Rideau v. Whitley: Lack of Evidence or Lack of Understanding?

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INTRODUCTION

Often referred to as the "Great Writ," the writ of habeas corpus, is the exclusive federal remedy available to a state prisoner who challenges the fact or duration of his or her conviction and seeks release. The prisoner files a petition for writ of habeas corpus in a United States District Court. The petition alleges not guilt or innocence but only that the prisoner is held in violation of his or her constitutional rights. In response, the warden asserts the prisoner is lawfully detained on the basis of a criminal conviction. At that point the district court is in the position to review the petitioner's claim and determine whether his or her detention is in violation of federal law. As a way of taming the Great Writ, Congress enacted Rule 9(a). Emphasizing the significant interplay between the writ of habeas corpus and Rule 9(a) of the Rules Governing Section 2254 cases, the Fifth Circuit declared: "because Rule 9(a) authorizes the summary disposition of habeas corpus petitions on grounds unrelated to the constitutional claims, its application necessarily must be limited to avoid the abrogation of the very purpose of the writ."2

In 1976, Congress enacted Rule 9(a) to minimize abuse of the writ of habeas corpus by limiting the petitioner's right to assert stale claims. Under Rule 9(a) a petition attacking the judgment of a state court may be dismissed on grounds of delay if the State has been prejudiced in its ability to respond to the petition. The equitable nature of the rule allows for petition at any time if the prisoner can prove the petition is based on grounds of which he or she could not have had knowledge in the ordinary exercise of diligence under the law.

In Rideau v. Whitley, petitioner Wilbert Rideau, claimed the selection of the Louisiana grand jury that indicted him for murder made him the victim of racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. The Fifth Circuit, in an opinion written by Judge James Dennis, held: (1) the State failed to make a sufficient showing of prejudice in its ability to respond to the petition caused by the petitioner's delay, pursuant to Rule 9(a) of the Rules Governing Section 2254 Cases of Title 28; and (2) the petitioner established a prima facie case of equal protection

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1. Rules such as 9(a), 28 U.S.C. following section 2254, supplement the Federal Rules of Civil Procedure for habeas cases.
2. McDonnell v. Estelle, 666 F.2d 246, 251 (5th Cir. 1982).
3. 237 F.3d 472 (5th Cir. 2000).
violation resulting from a racially discriminatory grand jury selection, which the State failed to rebut.4

Although several issues were addressed in Rideau, this note discusses the part of the court's holding regarding dismissal of habeas corpus claims when the State alleges prejudice in its ability to respond. The holding of Rideau was correct; the State did not meet its burden of proving particularized prejudice as a result of Rideau's delayed petition. While endorsing the court's decision, this note provides guidance for practitioners and clarifies the Fifth Circuit's standard for a particularized showing of prejudice. The standard is not unattainable; it is however, easily misunderstood. In Rideau the State failed to meet its burden of proof, perhaps not for lack of evidence, but because the State misapplied the standard of particularized prejudice required by the court.

This note is organized into four parts. Part I discusses background information, legislative history and public policies relating to Rule 9(a). Part II summarizes the Rideau case, including pertinent procedural history. Part III provides the holding and reasoning of the court; it is subdivided into three sections, each addressing the separate elements of the State's burden of proof. Finally, Part IV analyzes how the State in Rideau could successfully have met its burden of proof pursuant to Rule 9(a).

I. BACKGROUND

Rule 9(a) of the Rules Governing Section 2254 Cases was enacted by Congress in 1976. Codifying the equitable doctrine of laches,5 Rule 9(a) requires the courts to conduct an inquiry into the reasonableness of the petitioner's delay, and whether such delay results in prejudice to the State's ability to respond.6 Rule 9(a) of the Rules Governing Section 2254 Cases provides:

A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

4. Id. at 483, 489.
5. "Laches is such delay in enforcing one's rights as works disadvantage to another" 30A C.J.S. Equity § 112, at 19. See also Moore v. Smith, 694 F.2d 115, 117 (6th Cir. 1982) ("Rather, Rule 9(a) codifies the equitable doctrine of laches which has been applied in habeas cases to preclude a person from profiting to the detriment of another by his own delay in enforcing his rights.").
Rule 9(a) was enacted by Congress to discourage the filing of stale claims. It permits the courts to quickly dismiss delayed petitions without resorting to a full consideration of the merits of the claims. According to the Fifth Circuit, "it constitutes a legislative attempt to balance conflicting public policies, the right of the petitioner not to be unconstitutionally detained and the right of the State to dispute the petitioner's claim."

