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Missouri's Requirements for Federal Habeas Corpus Review: An Analysis of Exhaustion and Tolling of Statutes of Limitations

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Law Summary

Missouri's Requirements for Federal Habeas Corpus Review: An Analysis of Exhaustion and Tolling of Statutes of Limitations

INTRODUCTION

The writ of habeas corpus is the exclusive federal remedy for a state prisoner seeking release from incarceration that violates "the Constitution or laws or treaties of the United States."[1] But, a state prisoner may seek federal habeas relief only if she has exhausted state remedies.[2] Exhaustion requires a prisoner to employ all procedures available "under the law of the State" to raise her claim.[3]

The procedural rules in Missouri regarding federal habeas review—specifically, the definition of an "available" remedy for purposes of the exhaustion requirement—have fluctuated since the United States Supreme Court decided *O'Sullivan v. Boerckel*[4] in 1999. The *O'Sullivan* Court held that to exhaust state remedies for federal habeas purposes, the "prisoner must seek the discretionary review of the state court of last resort when that review is part of the ordinary and established appellate review process in that state."[5]

In *Dixon v. Dormire*,[6] the Eighth Circuit acknowledged that Missouri prisoners must apply for discretionary transfer to the Missouri Supreme Court in order to exhaust remedies.[7] But *Dixon* and *O'Sullivan* noted that state high courts are free to define an "available" remedy as they see fit.[8] So, after *Dixon,* the Missouri Supreme Court amended its rules to explicitly state that discretionary transfer is an "extraordinary remedy" outside of the "standard review process" for purposes of federal habeas review.[9] Thus, the Eighth

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1. 28 U.S.C. § 2254(a) (2000); Preiser v. Rodriguez, 411 U.S. 475, 500 (1973).
2. *See* 28 U.S.C. § 2254(b)(1)(A).
3. *Id.* § 2254(c).
4. 526 U.S. 838 (1999).
5. Dixon v. Dormire, 263 F.3d 774, 777 (8th Cir. 2001) (citing *O'Sullivan*, 526 U.S. at 845, 847). This decision effectively abrogated existing Eighth Circuit precedent on the issue. *See* Dolny v. Erickson, 32 F.3d 381, 383-84 (8th Cir. 1994) (holding that state prisoners were not required to seek the discretionary review of a state supreme court prior to filing for federal habeas relief, since review of that sort was infrequent and not really "available").
6. 263 F.3d 774 (8th Cir. 2001).
7. *Id.* at 778-79.
8. *O'Sullivan*, 526 U.S. at 847-48; *Dixon*, 263 F.3d at 778-79.
9. MO. SUP. CT. R. 83.04.

Circuit concluded in *Randolph v. Kemna*[10] that the amended rule reverted Missouri's law to its prior state—that is, state prisoners were not required to apply for discretionary transfer to the Missouri Supreme Court in order to exhaust state remedies.[11]

These developments present several issues. The first is whether the Missouri Supreme Court may effectively place discretionary review outside the scope of available remedies for federal habeas review. The *O'Sullivan* Court expressly declined to rule on this issue,[12] But this Summary hypothesizes that the Missouri rule will be upheld for two reasons. First, dicta in the *O'Sullivan* majority, concurring, and dissenting opinions strongly suggest that this result would serve the interests of comity and federalism, the policy considerations behind the exhaustion doctrine.[13] Second, the Unites States Supreme Court's refusal to interfere with other lower court decisions upholding rules similar to Missouri's implies that the Court agrees with this result.[14]

The second key issue is whether exclusion of discretionary review from the available list of remedies will impact the running of the statute of limitations for filing petitions for federal habeas review. This Summary contends that it will not impact that statute of limitations for two reasons. First, in Missouri, the right to apply for discretionary transfer is guaranteed by the state constitution.[15] If the statute of limitations for federal habeas corpus petitions were *not* tolled by a prisoner's pending application for discretionary transfer, state prisoners would be forced unfairly to choose between state and federal constitutional rights. Second, the characterization of a particular state remedy as "extraordinary" for exhaustion purposes should not affect its character as "direct" for statute of limitations purposes.[16]

LEGAL BACKGROUND

A. General Principles

When a state prisoner challenges the very fact or duration of his confinement, and the relief the prisoner seeks is immediate or expedited release from incarceration, the prisoner's exclusive federal remedy is the writ of ha-

10. 276 F.3d 401 (8th Cir. 2002).

11. *Id.* at 404. Further, since the amendment purported to clarify existing state law rather than alter it, this rule would be applied retroactively to all pending cases. *Id.* at 404-05.

12. *O'Sullivan*, 526 U.S. at 847.

13. *See generally id.*

14. *See, e.g.*, Adams v. Holland, 330 F.3d 398 (6th Cir. 2003), *cert. denied*, 124 S. Ct. 1654 (2004).

15. MO. CONST. art. 5, § 10.

16. *See* SUP. CT. R. 13; *see also, e.g.*, Smith v. Bowersox 159 F.3d 345, 347-48 (8th Cir. 1998).

beas corpus.[17] The writ of habeas corpus asserts that the confinement is illegal, not that the prisoner is innocent.[18] To apply for the writ, the petitioner must be "in custody."[19] Courts have construed this term to include physical incarceration as well as significant restraints on personal liberty.[20]

Furthermore, federal courts may entertain a state prisoner's petition for habeas relief only if "he is in custody in violation of the Constitution or laws or treaties of the United States."[21] Even then, a court should only grant relief for a violation of federal law if such violation "qualifies as 'a fundamental defect which inherently results in a complete miscarriage of justice [or] [is] inconsistent with the rudimentary demands of fair procedure.'"[22] Common habeas claims include ineffective counsel,[23] *Miranda v. Arizona*[24] violations,[25] improper conduct by the judge or prosecutor,[26] and insufficient evidence.[27] Violations of state law are not valid grounds for federal habeas re-

17. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973).

