
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

KURT ROBERT SMITH, *Petitioner*

v.

JOSEPH MEKO, WARDEN, LITTLE SANDY CORRECTIONAL COMPLEX,
Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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January 11, 2018

QUESTION PRESENTED

Whether the one year limitations period under 28 U.S.C. § 2244(d)(1) for filing a federal habeas corpus action challenging the judgment of a state court runs from the date that a fact which is an element of an ineffective assistance of counsel claim is definitively established through the exhaustion of a state prison administrative process?

LIST OF PARTIES

1. Kurt Robert Smith, an inmate at the Little Sandy Correctional Complex, who is represented by Hon. Timothy G. Arnold Department of Public Advocacy, 5 Mill Creek Park, Frankfort, Kentucky 40601.
2. Joseph Meko, Warden, Little Sandy Correctional Complex, who is represented by Hon. Andrew Beshear, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601.

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Kurt Robert Smith, Petitioner, respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Sixth Circuit, affirming the order of the United States District Court for the Eastern District, dismissing Mr. Smith's claim as untimely.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in *Smith v. Meko*, 16-5630 (6th Cir., 9/13/17) is attached at Appendix A. The opinion of the United States District Court for the Eastern District of Kentucky in *Smith v. Meko*, 5:15-CV-252-DCR-HAI (E.D.Ky. 2016) is attached at Appendix B.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the final decision of a United States Circuit Court of Appeals.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(d) states:

(1) 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. The limitation period shall run from the latest of—

...

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

STATEMENT OF THE CASE

Petitioner, Kurt Smith, is a Kentucky inmate who was charged in Kentucky state court with participation in a prison riot while serving a life sentence on an unrelated offense. He was offered an *Alford* plea to the maximum sentence for each offense, with the inducement that the offenses would run concurrently with each other and concurrently with his life sentence, for a total of five years. He was advised by counsel that this meant that if he agreed to this offer, his new sentence would not only not change his total time to serve, it would also not change his parole eligibility on his life sentence. Believing that he was being offered the opportunity to end the case without an admission of guilt, without altering his existing life sentence, and without delaying his parole hearing, Mr. Smith agreed. The trial court accepted his plea and sentenced him to the agreed term in July, 2010.

In Kentucky, parole eligibility is not calculated by the trial court, but by the Kentucky Department of Corrections (KDOC). Significantly, when Mr. Smith returned from sentencing the KDOC recalculated his sentence based on the new judgment, and his eligibility was not changed. It was not until September 2011, more than a year later, that Mr. Smith's parole eligibility date was first changed by the KDOC during a routine reclassification to reflect an additional two years before he would be parole eligible. If the amended parole eligibility date was correct, that would mean that by pleading guilty Mr. Smith had unwittingly agreed to the maximum possible sentence for his offenses.

Kentucky law provides that "No action shall be brought by or on behalf of an inmate, with respect to: . . . challenges to a sentence calculation . . . until administrative remedies as set forth in the policies and procedures of the Department of Corrections, county jail, or other local or regional correctional facility are exhausted." KRS 454.415(1)(b). Accordingly, Mr. Smith asked for administrative review of the recalculation of his parole eligibility date on October 10, 2011. Sometime between October 10 and October 18, 2011, Mr. Smith received a letter from a non-supervisory employee of KDOC, stating that that his parole eligibility had been correctly recalculated. According to this letter, a Kentucky regulation required the KDOC to add the parole eligibility for Mr. Smith's new offenses to the eligibility for his existing offense – i.e., to treat the new offenses as though they ran consecutively rather than concurrently for the purposes of parole eligibility. Notably, the explanation provided by KDOC omitted a critical portion of the regulation it was

quoting.

Mr. Smith sent an appeal letter to the KDOC on October 18, 2011, noting that his judgment had required the sentences to run concurrently and that was a condition of his plea agreement. On November 14, 2011, he received a response denying his appeal. For the first time, KDOC provided Mr. Smith with a correct and complete recapitulation on of the regulation on which they were relying.

On October 23, 2012, Mr. Smith filed a state post-conviction action alleging that his attorney had rendered deficient performance by mistakenly advising him that his plea would not change his parole eligibility, and that he would not have accepted the plea except for counsel's deficient advice. The Kentucky state court denied relief, and Mr. Smith filed a petition for writ of habeas corpus in the Eastern District of Kentucky. It is that petition which is the subject of this case.