As originally proposed, Rule 9(a) would have created a rebuttable presumption of prejudice in favor of the State if the petitioner filed his or her claim more than five years after the judgment of conviction. Ultimately, Congress rejected this approach. In deleting the rebuttable presumption language, the House Judiciary Committee reasoned it was unsound policy to require the defendant to overcome a presumption of prejudice.

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8. McDonnell v. Estelle, 666 F.2d 246, 249 (5th Cir. 1982).
10. As originally proposed by the Supreme Court, Rule 9(a) included the following language which the Congress deleted before the Rules became effective on February 1, 1977:
    
    If the petition is filed more than five years after the judgment of conviction, there shall be a presumption, rebuttable by the petitioner, that there is prejudice to the State. When a petition challenges the validity of an action, such as revocation of probation or parole, which occurs after judgment of conviction, the five year period as to that action shall start to run at the time the order in the challenged action took place.


11. The Advisory Committee Note to the rule states:
    
    This rule is intended to minimize abuse of the writ of habeas corpus by limiting the right to assert stale claims... Subdivision (a) provides that a petition attacking the judgment of a state court may be dismissed on the grounds of delay if the petitioner knew or should have known of the existence of the grounds he is presently asserting in the petition and the delay has resulted in the State being prejudiced in its ability to respond to the petition. If the delay is more than five years after the judgment of conviction, prejudice is presumed, although this presumption is rebuttable by the petitioner. Otherwise, the State has the burden of showing prejudice.


12. Strahan, 750 F.2d at 440-41.
As finally adopted, Rule 9(a) places the burden on the state to: (1) make a particularized showing of prejudice, (2) show that the prejudice was caused by the petitioner having filed a late petition, and (3) show that the petitioner has not acted with reasonable diligence as a matter of law. The showing of particularized prejudice must be based on the specific challenge raised in the petition; the mere passage of time alone is never sufficient to constitute prejudice. Further, whether the State will be able to re-convict the petitioner is irrelevant. If the State makes its showing of the three elements, the burden then shifts to the petitioner to show either (1) the State actually is not prejudiced, or (2) the petitioner’s delay is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred.

II. THE RIDEAU CASE

Rideau’s original indictment arose out of a February 16, 1961 robbery of the Southgate Branch of the Gulf National Bank in Lake Charles. During the robbery Julia Ferguson, a bank employee, was killed. A Calcasieu Parish jury found Rideau guilty and sentenced him to death. On direct appeal to the Louisiana Supreme Court, the conviction and sentence were affirmed. The United States Supreme Court granted Rideau certiorari and reversed his conviction and sentence. Subsequently, venue was changed to the Nineteenth Judicial District in East Baton Rouge Parish, where the defendant was re-tried, found guilty, and sentenced to death. The Louisiana Supreme Court affirmed the conviction and sentence; the United States Supreme Court denied certiorari.

Next, Rideau applied to the United States District Court for the Eastern District of Louisiana for habeas corpus relief, where the

which make it difficult for the State to respond to an old claim... can readily be discovered by the State.” Id. at 2482 n.8. “The proposed five-year rebuttable presumption would have been in effect, a statute of limitation, arguably prohibited by the Constitution which mandates that: ‘The privilege of the writ of habeas corpus shall not be suspended...’” U.S. Const. art. I, § 9, cl. 2.

15. McDonnell v. Estelle, 666 F.2d 246, 251 (5th Cir. 1982).
17. Id. (citing McDonell, 666 F.2d at 251 (quoting Rule 9(a)).
19. Id. (citing 137 So. 2d 238 (La. 1962)).
defendant again was retried, convicted and sentenced to death.\textsuperscript{22} From that decision Rideau appealed to the Louisiana Supreme Court, again arguing many bills of exception. Included was Bill of Exceptions No. 2 which was reserved when the trial court overruled both defense counsel's motion to quash the general venire list, grand jury venire, and the indictment of the grand jury of Calcasieu Parish and his motion to quash the general venire list and petit jury venire of East Baton Rouge Parish.\textsuperscript{23} The court rejected all of Rideau's bills as being without merit and affirmed his conviction.

