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Rouse v. Lee 339 F.3d 238 (4th Cir. 2003)

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I. Facts

On March 16, 1991, several officers, responding to a call, arrived at a convenience store called The Pantry.[1] The store was in disorder and the cash register had been moved.[2] There was blood near the cash register and on a bar stool.[3] Officer Mark Hinshaw ("Hinshaw") and Sergeant York found Kenneth Bernard Rouse ("Rouse") against a wall.[4] Rouse had blood on him, including on his pants, hands, waist, legs, and underwear, and had abrasions on his knees.[5] Rouse's belt hung off and his pants were unzipped.[6] After finding three rolls of pennies in Rouse's pockets, the officers took Rouse away.[7]

The officers found Hazel Colleen Broadway ("Broadway"), sixty-three years of age, lying on the floor of the convenience store in a pool of blood.[8] She attempted to say something to Hinshaw, but died before she was able.[9] Broadway had blood and hand prints all over her body.[10] She wore a blouse and her pants were pulled down to her ankles.[11] When paramedics attempted to apply cardioelectrodes to her body, they discovered a knife, bent at a ninety-degree angle just below the handle, in Broadway's neck.[12]

The blood on Rouse's hands, shirt, and underwear matched the samples of blood taken from Broadway.[13] The medical examiner determined that Broadway died as a result of blood loss caused by the stab wound that severed the carotid artery and jugular vein.[14] Broadway sustained numerous other wounds including bruises, stab wounds, and abrasions.[15]

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1. State v. Rouse, 451 S.E.2d 543, 548–49 (N.C. 1994).
2. *Id.* at 549.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Rouse*, 451 S.E.2d at 549.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Rouse*, 451 S.E.2d at 549.
14. *Id.*
15. *Id.*

In 1992, a jury found Rouse guilty of first-degree and felony murder.[16] He was also found "guilty of robbery with a dangerous weapon and attempted first-degree rape."[17] At the sentencing hearing, the jury recommended the death penalty and the court sentenced Rouse "to death for first-degree murder, forty years imprisonment for armed robbery, and twenty years imprisonment for attempted first-degree rape."[18] The Supreme Court of North Carolina affirmed the convictions and the sentences.[19]

After sentencing, Rouse discovered that one of the jurors failed to reveal during voir dire that his mother was sexually assaulted and murdered by a man who received the death penalty for that crime.[20] Moreover, the juror "expressed intense racial prejudice against African Americans."[21] He suggested that African Americans cared less for life than Caucasians and declared that African American men rape Caucasian women for the purpose of bragging to their friends.[22] Allegedly, the juror intentionally suppressed his bias to obtain a seat on the jury in order to judge Rouse, who is African American.[23] Rouse had no opportunity to object to the juror, nor to challenge his ability to judge and sentence Rouse impartially, because the juror did not express these sentiments during voir dire.[24]

Rouse collaterally attacked the judgment of the state court, noting the juror bias, by filing a Motion for Appropriate Relief ("MAR") in state court.[25] The state court, without a hearing, denied Rouse post-conviction relief.[26] However, the Supreme Court of North Carolina granted certiorari and remanded the case for reconsideration in light of recent North Carolina cases.[27] The state post-conviction court, again without a hearing, denied Rouse relief "and the Supreme Court of North Carolina denied his second petition for certiorari on February 5, 1999."[28]

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16. *Id.* at 548.

17. *Id.*

18. *Id.*

19. *Rouse*, 451 S.E.2d at 574.

20. Rouse v. Lee, 314 F.3d 698, 700 (4th Cir. 2003), *vacated by* 314 F.3d 698 (4th Cir. 2003), *reh'g en banc*, 339 F.3d 238 (4th Cir. 2003).

21. *Rouse*, 314 F.3d at 700.

22. *Rouse*, 451 S.E.2d at 574.

23. *Id.*

24. *Id.*

25. *Rouse*, 314 F.3d at 701; *see* N.C. GEN. STAT. § 15A-1415 (2001) (explaining when a defendant may assert a MAR and the appropriate grounds upon which the defendant may assert a MAR).

26. *Rouse*, 314 F.3d at 701.

27. *Id.*; *see* State v. Rouse, 510 S.E.2d 669, 669 (N.C. 1998) (granting certiorari and remanding Rouse's MAR to the Superior Court of Randolph County).

28. *Rouse*, 314 F.3d at 701.

