

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 Brief

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Phillip Eugene Parmley (“Parmley”), the petitioner-appellant, brings this appeal to challenge his wrongful conviction and incarceration from an underlying judgment in a criminal case in the State of Arkansas. The certified issue in this case, i.e., Whether the District Court erred in dismissing Mr. Parmley’s Section 2254 petition, presents not only an important underlying issue concerning which court is the court of last resort in Arkansas, but it also presents an important underlying issue with relatively little authority of what constitutes “good cause” to stay a 28 U.S.C § 2254 mixed petition. This appeal addresses and suggests a solution to the deprivation of significant federal constitutional rights.

Given the significance and complexity of this appeal, Parmley requests oral argument of 30 minutes.

CORPORATE DISCLOSURE STATEMENT

Parmley hereby respectfully represents that neither he nor the Appellee, Larry Norris, are corporate entities.

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JURISDICTIONAL STATEMENT

This Court has subject-matter jurisdiction given that Parmley challenged his Arkansas conviction in a 28 U.S.C § 2254 petition. This Court has appellate jurisdiction based upon 28 U.S.C. § 1291, which allows for jurisdiction over a final judgment of a United States District Court and 28 U.S.C. § 2253(a), which allows for jurisdiction over a final order of a District Judge in the Court of Appeals in the Circuit where a habeas corpus proceeding is held.

Parmley received a Certificate of Appealability from the Eighth Circuit Court of Appeals on April 2, 2009, and counsel was appointed to represent Parmley under the terms of the Criminal Justice Act. This appeal followed.

This appeal originates from a final judgment that disposes of all parties' claims. Specifically, on June 24, 2008 the U.S. District Court for the Western District of Arkansas – Hot Springs denied Parmley's petition as untimely and dismissed the same with prejudice.

STATEMENT OF THE ISSUE

I. Whether the District Court erred in dismissing Mr. Parmley's Section 2254 petition?

28 U.S.C § 2254

Collier v. Norris, 402 F.Supp.2d 1026 (E.D. Ark. 2005)

Rhines v. Weber, 544 U.S. 269 (2005)

STATEMENT OF THE CASE

Pursuant to 28 U.S.C. § 2254, Parmley sought to challenge his conviction from an underlying Arkansas criminal trial. On June 24, 2008, the District Court denied Parmley's petition as untimely and dismissed the same with prejudice. Parmley sought to appeal through a motion for a certificate of appealability filed on July 14, 2009, but the District Court denied said motion on September 5, 2009 pursuant to the reasons set forth in the Statement of Reasons for Denial of Certificate of Appealability, also filed on September 5, 2009.

In the Statement or Reasons for Denial of Certificate of Appealability, the District Court wrestled with the question, with respect to Parmley's post-conviction review, whether Parmley sought timely review of his conviction by the state court of last resort in Arkansas. The District Court concluded that although the Court has previously found that the Arkansas Supreme

Court is the highest court in the state of Arkansas, the rules are ambiguous as to whether Parmley needed a good faith argument based on one of the six grounds before petitioning for Arkansas Supreme Court review. Indeed, in a recent case it was determined that the Arkansas Court of Appeals was the highest court in the State of Arkansas. *Collier v. Norris*, 402 F.Supp.2d 1026, 1029-30, (E.D. Ark. 2005). The District Court concluded that procedural default is not clear and jurists of reason could disagree. In terms of the substance of Parmley's petition, the District Court concluded, again in Statement or Reasons for Denial of Certificate of Appealability, that the substantive constitutional claims are not debatable among jurists of reason.

STATEMENT OF THE FACTS

Parmley was convicted of possession of methamphetamine in the Circuit Court of Garland County, Arkansas. As a result of this conviction, he was sentenced to thirty (30) years imprisonment on September 25, 2002. The Arkansas Court of Appeals affirmed Parmley's conviction on January 14, 2004. *Parmley v. State*, CACR 03-71, 2004 WL 61045, at *1 (Ark. App. 2004). Thereafter, Parmley filed a pro se Motion for Permission to File a Belated Petition for Rehearing and a pro se Motion Requesting Belated Certification to the Arkansas Supreme Court, and both of these motions were denied, respectively, on May 19, 2004, and May 20, 2004. Parmley

did not seek any form of review by the United States Supreme Court.