Twenty-one years later, on July 27, 1994, Rideau filed a petition for federal habeas corpus relief alleging that his indictment and conviction were unlawfully obtained by an unconstitutionally impaneled grand jury.\textsuperscript{24} The State moved for dismissal of Rideau's petition as untimely under Rule 9(a) of the rules governing habeas corpus procedure. A federal magistrate judge recommended the district court deny the State's dismissal motion and grant Rideau's petition for habeas corpus.\textsuperscript{25} The warden, John Whitley, filed written objections on October 17, 1997.\textsuperscript{26} Following an evidentiary hearing, the federal district court denied Rideau's petition and granted the State's motion to dismiss pursuant to Rule 9(a).\textsuperscript{27} Rideau appealed. The instant case is a result of that final appeal.

\textbf{III. COURT OPINION}\textsuperscript{28}

When a habeas claim is based on either an in-court proceeding or one which was otherwise recorded, the State must demonstrate both that the transcript is unavailable and the participants (judge, court reporter, prosecutor, attorneys, law enforcement officials, and the like) are unavailable or unable to remember critical events.\textsuperscript{29} Generally, the court will conduct a hearing to determine whether the burden of proof is met and will make findings regarding the existence of prejudice.\textsuperscript{30} Rideau's habeas claim was based primarily on two

\begin{itemize}
  \item \textsuperscript{22} State v. Rideau, 278 So. 2d 100, 102.
  \item \textsuperscript{23} \textit{Id}.
  \item \textsuperscript{24} Rideau, 237 F.3d at 476, 477.
  \item \textsuperscript{25} \textit{Id}. at 477.
  \item \textsuperscript{26} Brief for Petitioner at 2, Rideau v. Whitley, 237 F.3d 472 (5th Cir. 2000) (No. 99-30849).
  \item \textsuperscript{27} \textit{Id}. at 477.
  \item \textsuperscript{28} As stated before, though the holding is indeed two-pronged, this casenote's focus will be limited to Judge Dennis' holding on whether the district court correctly dismissed Rideau's petition for a writ of habeas corpus as untimely under Rule 9(a).
  \item \textsuperscript{29} \textit{Id}. at 477.
  \item \textsuperscript{30} \textit{Id}.
\end{itemize}
transcripts taken from pretrial evidentiary hearings held in the East Baton Rouge state court on his motions to quash the Calcasieu Parish grand jury bodies. The transcript from the first hearing on November 5, 1964, was introduced as evidence in the second hearing on December 15, 1969. On appeal, both were made part of the record.

At each evidentiary hearing, Acton Hillebrandt, the clerk of court and ex-officio member of the jury commission, was the only witness. Mr. Hillebrandt was elected Clerk of Court of Calcasieu Parish in 1948 and served as an ex-officio member of its jury commission until 1988. At the first evidentiary hearing, Mr. Hillebrandt testified that the commission selected its jury venire from identification cards, which contained the names, race and other data regarding prospective jurors from the parish of registrar voters and other sources. The commission would select twenty people from the general venire to form the grand jury venire. In Mr. Rideau’s case, only one of the twenty grand jurors was black. Mr. Hillebrandt also testified that a person’s race would neither qualify nor disqualify him from serving on the grand jury. In addition, Mr. Hillebrandt noted that when the actual grand jury venire was selected the jury commissioners had no idea which case or defendant would come before it. In Rideau’s case, the grand jury that indicted him was selected on January 5, 1961, one month and eleven days before Rideau committed his crime.

At the 1969 hearing, Mr. Hillebrandt gave a similar description of the commission’s procedures on selecting jurors. At this hearing, Rideau introduced into evidence four identification cards, the 1960 census information, the voter registrar’s affidavit, and the transcript of the 1964 evidentiary hearing. After each hearing, the state trial court overruled Rideau’s motions to quash his conviction. Following a brief review of the procedural history in Rideau’s quest to seek habeas corpus relief due to discriminatory grand jury selection, the court examined each of the three elements the State must show to prove prejudice.

31. Id. at 479.
32. Id.
35. Rideau, 237 F.3d at 479.
36. State v. Rideau, 278 So. 2d 100.
37. Rideau, 237 F.3d at 480.
38. Id.
A. Particularized Showing of Prejudice

The State alleged it was prejudiced in its ability to respond to the petition because Mr. Hillebrandt, other jury commission members and the two state trial judges were either to elderly to recall details, at unknown locations, or deceased.\textsuperscript{39} In response, the court explained the State may not simply allege prejudicial facts, but must offer concrete proof of such allegations.\textsuperscript{40} For example, the State alleged but did not present proof that Mr. Hillebrandt was physically or mentally unable to testify. In addition, the State did not allege the factual substance of testimony Mr. Hillebrandt may have provided, or even that it would differ from his testimony at the two state court evidentiary hearings.\textsuperscript{41}