Subsequently, Rouse filed a petition for habeas relief in the United States District Court for the Middle District of North Carolina on February 8, 2000.[29] The petition alleged that the juror's bias denied Rouse his Sixth Amendment right to a fair and impartial jury.[30] The State moved to dismiss Rouse's petition as untimely.[31] The magistrate judge reviewed the motion and found that because the deadline set by the Antiterrorism and Effective Death Penalty Act ("AEDPA") fell on Saturday, February 5, 2000, Rule 6(a) of the Federal Rules of Civil Procedure "extended the deadline to the next working day, Monday, February 7, 2000."[32] Thus, the magistrate judge concluded that the petition was filed one day late and rejected Rouse's equitable tolling arguments.[33] The magistrate judge recommended that the district court grant the motion to dismiss.[34] The district court adopted the magistrate's recommendation and dismissed the petition as untimely.[35] The district court denied Rouse's subsequent motion to alter the judgment.[36] Rouse appealed the decision that his petition was filed untimely to the United States Court of Appeals for the Fourth Circuit.[37] A panel of the Fourth Circuit reversed the district court's dismissal.[38] However, "[u]pon the state's suggestion, a majority of the full-time, active circuit court judges voted to rehear the case *en banc*."[39]

II. Holding

The United States Court of Appeals for the Fourth Circuit affirmed the district court's dismissal of Rouse's federal habeas petition as untimely.[40] The Fourth Circuit held that Rouse was not entitled to statutory tolling beyond the date when the Supreme Court of North Carolina denied his petition for certiorari.[41] The Fourth Circuit also held that Rouse was not entitled to equitable

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29. *Id.*

30. *Id.*; *see* U.S. CONST. amend. VI (stating that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State").

31. *Rouse*, 314 F.3d at 701.

32. *Id.*; *see* 28 U.S.C. § 2244(d) (2000) (setting forth a statute of limitations for writ of habeas corpus; part of AEDPA); FED. R. CIV. P. 6(a) (describing how to compute "any period of time prescribed or allowed by . . . [the] rules").

33. *Rouse*, 314 F.3d at 701.

34. *Id.*

35. Rouse v. Lee, 339 F.3d 238, 243 (4th Cir. 2003).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 241.

41. *Rouse*, 339 F.3d at 257.

tolling because he failed to show "any extraordinary circumstances beyond his control that prevented him from complying with the statute of limitations."[42]

III. Analysis

A. Statutory Tolling

AEDPA was signed into law, and immediately became effective, on April 24, 1996.[43] AEDPA provides that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."[44] AEDPA states that the one-year period begins to run on the date on which the judgment became final.[45] For prisoners whose convictions became final before AEDPA was enacted, like Rouse, the one-year limitations period began to run on the date AEDPA became effective, April 24, 1996.[46] The Fourth Circuit stated that absent tolling, Rouse had until April 24, 1997 to file his federal habeas petition.[47] On February 8, 2000, Rouse filed his petition for federal habeas relief.[48]

The AEDPA statute of limitations period is tolled during the time in which " 'a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.' "[49] The Fourth Circuit agreed with the district court that Rouse's MAR "was no longer pending once the Supreme Court of North Carolina denied certiorari on February 5, 1999."[50] Therefore, the Fourth Circuit held that Rouse was not entitled to statutory tolling past that date.[51]

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42. *Id.* at 241.

43. *Id.* at 243; *see* 28 U.S.C. § 2244 (2000) (discussing the filing of a federal habeas petition; part of AEDPA).

44. *Rouse*, 339 F.3d at 243 (quoting 28 U.S.C. § 2244(d)(1)).

45. *See* 28 U.S.C. § 2244(d)(1)(A) (stating that a judgment becomes final "by the conclusion of direct review or the expiration of the time for seeking such review"; part of AEDPA).

46. *Rouse*, 339 F.3d at 243.

47. *Id.* It is interesting to note that the Fourth Circuit interpreted the one-year limitations period as running from April 24, 1996, to April 24, 1997. The court should have recognized that the one-year period expired on April 25, 1997. The Fourth Circuit's calculation denies petitioners the full year provided for in AEDPA by providing only 364 days to file a federal habeas petition.

48. *Id.*

49. *Id.* (quoting 28 U.S.C. § 2244(d)(2)); *see* Taylor v. Lee, 186 F.3d 557, 561 (4th Cir. 1999) (stating that "under § 2244(d)(2) the entire period of state post-conviction proceedings, from initial filing to final disposition by the highest state court (whether decision on the merits, denial of certiorari, or expiration of the period of time to seek further appellate review), is tolled from the limitations period for federal habeas corpus petitioners").

50. *Rouse*, 339 F.3d at 244, 246.

51. *Id.* at 246.

