

No. 08-~~08~~ 917 JAN 23 2009

IN THE OFFICE OF THE CLERK
Supreme Court of the United States

ROSEMARIE MCSWAIN,
Petitioner,

v.

SUSAN DAVIS, WARDEN,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in order to be entitled to an evidentiary hearing to determine if a habeas petitioner's mental illness prevented her from meeting the one-year limitations period instituted by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d), it is sufficient that a habeas petitioner demonstrates the existence of such a mental condition, as the Third and Ninth Circuits have held, or whether a petitioner must also meet additional pleading and evidentiary requirements, as the Sixth Circuit held below?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Sixth Circuit and in this Court are Petitioner Rosemarie McSwain and Respondent Susan Davis, the Warden of Huron Valley Complex (Women's), where Petitioner is incarcerated.

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INTRODUCTION

The Sixth Circuit's decision below denying Petitioner an evidentiary hearing to establish that her mental illness prevented her from meeting the one-year limitations period of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d), is in direct conflict with decisions from the Third and Ninth Circuits holding that an evidentiary hearing is required when, without more, a habeas petitioner makes a good faith claim of a mental illness. The courts of appeals thus are divided over an important and recurring issue in the law of federal habeas corpus that affects innumerable litigants each year. In light of Congress's instruction "that this Court, and not the lower courts, should provide the final answer to questions of interpretation arising under" AEDPA, *Dodd v. United States*, 545 U.S. 353, 365 n.4 (2005), review by this Court is warranted.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit affirming the dismissal of Petitioner's habeas petition as untimely (Pet. App. 1a-26a) is available at 287 F. App'x 450 (6th Cir. July 15, 2008). The Sixth Circuit's order denying Petitioner's timely petition for a rehearing *en banc* (Pet. App. 114a) is not reported. The decision of the United States District Court for the Eastern District of Michigan dismissing Petitioner's habeas petition as untimely (Pet. App. 31a-39a) is unpublished. The decision of the Michigan Supreme Court denying Ms. McSwain's post-conviction challenge (Pet. App. 41a) is available at *People v. McSwain*, 688 N.W.2d 499

(Mich. 2004). The order of the Michigan Supreme Court denying Ms. McSwain's direct appeal (Pet. App. 105a) is available at *People v. McSwain*, 437 Mich. 1029 (1991).

JURISDICTION

The court of appeals issued its decision on July 15, 2008. On July 29, 2008 Petitioner filed a timely petition for rehearing and rehearing *en banc*, which was denied on October 30, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2244(d) provides:

(d)(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—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme

Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(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

Petitioner Rosemarie McSwain presented “substantial evidence to support [her] assertion that she suffers from a mental illness” known as Dissociative Identity Disorder (“DID”), Pet. App. 12a. She seeks review of the decision of the United States Court of Appeals for the Sixth Circuit upholding the denial of her request for an evidentiary hearing to determine if her mental disease prevented her from meeting the one-year limitations period under AEDPA.

In 1988, Ms. McSwain was convicted of first-degree murder and felony firearm possession and sentenced to a mandatory life sentence. Pet. App. 1a-2a. After the Michigan Court of Appeals affirmed her conviction, Pet. App. 106a-113a, the Michigan Supreme Court denied leave to appeal. Pet. App. 105a.

On February 5, 1998, Dr. Steven R. Miller, a licensed psychologist and certified forensic examiner, diagnosed Ms. McSwain with DID, which confirmed an earlier diagnosis by Leslie K. Pielack, M.A., a certified social worker and licensed professional counselor. Pet. App. 8a-9a. The American Psychiatric Association (“APA”) classifies DID,

formerly known as multiple personality disorder, “as a dissociative disorder.” Pet. App. 8a, 48a (citing APA, *Diagnostic and Statistical Manual of Mental Disorders* (3rd ed. 1987)). “DID is extremely rare,” Pet. App. 63a, 102a, and “is characterized by [t]he presence of two [or] more distinct identities or personality states that recurrently take control of the individual’s behavior accompanied by an inability to recall important personal information that is too extensive to be explained by ordinary forgetfulness.” Pet. App. 48a (citing APA, *Diagnostic and Statistical Manual of Mental Disorders* 477 (4th ed. 1994)).

Based on the new diagnosis, Ms. McSwain sought state habeas corpus relief in August 1998, arguing that she was mentally incompetent at both the time of her trial and the offense, and that information regarding her mental illness was not available or discoverable during her trial or her appeal. Pet. App. 45a-46a. The Michigan habeas court held a two-day evidentiary hearing on Ms. McSwain’s motion for post-conviction relief. During the hearing, three mental health experts testified that Ms. McSwain’s condition was “among the most severe” cases of DID “they had ever observed.” Pet. App. 103a. All three experts agreed that Ms. McSwain suffered from DID not only at the time of their examinations, but also that she “suffered from DID from childhood on, including at the time of the offense.” Pet. App. 96a.

