Federal Habeas Corpus for Trial Lawyers

By Jean K. Gilles Phillips and Elizabeth Cateforis

I. Introduction

On April 24, 1996, new federal legislation, the Antiterrorism and Effective Death Penalty Act (AEDPA), became law. The most significant provisions of AEDPA substantially changed the federal habeas corpus statutes controlling a state inmate's pursuit of post-conviction relief in federal courts. Under AEDPA, the burden of properly presenting and preserving federal constitutional issues for federal review falls squarely on trial and appellate counsel. This article is designed to provide the defense practitioner with the basic AEDPA knowledge necessary to effectively present a state client's federal constitutional claims and preserve them for federal review.

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FOOTNOTES
1. We wish to thank Connie Hamilton and Hon. Monti Belot, truly remarkable editors, for all their help and insight.
II. Cognizable Issues

Federal habeas corpus is the mechanism by which violations of a state inmate's federal constitutional rights may be brought before a federal court. Most federal constitutional violations, including due process violations, are cognizable on habeas corpus review. Mere errors of state law are not reviewed in federal court. Practically speaking, the requirement that the claim raise a federal constitutional violation means, for example, a hearsay argument based on state law should also be raised as a Sixth Amendment Confrontation Clause issue at trial and on appeal. If the evidentiary challenge is made only on state hearsay grounds, then any constitutional confrontation clause issue is lost for federal review.

There are two long-standing and valid exceptions to the availability of federal review of federal constitutional claims. Fourth Amendment exclusionary rule claims cannot be raised on federal habeas review if there was an opportunity for full and fair litigation on the claim. If a motion to suppress is filed and litigated in state court and in the appellate courts, then the issue has gone as far as it can. But, the failure to litigate a Fourth Amendment issue can serve as a basis for a Sixth Amendment claim of ineffective assistance of counsel. That claim, after being exhausted in state court, would be cognizable on federal habeas review.

The second exception excludes claims based on the ineffectiveness or incompetence of counsel during federal or state post-conviction proceedings. The right to counsel, and thus the right to effective assistance of counsel, ends at the conclusion of direct review as a right. The right does not encompass the pursuit of discretionary review in the state's highest court or the filing of a petition for a writ of certiorari in the U.S. Supreme Court. The Court has repeatedly refused to extend the right to effective assistance of counsel to post-conviction proceedings.

Although federal constitutional violations are cognizable on federal habeas review, AEDPA requires that the violation be of "clearly established" Court precedent. No longer can federal habeas be an avenue to generate new constitutional law in the lower courts. While the Court decisions have restricted federal habeas review over the course of the last 20 years, AEDPA explicitly narrows the availability of review. Federal habeas is now a remedy only for the violation of already established federal constitutional rights. The Court has stated that "clearly established [federal law] means "the governing legal principle or principles set forth by the Court at the time the state court renders its decision." A petitioner may not rely on the Court's dicta in arguing a constitutional claim. Although this requirement limits the expansion of constitutional criminal procedure through federal habeas, it is not an absolute barrier. The Court recognizes that a federal court may "grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced."

This restriction of cognizable claims to violations of "clearly established"

If the constitutional issue to be litigated does not have direct, on-point case precedent, such as with the co-defendant confession and Bruton, the petitioner can still look to general principles of due process and fundamental fairness.

Court precedent has two ramifications. First, federal constitutional issues being presented in state court must be raised and argued in relation to the applicable Court precedent. For example, if there is an issue of redaction of a co-defendant’s statement, the clearly established precedent of Bruton v. United States, Richardson v. Marsh, and Gray v. Maryland must be cited. The second — and just as significant — ramification is that, because claims of clearly established Court precedent can be litigated on federal habeas, state prisoners with federal constitutional issues of first impression must use the direct review process and seek relief through a petition for a writ of certiorari to the Court.