1. *North Carolina Rule of Appellate Procedure 32(b)*

Rouse argued "that his MAR remained pending for twenty days after the state court denied certiorari" pursuant to North Carolina Rule of Appellate Procedure 32(b).[52] Rule 32(b) states that unless "a court orders otherwise, its clerk shall enter judgment and issue the mandate of the court 20 days after the written opinion of the court has been filed with the clerk."[53] Rouse argued that under this rule his MAR remained pending until February 25, 1999.[54]

The Fourth Circuit found that Rule 32(b) did not apply to the state court's denial of Rouse's petition for writ of certiorari.[55] The court reiterated that a mandate does not issue after a denial of certiorari because there is no further action for the lower court to take upon the petition's denial.[56] Similarly, because a denial of certiorari signals the court's refusal to determine the rights and obligations of parties, a judgment cannot be entered.[57] In addition, Rouse failed to submit any evidence that a mandate ever issued in his case.[58] The Fourth Circuit concluded that Rule 32(b) did not cause Rouse's MAR to remain pending for twenty days beyond the state court's denial of certiorari.[59]

2. *North Carolina Rule of Appellate Procedure 31(g)*

Rouse also argued that "his petition remained pending during the period in which he could have sought rehearing from the Supreme Court of North Carolina."[60] The Fourth Circuit found that North Carolina law did not support Rouse's argument.[61] General Statutes of North Carolina section 15A-1411(b) provides that "a MAR is part of the original action, and thus, criminal in nature."[62] According to North Carolina Rule of Appellate Procedure 31(g), petitions for rehearing are not available in criminal proceedings.[63] Rouse argued

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52. *Id.* at 244; *see* N.C. R. APP. P. 32(b) (discussing when the judgment and mandate of a court shall issue).

53. N.C. R. APP. P. 32(b).

54. *Rouse*, 339 F.3d at 244.

55. *Id.*

56. *Id.*

57. *Id.*; *see* Felton v. Barnett, 912 F.2d 92, 94 (4th Cir. 1990) (holding that a "denial of . . . writ [of certiorari from the Supreme Court of North Carolina] is not a judgment but is simply a refusal to hear the appeal").

58. *Rouse*, 339 F.3d at 244.

59. *Id.*

60. *Id.*

61. *Id.* at 244–45.

62. *Id.* at 245; *see* N.C. GEN. STAT. § 15A-1411(b) (2001) (explaining that a MAR is part of the original proceeding and is therefore part of a criminal proceeding).

63. *Rouse*, 339 F.3d at 245; *see* N.C. R. APP. P. 31(g) (stating that petitions for rehearing are not available in criminal proceedings).

that regardless of Rule 31(g), his MAR was still pending because, on occasion, the Supreme Court of North Carolina has used its discretionary power to rehear petitions.[64] The Fourth Circuit explained that this situation did not mean that the state proceeding remained "pending."[65] Thus, the Fourth Circuit found that Rule 31(g) did "not extend the pendency of Rouse's state post-conviction review."[66]

3. Federal Rule of Civil Procedure 6(e)

Finally, Rouse argued that Federal Rule of Civil Procedure 6(e) extended the AEDPA limitations period by three days.[67] The Fourth Circuit found this argument flawed in two ways.[68] The Fourth Circuit determined that the "mailbox rule" did not extend the AEDPA limitations period.[69] The court stated that Rouse was not a party to any federal proceeding during the running of the statute of limitations.[70] Second, the AEDPA limitations period runs from the date the judgment becomes final, not from the date a party is served or notified of the judgment.[71] Therefore, the Fourth Circuit concluded that the mailbox rule did not apply to Rouse and did not extend the one-year limitations period.[72]

B. Equitable Tolling

1. The Extraordinary Circumstances Test

In *Harris v Hutchinson*,[73] the Fourth Circuit held that the AEDPA statute of limitations is subject to equitable tolling.[74] Yet, the court held that circumstances rarely warrant equitable tolling and "[a]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent."[75] The *Harris* court proposed a three-part test to determine whether equitable tolling is

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64. *Rouse*, 339 F.3d at 245.

65. *Id.*

66. *Id.*

67. *Id.*; *see* FED. R. CIV. P. 6(e) (stating that "[w]henever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period").

68. *Rouse*, 339 F.3d at 245.

69. *Id.* at 246.

70. *Id.* at 245; *see* FED. R. CIV. P. 6(e) (stating that the rule applies only to parties).

71. *Rouse*, 339 F.3d at 245; *see* FED. R. CIV. P. 6(e) (stating that the three-day extension begins after the service of a notice).

72. *Rouse*, 339 F.3d at 246.