Parmley then petitioned for post-conviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 in the Circuit Court of Garland County, Arkansas on July 9, 2004, which was fifty days after the denial of his motions in State Court. Parmley's Rule 37.1 petition raised four ineffective assistance of trial counsel claims, namely: (1) counsel failed to seek a suppression hearing; (2) the State failed to prove an incriminating statement by appellant was voluntary; (3) counsel failed to prevent admission of uncharged offenses; and (4) counsel did not object to unqualified expert opinion from a crime lab technician. Upon review of the petition, the Arkansas trial court held that none of the alleged grounds provided for relief under a Rule 37.1 petition. Thereafter, Parmley appealed the denial of the Rule 37.1 petition to the Arkansas Supreme Court. On October 5, 2006, the Arkansas Supreme Court affirmed the denial of the Rule 37.1 petition. *Parmley v. State*, CR 05-141, 2006 WL 3239992, at *1 (Ark. 2006). Specifically, the Arkansas Supreme Court held Parmley waived the first issue, failure to seek or hold a suppression hearing, by failing to obtain a ruling from the trial court on that issue. The Court further found no prejudice to Parmley regarding the second and fourth grounds. With respect to the third ground, the Court held that counsel's performance

in attempting to prevent introduction of evidence of other criminal conduct of Parmley at trial was not deficient.

On September 29, 2007, Parmley filed his Petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 in this Court. (Doc. 1) This filing was 340 days after his denial of post-conviction relief in the Arkansas State Court. Particularly, Parmley's 28 U.S.C. § 2254 petition was based on ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments. Parmley claimed counsel was ineffective in the following ways, namely: (1) by failing to file a motion to suppress the methamphetamine at issue because of an alleged unreasonable stop and search of his vehicle; (2) by failing to file a motion to suppress his post arrest statement identifying the substance in his possession as methamphetamine rather than heroin; (3) by failing to properly challenge the expert testimony of the chemist from the state crime lab, who testified that the methamphetamine in Parmley's possession was a "usable" amount; and (4) by failing to file a motion in limine to exclude evidence of a prior theft charge which resulted in a dismissal of the charges.

On June 24, 2008, the District Court adopted the Report and Recommendations of Magistrate Judge Barry Bryant issued on April 24, 2008 and the District Court denied Parmley's petition as untimely and

dismissed the same with prejudice. (Doc. 19, 14). The Court dismissed the petition as time barred since it believed the one-year statute of limitations had run.

In the Statement of Reasons for Denial of Certificate of Appealability, filed on September 5, 2009, the District Court wrestled with the complex question, with respect to Parmley's post-conviction review, namely, whether Parmley sought timely review of his conviction by the state court of last resort in Arkansas. The District Court concluded that although the Court has previously found that the Arkansas Supreme Court is the highest court in the state of Arkansas, the rules are ambiguous as to whether Parmley needed a good faith argument based on one of the six grounds before petitioning for Arkansas Supreme Court review, pursuant to Rule 1-2(b). Indeed, in a recent case it was determined that the Arkansas Court of Appeals was the highest court in the State of Arkansas. *Collier v. Norris*, 402 F.Supp.2d 1026, 1029-30, (E.D. Ark. 2005). The District Court concluded that procedural default is not clear and jurists of reason could disagree.

The District Court also 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 found that

Parmley's petition raises constitutionally ineffective counsel claims on four grounds. The District Court further noted that Parmley's petition makes no showing of why his attorney's performance was deficient or the effect that a successful motion would have had on the outcome of the trial on any of the grounds. The District Court further reasoned that Parmley has provided the Court with nothing that gives the Court reason to believe the performance of counsel was deficient or that Parmley was prejudiced.