If the constitutional issue to be litigated does not have direct, on-point case precedent, such as with the co-defendant confession and Bruton, the petitioner can still look to general principles of due process and fundamental fairness. For example, there is no clearly established Court precedent holding that the abolition of the insanity defense is unconstitutional. Similarly, if an expert witness on child interviewing techniques is prohibited from testifying in a child molestation case, the practitioner will not find an on-point Supreme Court case holding that such testimony cannot constitutionally be excluded. Rather, the defense attorney, in addition to arguing any state law claims, can argue that the client's rights to due process, a fundamentally fair trial, and/or the right to present a defense were violated as these broad principles are clearly established precedents that may be favorable to the petitioner.
III. One-Year Statute of Limitations

The second most significant change is the imposition of a time limit for filing a habeas corpus petition in federal court. Prior to AEDPA, there was no time limit for a state inmate seeking federal habeas review. The petitioner could take an exhausted federal constitutional claim into federal court at anytime. The statute now contains a one-year period of limitation for a state petitioner to file a federal habeas corpus petition. The one year is treated as 365 calendar days.

There are four distinct starting points for calculating the deadline, depending on four different circumstances. The common starting point for most state inmates 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.” This time period includes time the case spends on direct appeal, on petition for review before the state supreme court, and the 90 days allowed for the filing of a certiorari petition even if the petition is not filed. For example, if a state petitioner’s petition for review in the Kansas Supreme Court is denied on April 1, 2003, then the 90 days for filing a petition for certiorari would end on July 1, 2003, and, if no petition is filed, the one-year period would begin and the federal habeas petition would be due on July 1, 2004. If a petition is filed, then, of course, the one-year period does not start until certiorari is decided.

In addition to the initial one year from when the conviction became final, the statute recognizes three other dates which can trigger, or change, the beginning of a one-year period. First, if the petitioner is prevented from filing a petition due to an impediment created by state action in violation of the Constitution or laws of the United States, the petitioner will have one year from when such impediment is removed in which to file a habeas petition in federal court.

Second, the statute allows a petitioner who is out of time or is filing a second or successive petition to receive an additional one year in which to file a federal habeas petition based on new rules of constitutional law. According to the statute, the one-year time period begins on the date the new rule of federal constitutional law was issued by the Court. While this provision is frequently litigated, it is very narrow, requiring that the rule of constitutional law being asserted be “newly recognized by the Court and made retroactively applicable to cases on collateral review.” Thus, unlike the Teague v. Lane retroactivity analysis utilized by petitioners who are filing a federal habeas petition within the one year of the conviction becoming final, petitioners who are out of time or filing successive petitions can only rely on new constitutional rights the Court holds to be retroactive.

Finally, AEDPA allows for a new one-year clock in the event that newly discovered evidence arises. In calculating a deadline for federal habeas review, the petitioner begins with the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence. The thorny issue presented by the beginning date relating to “newly discovered evidence” is determining what “could have been discovered through the exercise of reasonable diligence” means. If there is DNA evidence available and the state petitioner knows it exists, but simply does not have the funds available at the time to test the material, when does the clock start ticking? When the petitioner obtains the funds and submits the material for testing or when the test results are returned? Or will the time be calculated from the date the petitioner learned about the DNA evidence? These questions have not yet been addressed.

Tolling of the one-year period is recognized for “the time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent

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20. Although no statute of limitations existed, under Rule 9(a) of the rules governing § 2255, if the petitioner delayed too long in the filing of the federal habeas petition, it can be dismissed if unexcused delay prejudiced the state’s ability to file a response to the petition. Harmon v. Maschmeier, 815 F.2d 1553 (10th Cir. 1986).
24. Clay v. United States, 538 U.S. __, 123 S.Ct. 1072 (2003); Locke v. Saffle, 237 F.3d 1269 (10th Cir. 2001); Rhine v. Boone, 182 F.3d 1153 (10th Cir. 1999). Although Clay concerns a federal inmate seeking habeas review, the Court’s holding should be equally applicable to state inmates seeking federal habeas review.
27. Id. See, Preston v. Gibson, 234 F.3d 1118 (10th Cir. 2000) (one-year statute of limitations not restarted by the issuance of state court decisions).
28. Id.
30. Similarly, a petitioner is entitled to application of constitutional decisions that come down during trial or direct review. Griffth v. Kentucky, 479 U.S. 314 (1987).
31. See, Burger v. Scott, 317 F.3d 1133, fn. 5 (10th Cir. 2003); Supreme Court in Garner v. Jones, 529 U.S. 244 (2000) does not recognize a new constitutional right to be applied retroactively.
judgment or claim is pending. Under AEDPA the time spent litigating a state habeas petition is not counted in determining when the one year expires. "Properly filed" and "pending" are the two operative terms in this subsection. "Properly filed" means that the application for state post conviction relief was delivered to and accepted by the state district court and complied with the applicable governing rules and laws. Practically speaking, filing a K.S.A. 60-1507 motion in the appropriate court (district in which conviction occurred) stops the clock. Consequently, when a 1507 petition is necessary to exhaust constitutional issues, the sooner it is properly filed the more of the remaining 365 day filing period is left in which to file a federal habeas petition. "Pending" includes the time from filing of the 1507 in district court through the time in which a state petition for review is pending in the state supreme court. "Pending" in the context of postconviction or other collateral review does NOT include the 90 days in which certiorari may be sought in the Court.