* * * * *

As relevant here, the litigation in the lower Federal courts primarily concerned whether Mr. Smith's petition was timely filed. It was undisputed that under 28 U.S.C.A. § 2244(d)(1)(D), the one year limitations period at issue began to run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." To that end, all agree that Mr. Smith's petition is timely if the anchor date is the date the administrative process was exhausted (November 14, 2011), and untimely if the anchor date is the date Mr. Smith submitted his final appeal (October 18, 2011) or earlier.

Mr. Smith's argument for the later date was that his ineffective assistance of

counsel claim was based on the mistaken advice of his attorney about parole eligibility, and so a definitive determination of his parole eligibility was an essential fact in the case. In *Johnson v. United States*, 544 U.S. 295, 310 (2005), this Court interpreted identical language in 28 U.S.C.A. § 2255 to include the “fact” of “the result of a court proceeding or of some other process begun at the petitioner's behest.” Mr. Smith argued the same rule should apply to his case for several reasons. First, as in *Johnson*, the result of the administrative proceeding was a crucial fact in the case. If the KDOC reversed itself in the administrative process and returned his parole eligibility to what it was originally, Mr. Smith would have had no argument that his counsel had misadvised him. Second, as in most jurisdictions, Kentucky required Mr. Smith to exhaust administrative remedies before he can pursue relief in any court. As such, any reasonable inmate would presume that the anchor date for the limitations period would run from the end of the administrative process. Finally, Smith argued that other circuits had found that the result of an administrative proceeding was the “fact” which triggered the limitations period, and that Sixth Circuit should adopt the same rule.

The lower courts rejected these arguments and denied relief, finding the habeas to be untimely. Specifically, the Sixth Circuit found that “[i]n September 2011, Smith received a communication that his eligibility date was two years later than he expected it to be, and in October 2011, he received a letter from the DOC explaining why the date differed from his expectation. At that point, Smith knew or should have known that the advice he allegedly received from his counsel was

incorrect.” *Smith v. Meko*, 16-5630, Sept. 13, 2017 Opinion, Appendix A, pg. 7. Based on this finding, the Sixth Circuit rejected Smith’s argument that *Johnson* was controlling, stating that:

The state vacatur order [in *Johnson*] was a necessary prerequisite to Johnson’s bringing a § 2255 petition challenging his enhanced sentence. By contrast, the November 2011 result of the administrative proceeding was not necessary for Smith to bring an ineffective-assistance claim in a state collateral proceeding and later a federal habeas action. Although Smith may have been diligent in his efforts to determine why his parole date had changed, the result of the administrative proceeding did nothing to establish the facts underlying his ineffective-assistance claim. As we explained above, the events of September and October 2011 established the necessary factual predicate for Smith’s ineffective-assistance claim.

Id., pg. 9. Finally, the Sixth Circuit rejected Smith’s comparison of this case to cases in other circuits, noting that “All deal with a direct challenge to an administrative proceeding that affected the prisoner’s sentence and are therefore distinguishable.” *Id.*

In short, the Sixth Circuit took a very narrow view of the significance of the administrative procedure in this case, and rejected Smith’s argument that the time should run from the exhaustion of the administrative process. Smith brings this Petition to challenge that conclusion.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit has taken a statute that was clearly intended to ensure that all state inmates have a fair opportunity to litigate their federal claim in the United States Courts, and turned it into a trap for the unwary inmate. Disregarding the

important role that exhaustion of remedies plays in general, and the significance it played in this individual case, the Sixth Circuit has instead adopted an overly narrow interpretation of § 2244(d)(1)(D) which will not accomplish what Congress intended, which is to ensure that inmates have fair notice and adequate opportunity to bring their claims to Federal court. This Court should grant review to determine, in the first instance, whether the result of an administrative proceeding is a “fact” under § 2244(d)(1)(D) in this context.

I. When a State Administrative Decision or other Ruling Qualifies as a “Fact” under § 2244(d)(1)(D) and *Johnson v. United States* is an Important Question of Federal Law.

This Court has recognized that when Congress adopted the AEDPA, “it did so without losing sight of the fact that the writ of habeas corpus plays a vital role in protecting constitutional rights, [and therefore] did not seek to end every possible delay at all costs.” *Holland v. Florida*, 560 U.S. 631, 649 (2010)(citations and quotations omitted). This Court has also noted that the consequence of an untimely petition is particularly harsh – the entire petition is dismissed, regardless of merit. *Id.* As such, it is important for inmates and lower courts alike to have a clear understanding of when tolling applies and when it does not. Unfortunately, there is presently not a clear test for when tolling will apply to the result of a proceeding, and when it will not.

A. Lower Courts have Not Coalesced Around a Coherent View of When a Result of a Collateral Proceeding Constitutes a “Fact” under 2244(d)(1)(D).