18. 28 U.S.C. §§ 2241(c)(3), 2254(a) (2000); *see generally* Wright v. West, 505 U.S. 277, 285-90 (1992) (reviewing the common law and historical development of habeas corpus relief).

19. *See* 28 U.S.C. § 2241(c).

20. *See, e.g.*, Spencer v. Kemna, 523 U.S. 1, 7 (1998) (the "in custody" requirement is satisfied so long as the petitioner is incarcerated at the time the petition is filed); *see also* Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 300-01 (1984) (release on recognizance while awaiting trial satisfies the custody requirement, because the release is subject "to 'restraints not shared by the public generally'") (quoting Hensley v. Municipal Court, 411 U.S. 345, 351 (1973)); Beets v. Iowa Dep't of Corr. Servs., 164 F.3d 1131, 1133 n.2 (8th Cir. 1999) (a prisoner's release from custody during pendency of the habeas petition satisfies the custody requirement, so long as the prisoner was in custody at the time the petition was filed).

21. 28 U.S.C. § 2254(a).

22. Reed v. Farley, 512 U.S. 339, 348 (1994) (quoting Hill v. United States., 368 U.S. 424, 428 (1962)) (first alteration in original).

23. To be successful on such a claim, the petitioner must show that counsel's performance was deficient and that counsel's errors prejudiced the defense to such an extent that the petitioner was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687 (1994).

24. 384 U.S. 436 (1966).

25. The Supreme Court has held such claims cognizable for habeas corpus proceedings because violations of *Miranda* rights that protect a defendant's Fifth Amendment rights against compulsory self-incrimination are violations of due process. Withrow v. Williams, 507 U.S. 680, 688-93 (1993).

26. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 453-54 (1995) (a defendant's due process rights were violated when the prosecution suppressed exculpatory evidence that could have altered the result of the proceeding).

27. *See* Jackson v. Virginia, 443 U.S. 307, 324 (1979) (a petitioner "is entitled to [federal] habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt").

lief.[28] However, breaches of state law may provide a basis for federal habeas relief if they rise to a constitutional level.[29]

A federal court will not grant habeas relief for any claim adjudicated by a state court unless the decision (1) was "contrary to, or involved an unreasonable application of" federal law clearly established by the Supreme Court,[30] or (2) was "based on an unreasonable determination of the facts."[31] Even then, federal courts still routinely deny habeas relief if granting the relief would require the judiciary to announce or apply a new constitutional rule of criminal procedure.[32]

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28. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991).

29. The breach must create such fundamental unfairness as to encroach the petitioner's Fourteenth Amendment due process rights. Federal courts apply a harmless error standard in determining if constitutional violations at trial merit relief on collateral habeas review. Brecht v. Abrahamson, 507 U.S. 619, 623, 637-38 (1993). Under this standard, habeas relief is automatically granted for "structural defects" (e.g. deprivation of the right to counsel), while habeas relief for other constitutionally significant trial errors is granted only when the error is found to have "had a substantial and injurious effect." *Id.* at 629-30, 638-39. *See, e.g.*, Maurer v. Minn. Dep't of Corr., 32 F.3d 1286, 1290-91 (8th Cir. 1994) (finding that improper witness testimony vouching for the victim's sincerity was "probably crucial" to the jury's determination, sufficient to infect the proceeding with "fundamental unfairness"); *cf.* Robinson v. Crist, 278 F.3d 862, 866 (8th Cir. 2002) (a prosecutor's indirect comments about the defendant's failure to testify did not to have a substantial and injurious effect on the jury's verdict).

30. 28 U.S.C. § 2254(d)(1) (2000). The Supreme Court has held that "contrary to" means that a state court: (1) makes a conclusion on a question of law opposite to that reached by the United States Supreme Court or (2) when confronted with facts materially indistinguishable from a Supreme Court precedent, arrives at the wrong result. Williams v. Taylor, 529 U.S. 362, 404-05 (2000). "Unreasonable application" means that a state court: 1) has identified the correct legal rule but unreasonably applied it to the facts of the case or 2) unreasonably extended the legal principle to a new context to which it should not apply or unreasonably refused to extend the principle to a new context. *Id.* at 407. *See, e.g.*, Huss v. Graves, 252 F.3d 952, 958 (8th Cir. 2001) (finding that state court application of a Supreme Court precedent regarding double jeopardy was substantially different). *But see, e.g.*, Sexton v. Kemna, 278 F.3d 808, 814 (8th Cir. 2002) (finding that the Missouri Court of Appeals did not unreasonably apply Supreme Court precedent regarding the presumption of vindictiveness during sentencing).

31. 28 U.S.C. § 2254(d)(2).