SUMMARY OF THE ARGUMENT

The certified issue in this appeal is whether the District Court erred in dismissing Mr. Parmley's 28 U.S.C § 2254 petition. From this broad issue, there are two underlying issues presented. First, whether Parmley sought timely review of his conviction by the state court of last resort in Arkansas. Second, whether Parmley's 28 U.S.C § 2254 mixed petition 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 federal court for review of his perfected petition, assuming that the Arkansas state court denies his claims when he returns to state court.

Parmley asserts that he did indeed seek timely review of his conviction by the state court of last resort in Arkansas. Parmley further asserts that the District Court should have stayed his 28 U.S.C § 2254 mixed

petition for the purpose of allowing him to, first, present his unexhausted claims to the Arkansas state court, and, second, to then return to the federal court for review of his perfected petition, assuming that the Arkansas state court denies his claims. Further, Parmley asserts that this underlying 28 U.S.C § 2254 petition addresses the deprivation of significant federal constitutional rights, and said petition, as drafted by Parmley, is legally sufficient in demonstrating that his counsel's performance was deficient and that said deficiency prejudiced Parmley's case. 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 herein.

ARGUMENT AND APPLICABLE STANDARD OF REVIEW

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

A. STANDARD OF REVIEW

A district court's findings of fact are reviewed for clear error, and its conclusions of law are reviewed *de novo*. *Thomas v. Bowersox*, 208 F.3d 699, 701 (8th Cir. 2000). In Parmley's case, the District Court made no findings of fact, but rather, said Court ruled that Parmley's petition was procedurally defaulted, which concerns a question law. As a result thereof, this Court's review is *de novo*.

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

**1. PARMLEY SOUGHT TIMELY REVIEW OF HIS
CONVICTION BY THE ARKANSAS STATE
COURT OF LAST RESORT.**

With respect to a claim of ineffective assistance of counsel, there is a two prong test enunciated by the United State's Supreme Court: First, a petitioner must demonstrate that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, a petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") contains a one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1). With respect to the four possible situations contained within 28 U.S.C. § 2244(d)(1) concerning the statute of limitations, there is only one applicable situation that applies to Parmley's case. Specifically, the relevant triggering date for the one-year statute of limitations in Parmley's case is "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *See* 28 U.S.C. §2244(d)(1)(A). The Eighth Circuit has held in *Nichols v. Bowersox*, 172

F.3d 1068, 1072 (8th Cir. 1999) (quoting *Smith v. Bowersox*, 159 F.3d 345, 348 (8th Cir. 1998)), that the statute of limitations under 28 U.S.C.

§2244(d)(1)(A) is triggered by either:

- (i) the conclusion of all direct criminal appeals in the state system, followed by either the completion or denial of certiorari proceedings before the United States Supreme Court; or (ii) if certiorari was not sought, then by the conclusion of all direct criminal appeals in the state system followed by the expiration of the time allotted for filing a petition for the writ.

The United States Supreme Court can only review the judgment of a “state court of last resort,” or of a lower state court if the “state court of last resort” has denied discretionary review. *See* SUP.CT. R. 13.1 and 28 U.S.C. §1257(a). Ninety days is the time permitted for filing the petition for a writ of certiorari to the United States Supreme Court. *See* SUP.CT. R. 13.1.

A federal habeas petitioner is 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 so long as he sought review of his conviction before the highest state court. *See Riddle v. Kemna*, 523 F.3d 850, 856 (8th Cir. 2008). If, however, a petitioner does not seek review by the highest state court, the conviction becomes final on the issuance of the mandate by the state intermediate court of appeals and the one-year limitations period of 28 U.S.C. § 2244 begins to run from that date.

For purposes of determining which state Court of Appeals is the highest state court, one must analyze “the particular state court procedures.” *Id.* at 853. Amendment 80 of the Arkansas Constitution contains four material provisions, namely, Section One vests judicial power in the Supreme Court and other courts established by the Constitution. Section Two grants the Supreme Court statewide appellate jurisdiction. Section Four grants the Court of Appeals “such appellate jurisdiction as the Supreme Court shall by rule determine.” Section Eleven grants “a right of appeal to an appellate court from the Circuit Courts and other rights of appeal as may be provided by Supreme Court rule or by law.” *See* Ark. Const. amend. 80.

