08-3107

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PHILLIP EUGENE PARMLEY,
Petitioner / Appellant

v.

LARRY NORRIS,
Respondent / Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

Appellant's Reply Brief

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ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING PARMLEY'S 28 U.S.C. § 2254 PETITION.

A. Parmley sought timely review of his conviction in the Arkansas state court of last resort, thereby invoking Supreme Court of the United States jurisdiction pursuant to 28 U.S.C. § 1257(a).

There is an affirmative duty for an appellant to file his or her case in the Arkansas Supreme Court if the case falls into one of the categories outlined in Ark. R. Sup.Ct. 1-2(a). Ark. R. Sup.Ct. 1-2(b) creates no affirmative duty for either party to petition to the Arkansas Supreme Court, as this rule only gives the Arkansas Supreme Court authority to "reassign" a case from the Arkansas Court of Appeals to the Arkansas Supreme Court. However, Ark. R. Sup.Ct. 2-4(c)(iii) does create an affirmative duty for a party to petition to review to the Arkansas Supreme Court if the Arkansas Court of Appeals erred with respect to one of the grounds enunciated in Ark. R. Sup.Ct. 1-2(b). Ark. R. Sup.Ct. 1-2(b)(3) addresses "issues involving federal constitutional interpretation."

Norris relies upon *Ben-Yah v. Norris*, 570 F.Supp.2d 1086 (E.D. Ark. 2008). In *Ben-Yah v. Norris*, the Court noted that one of the grounds for Arkansas Supreme Court review, pursuant to Ark. R. Sup.Ct. 1-2(b)(3), concerns "issues of federal constitutional interpretation." *Id*. at 1094. The Court went on to note that a person who is in state custody must show that his

custody "violates the Constitution or laws or treaties of the United States" in order to obtain habeas relief. *Citing Smith v. Bowersox*, 311 F.3d 915, 920 (8th Cir. 2002) (which cited 28 U.S.C. § 2254). *Id*. The Court went on further to conclude, "[t]hus, it is arguable that any cognizable habeas claim is subject to review by the Arkansas Supreme Court." *Id*.

The aforementioned holding in *Ben-Yah v. Norris* is misplaced and incorrect for two reasons. First, procedurally, Ark. R. Sup.Ct. 1-2(b) does not create an affirmative duty for any party to an appeal, even if his or her case meets one of the criteria set forth in Ark. R. Sup.Ct. 1-2(b), to petition for review to the Arkansas Supreme Court. Specifically, Ark. R. Sup.Ct. 1-2(b) vests discretionary authority in the Arkansas Supreme Court to "reassign" a case from the Arkansas Court of Appeals to the Arkansas Supreme Court. Therefore, the way the Arkansas Supreme Court can move a case from the Arkansas Court of Appeals to the Arkansas Supreme Court, where the appeal originated in the Arkansas Court of Appeals, and said appeal meets at least one criterion pursuant to Ark. R. Sup.Ct. 1-2(b), is **<u>if and only if</u>** The Arkansas Supreme Court chooses to exercise its authority pursuant to Ark. R. Sup.Ct. 1-2(b) and "reassign" the appeal from the Arkansas Court of Appeals to the Arkansas Supreme Court. Otherwise, the Arkansas Court of Appeals for such an appeal would be the state court of last resort. However, Parmley does

concede that Ark. R. Sup.Ct. 2-4(c)(iii) does create an affirmative duty for a party to petition to review to the Arkansas Supreme Court if the Arkansas Court of Appeals erred with respect to one of the grounds enunciated in Ark. R. Sup.Ct. 1-2(b). The question, of course, is whether such a court has indeed erred with respect to one such ground. Second, substantively, the Court's holding in *Ben-Yah v. Norris* is misplaced and incorrect when it states that "...it is arguable that any cognizable habeas claim is subject to review by the Arkansas Supreme Court." *Id* at 1094.