32. *See* Teague v. Lane, 489 U.S. 288, 301 (1989) (plurality opinion). The Supreme Court wrote, "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . [or] if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* (emphasis added). The Court held that a new rule would only be applied retroactively if (1) "it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" or (2)

B. Exhaustion and Procedural Default

A federal court may only grant habeas relief to a state prisoner who has exhausted available state remedies.[33] State remedies are not exhausted until the prisoner employs all procedures available "under the law of the State" to raise his claim.[34] A prisoner satisfies the exhaustion requirement by properly pursuing a claim throughout the entire appellate process of the state.[35]

"Raising a claim in one full set of proceedings exhausts" the claim even when other state procedures are available.[36] For example, the Eighth Circuit has held that because a petitioner had presented his federal claims before the Missouri trial court and the Missouri Supreme Court (in state habeas proceedings), he was not required to relitigate those same claims before Missouri courts using a different procedural device.[37] In another case, the Eighth Circuit held that once a claim has been raised and decided on the merits on direct appeal, a petitioner need not raise that claim in a post-conviction relief motion in order to satisfy the exhaustion requirement.[38]

The purpose of the exhaustion requirement is "not to create a procedural hurdle on the path to federal habeas court,"[39] but to "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."[40] The petitioner may not raise the issue for the first and only time in a procedural context where the merits will not be decided.[41] For example, a state court may refuse to decide an issue on the merits if a prisoner raises the issue for the first time on appeal. Because the state court has not had the opportunity to decide the issue on the merits, the petitioner has not satisfied the exhaustion require-

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it requires the observance of "'those procedures that . . . are implicit in the concept of ordered liberty.'" *Id.* at 310-11 (quoting Mackey v. United States, 401 U.S. 667, 692-93 (1972) (Harlan, J., concurring and dissenting)) (alteration in original) (internal quotations omitted).

However, the Supreme Court has also held that *Teague* applies only to procedural rules. *Teague* should not be applied to situations in which the Supreme Court decides the substantive meaning of a criminal statute. *See* Bousley v. United States, 523 U.S. 614, 620 (1998).

33. *See* 28 U.S.C. § 2254(b)(1)(A).

34. *Id.* § 2254(c).

35. Wayne v. Mo. Bd. of Prob. & Parole, 83 F.3d 994, 998 (8th Cir. 1996).

36. *Id.*

37. *Id.* at 996.

38. Satter v. Leapley, 977 F.2d 1259, 1262 (8th Cir. 1992).

39. Keeney v. Tamayo-Reyes, 504 U.S. 1, 10 (1992), *superseded by statute as stated in* Weeks v. Bowersox, 119 F.3d 1342 (8th Cir. 1997).

40. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999).

41. *See* Castille v. Peoples, 489 U.S. 346, 351 (1989).

ment.[42] Habeas relief may also be barred where a petitioner fails to frame an issue as one of federal constitutional law at the state court level.[43]

The state "shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement."[44] Federal courts may, however, dispense with the exhaustion requirement if further state litigation would be futile,[45] or in "other limited circumstances."[46] The futility defense has been criticized because petitioners could use it to bypass state courts.[47] Consequently, some courts are reluctant to apply the exception.[48] The "other limited circumstances" exception arises when the interests of comity are better served by allowing the federal court to reach the issues on the merits.[49] Such a scenario may arise when the petitioner's claims are plainly meritless or when a miscarriage of justice has clearly occurred.[50]

Exhaustion is also unnecessary when "there is an absence of available State corrective process" or the procedures available would be "ineffective to protect the rights of the [petitioner]."[51] In the absence of exhaustion or an applicable exception, the federal court may not grant habeas *relief* to the peti-

42. *See, e.g.*, Murray v. Wood, 107 F.3d 629, 631-32 (8th Cir. 1997).

43. *See* Duncan v. Henry, 513 U.S. 364, 366 (1995) (per curiam). The United States Supreme Court held that the exhaustion requirement was not satisfied because the petitioner failed to apprise state courts that the evidentiary ruling of which he complained not only violated state law, but also denied him due process under the Fourteenth Amendment. *Id.* The Court noted that "[i]f state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution." *Id.* at 365-66.

44. 28 U.S.C. § 2254(b)(3) (2000).

45. *See, e.g.*, Padavich v. Thalacker, 162 F.3d 521, 522 (8th Cir. 1998) (holding that the exhaustion requirement was excused because the state court had recently decided the same legal issue adversely to the petitioner, and "'the interests of comity and federalism [were] better served by addressing the merits'" of the claim) (quoting Thompson v. Mo. Bd. of Parole, 929 F.2d 396, 398 (8th Cir. 1991)).

46. *See* Granberry v. Greer, 481 U.S. 129, 131-36 (1987). In *Granberry*, the Supreme Court held that "[a]lthough there is a strong presumption in favor of requiring the prisoner to pursue his available state remedies, his failure to do so is not an absolute bar to [federal] appellate consideration of his claims." *Id.* at 131.

47. *See, e.g.*, Maynard v. Lockhart, 981 F.2d 981, 985 (8th Cir. 1992) (petitioner failed to assert a claim of ineffective assistance of counsel in a state post-conviction proceeding but raised the issue in a federal habeas proceeding.)

48. *Id.* The Eighth Circuit held that a petitioner's belief that asserting a particular claim in a state court proceeding would be futile is, by itself, inadequate to "establish cause for omitting the claims." *Id.*

49. *Granberry*, 481 U.S. at 134.

50. *Id.* at 135-36. The Court suggested, however, that if the petitioner's claim involves an unresolved issue of fact or state law, *requiring* complete exhaustion would best serve the values of comity and efficiency. *Id.* at 134-135.