The procedure for Arkansas Supreme Court review is established through the Rules of the Arkansas Supreme Court. Specifically, Supreme Court Rule 2-4(c) requires that a petition for review must either allege a tie vote in the Court of Appeals, that the decision conflicted with a prior holding by the Arkansas Supreme Court or Court of Appeals, or that the Court of Appeals erred with respect to one of the six grounds listed in Rule 1-2(b). The six grounds listed in Rule 1-2(b) are:

- (1) issues of first impression, (2) issues upon which there is a perceived inconsistency in the decisions of the Court of Appeals or Supreme Court, (3) issues involving federal constitutional interpretation, (4) issues of substantial public interest, (5) significant issues needing clarification or development of the law, or overruling of precedent, and (6)

appeals involving substantial questions of law concerning the validity, construction, or interpretation of an act of the General Assembly, ordinance of a municipality or county, or a rule or regulation of any court, administrative agency, or regulatory body. *See* Ark. Sup. Ct. R. 2-4(c) and 1-2.

Supreme Court Rule 1-2(e) states that Supreme Court review is discretionary and the list of reasons found in both 1-2(e) and 2-4(c) are not fully controlling.

In the present case before this court, one may argue that Parmley did not seek timely review of his conviction by the Arkansas Supreme Court. Rather, he appealed his conviction to the Arkansas Court of Appeals, which affirmed on January 14, 2004. Then Parmley filed a petition for rehearing in the Arkansas Court of Appeals, which was denied on May 19, 2004. Interestingly, Parmley did file a Motion for Review to the Arkansas Supreme Court that was denied as untimely, but the Supreme Court never accepted his petition as filed. Parmley never petitioned for review to the Arkansas Supreme Court.

The statute of limitations was tolled during the pendency of Parmley's post conviction review. Less than ninety days after the conclusion of his direct appeals, Parmley first sought post-conviction review. As noted by the District Court, "If the Arkansas Court of Appeals is the highest state court, then the statute of limitations for Habeas Corpus would not begin to run

until after his denial of post-conviction review. If the Arkansas Supreme Court is not the highest state court, then the forty days between the end of Parmley's direct appeals and his State post-conviction review would add to the time between his denial of post-conviction review at the State level and the filing of his Habeas petition to time bar his claim." (Doc. 29, Statement of Reasons for Denial of Certificate of Appealability). The issue, therefore, is whether Parmley appealed to Arkansas state court of last resort.

In Parmley's direct appeal to the Arkansas Court of Appeals, five grounds were listed. *See Parmley v. State*, CACR 03-71, 2004 WL 61045, at *1 (Ark. App. 2004). Only one ground arguably falls into the list from 1-2(b). Specifically, his ineffective assistance of counsel claim concerns an issue of federal constitutional interpretation therefore falling into Rule 1-2(b)(3). Ineffective assistance of counsel arguments, however, may not be considered in a direct appeal unless they were raised by the Trial Court. *Whitney v. State*, 930 S.W.2d 343, 345 (Ark. 1996). The others grounds concerned issues of state law. *See Id.* at *2-*7.

The factors, however, referenced within Rule 1-2(b) concerning Supreme Court review "neither control, nor fully measure [the Supreme Court's] discretion." *Maxey v. Tyson Foods, Inc.*, 18 S.W.3d 328, 329 (Ark. 2000). However, as the District Court also correctly pointed out, "Rule 2-

4(c) requires an allegation of error ‘with respect to one of the grounds listed.’(emphasis added).” (Doc. 29, Statement of Reasons for Denial of Certificate of Appealability). Thus, the Arkansas Supreme Court is not always the highest court in the State of Arkansas. In order for Parmley to have petitioned the Arkansas Supreme Court for review, he would have needed a good faith argument based upon one of the six listed grounds from Rule 1-2(b) before petitioning for such review.