The court next rejected the State's argument that it was prejudiced by the disappearance of the race-coded identification cards and other documentary exhibits. The State did not make any particularized showing of prejudice from this disappearance.\textsuperscript{42} On the issue of missing documentary evidence, the court concluded that Mr. Hillebrandt's testimony from the prior evidentiary hearings, in which he described the cards, was sufficient and had been preserved. As a result, the court determined the availability of the actual cards was unnecessary.\textsuperscript{43}

B. Prejudice Caused by the Petitioner Having Filed a Late Petition

Assuming the death, disability, or unavailability of each witness was construed as particularized prejudice to the State, the State also bore the burden of proving that Rideau's delay in filing his habeas petition resulted in the loss of evidence.\textsuperscript{44} The court found the facts alleged by the State did not specifically set forth when the prejudice occurred. Though the parties stipulated that four of the jury commissioners and one of the state court judges was deceased as of

\textsuperscript{39} Id. at 482.
\textsuperscript{40} Id. (citing Wise v. Armontrout, 952 F.2d at 223; Marks v. Estelle, 691 F.2d 732, 734 (5th Cir. 1982); Paprskar v. Estelle, 612 F.2d 1003, 1008 (5th Cir. 1980); Jackson v. Estelle, 570 F.2d 546, 547 (5th Cir. 1978); Hamilton v. Watkins, 436 F.2d 1323, 1326 (5th Cir. 1970); and Hudson v. Alabama, 493 F.2d 171, 173 (5th Cir. 1974)).
\textsuperscript{41} "[I]f the state wishes to establish prejudice from the death of the court reporter and the unavailability of the court reporter's records, it must also establish that the substance of those records is unavailable from other sources. This the state has not done." Id. (quoting McDonnell, 666 F.2d at 253).
\textsuperscript{42} Id.
\textsuperscript{43} Id. at 483.
\textsuperscript{44} Id.
January 1999, the State did not sufficiently allege or prove the dates upon which each of the witnesses died or became unavailable. The State also failed to prove when Rideau’s delay became unreasonable, or the substance of any witness’s testimony lost during the specific period of Rideau’s allegedly unreasonable delay. At a minimum, the court believed this would require the State to establish that if Rideau filed his petition earlier, the evidence the State claims to have lost, would still be available and relevant.

C. Petitioner Has Not Acted with Reasonable Diligence as a Matter of Law

Upon determination that the State had not met the first two criteria, the court reached the final element of Rule 9(a) and declared: “Because we hold that the State has failed to make a sufficient showing of prejudice in its ability to respond to the petition that was caused by the petitioner’s delay, it is unnecessary for us to determine whether Rideau’s delay in filing his petition was unreasonable.”

IV. EXAMINING THE COURT’S RATIONALE

A. A Particularized Showing of Prejudice

The State of Louisiana failed to meet its burden of proving particularized prejudice. Arguably, the State had sufficient evidence at its disposal to meet the standard required by the court. The lack of available witnesses and documentary evidence were indeed valid assertions of prejudice. Dismissing the State’s arguments, the court reiterated that mere allegations of prejudice would not suffice; rather, the State must offer concrete proof. Cases mentioned demonstrate a consistent refusal by the courts to presume prejudice as a matter of law.

45. Id.
46. Id.
47. The court relied upon the following cases to reach this conclusion: Walters v. Scott, 21 F.3d 683, 686-87 (5th Cir. 1994); Strahan v. Blackburn, 750 F.2d 438 441, 443 (5th Cir. 1985); McDonnell v. Estelle, 666 F.2d 246, 251 (5th Cir. 1982); Bouchillon v. Estelle, 628 F.2d 926, 929 (5th Cir. 1980); and Smith v. Duckworth, 910 F.2d 1492 (7th Cir. 1990).
48. Rideau, 237 F.3d at 482 (citing Wise v. Armontrout, 952 F.2d 221, 223 (8th Cir. 1991); Marks v. Estelle, 691 F.2d 730, 734 (5th Cir. 1982); Paprskar v. Estelle, 612 F.2d 1003, 1008 (5th Cir. 1980); Jackson v. Estelle, 570 F.2d 546, 547 (5th Cir. 1978); Hamilton v. Watkins, 436 F.2d 1323, 1326 (5th Cir. 1970); and Hudson v. Alabama, 493 F.2d 171, 173 (5th Cir. 1974)).
For example, in *Wise v. Armontrout*, the court emphasized the necessity of having a sufficient quantity of conclusive evidence on which to base a decision to dismiss a Rule 9(a) petition. The district court found prejudice based on the State's inability to obtain "pertinent documents" and the difficulty encountered in an attempt to locate "reliable witnesses seventeen years after entrance of the guilty plea."