Although missing the applicable one-year filing limitation will generally lead to the dismissal of the habeas petition, the one-year period of limitation is not jurisdictional and may be equitably tolled in extremely limited circumstances. The doctrine of equitable tolling has typically been limited to circumstances where the failure to timely file resulted from conduct on the part of the court or the government or when the petitioner attempted to timely file, but did not properly get through the procedural hoops. For example, the 5th Circuit applied the equitable tolling doctrine in a case where the filing was late because the district court had erroneously granted the petitioner several extensions of time in which to file. Mistakes, lack of access to material, or lack of knowledge of the applicable law, on the part of either counsel or the state inmate, will not be a basis for equitable tolling. The one-year period of limitation is clearly meant to be a procedural gatekeeper and, unless the failure to timely file can be attributed to the state, the court, or a nonfatalfudicial mistake, missing the one-year limit means a state inmate's opportunity to seek federal habeas corpus relief is barred.

The 10th Circuit has held out the possibility of equitable tolling in one other situation. If a petitioner can make a strong showing of actual innocence, meaning factual innocence of the crime of conviction, then the Court might hear the procedurally defaulted federal constitutional claims to avoid a fundamental miscarriage of justice. But, a claim of innocence, standing alone, is not sufficient to overcome a failure to timely file. There must be a federal constitutional claim. The burden of showing actual innocence is quite high, and the applicability of this provision is in reality quite narrow.

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35. As of July 1, 2003, a one-year statute of limitations now exists for the filing of 1507 petitions. The amended K.S.A. 60-1507 statute now reads:

(i) Time limitations. (i) Any action under this section must be brought within one year of: (i) The final order of the last appellate court in this state to exercise jurisdiction on a direct appeal or the termination of such appellate jurisdiction; or (ii) the denial of a petition for writ of certiorari to the U.S. Supreme Court or issuance of such court's final order following granting such petition.

37. Barnett v. Lehman, 167 F.3d 1321 (10th Cir. 1999)(time tolled from the time filed state habeas petition until state Supreme Court denied timely-filed petition for writ of certiorari); Rhine v. Boone, 182 F.3d 1153 (10th Cir. 1999); see also, Saurts v. Meyers, 204 F.3d 417 (3rd Cir. 2000)(reviews several circuits cases on this issue).
39. See, Burger v. Scott, 317 F.3d 1113, 1141 (10th Cir. 2003)(one-year limitations period for filing habeas petitions was equitably tolled during four-month period between date petitioner delivered his state habeas petition to prison officials and date it was stamped "filed" in state court, absent evidence showing that petitioner did not diligently pursue his claim or that the four month delay was otherwise due to circumstances within his control).
40. Davis v. Johnson, 158 F.3d 806 (5th Cir. 1998) (equitable tolling granted, because court had granted petitioner numerous extensions to file). See also, Jones v. Betrand, 171 F.3d 499 (7th Cir. 1998) (equitable tolling granted because petitioner had filed on time but had failed to include fee to proceed in forma pauperis by the deadline).
41. See, Miller v. Mary, 141 F.3d 976, 978 (10th Cir. 1998) (being in trans between institutions, not having access to legal documents, and failure to learn of the new limitation period); Bradley v. Popiel, 198 F.3d 257, (10th Cir. 1999), 1999 WL 922981 (unpublished opinion) (ignorance of the law and inadequacy law library facilities); Harris v. Hutchinson, 209 F.3d 325, 330-31 (4th Cir. 2000) (attorney miscalculation, mistake, or negligence). See also, Justice v. Estes States, 177 F.3d 1474, 1480 (11th Cir. 1999) ("principles of equitable tolling ... do not extend to what at best is a garden variety claim of excusable neglect"); Tallian v. Obrad, 189 F.3d 597, 597-98 (7th Cir. 1999) (prisoner seeking federal habeas relief claimed that his attorney miscalculated and missed the deadline by a month due to inadequate research).
42. See, Gibson v. Klinger, 252 F.3d 799, 808 (10th Cir. 2000); York v. Galekta, 314 F.3d 522, 527 (10th Cir. 2003)(equitable tolling of limitations period for filing federal habeas petition is appropriate when a prisoner is actually innocent, when an adversary's conduct or other uncontrollable circumstances prevents petitioner from timely filing, or when petitioner actively pursues judicial remedies but files defective pleading during the statutory period; however, simple excusable neglect is not sufficient). See also, Riley v. Snider, 208 F.3d 227 (10th Cir. 2000), 2000 WL 251833 (unpublished opinion) (holding that the claim of actual innocence itself is not a constitutional claim but may be used as a gateway through which a habeas petitioner can pass to have his otherwise barred constitutional claim considered on the merits).
IV. Procedural Bars