In *Daniels v. Bennett*, 613 S.W.2d 591, 592 (Ark. 1981), there were two substantially similar petitions for certiorari filed by the Director of Labor asking the Arkansas Supreme Court to review two decisions of the Arkansas Court of Appeals. The two decisions reversed the Employment Security Board of Review on grounds that there was not substantial evidence to support its findings of fact. *Id.* The Arkansas Supreme Court denied the petitions, finding that they do not concern a legal principle of major importance within the intent of the Arkansas Supreme Court’s jurisdictional Rule. *Id.*

The Arkansas Supreme Court in *Daniels* went on to hold that it does not regard the Arkansas Court of Appeals as purely intermediate court, but rather its goal is that each such court will be a “*court of last resort*” with its decisions having desirable finality. *Id.* (emphasis added). This will provide

each litigant with the opportunity for only one appeal, not two. *Id.* at 593. If the Arkansas Appellate Court were simply looked at as an intermediate court, it would become “an expensive and time-consuming level in the appellate structure.” *Id.* at 592.

Interestingly, in *Daniels*, the Arkansas Supreme Court stated that if the Arkansas Court of Appeals ruled that it was abolishing the “substantial evidence rule,” then this would qualify as an issue of “major importance” presented for review. *Id.* at 593. However, the Court of Appeals simply found that the Board’s decision was “not supported by substantial evidence.” *Id.* Likewise, the Court of Appeals in Parmley’s case simply “affirmed” his conviction on January 14, 2004. *See Parmley v. State*, CACR 03-71, 2004 WL 61045, at *1 (Ark. App. 2004). There were no issues of “major importance” decided by the Arkansas Court of Appeals in Parmley’s case that would warrant review by the Arkansas Supreme Court. Simply seeking a “second appellate review” is contrary to the Arkansas Supreme Court’s rulings. *Daniels* at 593 (citing *Moose v. Gregory*, 590 S.W.2d 662 (Ark., 1979)).

Ultimately, in *Daniels*, the Court finally notes that the Arkansas Supreme Court will not review an Arkansas Appellate Court decision unless it presents some ground for review under Rule 29. *Id.* Rule 29 is now Rule

1-2 of the Rules of the Arkansas Supreme Court and Court of Appeals. *Morris v. Medin*, 858 S.W.2d 142, 146 (Ark. App. 1993). Thus, Parmley would need a good faith argument based upon one of the six listed grounds contained within Rule 1-2(b) before petitioning for such review. The Arkansas Appellate Court in Parmley's case merely affirmed. Further, there is nothing contained within said decision that could form a good faith argument to petition for Arkansas Supreme Court review under Rule 1-2(b). Interestingly, *Daniels v. Bennett* is not the only case to hold that the Arkansas Appellate Court is a court of last resort.

In *Collier v. Norris*, 402 F.Supp.2d 1026, 1029-30, (E.D. Ark. 2005), the Court found that 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. The Court found that the only issue posed to the Arkansas Court of Appeals was "whether the circuit court erred by refusing to exclude certain evidence under Rules 401 and 403 of the Arkansas Rules of Evidence." *Id.* The Petitioner-Appellant raised no issue that could have invoked jurisdiction under Rule 1-2. *Id.* Further, nothing in the Arkansas Appellate Court decision could have formed the basis or a petition for review under Rule 2-4(c). *Id.* In addition, the Court notes that the

Petitioner-Appellant's attorney could not honestly have signed a petition for review alleging any of the grounds that must be alleged under Rule 2-4(c).