The allegations of prejudice, much like those made by the State in *Rideau*, were brief, constrained, and evasive. The vague assertions offered by the State never explained how it was actually prejudiced. Thus, the court in *Wise* correctly found the lack of specificity in the findings of prejudice stood in sharp contrast to the well-settled requirement of particularity.

In the case at hand, the State attempted to demonstrate prejudice by offering proof that persons involved in the original indictment, such as Jury Commission members and the former Clerk of Court, were either too elderly to recall the specific details concerning the ground raised by the petitioner, were deceased, or were unavailable. These generalized grievances never demonstrated how these faded memories and deaths actually harmed the State's ability to respond to the petition. In addition, the State alleged that particular documentary evidence had been depleted, most notably the jury identification cards which no longer exist. Once again, there was no mention of the manner in which this lack of evidence prejudiced the State.

1. Unavailability of Witnesses

At each hearing, Mr. Acton Hillebrandt, who is now deceased, was the only witness called by Mr. Rideau. There was no additional testimony crucial to the issue of jury selection from the other Jury Commissioners. The State alleged Mr. Hillebrandt was too elderly to recall specific details of the case at the time Rideau filed his petition thus prejudicing the State. This, of course, was not the State's strongest argument, as Mr. Hillebrandt could have been cross-examined at the earlier hearings. Nevertheless, the State neglected to present concrete proof of Mr. Hillebrandt's physical inability to testify, the substance of his potential testimony or whether it would differ. If a witness such as Mr. Hillebrandt was physically unable to testify, proving as much would not be insurmountable.

49. 952 F.2d at 221.
50. *Id.* at 224.
51. *Id.* (quoting Magistrate's Rep. and Recomm. at 2).
54. *Rideau*, 237 F.3d at 482.
minimum, the State could have submitted an affidavit of Mr. Hillebrandt swearing under oath that he had no independent recollection of the case.\textsuperscript{55}

In addition to proving the witness's inability to testify, the State also needed to show what Mr. Hillebrandt would say that would differ from the testimony of the prior hearings. For example, the testimony from the two prior evidentiary hearings pertained only to how the twenty person grand jury venire was selected. At no time during the hearings did the petitioner elicit testimony from Mr. Hillebrandt regarding how the twelve person grand jury, which ultimately indicted Rideau, was selected. Thus, the petitioner took the testimony of Mr. Hillebrandt regarding the selection of the grand jury venire and applied it to the twelve person grand jury. The State could have offered new testimony illustrating how the twenty person grand jury venire was reduced to a twelve person grand jury. Or, the State could have established that there existed race-neutral reasons for including or excluding potential grand jurors, such as inappropriate age or past felony convictions.\textsuperscript{56} Lacking any type of concrete proof that Mr. Hillebrandt's testimony would differ reduced the State's argument to mere speculation that Mr. Hillebrandt might have materially assisted the fact-finding process.\textsuperscript{57}

To support the finding of lack of particularized prejudice, the court cited \textit{Walters v. Scott}.\textsuperscript{58} In \textit{Walters}, the court held the State's allegations of prejudice were insufficient to support the district court's summary dismissal of the petition under Rule 9(a) of the Section 2254 Rules. The petitioner in \textit{Walters} alleged he received ineffective counsel because his lawyer, Parks, never perfected Walter's appeal and never withdrew from the case.\textsuperscript{59} The State argued it was prejudiced due to the inadequacy of Park's memory of the facts surrounding the petitioner's plea and sentencing and his inability to locate the case file. Park's affidavit, however, did not unequivocally state that he had no recollection of any of the circumstances surrounding Walter's case. Therefore, the court determined the affidavit alone was insufficient to establish prejudice to the State. In addition, the State alleged prejudice due to the death of the court reporter and unavailability of the records.\textsuperscript{60} The court

\textsuperscript{55} See Brown v. Maggio, 730 F.2d 293, 295 (5th Cir. 1984) and Cotton v. Mabry, 674 F.2d 701, 705 (8th Cir. 1982).
\textsuperscript{56} Brief for Petitioner at 3, Rideau v. Whitley, 237 F.3d 472 (5th Cir. 2000) (No. 99-30849).
\textsuperscript{57} See Bedford v. Att'y Gen. of the State of Ala., 934 F.2d 295, 300 (11th Cir. 1991).
\textsuperscript{58} 21 F.3d 683 (5th Cir. 1994).
\textsuperscript{59} \textit{Id.} at 687.
\textsuperscript{60} \textit{Id.}
again found such evidence insufficient and explained that in order to establish prejudice from the death of a court reporter and unavailability of records, it must also be established that the substance of those records is unavailable from other sources.