The sole question is whether a given petitioner, after losing his or her direct criminal appeal at the Arkansas Court of Appeals level, has an affirmative duty pursuant to Ark. R. Sup.Ct. 2-4(c)(iii) **and** Ark. R. Sup.Ct. 1-2(b)(3) to petition the Arkansas Supreme Court for Review. The Court in *Ben-Yah v. Norris* seems to suggest that there is indeed such a duty given that "...it is arguable that any cognizable habeas claim is subject to review by the Arkansas Supreme Court." *Id* at 1094. Parmley submits that this analysis is flawed and incorrect, as one would need to analyze the issues raised within such a given appeal to see if indeed an issue of federal constitutional interpretation is raised pursuant to Ark. R. Sup.Ct. 1-2(b)(3). Further, if this were true, then in any direct criminal appeal, where the defendant is incarcerated, he or she would have such a duty to petition the Arkansas Supreme Court, regardless of the

issues raised within the appeal. That is, if this reasoning were correct, simply by virtue of the fact that such an defendant is challenging his or her conviction on direct appeal, even if he or she is not alleging habeas related issues, there is a challenge to his or her detention, on some level, and therefore an obligation to petition the Arkansas Supreme Court. Thus, this would mean that all incarcerated defendants directly appealing their criminal judgments would be obligated to petition the Arkansas Supreme Court for review.

Further, there is an exhaustion provision contained within the Arkansas Rules. Specifically, Ark. R. Sup.Ct. 1-2(h) states,

> [Exhaustion of remedies.] In all appeals from criminal convictions or postconviction relief matters heard in the Court of Appeals, the appellant shall not be required to petition for rehearing in the Court of Appeals or review in the Supreme Court following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. When the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the appellant shall be deemed to have exhausted all available state remedies.

The Arkansas Court of Appeals is indeed a state court of last resort in specific circumstances. For example, if a criminal conviction is directly appealed to the Arkansas Court of Appeals, and: (1) Arkansas Supreme Court jurisdiction is not invoked pursuant to Ark. R. Sup.Ct. 1-2(a), (2) the appeal is not "reassigned" pursuant to Ark. R. Sup.Ct. 1-2(b) to the Arkansas Supreme Court, and pursuant to Ark. R. Sup.Ct. 2-4(c)(iii) the Court of Appeals did not

err with respect to a ground listed in Ark. R. Sup.Ct. 1-2(b), then the Arkansas Court of Appeals is indeed the state court of last resort. This analysis is consistent with the holding in *Riddle v. Kemna*, 523 F.3d 850, 853 (8th Cir. 2008), whereby one determines the highest state court by analyzing "the particular state court procedures."

In Parmley's case, his direct appeal was filed in the Arkansas Court of Appeals, as Arkansas Supreme Court procedure could not be invoked pursuant to Ark. R. Sup.Ct. 1-2(a). The Arkansas Supreme Court never chose to "reassign" is case pursuant to Ark. R. Sup.Ct. 1-2(b). Further, pursuant to Ark. R. Sup.Ct. 2-4(c)(iii), the Arkansas Court of Appeals did not err in its decision with respect to a ground listed in Ark. R. Sup.Ct. 1-2(b). In *Collier v. Norris*, 402 F.Supp.2d 1026, 1029-30, (E.D. Ark. 2005), the Court found there was nothing in the Arkansas Court of Appeals decision that could form the basis for review under the factors listed in Rule 1-2(b), and as a result thereof, the Arkansas Court of Appeals was the highest court in the State of Arkansas. Parmley apparently did raise a habeas-type issue of ineffective assistance of counsel in his direct appeal, and the Arkansas Court of Appeals ruled against Parmley with respect to this issue. The Court, however, correctly noted that since Parmley never raised this issue in the trial court, he is precluded from doing so on direct appeal. *Whitney v. State*, 326 Ark. 206, 208 (1996). Since