On August 21, 2001, the Michigan habeas court granted Ms. McSwain’s motion for a new trial, concluding that she “presented a compelling case that she had and continues to have several distinct personalities.” Pet. App. 101a. But without

questioning Ms. McSwain's "current mental condition," the Michigan intermediate court reversed because "there was no direct evidence on which the trial court could have" determined that McSwain suffered from DID at the time of trial. Pet. App. 83a. The Michigan Supreme Court denied Ms. McSwain's application for leave to appeal on September 16, 2004. Pet. App. 41a.

On September 14, 2005, Ms. McSwain filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Michigan. Pet. App. 120a. She asserted in her habeas petition that she was "incompetent" at the time of her trial and sentence "due to [DID], in violation of her federal and state constitutional rights to due process and assistance of counsel." Pet. App. 122a-123a. Respondent Susan Davis, as Warden for Michigan's Huron Valley Complex ("Women's"), moved to dismiss Ms. McSwain's petition as time-barred under the one-year limitations period of 28 U.S.C. § 2244(d). In response to the State's motion to dismiss, Ms. McSwain filed a response in which she sought equitable tolling of the statute of limitations, appointment of counsel, and an evidentiary hearing. Pet. App. 133a-235a. The district court granted the motion to dismiss Ms. McSwain's petition as time-barred. Pet. App. 31a-39a.

Ms. McSwain appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed. Pet App. 1a. The panel assumed that Ms. McSwain's "DID diagnosis is newly discovered evidence," and "that the earliest date on which McSwain could have reasonably discovered the

mental illness that forms the factual predicate of her habeas claim was February 5, 1998.” Pet. App. 8a-9a. Reasoning that the “one-year limitations period [of AEDPA] started on February 5, 1998,” the court determined that the period “had run for over six months before it was tolled by the filing of McSwain’s state post-conviction proceedings on August 13, 1998.” Pet. App. 9a. Since Ms. McSwain filed her federal habeas petition on September 15, 2005, more than “six months from the conclusion of her state post conviction proceedings on September 16, 2004,” the panel concluded that “her petition was untimely.” *Id.*

The panel rejected Ms. McSwain’s request for equitable tolling of the one-year limitation period on account of her mental illness, explaining that “[i]n order to be entitled to equitable tolling the petitioner must make a threshold showing of incompetence and must also demonstrate that the alleged incompetence affected her ability to file a timely habeas petition.” Pet. App. 12a (citation omitted). The panel acknowledged that “[t]he record contains substantial evidence to support McSwain’s assertion that she suffers from a mental illness.” *Id.* However, in the appeals court’s view, the record was not sufficient “to support a causal connection between [Ms. McSwain’s] mental illness and her ability to file a timely habeas petition” when Ms. “McSwain was able to pursue both direct and collateral challenges to her convictions in the state courts notwithstanding her mental illness,” and Ms. “McSwain has not alleged any facts that would suggest that her mental illness prevented her from timely filing her habeas petition.” Pet. App. 12a-13a.

In the alternative, Ms. McSwain sought “an evidentiary hearing on the issue of whether her mental illness prevented her from timely filing her habeas petition.” Pet. App. 14a. This request was also rejected. The panel acknowledged decisions from the Third and Ninth Circuits that had “remanded for an evidentiary hearing on equitable tolling where the record contained evidence of mental illness but no evidence that the mental illness affected the petitioner’s ability to present his or her habeas petition.” *Id.* (citing *Laws v. Lamarque*, 351 F.3d 919, 924-25 (9th Cir. 2003); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001), *reversed in part on other grounds by Carey v. Saffold*, 536 U.S. 214 (2002)). The court, however, distinguished these rulings on the ground that Ms. McSwain did not assert that she was prevented from timely filing her habeas petition “because of her mental illness.” Pet. App. 15a. Rather, “[s]he merely indicated that because she has been suffering from DID since childhood, she likely suffers periods of incompetency which would effect her ability to file a timely habeas petition,” but had “not alleged any facts, which, if true, would show that her mental illness prevented her from timely filing her habeas petition once she became aware of her DID diagnosis.” *Id.*

Ms. McSwain timely filed a petition for rehearing and rehearing *en banc* before the Sixth Circuit, which was denied on October 30, 2008. Pet. App. 114a.