As noted above, this Court has previously held that the “the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence” can include “the result of a court proceeding or of some other process begun at the petitioner's behest.” *Johnson v. United States*, 544 U.S. 295, 310 (2005). At least to the extent that it related to administrative decisions, this principle was hardly controversial – prior to *Johnson* all of the circuits to have considered cases involving an administrative determination found that the habeas petition was timely if filed within one year of the termination of administrative proceedings. Most of those circuits followed the same reasoning as *Johnson*, finding that the “factual predicate of the claim” was not known until the administrative appeal was finally resolved. *Dulworth v. Evans*, 442 F.3d 1265, 1268 (10th Cir. 2006)(“[W]here, as here, a petitioner timely and diligently exhausts his administrative remedies, § 2244(d)(1)(D)'s one-year limitation period does not commence until the decision rejecting his administrative appeal becomes final”); *Shelby v. Bartlett*, 391 F.3d 1061, 1066 (9th Cir. 2004)(same); *Wade v. Robinson*, 327 F.3d 328, 333 (4th Cir. 2003)(same); *Cook v. New York State Div. of Parole*, 321 F.3d 274, 280 (2nd Cir. 2003)(same).

It does not appear that *Johnson* changed the approach taken in any of those circuits. See, e.g., *Mardesich v. Cate*, 668 F.3d 1164 (9th Cir.)(applying *Shelby v. Bartlett*, *supra*, in a post-*Johnson* case). *Johnson*, if anything, has expanded the types

of procedural rulings that trigger the limitations period under § 2244(d)(1)(D)). For example, one judge has recently observed that since *Johnson* “Four circuits have concluded that *Johnson* extends beyond state-court vacatur orders.” *Crangle v. Kelly*, 838 F.3d 673, 682 (6th Cir. 2016)(Stranch, J., concurring)(collecting cases). Around the same time, the Sixth Circuit joined that group by applying *Johnson* to a § 2254 case challenging the result of a delayed direct appeal. *Shorter v. Richard*, 659 Fed.Appx. 227, 230-231 (6th Cir. 2016).

Missing from these lower court opinions is a coherent and consistent rationale for determining the kinds of ruling that could qualify as a “fact” under § 2244(d)(1)(D). Identifying a coherent test for lower courts to use to sort out what results of proceedings qualify as “facts” under § 2244(d)(1)(D), and which results do not, would be very beneficial to the lower courts, and would provide inmates with clear guidance on when their limitations period expires.

B. There is Presently No Guidance on How Johnson Relates to Ineffective Assistance of Counsel Claims.

The Sixth Circuit’s opinion indicated that it might have considered Smith’s petition to be timely if Smith was challenging the parole calculation directly. However, as Smith was actually claiming ineffective assistance of counsel, in the eyes of the Sixth Circuit, the results of Smith’s administrative proceeding were not directly relevant to his habeas claim. However, this distinction does not withstand scrutiny, for several reasons.

First, KDOC’s final parole eligibility determination is an essential fact that

Smith was required to prove to make the ineffective assistance of counsel claim. Smith has no claim for misadvice if he cannot prove that the advice he received was inaccurate. The only reason that all parties agree that the advice he allegedly received is inaccurate is that Smith exhausted his administrative remedies and in so doing obtained a definitive opinion of the KDOC as to what his parole eligibility is.

Second, contrary to the Sixth Circuit's opinion, Kentucky law clearly required Smith to pursue these remedies. Though KRS 454.415 has not been extensively interpreted in the Kentucky courts, courts have found that the failure to exhaust remedies has precluded claims seeking sentence credit and challenging prison disciplinary proceedings. *See Thrasher v. Commonwealth*, 386 S.W.3d 132 (Ky.App. 2012)(prisoner action seeking sentence credit dismissed for failure to exhaust remedies); *Houston v. Fletcher*, 193 S.W.3d 276 (Ky.App. 2006)(prisoner action challenging prison discipline dismissed for failure to exhaust remedies.) The requirement of exhaustion applies even when the inmate uses the wrong appeal process. *Thrasher, supra* (inmate appealed through the standard grievance process, rather than the process for appealing sentence calculations in CPP 17.4; case dismissed for failure to exhaust administrative remedies).

The Sixth Circuit rejected this position by noting that Kentucky's post-conviction procedures apply to "any case", and therefore exhaustion was not required. This ignores the fact that the exhaustion statute, by its terms, declares that "No action shall be brought by or on behalf of an inmate" without exhausting administrative remedies. KRS 454.415(1). Therefore, while the Court was correct

that Smith could have filed a case based on rank speculation about what KDOC would do, he could not have won the case without first exhausting his administrative remedies.