73. 209 F.3d 325 (4th Cir. 2000).

74. *Rouse*, 339 F.3d at 246; *see* Harris v. Hutchinson, 209 F.3d 325, 329–30 (4th Cir. 2000) (holding that the AEDPA statute of limitations is subject to equitable tolling).

75. *Rouse*, 339 F.3d at 246 (quoting *Harris*, 209 F.3d at 330).

appropriate.[76] Under this test, a petitioner is entitled to equitable tolling only if he can show: "(1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time."[77]

Rouse argued that his health during the limitations period prevented him from filing his federal habeas petition on time.[78] The district court declined to apply equitable tolling because Rouse's medical condition did not render him incompetent for any significant part of the limitations period.[79] Rouse also argued that his former habeas counsel's misinterpretation of the statutory requirement constituted extraordinary circumstances beyond Rouse's control.[80] The district court rejected Rouse's argument and held that a mistake of counsel is not a ground for equitable tolling.[81]

2. *Standard of Review*

The Fourth Circuit discussed the proper standard for reviewing the district court's denial of equitable tolling in Rouse's habeas claim.[82] Until this case, the Fourth Circuit had not addressed whether an abuse of discretion or de novo review should be used.[83] The court decided that "where the relevant facts are undisputed and the district court denied equitable tolling as a matter of law, we review the district court's decision de novo . . . in all other circumstances, we review the denial of equitable tolling for an abuse of discretion."[84]

3. *Whether Extraordinary Circumstances Beyond Rouse's Control Prevented Him From Filing on Time*

Rouse first argued that equitable tolling was warranted because of his medical condition during the limitations period.[85] The Fourth Circuit agreed with the district court that Rouse's medical condition was not an extraordinary circumstance beyond his control that prevented him from filing on time.[86]

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76. *Id.*; *see Harris*, 209 F.3d at 330 (discussing the extraordinary circumstances test for equitable tolling).

77. *Rouse*, 339 F.3d at 246.

78. *Id.* at 248.

79. *Id.* at 247.

80. *Id.* at 248.

81. *Id.* at 246–47.

82. *Id.* at 247.

83. *Rouse*, 339 F.3d at 247.

84. *Id.* at 248; *see, e.g.*, Chao v. Va. Dep't of Transp., 291 F.3d 276, 279–80 (4th Cir. 2002) (reviewing the district court's ruling on equitable tolling for abuse of discretion).

85. *Rouse*, 339 F.3d at 248.

86. *Id.* at 247–48.

Therefore, the court held that the district court did not abuse its discretion when it denied equitable tolling based on Rouse's health.[87]

Rouse also argued that equitable tolling was warranted because his former habeas counsel erred in interpreting the statutory filing deadline.[88] The district court held, as a matter of law, that attorney errors provide no basis for equitable tolling.[89] The errors made by Rouse's former counsel were neither extraordinary nor external to Rouse's conduct.[90] On this basis, the Fourth Circuit applied de novo review to the district court's denial of equitable tolling.[91]

In *Harris*, the Fourth Circuit held that counsel's mistake in interpreting a statute of limitations was not an extraordinary circumstance that warranted equitable tolling.[92] The majority of other circuits agree that attorney error generally does not excuse a petitioner's failure to file a timely habeas petition.[93] The Fourth Circuit also noted that "attorney error during habeas proceedings is not itself a ground for relief in a [28 U.S.C.] § 2254 proceeding."[94] Furthermore, the court found that the actions of Rouse's attorneys were attributable to Rouse under standard principles of agency.[95] Rouse bore the risk of his counsel's error because he knowingly and voluntarily chose to be represented by them.[96] Therefore, the Fourth Circuit found that the actions of Rouse's attorneys were attributable to Rouse and did not present circumstances external to Rouse's own con-

87. *Id.* at 248.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Rouse*, 339 F.3d at 248.

92. *Id.*; *see Harris*, 209 F.3d at 331 (stating that "a mistake by a party's counsel in interpreting a statute of limitations does not present the extraordinary circumstance beyond the party's control where equity should step in to give the party the benefit of his erroneous understanding").

93. *Rouse*, 339 F.3d at 248 (citing Merritt v. Blaine, 326 F.3d 157, 169 (3d Cir. 2003) (following "the general rule that 'attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling' "); *see also* Fierro v. Cockrell, 294 F.3d 674, 683 (5th Cir. 2002) (stating that "counsel's erroneous interpretation of the statute of limitations provision cannot, by itself, excuse the failure to file [the] habeas petition in the district court within the one-year limitations period").