A cognizable constitutional claim still may be precluded from federal review due to procedural barriers associated with habeas corpus. To properly preserve an issue for federal court there are, in addition to the statute of limitations and issues of retroactivity, additional procedural requirements that must be satisfied in state court: exhaustion, waiver, and procedural default.

A. The exhaustion requirement

AEDPA specifically mandates that a federal habeas petition may not be granted unless "it appears that the applicant has exhausted the remedies available in the courts of the state." To properly exhaust a claim, both procedural and substantive components must be satisfied.

Procedural exhaustion requires that the claim being presented to federal court has been substantively presented to the highest court of the state. In O'Sullivan v. Boerckel, the Court explicitly held that exhaustion of state remedies required the petitioner to present the claims to the state's supreme court for discretionary review. In addition to this procedural component, to satisfy AEDPA's exhaustion requirement the petitioner must have fairly presented to the state court the substantive federal constitutional issue being challenged. A claim will be considered fairly presented if the substance of the claim was raised in the state courts in a serious and meaningful manner. The petition must do more than simply provide notice to the state appellate court.

Consequently, briefing and arguing the issue in the direct appeal and the subsequent petition for review satisfies the exhaustion requirement. Such is the case even if the state court did not address the issue. The petition need only to give the state court an opportunity to rule on the issue; it does not require that the state court accept the invitation.

Although raising the legal issue in the direct appeal brief and in the state petition for review will meet the exhaustion requirement, it is imperative that the petitioner raise the issue in exactly the same manner that he or she will raise it in the federal system. If the angle of the issue is changed or if the analysis of the harm the defendant suffered is altered between the state and federal courts, the issue may not be considered properly exhausted. Additionally, the specific allegations and supporting evidence offered must provide the state court a fair opportunity to apply controlling legal principles to the facts. While a habeas petitioner may be allowed to present bits of evidence to a federal court that were not presented to the state court that first considered the claim, new evidence that places the claims in a significantly different legal posture will not be considered by the federal habeas court unless it is first presented to the state courts.

The 10th Circuit has been very conservative in its application of the exhaustion requirement, making it essential that the factual record, as well as the legal analysis, be well developed at the trial or during the 1507 proceedings and continue through the whole process. If the evidence critical to an issue is not entertained by the trial court, a thorough proffer for the record must be made to preserve the issue for federal habeas review. The failure to be thorough and specific in the proffer will prevent the federal habeas court from