REASONS FOR GRANTING THE WRIT**THE SIXTH CIRCUIT'S DENIAL OF AN EVIDENTIARY HEARING TO ESTABLISH WHETHER PETITIONER'S MENTAL ILLNESS PREVENTED HER FROM MEETING THE AEDPA LIMITATIONS PERIOD IS IN DIRECT CONFLICT WITH RULINGS FROM THE THIRD AND NINTH CIRCUITS**

AEDPA provides a one-year period in which a prisoner can file a federal habeas petition following a state court conviction. This deadline extends, *inter alia*, from “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D). Because the Sixth Circuit assumed that Petitioner’s mental condition could have been discovered nearly six months prior to the filing of her state post-conviction proceedings, and nearly a year passed between the end of those proceedings and the filing of her federal habeas petition, the total time exceeded this one-year period, unless, as Petitioner asserted, AEDPA’s non-jurisdictional limitations period was equitably tolled by her mental illness. *Souter v. Jones*, 395 F.3d 577, 588 (6th Cir. 2005) (“[b]ecause AEDPA’s one-year statute of limitations is not jurisdictional, a petitioner who misses the deadline may still maintain a viable habeas action if the court decides that equitable tolling is appropriate” (quoting *Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004))). The federal courts of appeals are in agreement that the AEDPA limitations period is subject to equitable tolling where an “extraordinary circumstance” prevented a petitioner from timely filing her habeas

petition.¹ They are also in agreement that “the mental incapacity of the petitioner can warrant the equitable tolling of the statute of limitations,” and that the habeas petitioner must demonstrate that she suffers from a mental defect during the relevant time period to be eligible for such tolling. Pet. App. 12a.²

Where the courts of appeals disagree is over what sort of showing or allegation must be made to obtain an evidentiary hearing to determine whether the habeas petitioner’s mental illness prevented him or her from meeting the AEDPA limitations period.

¹ While this Court has “not decided whether § 2244(d) allows for equitable tolling,” *Lawrence v. Florida*, 549 U.S. 327, 336 (2007), the courts of appeals have unanimously ruled that the AEDPA one-year limitations period is subject to equitable tolling for extraordinary circumstances. See *Trapp v. Spencer*, 479 F.3d 53, 59 (1st Cir. 2007); *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000); *Miller v. N.J. State Dept. of Corr.*, 145 F.3d 616, 618 (3d Cir. 1998); *United States v. Prescott*, 221 F.3d 686, 688 (4th Cir. 2000); *Baker v. Cain*, No. 06-31177, 2008 WL 3243993, at *2 (5th Cir. Aug. 7, 2008); *In re McDonald*, 514 F.3d 539, 543 (6th Cir. 2008); *Keenan v. Bagley*, 400 F.3d 417, 420-21 (6th Cir. 2005); *Johnson v. Chandler*, 224 F. App’x 515, 518 (7th Cir. 2007); *Bishop v. Dormire*, 526 F.3d 382, 384-85 (8th Cir. 2008); *Brown v. Attorney Gen.*, 291 F. App’x 15, 16 (9th Cir. 2008); *Herdocia v. Howard*, 275 F. App’x 774, 776 (10th Cir. 2008); *Holland v. Florida*, 539 F.3d 1334, 1338 (11th Cir. 2008). The Court may, of course, address the subsidiary question of the availability of equitable tolling for extraordinary circumstances under AEDPA in addition to answering the question presented. SUP. CT. R. 14(a).

² See also *Laws v. Lamarque*, 351 F.3d 919 (9th Cir. 2003); *Nowak v. Yukins*, 46 F. App’x 257 (6th Cir. 2002); *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001); *Lake v. Arnold*, 232 F.3d 360 (3d Cir. 2000).

The court below ruled that the habeas petitioner must, at the very least, present “a sufficient factual basis,” in addition to a specific pleading, that her mental condition caused her untimely filing to warrant such a hearing. Pet. App. 16a. By contrast, the Third and Ninth Circuits require an evidentiary hearing whenever the habeas petitioner makes a good faith showing of a mental disease—without imposing any special pleading or proof burdens as to causation. *Laws*, 351 F.3d at 924-25; *Nara*, 264 F.3d at 310. The Sixth Circuit’s decision to deny Petitioner an opportunity to establish that her dissociative condition presents an extraordinary circumstance which prevented her from filing a timely habeas petition is thus plainly in conflict with established precedent in at least two other Circuits.