94. *Rouse*, 339 F.3d at 249; *see* 28 U.S.C. § 2254(i) (2000) (stating that "[t]he effectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254"; part of AEDPA).

95. *Rouse*, 339 F.3d at 249; *see* Coleman v. Thompson, 501 U.S. 722, 753–54 (1991) (stating that attorney error, except such error that rises to the level of ineffective assistance, is attributable to the client under standard agency principles).

96. *Rouse*, 339 F.3d at 249 n.12; *see* Murray v. Carrier, 477 U.S. 478, 488 (1986) (explaining that attorney error does not constitute cause for procedural default).

duct.[97] The court held that Rouse failed to satisfy the extraordinary circumstances test and was not entitled to equitable tolling.[98]

4. Death Does Not Matter

Rouse argued that the significance of the juror misconduct claim and the fact that he faced a death sentence should be factored into the equitable tolling analysis.[99] The exceptional circumstances test required a petitioner to show extraordinary circumstances beyond his control that prevented him from filing his federal habeas petition on time.[100] "[N]either the nature of Rouse's claims nor his sentence was a factor 'beyond his control' " that affected his ability to meet the statutory deadline.[101] Rouse argued that because death is different, an entirely different test for equitable tolling should be applied to petitioners who face a death sentence.[102]

The Fourth Circuit first addressed the question of whether the nature of Rouse's claims should affect the decision to consider an untimely petition.[103] Rouse argued that the strength and seriousness of his juror bias and attorney misconduct claims should shape the equitable tolling analysis.[104] Effectively, this approach circumvents the statute of limitations by allowing courts to consider the merits of untimely claims.[105] The Fourth Circuit stated that "[i]t seems curiously circular to say . . . that we consider the merits in deciding whether we can consider the merits."[106] The court stated that this approach would frustrate two central purposes of AEDPA, preventing delay and encouraging finality.[107] Thus, the court declined to adopt an equitable tolling test that would consider the strength and seriousness of a petitioner's claims.[108]

Rouse argued that the concurrence in *Duncan v. Walker*[109] supported his argument that the seriousness of a potential constitutional violation should affect

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97. *Rouse*, 339 F.3d at 250.

98. *Id.* at 251.

99. *Id.* Rouse argued that the fact that he "faces a death sentence is an important part of the equitable tolling equation," and that the "significance and magnitude of the potentially barred claim is a primary justification for equitable tolling." *Id.*

100. *Id.*

101. *Id.* (quoting *Harris*, 209 F.3d at 330)

102. *Id.*

103. *Rouse*, 339 F.3d at 251.

104. *Id.*

105. *Id.*

106. *Id.* at 252 n.15.

107. *Id.* at 251.

108. *Id.*

109. 533 U.S. 167 (2001).

the court's equitable tolling analysis.[110] The Fourth Circuit rejected Rouse's characterization of the *Duncan* concurrence.[111] The *Duncan* concurrence stated that a timely petition containing unexhausted claims may warrant equitable tolling.[112] The Fourth Circuit found that *Duncan* applied only to petitions filed within the one-year limitations period.[113] Rouse did not file a petition containing unexhausted claims within the limitations period.[114] The *Duncan* concurrence did not suggest that the nature of a petitioner's claims should factor into the equitable tolling analysis.[115] Thus, the Fourth Circuit found that the *Duncan* concurrence did not apply to Rouse's situation.[116]

Rouse also relied on *Baskin v United States*[117] for the proposition that the equitable tolling analysis should include a consideration of the merits of the underlying claim.[118] The petitioner in *Baskin* claimed that attorney error caused his untimely federal habeas petition.[119] The *Baskin* court stated that " '[i]t would be grossly inequitable to bar petitioner's ineffective assistance of counsel claim on the basis that counsel's error permitted the statute of limitations to run.' "[120] The Fourth Circuit, however, stated that *Baskin* did not suggest that the merits of the underlying claim were a reason for equitable tolling.[121] Unlike *Rouse*, *Baskin* involved trial counsel error which "constituted constitutional ineffective assistance of counsel," such that "counsel's error is not attributable to the petitioner."[122] The Fourth Circuit found that Rouse's former trial counsel's error did not constitute ineffective assistance of counsel and was therefore attributable to Rouse.[123] The court found that *Baskin* did not apply because Rouse's counsel's error did not rise to the level of ineffective assistance.[124]

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110. *Rouse*, 339 F.3d at 251 (citing Duncan v. Walker, 533 U.S. 167, 182 (2001) (Stevens, J., concurring)).

111. *Id.* at 251–52.

112. *Id.*; *Duncan*, 533 U.S. 182–83 (Stevens, J., concurring).