Likewise, in *Rideau*, the State failed to prove Mr. Hillebrandt's memory had deteriorated. An affidavit by Mr. Hillebrandt offering sworn testimony of his failure to recollect material facts of the case would have been sufficient under *Walters*. Furthermore, to prove the State was prejudiced by the disappearance of identification cards, the State should have established that particular information contained on the cards was critical to the State's response to Rideau's petition. Nevertheless, the State neglected to show evidence on the card was no longer available from any other source.

The State also alleged it was prejudiced by the deaths of the jury commissioners and other participants involved in the case. Because these witnesses had died, the State contended it was prejudiced by the inability to cross-examine key witnesses. Perhaps the State believed such allegations were self-proving; dead witnesses cannot testify, which in turn prejudiced the State's ability to elicit material testimony. The State, however, may not end its argument here. Proof of why a witness's death will disadvantage the respondent is mandatory.61

2. Unavailability of Documentary Evidence

In addition to the unavailability of key witnesses, the State contended the missing documentary evidence was crucial to defend the habeas petition.62 The identification cards were no longer in existence, and other records dealing with the motion to quash hearing were no longer available.63 Again, the prejudice flowing from the loss of evidence may not be presumed. It was not enough for the State to surmise what information might have been offered in the documentary evidence. Further, the entire transcript of the state court hearings and evidentiary hearings, including testimony which described the voter registration cards, had been preserved.64 Thus, the

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63. United States District Court for the Middle District of Louisiana, Chief Judge Frank Polozola (proceedings No. 94-CV-952, page 151).

64. *See Smith*, 910 F.2d at 1495 (7th Cir. 1990) (There was no merit to the State's Rule 9(a) claim of prejudice when the "state had the opportunity during
State was required to establish that the substance of the registration cards was unavailable from any other source which the State could obtain the requisite information to counter Rideau’s claim. The loss of evidence must detrimentally impair the State’s ability to respond to the particular allegations or theories asserted by the petitioner as grounds for habeas corpus.

B. Prejudice Caused by the Petitioner Having Filed a Late Petition

The second component of the State’s burden of proof may be classified as the causation element. The State must demonstrate the prejudice caused resulted from the petitioner’s delay in bringing the writ. In Rideau, the State was required to show that the unavailability of witnesses and documentary evidence was a direct result of Rideau’s twenty-one year delay in filing his petition. At a minimum, this required the State to confirm that if Rideau had filed his petition at some earlier time, the witnesses and the documentary evidence would have been available.

One case cited by the Rideau court was Marks v. Estelle. The court in Marks, which found evidence of prejudice to the State to be “manifest,” ultimately concluded that whether the State was prejudiced was not at issue; rather, the crucial question was when the prejudice occurred. In Marks, there was uncertainty surrounding the date of conviction, from which the petitioner’s delay would be measured. Because the State based its prejudice argument upon the incorrect date of conviction, the court concluded the State never pinpointed any instance of prejudice. According to the Marks court, “the state, which normally has far greater access to the facts, already must shoulder the burden of demonstrating that it has suffered actual prejudice from the petitioner’s delay. When pertinent, the state should also be required to show when that prejudice occurred.” The State in Rideau could have met this burden of proof by submitting death certificates, evidence of routine record disposal procedures, or

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those hearings to present the evidence that it deemed relevant to the determination [of petitioner’s claim]” and the testimony of key witnesses “has been preserved in its entirety.”

65. Walters, 21 F.3d at 688.
67. See Lawrence v. Jones, 837 F.2d 1572, 1575 (11th Cir. 1988).
68. See Walters, 21 F.3d at 688.
69. 691 F.2d 730 (5th Cir. 1982).
70. Id. at 733.
71. Id. at 734.
any other evidence pertinent to the alleged prejudice. Conceivably, such information was readily available to the State. Thus, it is possible the State simply did not realize that it was required to be submitted as evidence.

