

Winter 1-1-2005

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Recommended Citation

Roger D. Groot, *Comment on For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases*, 62 Wash. & Lee L. Rev. 407 (2005), <https://scholarlycommons.law.wlu.edu/wlulr/vol62/iss1/10>

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Comment on *For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases*

Roger D. Groot*

Few attorneys have ever read a full-scale circuit court AEDPA opinion in a death penalty case. It is an arduous process. I have read many of them in the past few years, often stopping in the middle and saying to myself, "I can't do this—I can't read any more of this stuff." So I certainly commend Aaron McCollough for acquiring an understanding of an extraordinarily complex body of law in a fairly short period of time.

For example, I refer to his grasp of the role of the "properly filed" rule.¹ If a petition for a state postconviction remedy is filed improperly, the statute of limitations under AEDPA runs the entire time the state case is pending.² By the time the state court finally tells the applicant that he has filed improperly in state court, he has lost his opportunity for state court review. In many cases, he will also have lost his opportunity for federal habeas corpus review.³

Prior to AEDPA, an application for appointment of federal habeas counsel was treated for several purposes as the commencement of the habeas case.⁴ Under AEDPA, however, a request for appointment of habeas counsel is not

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1. Aaron G. McCollough, Note, *For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases*, 62 WASH. & LEE L. REV. 365, 376–80 (2005).

2. See 28 U.S.C. § 2244(d)(2) (2000) (stating that the statute of limitations continues to run until a defendant's state claim is properly filed); *Dictado v. Ducharme*, 189 F.3d 889, 892 (9th Cir. 1999) (noting that Congress would not have included the "properly filed" language if it intended to toll the statute of limitations pending improperly filed applications); see also James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 417–18 (2001) (discussing the problem of improperly filed state habeas petitions).

3. See, e.g., *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001) (finding a habeas petition untimely when the defendant's attorney miscalculated the statutory tolling period for pending state claims).

4. See *McFarland v. Scott*, 512 U.S. 849, 856–57 (1994) (deciding that, in death penalty cases, a "post-conviction proceeding" begins when a defendant files a motion requesting counsel).

treated as the filing of an actual petition for writ of habeas corpus.⁵ Thus, a request for habeas counsel does not stop the running of AEDPA's one-year statute of limitations.⁶ The only way one can meet the AEDPA time limit is to request habeas counsel, actually have counsel appointed, and file the application within one year following an adverse ruling in a "properly filed" state postconviction case. That, of course, assumes that a death row inmate knows how to request counsel. But Congress also played a little trick on capital defendants. Much of AEDPA itself is in Title 28 of the United States Code—the civil procedure code.⁷ The appointment-of-counsel provision is in Title 21 under the Drug Control Act.⁸ Thus, a capital defendant must first be able to find the appointment-of-counsel statute. That is just one example of the many strange labyrinthine twists that run through not only the federal processes but state processes as well. Some of these, I suspect, may have been intentional.

But McCollough did a wonderful job. He started with a vehicle case, *Rouse v. Lee*,⁹ and took it through a very difficult analytical process to reach his conclusion about the expansion of equitable tolling—at least in the Fourth Circuit—to come into line with those "liberal" circuits that actually let people seek habeas relief.¹⁰ But I want to look at this a little bit differently—both a little more narrowly and a little more broadly.

First, I want to talk about *Rouse v. Lee* with some clarity. This is not to say that McCollough failed to state it accurately. Yet he did not emphasize the points that I would emphasize. Factually, Rouse was charged with attempted rape and murder in rural North Carolina and sentenced to death.¹¹ One must be sure to recognize this case involved the attempted rape and murder of an elderly white woman by a black man in rural North Carolina—and he got a sentence of

5. See *Lookingbill v. Cockrell*, 293 F.3d 256, 264 (5th Cir. 2002) (finding that the statute of limitations is not tolled while the capital defendant waits for counsel to be appointed, as defendant "could have filed a *pro se* skeletal petition").

6. See *Woodford v. Garceau*, 538 U.S. 202, 208 (2003) (concluding that "a habeas suit begins with the filing of an application for habeas corpus relief").

7. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 21 and 28 U.S.C.).

8. 21 U.S.C. § 848(q)(4)(b) (2000).

9. *Rouse v. Lee*, 339 F.3d 238 (4th Cir. 2003) (en banc), cert. denied 124 S. Ct. 1605 (2004).

10. See, e.g., *Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001) (refusing to apply the "extraordinary circumstances" test to capital defendants who diligently pursue their claims, and instead applying a more lenient test); *Calderon v. U.S. Dist. Court*, 128 F.3d 1283, 1289 (9th Cir. 1997) (tolling statute based on "extraordinary circumstances" when the defendant's attorney withdrew in the middle of the capital case, leaving unusable work product).