Id. As a result thereof, the Arkansas Court of Appeals was the highest court in Arkansas in which a decision could be had on the Petitioner-Appellant's conviction. *Id.*

In addition to the reasons stated above as to why Parmley could not have petitioned the Arkansas Supreme Court for review under any of the six grounds listed in Rule 1-2(b), he also could not have petitioned for review under the two other grounds listed in Rule 2-4(c), namely that a petition for review must either allege a tie vote in the Court of Appeals or the decision conflicted with a prior holding by the Arkansas Supreme Court or Court of Appeals. Nothing contained within the Arkansas Appellate Court Decision suggests that there was a tie vote from the Arkansas Court of Appeals, nor does said decision conflict with a prior holding by the Arkansas Supreme Court. Therefore, the Arkansas Court of Appeals was the highest court in Arkansas in which a decision could be had on Parmley's appeal of his conviction. As a result thereof, Parmley sought timely review of his conviction by the Arkansas state court of last resort.

2. PARMLEY’S 28 U.S.C § 2254 MIXED PETITION 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 FEDERAL COURT FOR REVIEW OF HIS PERFECTED PETITION, ASSUMING THAT THE ARKANSAS STATE COURT DENIES HIS CLAIMS.

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). “Courts should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.” *Id.* at 274. The statute of limitations for federal habeas corpus relief is not tolled by the filing of a petition for habeas corpus in federal court. *Id.* at 274-275. Federal district courts may issue stays, where such a stay is a proper exercise of discretion. *Id.* at 276.

A district court may only issue a stay and abeyance of a federal habeas proceeding involving a mixed petition of exhausted and unexhausted claims when the district court determines there was good cause for the

petitioner's failure to exhaust his claims first in state court. *Id.* at 277.

However, a district court should not grant a habeas petitioner a stay and abeyance of such a mixed petition when the unexhausted claims are plainly meritless. *Id.* Even in situations where stay and abeyance is appropriate, the district court's discretion in structuring the stay is limited by the timeliness concerns of AEDPA, and as a result thereof, such a mixed petition should not be stayed indefinitely. *Id.* Rather, reasonable time limits should be placed on the petitioner's trip to state court and back to federal court. *Id.* at 278.

If a petitioner engages in abusive litigation tactics or intentional delay, then the district court should not grant a stay and abeyance. *Id.* Further, when a petitioner has good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics, then in such a situation a district court should stay, rather than dismiss, a mixed habeas petition. *Id.* Also, when a petitioner files a mixed petition, and when the court determines that a stay and abeyance is inappropriate, the court should then permit the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to federal relief. *Id.*

It is clear that Parmley filed a mixed 28 U.S.C. § 2254 petition on or about September 29, 2007. As way of background, his state petition was filed pursuant to Arkansas Rule of Criminal Procedure 37.1 in the Circuit Court of Garland County, Arkansas. Said Rule 37.1 petition sounded in ineffective assistance of counsel claims alleging: (1) counsel failed to seek a suppression hearing; (2) the State failed to prove an incriminating statement by appellant was voluntary; (3) counsel failed to prevent admission of uncharged offenses. and (4) counsel did not object to unqualified expert opinion from a crime lab technician. Parmley's 28 U.S.C. § 2254 petition also sounded in ineffective assistance of counsel claims in violation of the Sixth and Fourteenth Amendments of the U.S. Constitution claiming: (1) by failing to file a motion to suppress the methamphetamine at issue because of an alleged unreasonable stop and search of his vehicle; (2) by failing to file a motion to suppress his post arrest statement identifying the substance in his possession as methamphetamine rather than heroin; (3) by failing to properly challenge the expert testimony of the chemist from the state crime lab, who testified that the methamphetamine in Parmley's possession was a "usable" amount; and (4) by failing to file a motion in limine to exclude evidence of a prior theft charge which resulted in a dismissal of the charges.