113. *Rouse*, 339 F.3d at 251–52.

114. *Id.* at 252.

115. *Id.* at 251.

116. *Id.* at 252.

117. 998 F. Supp. 188 (D. Conn. 1998).

118. *Rouse*, 339 F.3d at 252; *see* Baskin v. United States, 998 F. Supp. 188, 189–90 (D. Conn. 1998) (allowing equitable tolling for the petitioner's ineffective assistance of counsel claim).

119. *Rouse*, 339 F.3d at 252.

120. *Id.* (quoting *Baskin*, 998 F. Supp. at 190) (alteration in original).

121. *Id.*

122. *Id.*; *see Coleman*, 501 U.S. at 753–54 (discussing that attorney error, short of ineffective assistance of counsel, is attributable to the client); *Murray*, 477 U.S. at 488 (finding that a habeas petitioner was bound by attorney error).

123. *Rouse*, 339 F.3d at 250.

124. *Id.* at 252.

The Fourth Circuit then turned to the question of whether the nature of Rouse's sentence should affect the equitable tolling analysis.[125] Rouse argued that "less than 'extraordinary' circumstances [should] trigger equitable tolling in capital cases because 'death is different.' "[126] According to the Fourth Circuit, although the United States Supreme Court has treated death penalty cases differently, it has not applied a different test to capital cases on collateral review.[127] Any distinctions between capital and non-capital cases have related to the procedures to which a defendant is entitled at trial or sentencing.[128] The *Rouse* court stated that "the Supreme Court has repeatedly declined to treat death differently in the post-conviction context."[129] The Fourth Circuit stated that relaxing the statute of limitations in capital cases would contradict the purposes of AEDPA by causing delay in the execution of criminal sentences.[130] Therefore, the court held that "Rouse's death sentence does not change the test . . . to determine if equitable tolling is warranted."[131]

5. Dissent

The dissent disagreed with the majority's decision to deny equitable tolling.[132] The dissent argued that "[i]f equity has any place in our habeas jurisprudence . . . then the exceptional circumstances in this case demand tolling."[133] The dissent emphasized the "disturbing" facts surrounding Rouse's conviction.[134] Rouse was an African American convicted by an all-white jury for the attempted rape and murder of a white woman.[135] After Rouse's appeal was denied, he discovered that a juror deliberately concealed the facts of his mother's murder

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125. *Id.* at 253–54.

126. *Id.* at 254 (quoting Fahy v. Horn, 240 F.3d 239, 245 (3d Cir. 2001) (applying a different test for equitable tolling in capital cases)).

127. *Id.* It is possible that the Fourth Circuit is referring to *Duncan*, which denies tolling for a petitioner's federal habeas application under AEDPA. *Duncan*, 533 U.S. at 181–82.

128. *Rouse*, 339 F.3d at 254; *see* Satterwhite v. Texas, 486 U.S. 249, 256–58 (1988) (illustrating that even though capital defendants might be entitled to heightened procedural safeguards at trial, the standard of appellate review does not change in a capital case).

129. *Rouse*, 339 F.3d at 255; *see* Smith v. Murray, 477 U.S. 527, 538 (1986) (rejecting the claim that the principles governing procedural default apply differently depending on the nature of the penalty); California v. Ramos, 463 U.S. 992, 998–99 (1983) (stating that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination").

130. *Rouse*, 339 F.3d at 256; *see* 28 U.S.C. § 2244(d)(1) (2000) (providing that a one-year period of limitation shall apply to an application for a writ of habeas corpus; part of AEDPA).

131. *Rouse*, 339 F.3d at 256.

132. *Id.* at 257 (Motz, J., dissenting).

133. *Id.*

134. *Id.*

135. *Id.*

and his racial prejudice in order to sit on the jury.[136] The dissent stressed that Rouse had never received a hearing to explore his "disturbing evidence of juror bias."[137] The dissent argued that Rouse should not face a death sentence without a hearing on his claims simply because he filed his habeas petition *one day* after the AEDPA limitations period expired.[138]

The dissent argued that although Rouse's petition was filed one day late, his former lawyers had relied "on a facially applicable state procedural rule and federal decisions interpreting Federal Rule of Civil Procedure 6(e) in calculating the filing deadline."[139] Rouse argued that his lawyers had " 'played Russian roulette with [his] rights' in waiting to file his petition."[140] The dissent pointed to the fact that Rouse had diligently pursued every avenue of appeal and that he did not know or consent to the late filing of his petition.[141] The dissent also argued that standard principles of agency should not bind Rouse to his attorneys' errors because of Rouse's limited mental ability.[142] The facts surrounding Rouse's mental ability "render it impossible to conclude that Rouse could meaningfully participate in an agency relationship with his lawyers, especially one concerning the bewildering complexity of the habeas corpus rules."[143]

The dissent emphasized the discretionary nature of equitable tolling.[144] The dissent argued that courts should allow greater flexibility in applying the AEDPA statute of limitations in a habeas context.[145] "[T]he strength of the claims in a habeas petition *must* inform a court's decision to exercise its equitable power to toll limitations at least in cases such as this one, where the evidentiary basis for

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136. *Id.*

137. *Rouse*, 339 F.3d at 257 (Motz, J., dissenting).