51. 28 U.S.C. § 2254(b)(1)(B) (2000).

tioner.[52] The court may nonetheless deny the habeas corpus petition on the merits, "notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."[53]

State procedural defaults may also bar federal habeas review. A procedural default occurs when a petitioner fails to comply with state procedural rules in presenting a federal constitutional claim, and the state declines to address the merits of the claim.[54] So long as the default rests upon "adequate and independent state grounds,"[55] the petitioner is generally barred from obtaining federal habeas review of the defaulted claim.[56] However, a state procedural ground is not adequate unless it is "'strictly or regularly followed.'"[57] Under some circumstances, a state procedure which is confusing or fluctuating "may be inadequate to bar consideration of a claim in federal court."[58]

Further, the United States Supreme Court held in *Trest v. Cain*[59] that federal courts hearing a habeas claim are not obligated to consider sua sponte whether the claim is procedurally barred if the issue is not raised by the

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52. *See id.* § 2254(b)(1).

53. *Id.* § 2254(b)(2). *See also Granberry*, 481 U.S. at 134.

54. This may result from a petitioner's failure to comply with state rules requiring the defendant to make a contemporaneous objection at trial, or to raise certain issues on appeal. *See, e.g.*, Miller v. Lock, 108 F.3d 868, 870-71 (8th Cir. 1997) (procedural default occurred when the petitioner failed to timely file a post-conviction motion on a claim of ineffective assistance of counsel).

55. Harris v. Reed, 489 U.S. 255, 262 (1989). The Supreme Court explained, "[T]he adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law." *Id.* at 264 n.10.

56. *See* Coleman v. Thompson, 501 U.S. 722, 729-31 (1991). The Court explains,

> In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism.
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> . . . .
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> . . . In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court.

Id. at 730, 732.

Note, however, that a presumption against adequate and independent state grounds exists when the state court's decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, [or if] the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Id.* at 732-35 (quoting Michigan v. Long, 463 U.S. 1032, 1040-41 (1983)).

57. Johnson v. Mississippi, 486 U.S. 578, 587 (1998) (quoting Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982)).

58. *See* Ashby v. Wyrick, 693 F.2d 789, 793-94 (8th Cir. 1982); *cf.* Sloan v. Delo, 54 F.3d 1371, 1380 (8th Cir. 1995) (habeas review was unavailable because the state rule limiting the time to file a motion for ineffective assistance of counsel was regularly followed).

59. 522 U.S. 87 (1997).

state.[60] The *Trest* Court failed to address the issue of whether a federal habeas court *may* consider procedural bar sua sponte, but some circuits permit such consideration.[61] Also, if the last state court to which the issue is presented ignores a potential state procedural default and reaches the merits of the claim, federal habeas courts may consider the claim.[62] In one case, the Eighth Circuit held that although the petitioner's failure to raise his ineffective assistance of counsel claim in his post-conviction relief motion constituted procedural default under Missouri law, federal habeas review of the claim was not precluded because the state supreme court reached the issue on the merits.[63]

Nonetheless, if a state court's dismissal of a petitioner's claims rests upon independent and adequate state grounds, the petitioner may obtain federal habeas review only by demonstrating either: 1) cause for his procedural default and actual prejudice resulting from the alleged violation of federal law,[64] or 2) "that failure to [review] the claims will result in a fundamental miscarriage of justice."[65] Procedural default may also be excused when "a constitutional violation has probably resulted in the conviction of one who is actually innocent."[66] The Eighth Circuit, for example, has excused procedural default under the actual innocence exception where the state trial counsel failed to investigate and develop obvious leads that would have implicated the victim's husband in murder.[67]

C. Remedies and Appeals

The federal courts must decide a state prisoner's habeas petition "as law and justice require."[68] This includes the power to "stay any proceeding . . . for any matter involved in the habeas corpus proceeding" including execution.[69] A federal judge also has wide discretion in fashioning remedies to grant habeas relief. Such remedies include ordering a state to resentence a prisoner or

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60. *Id.* at 90.

61. *See, e.g.*, King v. Kemna, 266 F.3d 816, 822 (8th Cir. 2001) (holding that the Court of Appeals had the discretion to reach the issue sua sponte despite the state's failure to properly preserve or present the issue of procedural default).

62. *See* Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991) (citing Harris v. Reed, 489 U.S. 255, 262 (1989)).

63. Tokar v. Bowersox, 198 F.3d 1039, 1047 n.8 (8th Cir. 1999).

64. *See* Coleman v. Thompson, 501 U.S. 722, 750 (1999). The Coleman Court established that the cause and prejudice standard must be applied, "[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule." *Id.*

65. *Id.*

66. Murray v. Carrier, 477 U.S. 478, 496 (1986).

67. Henderson v. Sargent, 926 F.2d 706, 713-14 (8th Cir. 1991), *amended by* 939 F.2d 586 (8th Cir. 1991).

68. 28 U.S.C. § 2243 (2000).

69. 28 U.S.C. § 2251 (2000).

to grant a retrial.[70] Unconditional release is also permitted, but is an extraordinary remedy of last resort.[71]

In the event of dismissal or denial of relief, a petitioner wishing to appeal must apply for a certificate of appealability ("COA") from the district court judge who rendered the decision, or from a circuit court judge.[72] A district or circuit court judge may issue a COA "only if the [petitioner] has made a substantial showing of the denial of a constitutional right."[73] Dismissal of the habeas petition on procedural grounds does not bar issuance of a COA.[74] When issuing a COA, the judge must indicate the specific issues that satisfy the "substantial showing" standard.[75] But failure to specify the issues does not render the COA void. In the Eighth Circuit, certificates issued by the district court that fail to specify the issues for appeal are treated as an application for a COA to the circuit court.[76] On appeal, the circuit court reviews the district court's legal conclusions de novo, but will overturn factual determinations only if those determinations are clearly erroneous.[77]

RECENT DEVELOPMENTS

It is against this background that recent developments in Missouri's law must be viewed. Missouri law has fluctuated in regard to what constitutes exhaustion for purposes of federal habeas review. Missouri law on procedural default has also changed recently.