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44. 526 U.S. 838 (1999).
45. For those inmates who fail to file a petition for review with a state supreme court, the issue will not be deemed exhausted. This is particularly problematic as the inmate will have very limited methods of curing the error. Even though the filing of a petition for review is discretionary and the petitioner had no right to counsel, O'Sullivan creates what appears to be a federal procedural default rule for the failure to seek discretionary review. Moreover, because there is no right to counsel for a petition for review or the 1507 petition, cause and prejudice will not salvage the claim. Wainwright v. Torna, 455 U.S. 568 (1972). See also, 28 U.S.C. 2254(b).
46. Demarest v. Price, 130 F.3d 922 (10th Cir. 1997).
48. Bear v. Boone, 173 F.3d 782 (10th Cir. 1999) (§ 2254 does not require repetitive presentation of a claim to the state courts. Instead, the exhaustion requirement is satisfied if the federal issue has been properly presented to the highest court of the state).
50. See, Gonzales v. McKune, 279 F.3d 922, (10th Cir.), cert. denied, 537 U.S. 838 (2002) (failure to properly cumulate the harm at the state court level resulted in the cumulative error issue not being properly before the federal court).
52. For an example of the conservative approach of the 10th Circuit to exhaustion, see Gonzales v. McKune, 279 F.3d 922 (10th Cir.) cert. denied, and Gonzales v. McKune, 537 U.S. 838 (2002). There the inmate alleged in the state 1507 proceedings that he was denied due process and a fair trial when his attorney's performance fell below professional norms and the prosecution withheld exculpatory evidence. Each issue was separately argued and the only additional argument was a general statement that Mr. Gonzales did not receive due process. On appeal to the 10th Circuit, Mr. Gonzales only argued the errors denied him a fair trial in violation of due process. The 10th Circuit held that because Mr. Gonzales did not cite to cumulative error case law or raise a cumulative error issue independently in the 1507 at the district court or appellate court level, any cumulation of the harm suffered had not been exhausted.
reviewing any details not presented, no matter how significant they are to the issue, unless requirements for an evidentiary hearing under 2254(e)(2) are met.53

If the evidence was not presented to the state court, and additional state remedies exist wherein the evidence could be presented for a ruling on the merits, a petitioner must utilize those state procedures (e.g. a 60-1507 motion) in order to meet the exhaustion requirement.54

Although exhaustion is a fairly rigid requirement, there are limited exceptions. According to the specific language of AEDPA, if there is an absence of available state corrective process or if circumstances exist that render such process ineffective to protect the rights of the applicant, exhaustion is not required in order for the federal court to evaluate the issue.55 However, a state's failure to raise exhaustion as a bar to relief is not an automatic exception to the exhaustion requirement.

The statute specifically provides that the state does not waive exhaustion and is not estopped from reliance upon the requirement, even if they initially fail to raise the issue, unless the state, through counsel, expressly waives the requirement.56

Prior to the passage of AEDPA, petitions with a mix of exhausted and unexhausted issues would routinely be dismissed without prejudice by the federal court to allow the petitioner to fully exhaust state court remedies on all claims.57 Under AEDPA, however, if the petition contains unexhausted issues, the federal court may, in its discretion, go ahead and review the application on the merits and deny relief.58 A petitioner only gets one chance to raise an issue in a federal habeas petition.59 If further state proceedings and fact findings could bolster the quality of the unexhausted claim, prematurely raising the unexhausted issue in federal court risks a decision on the merits of undeveloped constitutional claim. In that event, the petitioner would lose the opportunity to present additional evidence in support of the claim as a decision on the merits has already been made.

B. Waiver and procedural default

For those petitioners who fail to properly exhaust a constitutional issue, the issue will either be considered waived, if not raised at all, or procedurally defaulted, if raised incorrectly.

The waiver doctrine states that those issues that were not raised at trial and/or on direct appeal are considered waived.60 If the case is working its way through the initial state court proceedings, the issue must be raised at trial and on direct appeal or the issue is deemed waived.61

In the event the issue is not raised at trial or on direct appeal, the petitioner will have to establish that exceptional circumstances exist for failing to do so. This usually takes the form of an ineffective assistance of counsel claim pre-