138. *Id.* at 257–58 (Motz, J., dissenting); *see* 28 U.S.C. § 2244(d)(1) (2000) (explaining the one year statute of limitations that applies to the filing of a federal habeas petition; part of AEDPA).

139. *Rouse*, 339 F.3d at 258 (Motz, J., dissenting); *see* FED. R. CIV. P. 6(e) (stating that "[w]henever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period").

140. *Rouse*, 339 F.3d at 259 (Motz, J., dissenting) (quoting Supplemental Brief of Appellant at 7).

141. *Id.*

142. *Id.* at 259 n.3 (Motz, J., dissenting). Rouse was classified as having "borderline intellectual functioning" with an IQ of between seventy and eighty. *Id.* Due to brain dysfunction, pediatric head injury, early substance abuse, and a severely dysfunctional family, Rouse had compromised psychological and neuropsychological functioning. *Id.*

143. *Id.*

144. *Id.* at 259–60 (Motz, J., dissenting); *see* 28 U.S.C. § 2244(d)(1) (2000) (stating that a one year statute of limitations applies to the filing of a federal habeas petition; part of AEDPA); Fisher v. Johnson, 174 F.3d 710, 713 (5th Cir. 1999) (discussing the discretionary nature of equitable tolling which turns on the facts and circumstances of particular cases and does not lend itself to bright-line rules).

145. *Rouse*, 339 F.3d at 260 (Motz, J., dissenting).

such claims has never been subjected to judicial scrutiny."[146] The court should consider that Rouse never received an evidentiary hearing, had limited mental capacity, and presented a powerful constitutional claim.[147]

The dissent also disagreed with the majority's assertion that Rouse's sentence of death should not affect the equitable tolling analysis.[148] In *Harris*, the Fourth Circuit recognized that the presence of a death sentence affected equitable tolling analysis.[149] In *Eddings v Oklahoma*,[150] the United States Supreme Court stated that it has been willing to overlook requirements in capital cases that it would ordinarily impose in non-capital cases " 'in the interests of justice.' "[151] The dissent encouraged the court to recognize the inherent difference of a death sentence and refrain from hiding behind "procedural rules when confronted with such circumstances."[152] The dissent rejected the majority's rigid application of the AEDPA limitations in favor of a more flexible consideration of the facts in a particular case.[153]

IV. Application in Virginia

Rouse confirmed that the AEDPA statute of limitations will be strictly applied regardless of whether the defendant faces a death sentence.[154] Under 28 U.S.C. § 2244(d)(2), " 'the entire period of state post-conviction proceedings, from initial filing to final disposition by the highest state court (whether decision on the merits, denial of certiorari, or expiration of the period of time to seek further appellate review), is tolled from the limitations period for federal habeas corpus petitioners .' "[155] Because Virginia has not opted into the six-month limitations period set forth under 28 U.S.C. § 2263, it is still under the one-year provision set out in § 2244(d).[156] Attorneys must file federal habeas petitions

146. *Id.* at 261 (Motz, J., dissenting).

147. *Id.* at 260 (Motz, J., dissenting).

148. *Id.* at 262–63 (Motz, J., dissenting).

149. *Id.* at 262 (Motz, J., dissenting); *see Harris*, 209 F.3d at 328–30 (discussing strict limitations rules).

150. 455 U.S. 104 (1982).

151. *Rouse*, 339 F.3d at 263 (Motz, J., dissenting) (quoting Eddings v. Oklahoma, 455 U.S. 104, 117 n.* (1982) (O'Connor, J., concurring)) (internal quotation marks omitted).

152. *Id.*

153. *Id.* at 266 (Motz, J., dissenting); *see* 28 U.S.C. § 2244(d)(1) (2000) (explaining the one year statute of limitations that applies to the filing of a federal habeas petition; part of AEDPA).

154. *Rouse*, 339 F.3d at 251.