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70. *See* Huss v. Graves, 252 F.3d 952, 958 (8th Cir. 2001).

71. *See* Smith v. Groose, 205 F.3d 1045, 1054 (8th Cir. 2000).

72. *See* 28 U.S.C. § 2253 (c)(1) (2000). Although the statutory language permits a certificate of appealability ("COA") to be issued only from a "circuit justice or judge," the statute has been interpreted to include certification by a "district judge who rendered the judgment." FED. R. APP. P. 22(b)(1).

73. 28 U.S.C. § 2253(c)(2). For a COA to issue, the petitioner must show "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 483-84 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983), *superseded by statute as stated in* Rickman v. Bell, 131 F.3d 1150 (6th Cir. 1997)).

74. *Slack*, 529 U.S. at 484-85. "When the district court denies a habeas petition on procedural grounds without reaching the [petitioner's] underlying constitutional claim, a COA should issue when the [petitioner] shows . . . that [1] jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 484.

75. *See* 28 U.S.C. § 2253(c)(2).

76. *See, e.g.*, Tiedeman v. Benson, 122 F.3d 518, 522 (8th Cir. 1997).

77. *See* Strickland v. Washington, 466 U.S. 668, 698 (1984); Johnston v. Luebbers, 288 F.3d 1048, 1051 (8th Cir. 2002); Laws v. Armontrout, 863 F.2d 1377, 1381 (8th Cir. 1988) (en banc).

In *Dolny v. Erickson*,[78] the Eighth Circuit addressed the limits of the exhaustion doctrine.[79] The court determined that the exhaustion doctrine did not require a state prisoner to seek discretionary review by a state supreme court prior to filing for federal habeas relief.[80] In so doing, the court reasoned that discretionary review was not really "available" because very few petitions for review were actually granted.[81]

Subsequently, the United States Supreme Court decided *O'Sullivan v. Boerckel*,[82] abrogating the Eighth Circuit rule laid out in *Dolny*. The Supreme Court held that to exhaust state remedies, a prisoner must seek discretionary review by the state supreme court when that review is part of the "ordinary and established" appellate review process in that state.[83] The Court emphasized that "[t]he exhaustion doctrine . . . turns on an inquiry into what procedures are 'available' under state law."[84] The Court held that because the state supreme court had discretion to decide which cases it would hear, the Court could not conclude that discretionary review was unavailable for purposes of the exhaustion doctrine.[85]

The Eighth Circuit addressed the *O'Sullivan* development in *Dixon v. Dormire*.[86] Three prisoners were separately convicted of violent felonies and sentenced to prison terms in Missouri. The court of appeals affirmed all three convictions.[87] Each prisoner chose not to apply for discretionary state supreme court review and filed petitions for federal habeas corpus relief pursuant to the Eighth Circuit rule set forth in *Dolny*.[88] In the interim, the United States Supreme Court handed down the *O'Sullivan* decision. The district court denied all three petitioners' claims for habeas relief because they failed

78. 32 F.3d 381 (8th Cir. 1994), *abrogated by* O'Sullivan v. Boerckel, 526 U.S. 838 (1999).

79. *Id.*

80. *Id.* at 384.

81. *Id.*

82. 526 U.S. 838 (1999).

83. *Id.* at 845, 847.

84. *Id.* at 847.

85. *Id.* at 846. At issue in *O'Sullivan* was the Illinois Supreme Court discretionary review rule. The Illinois rule listed criteria allowing an application for transfer, but specifically stated that the reasons listed in the rule "'neither control[ed] nor fully measure[ed] the court's discretion.'" *Id.* at 843 (quoting ILL. SUP. CT. R. 315(a)). The Court explained that due to the rule's broad language, even if the Court "were to assume that the Rule discourages the filing of certain petitions, it is difficult to discern which cases fall into the 'discouraged' category." *Id.* at 846. The right to raise claims before the state supreme court meant that the interests of comity were best served by requiring a petitioner to seek discretionary review. *Id.*

86. 263 F.3d. 774 (8th Cir. 2001).

87. *See* State v. Barton, 957 S.W.2d 814 (Mo. Ct. App. 1998) (per curiam); State v. Dixon, 969 S.W.2d 252 (Mo. Ct. App. 1998); State v. Russell, 941 S.W.2d 11 (Mo. Ct. App. 1997) (per curiam).