53. 28 U.S.C. § 2254(e)(2). "If the applicant has failed to develop the factual basis of a claim in state court proceedings, the Court shall not hold an evidentiary hearing on the claim unless the applicant shows that:
(A) the claim relies on the following:
(1) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(2) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
54. 28 U.S.C. § 2254(e). "A defendant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented.
56. 28 U.S.C. § 2254(b)(3).
57. See, Rose v. Lundy, 455 U.S. 509 (1982);
58. 28 U.S.C. § 2254(b)(2); Rudolph v. Galietta, 208 F.3d 227 (10th Cir. 2000) (stating that this is a codification of the holding in Cranberry v. Green, 481 U.S. 129 (1987), under which a federal court that is convinced that the petition has no merit may deny the petition on the merits rather than apply the exhaustion rule).
60. Burger, 317 F.3d at 1142-43.
61. If the issue was not raised at trial, and the petitioner is thus barred from raising for the first time on appeal, then the petitioner must decide to either raise it on appeal anyway or take the issue through the state habeas process via K.S.A. 60-1507. The potential advantage to raising the unpreserved issue on appeal is that the state appellate court will either rule on the merits, thus exhausting the issue for a federal petition, or it will hold that the issue was not properly preserved for appeal and decline to entertain the issue. In the event that the appellate court declines to rule on the issue, the petitioner will be in a procedural posture to argue that trial counsel was ineffective in a 60-1507 motion. Of course, if the unpreserved issue needs further factual development, the petitioner would be well advised not to raise the issue on appeal, but wait to raise the issue for the first time in the 60-1507 motion. By raising the issue for the first time on appeal, the petitioner runs the risk that the appellate court may actually decide to rule on the merits and thereby prevent the petitioner from further developing the record in a 1507 proceeding. In this instance, the petitioner would also be precluded from presenting the additional information to the federal habeas court as evidentiary hearings are no longer generally available in federal court. See, 28 U.S.C. 2254(e)(2).
sent in a 1507 petition. Essentially, the petitioner argues that the trial or appellate attorney violated the defendant’s Sixth Amendment right to the effective assistance of counsel by waiving the issue. Ineffective assistance of counsel claims can be of the trial attorney for his or her failure to litigate the issue at trial and thus preserve it for appeal or of the appellate attorney for failing to raise on direct appeal an issue that was ripe for appellate review. Other exceptional circumstances include prosecutorial or judicial misconduct, where the misconduct was not known at the time of trial or appeal, or newly discovered evidence.

The issue must also be properly raised according to state procedures. The basic thrust behind procedural default is guaranteed that the state courts have an opportunity to review and rule on the substance of the petitioner’s claim. Thus, the procedural default doctrine requires that proper state procedures be followed when exhausting a federal constitutional issue in state court. If the reason that the state court did not review the substance of an issue is because the petitioner failed to raise the issue in accordance with well-established state procedures, then not only will the petitioner have defaulted on the issue at the state level, but he or she will have defaulted on the issue at the federal level as well.

While a petitioner can assert cause and prejudice to overcome a procedural default problem, this exception is very narrowly defined. In general, “cause” is defined as something other than attorney error that prohibited the petitioner from following state procedures. Because a defendant generally bears the risk of attorney error, mistakes of counsel in exhausting an issue will rarely meet the cause standard. Instead, the petitioner will have to run the issue back through state habeas procedures on an ineffective assistance of counsel claim. As the statute now stands, a petitioner is not entitled to relief unless the state court decision was:

1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or

2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

In evaluating factual issues, state court determinations of the facts are presumed to be correct and this presumption can only be rebutted by “clear and convincing evidence.”

After passage of AEDPA, federal litigation focused on how to interpret “contrary to” or an “unreasonable application of” the Court precedent. A state court decision is “contrary to” federal law when the state court applied a rule that contradicts the governing law set forth in the Court precedent of if the state court confronts facts materially indistinguishable from relevant Court precedent and arrives at an opposite result.

To meet the “unreasonable application” requirement of 28 U.S.C. § 2254(d)(1), the state court must invoke the correct principle of law but unreasonably apply it to the facts. A state

V. Standard of Review

In the event that a state petitioner is able to timely file a federal habeas petition that has a properly exhausted constitutional issue supported by clearly established Court precedent, that petitioner still faces the very difficult challenge of meeting the heightened standard of review adopted by AEDPA.

Prior to the passage of AEDPA, many substantive issues involving questions of law were reviewed de novo. If the issue was a mixed question of law and fact, it was still reviewed de novo. It was only the purely factual issues decided by the state courts that were entitled to deference. AEDPA dramatically changed these standards and significantly raised the bar for a successful federal constitutional challenge to a state conviction.