In *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001), *reversed in part on other grounds by Carey v. Saffold*, 536 U.S. 214 (2002), the Third Circuit considered an appeal from the dismissal of a habeas petition on grounds of untimeliness under § 2244(d). The petitioner, Joseph Nara, sought to have his original guilty plea withdrawn on the grounds that he was not mentally competent to enter the plea at the time, *id.* at 311-12—a situation similar to that of Petitioner here, who asserts that she, too, was incompetent to stand trial. Pet. App. 2a. After a series of state post-conviction proceedings, Nara filed a habeas petition in a federal district court. When the State sought to have his petition dismissed as untimely, Nara argued that “his mental health problems are extraordinary circumstances” which justify equitable tolling. *Nara*, 264 F.3d at 320. The district court adopted the Magistrate Judge’s recommendation to dismiss the

petition as untimely without further inquiry into Nara's mental state.

On appeal, the Third Circuit in *Nara* reversed, holding that because the petitioner "presented evidence of ongoing, if not consecutive, periods of mental incompetency, an evidentiary hearing is warranted in order to develop the record." *Id.* Though—like the Sixth Circuit here—the Third Circuit recognized that "the alleged mental incompetence must somehow have affected the petitioner's ability to file a timely habeas petition," *id.*, the court held that Nara's allegations of an ongoing mental illness "may constitute extraordinary circumstances to justify equitable tolling," and remanded the case for further inquiry by the district court. *Id.* The appeals court emphasized that Nara was entitled to such a hearing despite the fact that "there was no evidence in the record that Nara's current mental status affected his ability to present his habeas petition." *Id.*³

³ Subsequent applications of *Nara* within the Third Circuit reaffirm its holding that a habeas petitioner need only advance evidence of his or her mental illness to be entitled to a hearing to establish whether the mental condition prevented compliance with the AEDPA limitations period. For example, in *Graham v. Kyler*, No. 01-1997, 2002 WL 32149019 (E.D. Pa. Oct. 31, 2002), the district court considered a report and recommendation from a Magistrate Judge that the petitioner's habeas petition be rejected as untimely. Citing *Nara*, the habeas court rejected the recommendation as deficient, and—based on a submitted report by the petitioner's psychologist—held its own evidentiary hearing to determine whether the petitioner "was mentally incompetent, and if so, whether this affected his ability to file a timely habeas petition." *Id.* at *1; accord, *Wilson v. Stickman*,

Similarly, in *Laws v. Lamarque*, 351 F.3d 919 (9th Cir. 2003), the Ninth Circuit mandated an evidentiary hearing in the case of a habeas petitioner, Brian Laws, who attached medical records to his habeas petition but made no attempt to establish that his mental condition made it “impossible” to file a timely petition. *Id.* at 922. Like Petitioner here, Laws filed his habeas petition within one year of denial of state post-conviction review, but failed to account for the passage of time between direct and post-conviction review. Despite Laws’ proof of his mental condition and claim that his condition “precluded his timely filing,” the magistrate judge found that Laws’ application was untimely, and the district court adopted the recommended dismissal. *Id.*

The Ninth Circuit, however, reversed. The appellate court held that a habeas petitioner is not

Nos. 03-953, 03-699, 2005 WL 1712385, at *1-2 (E.D. Pa. July 21, 2005) (accepting recommendations based on an evidentiary hearing held before the Magistrate Judge). Given the benefit of a fully developed record, the district court in *Graham* was able to conclude that the “petitioner’s inability to engage in the abstract reasoning necessary to understand basic legal concepts, combined with his diagnosed psychiatric disorders and obvious functional illiteracy would have made it impossible for him to file or to seek assistance in filing a habeas petition” *Graham*, 2002 WL 32149019, at *10. At no time prior to the evidentiary hearings did the petitioners in these cases present evidence that their mental conditions prevented them from filing a timely habeas petition. Rather, they were capable only of referring to prior psychiatric evaluations, and required an evidentiary hearing on this issue of causation—precisely the same relief Petitioner seeks here.

required “to carry a burden of persuasion at this stage in order to merit further investigation into the merits of his argument for tolling,” and remanded the case for “further factual development” to determine whether the petitioner’s mental condition warranted equitable tolling of AEDPA. *Id.* at 924. Like the Third Circuit in *Nara*, the Ninth Circuit emphasized the need for an evidentiary hearing on the basis of the habeas petitioner’s “unrebutted allegation” of mental defect, and held that such an allegation of mental disease was sufficient to require “further factual development.” *Id.* “[E]ntirely in accord with a recent Third Circuit decision addressed to similar facts,” *id.* (citing *Nara*, 264 F.3d at 319-20), the *Laws* appeals court remanded the case back to the district court with instructions to allow discovery and expansion of the factual record.⁴