88. *Dixon*, 263 F.3d at 776.

to apply for discretionary review by the Missouri Supreme Court.[89] The district court granted each prisoner a COA, and the Eighth Circuit consolidated their appeals.[90]

The Eighth Circuit noted that "the crucial inquiry under *O'Sullivan* involves whether the state supreme court has retained the opportunity to decide which cases to hear on the merits or whether the state's rules indicate that discretionary review by the state's highest court is not within the ordinary appellate review process."[91] The Eighth Circuit then held that the Missouri Supreme Court's rules did not render discretionary review "unavailable" to most litigants.[92] The court emphasized that Missouri law did not state that discretionary transfer was an "extraordinary remedy outside the standard review process."[93]

Nevertheless, the Eighth Circuit declined to apply the *O'Sullivan* principle to the petitioners because they "reasonably relied on Missouri's 'firmly established and regularly followed state practice' of *not* asserting the failure to seek discretionary review as a bar."[94] The court observed, however, that in the future it would be "absolutely necessary" for Missouri petitioners to apply for transfer to the Missouri Supreme Court to comply with the exhaustion requirement, "unless, of course, the Supreme Court of Missouri clearly determines otherwise."[95]

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89. *Id.* The District Court further found that none of the petitioners had demonstrated cause and prejudice, or a fundamental miscarriage of justice rising to the level required by the exception to the exhaustion doctrine. *Id.* at 776-77.

90. *Id.* at 777.

91. *Id.* at 778 (citing O'Sullivan v. Boerckel, 526 U.S. 838, 846-48 (1999)).

92. *Id.* at 777-79. "Specifically, '[t]ransfer may be ordered because of the general interest or importance of a question involved in the case or for the purpose of reexamining existing law.'" *Id.* at 777 (quoting MO. SUP. CT. R. 83.02) (alteration in original). The Eighth Circuit compared this broad language to the Illinois rule in *O'Sullivan*, and observed that "[i]t would be difficult for us to determine in each case whether a motion for transfer could have been properly filed." *Id.* at 779.

93. *Id.* The Eight Circuit pointed out that had Missouri law clearly articulated its intent to place discretionary review outside the ordinary review process, the court could not ignore it. Federal courts cannot "'ignore any state law or rule providing that a given procedure is not available.'" *Id.* at 779-80 (quoting *O'Sullivan*, 526 U.S. at 847-48).

94. *Id.* at 781 (quoting Ford v. Georgia, 498 U.S. 411, 423-24 (1991)). The Court reached this result despite recognizing that it had a duty to apply the controlling interpretation of the Supreme Court retroactively to all cases still open on direct review. *Id.* The Court pointed out that Missouri had not exerted this defense since 1991 and that "'state procedural rules not strictly or regularly followed may not bar . . . review.'" *Id.* (quoting *Ford,* 498 U.S. at 424). It followed that, in the absence of procedural default, it was unnecessary for the petitioners to demonstrate cause and prejudice to merit review. *Id.* at 782.

95. *Id.* at 782 n.3.

In response to *Dixon*, the Missouri Supreme Court revised its rule to read: "Transfer by this Court is an extraordinary remedy that is not part of the standard review process for purposes of federal habeas corpus review."[96]

Meanwhile, Eddie Randolph was convicted in Missouri in 1995 of second degree manslaughter and armed criminal action, and sentenced to two consecutive life terms.[97] The court of appeals affirmed Randolph's conviction and sentence on July 15, 1997.[98] Randolph raised one issue in a motion for transfer to the Missouri Supreme Court, which was denied.[99] Randolph then filed a petition for habeas corpus in the District Court for the Western District of Missouri. The district court ruled that Randolph had procedurally defaulted on any issues he did not raise in his motion for transfer to the Missouri Supreme Court.[100] The district court granted Randolph a COA to determine whether *O'Sullivan* required that he pursue discretionary review of each claim in order to meet the exhaustion requirement.[101]

The Eighth Circuit reversed the district court's finding that Randolph's claims were barred by procedural default. Randolph, like the petitioner in *Dixon*, had been "lulled into believing that the State 'would not assert a failure to seek discretionary review as a defense in federal court.'"[102] Further, the Eighth Circuit found that the Missouri Supreme Court's recent rule revision made discretionary review an extraordinary remedy and dictated the same result.[103] The court remanded the case for adjudication on the merits.[104]

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96. MO. SUP. CT. R. 83.04. The revision was issued on October 23, 2001, two months after the *Dixon* decision.

97. *See* State v. Randolph, 951 S.W.2d 645 (Mo. Ct. App. 1997) (per curiam).

98. *Id.*

99. *See* Randolph v. Kemna, 276 F.3d 401, 402 (2002).

100. *Id.*

101. *Id.* at 402-03.

102. *Id.* at 403 (quoting Dixon v. Dormire, 263 F.3d 774, 782 (8th Cir. 2001)). The state attempted to distinguish *Dixon* because Randolph had sought discretionary review of one of his claims, thus indicating that Randolph had not relied on the State's pre-*O'Sullivan* practice. *Id.* The court disagreed, finding that because the state conceded exhaustion in the district court and drew no distinction between Randolph's claims in that proceeding, the State had not followed a practice different than it did in *Dixon*. *Id.* at 403-04. Thus, the court stated, "The State will not now be heard to argue that the claims should be treated differently based on the possibility that Randolph only partially relied on past practice of the State." *Id.*

103. *Id.* The State argued that because the amendment to Rule 83.04 had an effective date of July 1, 2002, (subsequent to the date of the appeal, decided Jan. 9, 2002) it did not apply to Randolph. *Id.* The Eighth Circuit disagreed, finding that the amendment was merely an act of the Missouri Supreme Court in "affirmatively recognizing what the law of Missouri has been and setting forth what the law of Missouri will continue to be from this point forward." *Id.* at 404-05.

104. *Id.* at 405.

DISCUSSION

These recent developments in Missouri's federal habeas corpus law present several issues for future consideration. The first is the validity of these developments against the backdrop of established Supreme Court precedent. The second is what implications these developments may have on statute of limitations issues.