Given that Parmley's claims raised in his Arkansas Rule of Criminal

Procedure 37.1 petition are different, at least in part, from his claims raised in his 28 U.S.C. § 2254 petition, i.e., given that his 28 U.S.C. § 2254 petition contains unexhausted claims, the 28 U.S.C. § 2254 petition is indeed a mixed petition. With respect to the first claim in the Rule 37.1 petition, Parmley references an issue of his counsel's failure to "seek a suppression" hearing. Although similar to his first and second claims in his 28 U.S.C. § 2254 petition, insofar as all three reference the issue of a failure to "seek" or "file a motion to" suppress, his first and second claims of his 28 U.S.C. § 2254 petition provide greater specificity of the content of what should have been suppressed. Parmley's third claim in his Rule 37.1 petition addresses a failure to prevent the admission of "uncharged offenses," which is distinct from Parmley's fourth claim in his 28 U.S.C. § 2254 petition, which discusses a failure to file a motion in limine to exclude evidence of "a prior theft charge" that was apparently dismissed. Parmley's third claim in his Rule 37.1 petition addresses counsel's failure to object to the "expert opinion of a crime lab technician," yet his third claim in his 28 U.S.C. § 2254 petition addresses a failure to challenge the "expert testimony of a chemist...."

It may be argued that some of the claims in the Rule 37.1 petition are similar in nature to those in the 28 U.S.C. § 2254 petition. For example,

there is a discussion in both petitions of the expert testimony of someone from a crime lab. There is also discussion in both petitions of an issue of suppression, yet, the 28 U.S.C. § 2254 petition discusses two issues of suppression, and the Rule 37.1 discusses only one issue of suppression. Further, the 28 U.S.C. § 2254 petition discusses a failure to exclude evidence of a prior “charge,” not “uncharged misconduct,” as is referenced in the Rule 37.1 petition. Therefore, although some claims in both petitions may be similar in nature, it would be impossible to argue that all Rule 37.1 claims were indeed raised in the 28 U.S.C. § 2254 petition. As a result thereof, the 28 U.S.C. § 2254 petition is indeed a mixed petition.

There is nothing to suggest that Parmley ever engaged in abusive litigation tactics or intentional delay. He diligently pursued his case and responded appropriately in his written pleadings. He never did anything that would suggest that he was trying cause undue delay or to engage in oppressive and inappropriate litigation tactics.

There may be “good cause” for Parmley’s failure to exhaust all of his claims in the Arkansas state courts. Although the law is not well settled as to all of the specific situations that constitute “good cause,” a number of courts have attempted to define such situations. It has been suggested that “good cause” for failure to exhaust claims in state court may be found when

a petitioner has reasonable confusion about whether a state filing would be timely. *Pace v. DiGuglielmo*, 544 U.S. 408, 416-417 (2005). “Good cause” under *Rhines* should not be so strict to require a showing of some extreme and unusual event beyond the control of the defendant. *Caporini v. Smith*, 2008 WL 4502669, 3 (S.D. Ohio 2008). Further, “good cause” requires the petitioner to show that he was prevented from raising the claim as a result of his own ignorance or confusion about the law or even the status of his case, or by circumstances over which he had little or no control. *Id.*

The “‘extraordinary circumstances’ standard does not comport with the ‘good cause’ standard prescribed by *Rhines*.” *Jackson v. Roe*, 425 F.3d 654, 661-662 (9th Cir. 2005) (citation omitted). Specifically, “good cause” seems to be less stringent than “extraordinary circumstances.” *Id.* (citation omitted). “Good cause” seems to fall between the “lower threshold of unfairness” and the “higher standard of extraordinary circumstances,” which is necessary for equitable tolling in capital cases. *Baker v. Horn*, 383 F.Supp.2d 720, 747 (E.D. Pa. 2005). The Eastern District of California reasoned that in order to demonstrate “good cause,” one must make “a prima facie case that a justifiable, legitimate reason exists which warrants the delay of federal proceedings while exhaustion occurs.” *Briscoe v. Scribner*, 2005 WL 3500499, 2 (E.D. Cal. 2005). This Court has held that it is an abuse of

discretion for a district court to deny a stay and to dismiss a petition when “good cause” exists. *Nance v. Norris*, 429 F.3d 809, 810 (8th Cir. 2005).

