to establish guilt beyond a reasonable doubt for each and every element of the offense" is a new standard that federal habeas courts may not impose under 28 U.S.C. § 2254(d). Finally, the Ninth Circuit erred because Brown "failed to develop the factual basis of [his] claim in State court proceedings," and was therefore barred by §2254(e)(2) from supplementing the proceedings on federal habeas. Brown argues that the prosecution "conceded the insufficiency of the DNA evidence" and conceded that "but for the DNA there was reasonable doubt." He also argues that he did present to the state courts his sufficiency of the evidence claims based on the reliability of the DNA evidence presented at trial.



Bobby v. Bies, 08-598. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that the Eighth Amendment bars imposition of the death penalty on persons suffering from mental retardation. At issue here is whether the Double Jeopardy Clause bars the state from asserting at a post-*Atkins* hearing that a death-sentenced inmate is not mentally retarded when the state courts had previously held that the inmate's "borderline mental retardation" constituted mitigating evidence at sentencing. Respondent Michael Bies was convicted of capital murder in 1992. During the penalty phase, a licensed clinical psychologist testified that Bies had an IQ of 69 and possessed each of the traits necessary for a clinical diagnosis of mental retardation. Her testimony was corroborated by the letter of another clinical psychologist who determined that Bies was a "mildly mentally retarded man." Bies was sentenced to death. On appeal, Bies argued that he was retarded and that his retardation was a mitigating factor that warranted a sentence of life in prison. The state contested Bies' claim of retardation, citing the trial record for evidence of Bies' cognitive functioning. The Ohio Court of Appeals agreed with Bies on the issue of his retardation, finding that Bies suffered from "mild mental retardation to borderline mental retardation." The court agreed with the state, however, that Bies' death sentence was nevertheless appropriate. The Ohio Supreme Court agreed with both assessments, concluding that (1) "Bies's personality disorder and mild to borderline mental retardation merit some weight in mitigation," but that (2) the aggravating circumstances of the crime outweigh the mitigating factors. After the U.S. Supreme Court issued its *Atkins* decision, Bies filed a third state post-conviction petition which asserted that the trial record established his mental retardation, that the Ohio Supreme Court recognized his mental retardation on direct appeal, and that double jeopardy therefore precluded the state from taking a contrary position. The post-conviction court denied summary judgment, finding that the Ohio Supreme Court had not made a definitive ruling on mental retardation for *Atkins* purposes. Bies then pressed his double jeopardy theory on federal habeas, and obtained relief from the district court. The Sixth Circuit affirmed. 519 F.3d 324.

Quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970), the Sixth Circuit held that Bies could not be forced to relitigate his *Atkins* claim because "[u]nder the Double Jeopardy Clause, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit . . . regardless of the correctness of the original decision." The court found that the Ohio Supreme Court actually and necessarily decided the issue of Bies' mental retardation on direct appeal using the standards it would adopt six years later in the wake of *Atkins*. In its petition, the state argues first that the Sixth Circuit erred because the Double Jeopardy Clause requires an "acquittal" before terminating jeopardy, and Bies was never "acquitted" of the death penalty. To the contrary, all of the state courts to assess his sentence, including the Ohio Supreme Court, expressly upheld his death sentence. Second, even if Bies was somehow "acquitted" of the death penalty in state court, the Double Jeopardy Clause is implicated only when a successive proceeding places the defendant at risk of additional criminal sanctions. But the *Atkins* proceeding does not place Bies at any additional risk of punishment; indeed, Bies himself initiated the proceeding. Third, argues Ohio, the Sixth Circuit misapplied the rules of collateral estoppel because (1) the Ohio Supreme Court did not actually determine the fact of Bies' mental retardation under *Atkins*, and (2) the fact of Bies' retardation was not necessary to the Ohio Supreme Court's affirmance of his death sentence. Finally, the state adds that no Supreme Court case "clearly established" the double jeopardy rule adopted by the Sixth Circuit, as is required to grant federal habeas relief under 28 U.S.C. §2254(d).

Summary provided by Dan Schweitzer, Supreme Court Counsel, National Association of Attorneys General, Washington, D.C.