The *O'Sullivan* Court determined that state supreme courts are free to fashion rules deciding the availability of a particular state remedy. But, the Court declined to rule definitively on the impact such rules would actually have on the law of exhaustion and procedural default.[105] The Court, however, seems to imply that such rules would effectively eliminate discretionary review as an available remedy for purposes of exhaustion in a federal habeas corpus context.[106] Considerations of comity and federalism support this implication.[107] Justice Stevens explains:

> The Court's decision . . . . will impose unnecessary burdens on habeas petitioners; it will delay the completion of litigation that is already more protracted than it should be; and, most ironically, it will undermine federalism by thwarting the interests of those state supreme courts that administer discretionary dockets. If, as the Court has repeatedly held, the purpose of our waiver doctrine is to cultivate comity by respecting state procedural rules, then . . . we should not create procedural obstacles when state prisonersfollow [sic] those rules.[108]

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105. O'Sullivan v. Boerckel, 526 U.S. 838, 847 (1999). This analysis is bolstered by the concurring opinion of Justice Souter, which states,

> I understand the Court to have left open the question (not directly implicated by this case) whether we should construe the exhaustion doctrine to force a State, in effect, to rule on discretionary review applications when the State has made it plain that it does not wish to require such applications before its petitioners may seek federal habeas relief.

Id. at 849 (Souter, J., concurring).

106. The Court is clear that "nothing in the exhaustion doctrine requir[es] federal courts to ignore a state law or rule providing that a given procedure is not available." *Id.* at 847-48.

107. *Id.* at 850-64 (Stevens, J. dissenting) (Breyer, J., dissenting).

108. *Id.* at 859-60 (Stevens, J., dissenting). The majority opinion, in fact, acknowledged that its decision may "disserv[e] . . . comity" by causing an "unwelcome" influx of filings in state supreme courts. *Id.* at 847.

In addition, Justice Breyer observed that the procedural requirements for a state prisoner seeking federal habeas review should be dictated by the state's own preference.[109]

This result is also supported by the Supreme Court's failure to react to lower court decisions upholding state supreme courts' ability to determine that discretionary review is unavailable for purposes of exhaustion. Lower courts have interpreted similar rules to be effective in Arizona,[110] South Carolina,[111] Missouri,[112] and, most recently, Tennessee,[113] without contrary rulings by the United States Supreme Court.

The Tennessee decision is particularly telling as it was decided on the same grounds as the *Randolph* decision.[114] As in Missouri, the Tennessee Supreme Court amended its rules post-*O'Sullivan* to make discretionary review an extraordinary remedy.[115] As in *Randolph*, the Sixth Circuit had to address the question of whether the amended rule applied retroactively to prevent procedural default by the appellant in the instant case.[116] The Sixth Circuit relied on the similarity between the Missouri rule and the Tennessee rule, and followed the Eighth Circuit in finding that the Tennessee rule acted to clarify existing state law rather than applying retroactively.[117] The United States Supreme Court declined to review the Sixth Circuit decision.[118] Coupled with the dicta of the *O'Sullivan* opinion, the Supreme Court's refusal to examine the virtually analogous Sixth Circuit decision highly suggests that

109. *Id.* at 862 (Breyer, J., dissenting). Justice Breyer further explains, "[T]oday's holding creates a kind of presumption that a habeas petitioner must raise a given claim in a petition for discretionary review in state court prior to raising that claim on federal habeas, but the State could rebut the presumption through state law clearly expressing a desire to the contrary." *Id.* at 864.

110. *See* Swoopes v. Sublett, 196 F.3d 1008 (9th Cir. 1999), *cert. denied*, 529 U.S. 1124 (2000).

111. *See In re* Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 471 S.E.2d 454 (S.C. 1990) (cited with approval by *O'Sullivan*, 526 U.S. at 847, 849-50).

112. *See* Randolph v. Kemna, 276 F.3d 401 (8th Cir. 2002).

113. *See* Adams v. Holland, 330 F.3d 398 (6th Cir. 2003), *cert. denied*, 124 S. Ct. 1654 (2004).

114. *See generally Adams*, 330 F.3d 398.

115. *Id.* at 400.

116. *Id.* at 404.

117. *Id.* at 405. Specifically, the Eighth Circuit based its conclusion on the language of the Missouri rule, which stated that the amendment was promulgated "[i]n order to state the existing law in Missouri." Randolph v. Kemna, 276 F.3d 401, 404 (8th Cir. 2002). The Sixth Circuit found this language analogous to the Tennessee rule, which "announced its applicability to 'all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967.'" *Adams*, 330 F.3d at 405 (quoting TENN. SUP. CT. R. 39).

118. Holland v. Adams, 124 S. Ct. 1654 (2004).

the recent developments in Missouri's court rules are valid and will be upheld in the face of future challenges.

The second key issue raised by the recent evolution of Missouri federal habeas law is the manner in which statute of limitations questions will now be resolved as they relate to exhaustion of state remedies. Pursuant to 28 U.S.C. §2244(d)(1), a one-year statute of limitations applies to any state prisoner wishing to file a habeas petition. The limitations period begins running at the conclusion of direct review by state courts.[119] 28 U.S.C. § 2244(d)(2) provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."[120] The Eighth Circuit has not ruled on whether Missouri's rule change[121] affects tolling of the limitations period in § 2254(d)(1)(A). It is conceivable that the State would argue that "conclusion of direct review" should be conflated with the § 2254(b)(1)(A) concept of exhausted remedies.[122] That is, if application for discretionary review to the Missouri Supreme Court is an "extraordinary remedy" for exhaustion purposes, the "conclusion of direct review" occurs when a state prisoner's proceedings in the court of appeals become final. Thus, the statute of limitations under § 2244(d)(1)(A) would not be tolled pending disposition of an application for discretionary transfer.