155. *Id.* at 243–44 (quoting *Taylor*, 186 F.3d at 561); *see* 28 U.S.C. § 2244(d)(2) (explaining that the deadline for filing a federal habeas petition is tolled while the judgment or claim is still pending).

156. *See* 28 U.S.C. § 2244(d)(1) (providing that a one-year period of limitation shall apply to an application for a writ of habeas corpus; part of AEDPA); 28 U.S.C. § 2263(a) (2000) (stating that "[a]ny application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the

within one year of the date when either: (1) the Supreme Court of Virginia denies the state habeas petition; or (2) after the United States Supreme Court denies certiorari. If the Supreme Court of Virginia denies a habeas petition, the one-year limitations period begins to run upon the court's entry of a final judgment.[157] The Rules of the Virginia Supreme Court state that "[t]he date of entry of any final judgment, order, or decree shall be the date the judgment, order, or decree is signed by the judge."[158] Therefore, habeas counsel must file the federal habeas petition within one year of the date the judge signs the judgment.[159]

Capital defense attorneys should be aware that Virginia habeas proceedings are common law actions and are therefore civil in nature. In *Rouse*, the Fourth Circuit denied the claim that Rouse's habeas petition remained pending during the time in which he could have sought a petition for rehearing.[160] In North Carolina, a MAR is criminal in nature and petitions for rehearing are not available in criminal proceedings.[161] Unlike the situation in *Rouse*, Virginia habeas proceedings are civil actions. Thus, other civil rules might be available to attorneys who fail to file a federal habeas petition within the one-year statute of limitations period.

It is important to recognize the different issues emphasized by the majority and the dissent in *Rouse*. The majority's decision to deny relief was based on procedural determinations.[162] The court stressed that strict adherence to procedural limitations was necessary to ensure the underlying goals of AEDPA, namely finality.[163] The majority's decision illustrates its belief that the most important issues in this case were procedural. The dissent, on the other hand, focused on fundamental fairness issues.[164] The dissent contrasted the strength of Rouse's

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conviction and sentence on direct review or the expiration of the time for seeking such review"; part of AEDPA); E-mail from Michele Brace, Attorney, to Priya Nath, Editor, Capital Defense Journal, Washington and Lee University School of Law (Sept. 9, 2003, 15:32 EST) (on file with authors). Michele Brace, a federal habeas practitioner in Virginia, verifies that Virginia is not an opt-in state and is subject to the one-year statute of limitations period.

157. E-mail from Michele Brace, Attorney, to Priya Nath, Editor, Capital Defense Journal, Washington and Lee University School of Law (Sept. 9, 2003, 15:32 EST) (on file with authors).

158. VA. SUP. CT. R. 1:1.

159. The Supreme Court of Virginia exercises original jurisdiction over petitions for writs of habeas corpus. VA. CONST. art. VI, § 1. Thus, when that court denies a habeas petition, there is no court to which a mandate should issue under the Rules of the Supreme Court of Virginia. VA. SUP. CT. R. 5:38.

160. *Rouse*, 339 F.3d at 244–45.

161. *Id.* at 245.

162. *See id.* at 257 (holding that Rouse was not entitled to equitable tolling because he failed to show "extraordinary circumstances beyond his control that prevented him from complying with the AEDPA statute of limitations").

163. *Id.* at 256.

164. *See id.* at 263–64 (Motz, J., dissenting) (stating that "to confine even the possibility of habeas relief within rigid formalistic boundaries ties the hand of equity in a manner fundamentally

claims and the severity of his punishment, with the extremely minor violation of the statute of limitations period.[165] From the dissent's perspective, the court should focus on the larger equitable issues and not "hide behind procedural rules."[166] In light of *Rouse*, it appears that procedural issues trump fundamental fairness concerns—even in capital cases.

V. Conclusion

Rouse demonstrates that statutory tolling analysis is based purely on state and federal law.[167] The Fourth Circuit denied statutory tolling because Rouse failed to present valid reasons to extend the pendency of his claim.[168] Rouse was not entitled to equitable tolling because he failed to meet the requirements of the exceptional circumstances test.[169] Most importantly, the Fourth Circuit's decision to deny equitable tolling underscores the court's reluctance to apply a different equitable tolling test to death penalty cases.[170]

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at odds with our Nation's commitment to fair process").

165. *Id.* at 260 (Motz, J., dissenting). In particular, the dissent discussed Rouse's "powerful constitutional claim" regarding juror deception and racial bias. *Id.*

166. *Rouse*, 339 F.3d at 263 (Motz, J., dissenting).

167. *Id.* at 243–46.

168. *Id.* at 244–46.

169. *Id.* at 257.

170. *Id.* at 251.