67. A very basic example of procedural default is when a trial attorney fails to lodge a contemporaneous objection at trial, thus failing to preserve the issue for state direct review. If the attorney raises the issue on direct appeal and the appellate court rules that the issue is not properly before the court, the issue is procedurally defaulted. Although the petitioner technically gave the state appellate court the opportunity to review the issue, by failing to raise it in accordance with established state procedural rules, the procedural default doctrine prohibits federal court from stepping in the toes of state court procedures to review the issue. Instead, the petitioner will have to go back through state habeas procedures on an ineffective assistance of counsel claim contending that the trial attorney failed to properly object to the issue. Despite the simplicity of this example, procedural default is a very intricate and thorny issue; and while a thorough analysis of the doctrine is beyond the scope of this article, a basic understanding of procedural default is necessary to avoid its pitfalls.
69. This “something” requires some interference by state officials or a showing that the factual or legal basis for the claim was not reasonably available to counsel. See, Coleman v. Thompson, 501 U.S. 722, 752-53 (1991).
70. In addition to state interference, the failure to establish cause can be overcome in the event that the petitioner can establish actual innocence, which requires that the petitioner establish that it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt. Schlap v. Delo, 513 U.S. 298, 327 (1995).
71. Id. In the event that the attorney error occurred at a stage where there is no constitutional right to counsel, such as the failure to file a petition for review, the petitioner will have procedurally defaulted and will be barred from presenting the unexhausted issue in federal court.
73. Sumner v. Mata, 455 U.S. 591, 597 (1982); Romero v. Farlong, 215 F.3d 1107 (10th Cir. 2000); Chaney v. Brown, 730 F.2d 1334, 1346 (10th Cir. 1984). For example, as claims of ineffective assistance of counsel are mixed questions of law and fact, such claims were entitled to de novo review. See Hite v. Gibson, 227 F.3d 1298 (10th Cir. 2000).
75. 28 U.S.C. § 2254(d).
76. 28 U.S.C. § 2254(e)(1).
court decision can also be unreasonable if it unreasonably extends, or unreasonably refuses to extend, a Court principle to instances where the principle should or should not apply. The "unreasonable application" inquiry requires the federal courts to employ an objectively unreasonable standard. In Lockyer v. Andrade, the Court overruled the 9th Circuit's adoption of a clearly erroneous standard for "unreasonableness." In attempting to clarify the standard for "unreasonable," the Court stated that "[i]t is not enough that a federal habeas court, in its independent review of the legal question" is left with a "firm conviction that the state court was 'erroneous.' Rather, [the state court] application must be objectively unreasonable.

Thus, in litigating constitutional issues at trial, in the direct appeal, and/or the 1507 process, the state practitioner must carefully and thoroughly develop the record to present the issues under clearly established Court precedent and to allow the federal court to conclude the adverse state court rulings were unreasonable. All possible evidence necessary for federal habeas review must be presented, or proffered, to the state court to allow the federal court to decide whether the factual interpretations made by the state court do not deserve a presumption of correctness, or whether the facts as found and applied to the law resulted in an unreasonable application of clearly established precedent.

IV. Conclusion

With the passage of AEDPA it is more important than ever to thoroughly present and preserve issues in state court in order to obtain federal review. Comprehensive exhaustion of issues through the direct appeal, petition for review, and, if necessary, the 1507 proceeding, following state procedural rules throughout is absolutely essential. Moreover, relief from constitutional error now is constrained by controlling U.S. Supreme Court precedent and the time limitations firmly established by AEDPA.

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78. 529 U.S. at 407.
81. Clear error was the standard utilized by the 10th Circuit in Gonzales v. McKune, 279 F.3d 922, cert. denied, 557 U.S. 838 (2002). In Paine v. Massie, 339 F.3d 1194 (10th Cir. 2003), the 10th Circuit, acknowledging Lockyer, held that "objectively unreasonable," not "clear error," is the standard to be applied to a state court's application of clearly established federal constitutional law. The Paine court stated that although the petitioner need not show that all reasonable jurists would disagree with the state court to find the state court was objectively unreasonable, it did not note that "objectively unreasonable" was more deferential to the state court decision than the "clear error" standard, 339 F.3d at 1198.
82. Lockyer, 123 S.Ct. at 1175.