The Sixth Circuit also relied on its belief that no post-conviction case had ever been rejected for failing to exhaust administrative remedies. In this regard the Sixth Circuit was simply incorrect: a Kentucky court has held, in an unpublished decision, that an inmate is generally not permitted to proceed in a state post-conviction action based on an administrative decision unless he has first exhausted his administrative remedies related to that claim. *Davis v. Commonwealth*, 2009 WL 1098081, pg. 1 (Ky.App. 2009)(“As he clearly failed to exhaust his administrative remedies, the trial court was correct to deny Davis's CR 60.02 motion.”).

Further, to the extent that no ineffective assistance of counsel challenge has been rejected for a failure to exhaust administrative remedies, the Sixth Circuit conflates absence of evidence with evidence of absence. In every published case where a Kentucky court has granted post-conviction relief to an inmate based on counsel's failure to predict the outcome of an administrative decision of the KDOC, the inmate first exhausted their administrative remedies and conclusively established the substance of the administrative decision before proceeding in post-conviction. See *Pate v. Department of Corrections*, 466 S.W.3d 480, 484 (Ky. 2015)(granting CR 60.02 relief, and noting that the litigation challenging both the administrative determination and the CR 60.02 challenging the judgment was filed “[a]fter Appellant exhausted all administrative remedies”); *Pridham v. Commonwealth*,

2008-CA-002190-MR, pp. 2-3 (Ky.App., 2010)(Attached) *affirmed in Commonwealth v. Pridham*, 394 S.W.3d 867 (Ky. 2012)(In case where RCr 11.42 relief was granted, court noted that prior to filing his RCr 11.42 motion, Pridham had filed a motion with the trial court in which he “claimed that the Department of Corrections categorized him inappropriately as an inmate who would be eligible for parole after serving 85% of his sentence.”) Counsel is unaware of any published or available unpublished case where a Kentucky court granted relief to an inmate based on an administrative decision that was not properly exhausted.

Finally, and perhaps most importantly, the Sixth Circuit’s reasoning suffers from the bias of hindsight. Had the result of the administrative appeal been to reverse the recalculation and revert Mr. Smith’s parole eligibility to what it was prior to September 2011, Smith would have had no claim for ineffective assistance of counsel. This Court has previously found that the exhaustion requirement serves two main purposes – (a) it “protects administrative agency authority”, and (b) it “promotes efficiency” because “claims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation.” *Woodford v. Ngo*, 548 U.S. 81, 89 (2006). Based on this, the requirement of exhaustion through administrative proceedings prior to litigation is now nearly universal in actions involving prison decisions. Courts should not presume – as the Sixth Circuit clearly did here – that exhaustion is little more than a rote procedural requirement without significance.

Given the existing case law, any reasonable Kentucky inmate would have

believed that he had no claim to make in state court concerning a sentence calculation – including the calculation of parole eligibility – until he had exhausted the review process, as Smith did in this case. The Sixth Circuit’s ruling punished Smith for presuming that the exhaustion was required and using the date of exhaustion as his anchor date. Had Smith known that the administrative proceeding was not required, he clearly could have filed his state court postconviction action the mere 4 days sooner to preserve his right to habeas corpus review.

The flaws in the Sixth Circuit’s reasoning underscore the consequences of having no guidance as to how to apply *Johnson* and § 2244(d)(1)(D) to a case involving an ineffective assistance of counsel claim. There should be no difference between an ineffectiveness claim and any other kind of claim for these purposes – if the result of the proceeding is necessary to prove a fact related to the claim, then it should qualify. Nevertheless, the Sixth Circuit found in this case that where the proceeding relates to a fact needed to prove ineffectiveness, it doesn’t qualify for treatment under *Johnson* and § 2244(d)(1)(D).

II. This Case Presents the Right Vehicle to Resolve these Important Federal Claims.

This case is probably as clean a presentation of this issue as this Court is likely to find. There is no dispute that Mr. Smith would be entitled to have his claim heard if his theory is correct, and that his claim should be dismissed if the Sixth Circuit is correct. There is also no dispute that Mr. Smith was diligent in pursuing his remedies, completing the administrative process less than a month after he learned

that his parole eligibility date had been changed. And, the administrative procedure in this case was facially relevant to the outcome of the proceeding. In a world where Mr. Smith was required to prove his advice was faulty, an administrative proceeding conclusively establishing that fact was clearly important to the case.

As noted above, there is no question that this is an important issue which requires a clearly resolution in order to guide the lower courts and protect the critical rights of inmates. In light of the foregoing, this Court should grant certiorari to resolve this claim.

CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner Kurt Robert Smith prays that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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