An example of the importance of proving the causation element is found in Hill v. Linahan. The petitioner, who pled guilty to murder, filed a habeas petition alleging ineffective counsel, his guilty plea was involuntary, his attorney was not a member of the Georgia bar and there was no written record of his guilty plea. The respondent claimed that the petitioner’s delay prejudiced him because the transcript of the petitioner’s plea was unavailable and counsel was deceased. The court found no indication in the record that a transcript would have been available had the petitioner filed his writ at an earlier date. There was only an insufficient assertion by the respondent claiming the guilty plea transcript was not available from the courthouse. In reference to the respondent’s unavailability of counsel claim, the court conceded that if the petitioner’s counsel was deceased, the respondent would have been prejudiced in his ability to respond to the allegations because his attorney was the only person who could testify to the actions taken to represent the petitioner. However, the respondent failed to disclose the date of counsel’s death. Due to this omission, the respondent failed to prove that counsel would have been available if the petitioner had filed his claim earlier.

The court’s reasoning in Hill mirrors the court’s analysis in Rideau. Assuming pertinent documentary evidence was missing, the burden remained on the State to prove it would have been available at a specific earlier date and had Rideau filed his petition timely, the State would not have been prejudiced. Again, assuming the deaths of the jury commissioners prejudiced the State’s ability to respond to the petition—either because they could have provided new information or contradicted Mr. Hillebrandt’s testimony—the date of each death should have been offered into evidence. Even if the other jury commissioners could have provided significant testimony, they could have died shortly after Rideau’s conviction and sentence. Thus, the loss of such testimony would not have been caused by Rideau’s delay.

72. See Lawrence, 837 F.2d at 1575.
73. 697 F.2d 1032 (11th Cir. 1983).
74. Id. at 1033.
75. Id. at 1035.
76. Id.
77. Id.
78. Id. at 1035-36.
79. Id.
Therefore, under the rationale of cases which discuss the second element, the procedure utilized to prove Rule 9(a) causation is essential. Once the respondent proves a particular fact is prejudicial, the date of when that prejudicial event occurred must be submitted into evidence. Next, the respondent must determine what constituted a reasonable amount of time in which the petitioner could have responded. Finally, it must be shown that the prejudicial event fell after the "reasonable time to respond" period ended.

C. Petitioner Has Not Acted with Reasonable Diligence as a Matter of Law

The court completely evaded the last element of the State's burden of proof. This was perhaps the only component of the burden of proof for which the State presented sufficient evidence. The State established Mr. Rideau had been incarcerated for over forty years and was certainly no stranger to the courthouse or to what happens in criminal proceedings. Rideau delayed filing his petition, perhaps inexcusably, especially in light of the fact that 33 years had elapsed since he had actual knowledge of the existence of the ground upon which his petition was based.

The reasonable diligence element, or the "unless" clause of Rule 9(a) is consistent with its equitable nature. Delay is excused only if the petition is based on a change in the law or newly discovered evidence. In such a case, the State may not rely upon the prejudice suffered during the period of reasonable delay. In the Rideau case there was no newly discovered evidence offered by Rideau, and the laws on which he based his claims had not changed. In fact, as Judge Dennis pointed out, there was jurisprudence on the matter (upon which the petition is based) dating back to 1880. Yet, Rideau advanced no substantial explanation for his prolonged delay.

Rule 9(a) codifies the equitable doctrine of laches as it is applied in habeas cases, which precludes a person from profiting to the

80. See Lawrence v. Jones, 837 F.2d 1572 (11th Cir. 1988); Hill v. Linahan, 697 F.2d 1032 (11th Cir. 1983); McDonnell v. Estelle, 666 F.2d 246 (5th Cir. 1982); Marks v. Estelle, 691 F.2d 730 (5th Cir. 1982); and Walters v. Collins, 21 F.3d 683 (5th Cir. 1994).
83. Marks, 691 F.2d at 732.
detriment of another by his own delay in enforcing his rights.\textsuperscript{85} In the instant case, for Rideau to have waited 29 years to re-file his petition was inexcusable and should not be condoned by the courts. The State argued, "this is a tactic used by petitioner[s] to wait out their time until many years later when witnesses are dead or their whereabouts unknown. Patience may be a virtue, but it should not be a tool used by an admitted murderer for habeas relief."\textsuperscript{86}

Whether the Fifth Circuit would have agreed with the State on the final element is immaterial. The final holding of the court would have been no different had the court concluded Rideau unreasonably delayed re-filing his petition. The State's proof of failure to act with reasonable diligence under the law alone will not merit dismissal of a petitioner's habeas claim absent a showing of particularized prejudice by the State.