11. *Rouse*, 339 F.3d at 241.

death.¹² Now those are the facts we must live with; if those facts do not evoke anything, then we might as well all give up and go home. *Is there no history?*

Second, after he was sentenced to death and his state appeal denied, Rouse discovered significant evidence that one of the jurors who convicted him and sentenced him to death implicitly perjured himself by failing to disclose, in response to a *voir dire* question asking if a family member had been the victim of violent crime, that the juror's mother had been raped and murdered by a man who was executed for that crime.¹³ The juror later told people that he crafted his *voir dire* responses because he wanted to sit on this jury and that "niggers" like to rape white women so they can brag about it to their friends.¹⁴ That provided the impetus for Rouse's claim. The claim was based on evidence discovered after his conviction and sentence, but the evidence was fairly substantial, and it did not appear to be made up out of the whole cloth. In any event, his claim was a pretty strong one.

Here is where I have a disagreement with McCollough. In his introduction, McCollough describes *Rouse* as a case about conviction by a possibly tainted jury.¹⁵ He might want to rethink this characterization. This is not a conviction case. In the trade in which I work, this is the kind of case that is known as a "slow plea." The defense proceeds through the trial only to end up at the sentencing phase because the defendant did it, the facts are awful, and the state has him jam up and jelly tight.¹⁶ Twelve death penalty opponents, if they followed their oath, would have convicted this defendant. I would have convicted him—guilt was absolutely clear. It was truly an awful case. These cases often are, yet one must try them because the only possible way to avoid the death penalty is, in fact, a trial. So, this is a "slow plea" case. The problem is not in the tainted jury convicting—the problem is in the tainted jury sentencing.

Now, switch focus to what happened procedurally. Rouse filed what in North Carolina is called the Motion for Appropriate Relief (MAR), the new streamlined form of habeas corpus in North Carolina.¹⁷ The process is

12. *Id.*

13. *Id.* at 257 (Motz, J., dissenting) (stating the grounds for Rouse's claim of juror misconduct).

14. *Id.*

15. McCollough, *supra* note 1, at 365–66 (recounting the problem of juror misconduct in *Rouse*).

16. Tommy Roe, *Jam Up and Jelly Tight, on Jam Up and Jelly Tight* (ABC Paramount 1969). In context, the phrase means that the state's guilt case is irrefutable.

17. *Rouse v. Lee*, 339 F.3d 238, 242 (4th Cir. 2003) (en banc), *cert. denied* 124 S. Ct. 1605 (2004). This streamlined habeas corpus motion is set forth in N.C. Gen. Stat. § 15A-1411 (2003).

supposed to be very modern and very simple—all one must do is state a valid claim, and the court will provide appropriate relief. But Rouse was denied relief in the lower court and the North Carolina Supreme Court denied review. One of the reasons Rouse was late in filing his federal habeas corpus petition is grounded in the historic nature of habeas corpus as a civil proceeding.¹⁸ It is a civil proceeding both in the federal system¹⁹ and in Virginia.²⁰ Furthermore, in civil proceedings in North Carolina, one can file a petition for rehearing after an adverse supreme court action. Based on these facts, Rouse argued that the AEDPA statute of limitations did not begin to run until his time for filing a petition for rehearing had expired.²¹ The Fourth Circuit, noting that North Carolina law says the MAR is part of the original action, disagreed.²² Thus, the MAR is a criminal proceeding, not a civil proceeding, and one cannot have a petition for rehearing in North Carolina in a criminal proceeding.²³ So Rouse could not count the time between the denial of his petition for certiorari and the time when a civil litigant could have filed a petition for rehearing. Despite the significance of these facts, it should be noted that this is simply a procedural question of how the state postconviction process is categorized. It has nothing to do with the substance of the underlying claim.

In any event, Rouse filed his MAR, which alleged all of the information about the miscreant juror.²⁴ His MAR was denied without a hearing.²⁵ On his petition for a writ of certiorari, the Supreme Court of North Carolina reversed on other grounds and sent the MAR back to the lower court.²⁶ The MAR was again denied without a hearing.²⁷ For the second time, Rouse sought a writ of certiorari from the Supreme Court of North Carolina.²⁸ Once again, certiorari was denied without an opinion.²⁹

18. See, e.g., *Browder v. Dir., Dep't of Corr.*, 434 U.S. 257, 269 (1978) ("It is well settled that habeas corpus is a civil proceeding.").