Parmley never raised the ineffective assistance of counsel issue before the trial court, the Arkansas Appellate Court was unable to consider this issue. Thus, the Arkansas Appellate Court never reached the merits of this issue and therefore never engaged in the analysis of an issue "involving federal constitutional interpretation." Joint Appendix, Vol. 1, at 104. Moreover, hypothetically, even if the Court did consider such an ineffective assistance of counsel argument, the Court would need to first consider Parmley's claim in relationship to state law, namely, Ark. R.Crim. Pro. 37, before engaging in any "federal constitutional interpretation." Therefore, the Arkansas Court of Appeals was the highest court in the State of Arkansas for Parmley's case.

Since Parmley petitioned the state court of last resort with respect to his direct criminal appeal, he is indeed entitled to the expiration of the ninety days allotted for filing a petition for writ of certiorari with the United States Supreme Court before his conviction becomes "final" for purposes of federal habeas review. *See Riddle v. Kemna*, 523 F.3d 850, 856 (8th Cir. 2008). Norris concedes that if Parmley is afforded ninety days for filing the petition for a writ of certiorari to the United States Supreme Court pursuant to SUP. CT. R. 13.1, then his federal habeas petition would be timely. Appellee Brief at 1.

B. Stay-and-Abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005) is an issue within the scope of the certified issue, it need not be requested at the court below, it should be afforded in this case because Parmley's petition was timely, and it serves to cure any technically exhausted ineffective assistance of counsel claims raised for the first time in federal habeas corpus petitions.

Stay-and-Abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005) is an issue within the scope of the certified issue. The certified issue in this appeal is whether the District Court erred in dismissing Parmley's 28 U.S.C § 2254 petition. Throughout the litigation of Parmley's case, the District Court addressed, almost entirely, the issue of the statute of limitations imposed by AEDPA. The District Court concluded in two paragraphs in the Statement of Reason for Denial of Certificate of Appealability, with respect to the substance of Parmley's petition, that the substantive constitutional claims are not debatable among jurists of reason. The District Court strictly focused its analysis almost entirely on procedural default, rather than on the substantive claims raised by Parmley. With no further analysis by the District Court, it is clear that it simply glossed over the substantive claims raised by Parmley in his petition. Parmley has suffered a severe deprivation of major federal constitutional rights that has resulted in a criminal conviction and a lengthy sentence of incarceration.

This court has arguably certified a broad issue on appeal. Specifically, this court has invited the parties to consider whether the District Court erred in dismissing Parmley's 28 U.S.C § 2254 petition. In addition to the procedural issue of whether Parmley sought timely review of his conviction in the Arkansas state court of last resort, thereby invoking Supreme Court of the United States jurisdiction pursuant to 28 U.S.C. § 1257(a), the Court in Statement of Reason for Denial of Certificate of Appealability did indeed address Parmley's substantive claims and concluded that his constitutional claims are not debatable among jurists of reason. Therefore, stay-and-abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), is an issue well within the scope of the certified issue because the Court did rule upon Parmley's substantive claims, which indeed consisted of a mixed petition.

If this Court believes that the stay-and-abeyance issue pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005) is beyond the scope of the certified issue, Parmley respectfully requests that this Court expand the certificate to include this issue. In *Winfield v. Roper*, 460 F.3d 1026, 1040 (8th Cir. 2006), this Court determined that it has the discretion to expand certificates of appealability, yet it will exercise its discretion carefully. Thus, this Court should exercise such discretion, as "a reasonable jurist" would certainly find that the district court's failure determine that Parmley should be afforded stay-and-abeyance pursuant

to *Rhines v. Weber*, 544 U.S. 269 (2005) with respect to his mixed petition is indeed "debatable." *Id*.