Today, many of the "unreasonable delay" problems faced by the courts\textsuperscript{87} have been eliminated by the passage of the Antiterrorism and Effective Death Penalty Act of 1996\textsuperscript{88} (AEDPA). Enacted and effective on April 24, 1996, the AEDPA drastically changed the legal landscape of federal habeas corpus law. One significant feature of this statute\textsuperscript{89} is the addition of a one-year limitation period for the

\begin{footnotes}
\item[85] Moore v. Smith, 694 F.2d 115, 117 (6th Cir. 1982).
\item[86] Brief for Respondent at 13, Rideau v. Whitley, 237 F.3d 472 (No. 99-30849).
\item[87] See Strahan v. Blackburn, 750 F.2d 438, 443-44 (5th Cir. 1985); Terry v. Enomoto, 723 F.2d 697, 700 (9th Cir. 1984); Bowen v. Murphy, 698 F.2d 381, 382 (10th Cir. 1983); Cotton v. Mabry, 674 F.2d 701, 704 (8th Cir. 1982); Baxter v. Estelle, 614 F.2d 1030, 1035-35 (5th Cir. 1980); Honeycutt v. Ward, 612 F.2d 36, 41-42 (2nd Cir. 1979).
\item[88] Because Rideau's petition was filed before the effective date of the AEDPA, its provisions amending the habeas corpus statute do not apply to Rideau's case. See Rideau, 237 F.3d at 476, n.2.
\item[89] Section 28 U.S.C. § 2244(d)(1) of the AEDPA provides in pertinent part: (d)(1) A one year time period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment a State court. The limitation period shall run from the latest of:
\begin{enumerate}
\item the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
\item 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;
\item 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;
\item the date on which the factual predicate of the claim or claims
\end{enumerate}
\end{footnotes}
filing of habeas corpus petitions by state and federal prisoners. \textsuperscript{90} With this provision, Congress imposed a one-year statute of limitations on state and federal prisoners seeking habeas corpus relief. Arguably, "the purpose of the statutory reform was to curb the lengthy delays in filing that were occurring in federal habeas litigation, while preserving the availability of habeas review when a prisoner diligently pursues state remedies and applies for federal habeas relief in a timely manner." \textsuperscript{91} Thus, petitioners who industriously pursue their claims, or who have extraordinary circumstances (such as a change in law or existence of new evidence), would be entitled to petition the courts. Petitioners who exhibit no reasonable diligence as a matter of law would not be granted such a writ. Arguably, the interest of both the petitioner and the government is best served if claims are raised while evidence is still fresh. \textsuperscript{92} Statutes such as the AEDPA facilitate the reduction of untimely petitions.

CONCLUSION

The writ of habeas corpus has existed in American law since the inception of this country. Typically a remedy of last resort, the federal writ usually is embraced by prisoners who have exhausted all other forms of relief. Thus, delay is inherent in the nature of the remedy. The tri-factor burden of proof on the State preserves the equitable purpose of the rule; timely filed meritorious claims are welcomed, inexcusably delayed petitions which prejudice the State are not.

The court in \textit{Rideau} correctly decided that the State of Louisiana did not meet its burden of proof. Though allegations of prejudice were made, such as the unavailability of witnesses and documentary evidence, the respondent failed to show how it was prejudiced. Thus, the State did not meet the first requirement of particularized prejudice. Next, the State never linked the prejudice to the delay of the petitioner. No evidence was offered to show that the missing evidence would have been available had the petitioner filed his petition in a timely manner. Without this connection the State was not able to prove the causation element. The court opined the last presented could have been discovered through the exercise of due diligence.


\textsuperscript{91} \textit{Id}.

\textsuperscript{92} Rules Governing Section 2254 cases, Rule 9(a), 28 U.S.C. § 2254, advisory committee notes (1976).
element required no discussion. If there was no prejudice that could be linked to the petitioner, then there was no need to discuss how long he waited to file his claim. It is well established that delay alone is not sufficient to constitute prejudice. A court may not predicate its decision on the passage of time, as inexcusable as it may be, for such reliance would thwart the chief objective of Rule 9(a).

Whether the instant case exemplifies the situation which 9(a) seeks to avoid is unclear. In *Rideau*, the State fell short of meeting the first two elements of its burden of proof. Perhaps the State did not have any evidence sufficient to prove particularized prejudice. Or maybe the State trusted the allegations were self-proving, unaware of what standard the court required. The standard articulated by Judge Dennis is not unworkable. With specific factual support for allegations of prejudice based on the petitioner’s unreasonable delay, a respondent actually prejudiced in its ability to respond to the petition is entitled to take advantage of dismissal pursuant to Rule 9(a).

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