19. *Id.*

20. See, e.g., *Smyth v. Godwin*, 51 S.E.2d. 230, 233 (Va. 1949) ("It is well settled that habeas corpus is a civil and not a criminal proceeding.").

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

22. *Id.* at 245.

23. *Id.*

24. *Id.* at 242 n.2.

25. *Id.* at 242.

26. *Id.*

27. *Id.*

28. *Id.* at 242–43.

29. *Id.*

So, where does one go when he has substantial federal constitutional claims lying directly in the Sixth and Fourteenth Amendments? One goes to federal court *via* habeas corpus, the Great Writ, seeking vindication of his federal constitutional rights. But not if that person files the petition one day late. The federal district court dismissed Rouse's habeas petition without a hearing,³⁰ and the Fourth Circuit affirmed.³¹ The result of all this is that Rouse's fundamental claim—that he was denied a fair life/death sentencing hearing because his jury was infected by a lying, racist juror—will never be considered by any court. He will be killed on the basis of a death verdict issued by a tainted jury. That is where we are, and that is going to happen.

In *Rouse*, the Fourth Circuit said that it would not treat death-sentence cases differently from other cases.³² Instead, the court views the issue as a purely procedural one, where the only thing that matters is counting up the days.³³ According to the Fourth Circuit, death does not make any difference, despite the fact that AEDPA includes special procedures for capital cases.³⁴ AEDPA is an acronym for the Antiterrorism and Effective Death Penalty Act of 1996.³⁵ For a court to say death does not make any difference under AEDPA means it has not read the title. How could death not be an issue under the Effective Death Penalty Act? One would think that the death penalty and the Effective Death Penalty Act went together, but one would apparently be mistaken.

McCullough made another very good point in his Note. He mentioned that the first statute that created federal habeas corpus jurisdiction over state prisoners was the Habeas Corpus Act of 1867 (the "Act").³⁶ It is not accidental that the Act is contemporaneous with the first major civil rights movement in this country—that is, the abolition of slavery by the Thirteenth Amendment³⁷ and the application of federal due process principles and equal protection

30. *Id.* at 243.

31. *Id.* at 257.

32. *See id.* at 256–57 (refusing to grant extra protections to capital defendants in federal habeas review and applying the traditional "extraordinary circumstances" test).

33. *See id.* at 257 ("Because Rouse's attorneys could have filed his petition on time, but simply failed to do so, he is not entitled to equitable tolling.").

34. *See generally* 28 U.S.C. §§ 2261–2266 (2000) (Special Procedures for Capital Habeas Cases).

35. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

36. *See* McCullough, *supra* note 1, at 370–71 ("After 1867, the right to federal habeas corpus has also extended by statute to state prisoners seeking federal review of state convictions.").

37. U.S. CONST. amend XIII. The Thirteenth Amendment was ratified in 1865.

principles against state action under the Fourteenth Amendment.³⁸ That is an inescapable fact.

The reach of federal habeas corpus expanded from the enactment of the Act until 1996.³⁹ Much of this expansion came as the Supreme Court constitutionalized criminal procedure.⁴⁰ The Supreme Court could not, via direct review, hear a sufficiently large number of state cases such that it could control the application of the federal constitution to state criminal cases. Instead, habeas corpus jurisdiction was expanded in the lower federal courts.⁴¹ By hearing state cases on collateral review, those lower courts became the Supreme Court's constitutional cops.

Moreover, much of the Supreme Court's constitutional criminal procedure was overtly concerned with race and justice.⁴² Indeed, this concern was most pronounced when the issue involved juries and race.⁴³ The history of constitutional criminal procedure, and therefore the modern history of federal habeas corpus, closely parallels the history of race. If one understands, as I do, federal habeas corpus to be (or, at least, to have been) a vehicle for ensuring racial justice, the *Rouse* outcome is shocking.

McCullough states that AEDPA is about "fair, efficient and final resolution of capital habeas cases."⁴⁴ Efficiency and finality are certainly goals

38. U.S. CONST. amend XIV. The Fourteenth Amendment was ratified in 1868.

39. See McCullough, *supra* note 1, at 371 ("The scope of federal habeas review over state convictions expanded exponentially through the middle part of the twentieth century.").

40. *Id.* at 371 nn.35–37.

41. See *id.* at 370–71 (discussing the expansion of federal habeas review).

42. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 457 (1966) (referring to the defendants as an "indigent Mexican defendant" and an "indigent Los Angeles Negro"); *Brown v. Mississippi*, 297 U.S. 278, 281 (1936) (noting the trial court's description of the defendants as "all ignorant negroes") (quoting *Brown v. State*, 161 So. 465, 470 (1935) (Griffith, J., dissenting)); *Powell v. Alabama*, 287 U.S. 45, 49 (1932) ("The Petitioners . . . are negroes charged with the crime of rape . . . of two white girls.").