⁴ The central holding in *Laws* has been reaffirmed by the Ninth Circuit in a number of subsequent cases. *See Lopez v. Kernan*, 192 F. App’x 659, 660 (9th Cir. 2006) (“[a] petitioner is entitled to an evidentiary hearing or an opportunity for further factual development of equitable tolling if he alleges facts ‘that would if true, entitle him to equitable tolling’” (quoting *Laws*, 352 F.3d at 921)). For example, *Queen v. Newland*, 109 F. App’x 884 (9th Cir. 2004), an opinion following on the heels of *Laws*, remanded a summary denial of equitable tolling, noting that the district court “did not have the benefit of our decision in *Laws*.” *Id.* at 885. The petitioner in *Queen* argued he was entitled to equitable tolling “because of his mental health,” and—in accordance with the *Laws* principle—the Ninth Circuit instructed the district court to “make a determination after further development of the record.” *Id.* In addition, as with subsequent application of *Nara* in the Third Circuit, the district courts in the Ninth Circuit have consistently interpreted *Laws* as mandating an inquiry into the factual circumstances of an

Petitioner's plea for an evidentiary hearing to determine whether her mental illness prevented compliance with the AEDPA filing period is virtually identical to the pleas sustained in *Nara* and *Laws*. As with the petitioners in those cases, Ms. McSwain here submitted her habeas filings within one year after the end of state post-conviction proceedings. Petitioner also presented substantial evidence of her mental condition by stating that she was "incompetent, due to dissociative identity disorder," in her habeas petition (Pet. App. 122a-123a), attaching affidavits of psychiatric testimony, and arguing in her opposition to the State's motion to dismiss that a "threshold showing of incompetence" was made. Moreover, Petitioner also alleged that "periods of incompetency" had affected her ability to file her habeas petition. Pet. App. 15a, 136a. In sum, Petitioner here proceeded in a nearly identical fashion to the petitioners in *Nara* and *Laws*. Indeed, counsel for the State conceded that a denial of Petitioner's request for an evidentiary hearing would be in conflict with the Third Circuit's opinion in *Nara*, stating before the Sixth Circuit that, were the court bound by the law of the Third Circuit, "the cases would require a remand." Pet. App. 238a. Nevertheless, the Sixth Circuit in this case affirmed the grant of the State's motion to dismiss without

equitable tolling claim. *See Elmore v. Knowles*, No. S-05-1641 GEB, 2007 WL 2275169, at *8 (E.D. Cal. Aug. 7, 2007) ("While the undersigned does not find petitioner should be granted equitable tolling . . . based on the evidence submitted, the court has little choice, in light of *Laws*, but to grant, as petitioner alternatively suggests, an evidentiary hearing on the question of whether petitioner should have equitable tolling.").

affording Petitioner an evidentiary hearing on causation—whether her mental condition (as to which there concededly was “substantial evidence” (Pet. App. 12a)) prevented her from meeting the AEDPA filing deadline.

The issue here is whether a habeas petitioner who has presented credible evidence of her mental illness is entitled to an evidentiary hearing on the issue of causation—that is, whether her mental illness prevented compliance with the AEDPA filing period. The Third and Ninth Circuits recognize that a showing of mental illness during the period in question is sufficient, without more, to trigger an evidentiary hearing as to causation. The Sixth Circuit, by contrast, would impose a substantial pleading (and proof) requirement that would effectively foreclose habeas relief for many petitioners afflicted by mental illness. As the record in this case indicates, Petitioner repeatedly had difficulty comprehending both the orders of the courts below and the motions filed by the State. Pet. App. 81a-83a. Imposing a pleading or proof burden in addition to the required showing of her mental illness during the relevant time fails to further any purpose of AEDPA or equitable tolling principles generally. By contrast, the opinions of the Third and Ninth Circuits in *Nara* and *Laws*, respectively, do not impose this additional hurdle, and thus better reflect this Court’s insistence on rules that effectively balance the petitioner’s “right to pursue constitutional claims in federal court,” *Lawrence*, 549 U.S. at 344, with “the principles of comity, finality and federalism”

embodied by AEDPA. *Williams v. Taylor*, 529 U.S. 420, 436 (2000).⁵

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

⁵ Furthermore, the approach of the Third and Ninth Circuits is preferable as a matter of policy and sound judicial administration. To make the availability of an evidentiary hearing into whether a prisoner's mental illness prevented a timely filing turn on a special pleading burden is to erect an entirely inappropriate hurdle because prisoners suffering from a mental condition cannot be presumed capable of making such a specific pleading.

Respectfully Submitted,

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