The record is somewhat silent as to the reasons why Parmley did not exhaust all of his claims in the Arkansas state courts. Given that this was not an issue addressed by the parties in their pleadings in the litigation thus far, this Court does not have the benefit of reviewing these reasons. It may be that the mere act of Parmley filing a mixed petition is a display of his “reasonable confusion” over the process. It may very well be the case that Parmley had some degree of confusion over the timeliness of his petition and therefore filed a “protective” petition. *See Pace v. DiGuglielmo*, 544 U.S. 408, 416-429 (2005). That is, given the relatively close temporal proximity between Parmley’s 28 U.S.C. § 2254 petition and the statutory deadline for filing the same, Parmley may have reasoned that time was of the essence and filing a mixed petition was more important than filing it correctly.

In *Jackson v. Roe*, 425 F.3d 654, 656 (9th Cir. 2005), the Court remanded to allow the district court to have an opportunity to apply the standards regarding the staying of a mixed habeas petition as discussed in *Rhines*. Likewise, since the District Court in Parmley’s case failed to consider the same, it would be entirely appropriate and necessary for this

Court to remand so that the District Court can apply the *Rhines* standards. Otherwise, this Court would simply engage in speculation and conjecture as to the reasons why Parmley filed a mixed petition. The District Court should apply the *Rhines* standards of whether it should delete the unexhausted claims, and allow Parmley to proceed with the exhausted claims, if such a dismissal of the entire petition would unreasonably impair Parmley's right to federal habeas corpus relief. If the District Court, on remand, decides that stay and abeyance is indeed appropriate, then the District Court would also be able to place reasonable time limits, as discussed in *Rhines*, on Parmley's trip to state court and back to federal court.

Parmley's unexhausted 28 U.S.C. § 2254 petition claims are not plainly meritless, which is a requirement of *Rhines v. Weber*, 544 U.S. 269, 277 (2005). Further, Parmley's exhausted 28 U.S.C. § 2254 petition claims are not plainly meritless. Interestingly, 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's 28 U.S.C. § 2254 petition is based on ineffective assistance of counsel claims in violation of the Sixth and Fourteenth Amendments of the United States Constitution. There is a two prong test enunciated by the United State's Supreme Court with respect to ineffective assistance of counsel claims: First, a petitioner must demonstrate that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, a petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Parmley's counsel's performance was deficient and said deficient performance prejudiced Pamley's case. Indeed, the results in Parmley's case would have been different but for his counsel's unprofessional errors. 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 case should therefore be remanded for further review. Under

Rhines, this case should be remanded with an instruction that the District Court should apply the standards of *Rhines*, perhaps through an evidentiary hearing, to determine whether stay and abeyance is appropriate with respect to the “good cause” element. As this Court determined in *Akins v. Kenney*, 410 F.3d 451, 456 (8th Cir. 2005), remanding may be appropriate to permit a given district court an opportunity to exercise its discretion within the framework of *Rhines*. If there is “good cause,” then the District Court should enter an order of stay and abeyance to allow Parmley to return to the Arkansas state court to address his unexhausted claims and then to return to federal court for review of his perfected petition. Under the District Court’s failure to adequately analyze Parmley’s substantive claims, this case should also be remanded for an in depth analysis, and quite possibly an evidentiary hearing. Therefore, the only way to cure the severe deprivation of major federal constitutional rights suffered by Parmley is for this case to be remanded for further review.

C. CONCLUSION

For the forgoing reasons, 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 herein.

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May 30, 2009

CERTIFICATE OF COMPLIANCE AND SERVICE

Pursuant to FRAP 28(a)(11) and 32(a)(7)(C) and Local Rule 28A(c) the appellant's Brief in the above-captioned matter contains 6,568 words as calculated by word count of the work processing program (Word 2008 for Mac, Version 12.1.7), used to prepare the brief, and is otherwise in conformity with the FRAP. On June 1, 2009, the following has been / will be sent, postage prepaid as follows: I. the original brief, nine (9) copies, one (1) CD containing this brief, and three (3) appendices to the United States Court of Appeals For The Eighth Circuit; II. two (2) copies of this brief, one (1) CD containing this brief, and one (1) appendix to opposing counsel; III. one (1) copy of this brief and one (1) appendix to Mr. Parmley. Said CD's are virus-free.

Michael D. Day, Esq.

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