This argument is plausible but likely flawed. First, in Missouri a prisoner's right to appeal directly to the Missouri Supreme Court for transfer is guaranteed by the state constitution.[123] A construction of § 2244(d)(1)(A) in which the statute of limitations is not tolled pending disposition of an applica-

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119. 28 U.S.C. § 2244(d)(1) (2000). Specifically, the statute of limitations begins

> run[ning] 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.

Id.

120. *Id.* at § 2244(d)(2).

121. MO. SUP. CT. R. 83.04.

122. 28 U.S.C. § 2254(b)(1)(A) (2000) states that: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—(A) the applicant has exhausted the remedies available in the courts of the State . . . ."

123. MO. CONST. art. 5, § 10.

tion for transfer to the Missouri Supreme Court would force state prisoners to choose between state and federal constitutional rights,[124] a result clearly at odds with public policy.

Further, neither the Supreme Court nor the Eighth Circuit has suggested that defining a particular state court review procedure as "unavailable" or "extraordinary" affects its status as "direct." Review by a state supreme court has traditionally been considered direct review.[125] In fact, review by the United States Supreme Court is also considered direct review of a state prisoner's case.[126] Thus, the Eighth Circuit concludes:

> [T]he running of the statute of limitations imposed by § 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.[127]

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124. The U.S. Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

125. *See, e.g.*, Caspari v. Bohlen 510 U.S. 383, 390-391 (1994). The Supreme Court observed, "[a] state conviction and sentence become final . . . when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Id.*

126. *See* Smith v. Bowersox 159 F.3d 345, 347-48 (8th Cir. 1998). The Eighth Circuit elaborates, "[r]eview of a state criminal conviction by the Supreme Court of the United States is considered direct review of the conviction. Moreover, there is a well-established body of federal case law that interprets the phrase 'final by the conclusion of direct review' to include an opportunity to seek certiorari." *Id.* (citations omitted). *See also* Teague v. Lane, 489 U.S. 288, 295 (1994).

127. *Smith*, 159 F.3d at 348. The Supreme Court rules provide that a petitioner has 90 days from the entry of a final judgment in a state court of last resort to timely file a petition for a writ of certiorari. U.S. SUP. CT. R. 13. Because 28 U.S.C. § 2244(d)(1)(A) (2000) provides that the statute of limitations does not begin to run until "the conclusion of direct review or the expiration of the time for seeking such review," in the case of a prisoner who opts not to seek certiorari, the statute of limitations would not begin to run until 90 days had elapsed from the conclusion of direct review in the state courts. In *Caspari*, this principle was extended to a situation in which the prisoner did not even seek transfer to the state supreme court. *Caspari*, 510 U.S. at 390-91. Explains the Supreme Court, "The Missouri Court of Appeals denied respondent's petition for rehearing on October 3, 1985, and respondent did not file a petition for a writ of certiorari. Respondent's conviction and sentence therefore became final on January 2, 1986—91 days (January 1 was a legal holiday) later." *Id.*

The logical conclusion is that application for review by the Missouri Supreme Court retains its character as "direct" even if it is "extraordinary" for exhaustion purposes. It is therefore unlikely that the Eighth Circuit would rule that the recent amendment to the Missouri Supreme Court's rules permits a state prisoner to apply for discretionary transfer at peril of later finding a petition for federal habeas corpus review procedurally barred by the statute of limitations.

CONCLUSION

The historical development of the writ of federal habeas corpus is vast and complex. Since the United States Supreme Court handed down the *O'Sullivan*[128] decision in 1999, calling discretionary transfer to a state supreme court "available" for the purposes of the exhaustion doctrine and effectively abrogating existing Eighth Circuit precedent,[129] Missouri law on exhaustion and procedural default has evolved. The first post-*O'Sullivan* development saw the Eighth Circuit require that state prisoners apply for discretionary transfer to satisfy the exhaustion requirement.[130] The Missouri Supreme Court then amended its rule on discretionary transfer to specifically define the procedure as "extraordinary," thus endeavoring to remove Missouri from the scope of the *O'Sullivan* decision.[131] The Eighth Circuit acknowledged and upheld Missouri's attempt in *Randolph v. Kemna*.[132]

These legal modifications raise several unresolved issues for consideration. First, can the Missouri Supreme Court validly remove discretionary transfer from the requisite procedures for exhaustion purposes? Second, if so, what impact might that have on the interpretation of statutes of limitations provisions for federal habeas corpus review? The likely answer is that Missouri's rule revision has validly redefined and clarified the scope of "available state remedies" for purposes of the exhaustion requirement. However, this change has probably not impacted the way the statute of limitations operates on federal habeas corpus review.

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128. 526 U.S. 838 (1999).

129. *See* Dolny v. Erickson, 32 F.3d 381 (8th Cir. 1994) *abrogated by* O'Sullivan v. Boerckel, 526 U.S. 838 (1999).

130. *See* Dixon v. Dormire, 263 F.3d 774 (2001).

131. *See* MO. SUP. CT. R. 83.04.

132. 276 F.3d 401 (8th Cir. 2002).