Since Parmley did not raise the issue of stay-and-abeyance at the court below, he should not be precluded from raising the same before this court. It is not a petitioner's responsibility to raise such an issue. Indeed in all instances it is the petitioner who would have improperly filed such a mixed petition. Rather, as this very Court has noted, "a district court faced with a mixed petition has discretion to enter a stay to allow the petitioner to present his unexhausted claims to the state court in the first instance, preserving the petitioner's ability to return to federal court for review of his perfected petition." *Akins v. Kenney*, 410 F.3d 451, 455 (8th Cir. 2005). Therefore, in order to obtain the relief that stay-and-abeyance would afford a petitioner, such a petitioner need not individually raise such an issue to the district court. Moreover, since the purpose of such a form of relief is to cure a defective petition filed by a petitioner, he or she may not be ware that the petition is even defective.

Further, as discussed above, almost all of the litigation in this case focused on the issue of the statute of limitations imposed by AEDPA. The District Court concluded in two paragraphs in the Statement of Reason for Denial of Certificate of Appealability, with respect to the substance of

Parmley's petition, that the substantive constitutional claims are not debatable among jurists of reason. With no further analysis by the District Court, it is clear that it simply glossed over the substantive claims raised by Parmley in his petition. Parmley was not afforded an opportunity to properly address this issue, nor was he given a fair opportunity to properly litigate his substantive claims in his mixed petition.

Parmley's mixed federal habeas petition was timely filed. Norris' cites *Rhines v. Weber*, 544 U.S. 269, 275-276 (2005) for the proposition that such a mixed petition should be timely filed. Parmley submits that his mixed petition was indeed timely filed for all of the reasons set fourth in Parmley's brief and within this reply brief and Parmley relies upon said argument and incorporates the same herein.

Norris apparently argues that Parmley's unexhausted claims of ineffective assistance of counsel in his federal habeas petition are now technically exhausted by state law barring successive petitions for post-conviction relief. Appellee's Brief, p. 11. However, *Rhines v. Weber*, 544 U.S. 269 (2005) cures this very problem. Stay-and-abeyance pursuant to *Rhines v. Weber* serves to cure any claim that may be technically exhausted under state law and raised for the first time in a federal habeas petition. Specifically, federal district courts have the discretion to stay mixed habeas petitions, i.e., those containing both

exhausted and unexhausted claims, to allow petitioners an opportunity to present their unexhausted claims to state court and then to return to federal court for review of the perfected petition. *Rhines v. Weber*, 544 U.S. 269, 273-279 (2005).

C. Conclusion

For the forgoing reasons, and those contained within Parmley's initial brief, the District Court erred in dismissing Parmley's 28 U.S.C. § 2254 petition. Parmley's 28 U.S.C. § 2254 petition was timely filed in District Court, as Parmley sought timely review of his conviction before the Arkansas state court of last resort, which was the Arkansas Court of Appeals in Parmley's case. Further, Parmley's 28 U.S.C. § 2254 petition was a mixed petition that should have been stayed to allow him to, first, present his unexhausted claims to the Arkansas state court, and, second, to then return to the District Court for review of his perfected petition, assuming that the Arkansas state court denies his claims. For these reasons, and as a result of the District Court's cursory analysis of Parmley's underlying substantive claims, his case should be remanded for further review, as specified and referenced in his initial brief.

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CERTIFICATE OF COMPLIANCE AND SERVICE

Pursuant to FRAP 28 (c) and Rule 32(a)(7)(ii) the appellant's Reply Brief in the above-captioned matter contains 2,775 words as calculated by word count of the word processing program (Pages for Mac, Version 4.0.2), used to prepare the brief, and is otherwise in conformity with the FRAP. On August 25, 2009, the following has been / will be sent, postage prepaid as follows: I. the original brief, nine (9) copies, and one (1) CD containing this brief to the United States Court of Appeals For The Eighth Circuit; II. two (2) copies of this brief and one (1) CD containing this brief to opposing counsel; III. one (1) copy of this brief to Mr. Parmley. Said CD's are virus-free.

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