43. See, e.g., *Miller-El v. Cocknell*, 537 U.S. 322, 341–42 (2003) (finding that the defendant made a sufficient showing of a *Batson* violation where prosecution struck "91% of the eligible African-American venire members"); *Batson v. Kentucky*, 476 U.S. 79, 93–94 (1986) (allowing a defendant to make out his *prima facie* case by showing that the prosecution has struck all members of his race through peremptory challenges, at which point the burden shifts to the prosecution to offer a nondiscriminatory explanation for the strikes); *Castaneda v. Partida*, 430 U.S. 482, 494 (1977) ("[I]n order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race."); *Ham v. South Carolina*, 409 U.S. 524, 529 (1973) (opining that the trial court should have made "inquir[ies] as to racial bias" during *voir dire*); *Swain v. Alabama*, 380 U.S. 202, 222 (1965) (disallowing the pattern or practice of excluding all black jurors).

44. McCullough, *supra* note 1, at 405.

of AEDPA, but I am not so sure about fairness. The interaction of AEDPA and *Ford* claims illustrates a lack of fairness in capital habeas proceedings. In *Ford v. Wainwright*,⁴⁵ the Supreme Court held that it is unconstitutional to execute a defendant who is unable to understand: (a) that he is being executed, or (b) why.⁴⁶ The law is that a defendant cannot raise a *Ford* claim until execution is imminent because even if the defendant is insane while on death row, the defendant might regain his or her sanity prior to the execution date, and there would not be a constitutional violation.⁴⁷ Until AEDPA, that was not a problem. A death-sentenced defendant raised whatever claims he had in his federal habeas petition and got them settled—obviously adversely. He became or continued to be insane, and as he got close to execution, he filed a *Ford* claim by a second habeas petition. Today, under AEDPA, we have a one-year statute and a bar against successive petitions.⁴⁸ The defendant must file all of his claims within one year, yet his *Ford* claim would be premature. Now, imagine a defendant who filed all of his available claims within the one-year statute and lost. The defendant still has the death sentence, and he is still insane. The execution becomes imminent and ripens the *Ford* claim. But, the defendant cannot file a successive petition. The *Ford* claim cannot be heard.⁴⁹ In effect, an insane, death-sentenced defendant must find the appointment-of-counsel statute in the Drug Control Act, obtain counsel, and file the petition on time. The defendant must also be fortunate enough that his appointed counsel knows how to raise and preserve a premature *Ford* claim.⁵⁰ Otherwise, the *Ford* claim is lost and no matter how crazy the defendant remains, he will be killed. Now, that is not fair, but it is certainly efficient and final.

The *Rouse* majority says, in one of the great understatements of all time, that "[t]he delay in filing this petition may seem small, but the principles at issue are large."⁵¹ I happen to agree with that statement, but I disagree with the

45. *Ford v. Wainwright*, 477 U.S. 399 (1986).

46. *Id.* at 410 ("The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane.").

47. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 644–45 (1998) (noting that execution must be "imminent" before one can bring a *Ford* claim).

48. *See* 28 U.S.C. § 2244(b)(1) (2000) (barring a "second or successive habeas corpus application"); *id.* § 2255(d)(1) (providing a one-year statute of limitations for habeas petitions).

49. *See, e.g., Nguyen v. Gibson*, 162 F.3d 600, 600–02 (10th Cir. 1998) (denying petitioner's request to file a second habeas petition after petitioner failed to assert a *Ford* claim in his first habeas petition).

50. *See Martinez-Villareal*, 523 U.S. at 645 (finding that defendant's "*Ford* claim was not a 'second or successive' petition because it was not ripe when originally raised").

51. *Rouse v. Lee*, 339 F.3d 238, 256 (4th Cir. 2003) (en banc), *cert. denied* 124 S. Ct. 1605 (2004).

court's selection of principles. The court's principles are comity, finality, and federalism—"let's get it over with and not upset anything the state courts have already done." The state courts have already said "kill this guy; let's get on with it." There is nothing in there about fairness. Let me suggest a different view to you. The delay was small and the principles are great, but the great principles are racial justice and fair life/death sentencing decisions. In my view, AEDPA is not about fairness in any sense. It is about putting the constitutional rubber stamp on state death sentences. It is the Effective Death Penalty Act. And it works. We are frequently told that criminals "get off" on a technicality. I suggest that they sometimes get killed on a technicality.

ARTICLES
