

IN THE UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

JOSHUA STUMP,)	
)	
Petitioner-Appellant,)	
)	
-vs-)	Case No. 05-6325
)	
STATE OF OKLAHOMA, et al.)	
)	
Respondent-Appellee.)	

**RESPONDENT/APPELLEE'S MOTION FOR RECONSIDERATION OF
CERTIFICATE OF APPEALABILITY AND BRIEFING IN THIS COURT
(document has attachment in scanned pdf format)**

1. On April 28, 2005, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Oklahoma pursuant to 28 U.S.C. § 2254. Doc. 1.
2. On May 5, 2005, the District Court ordered the Petitioner to show cause why the writ should not be denied as untimely, sua sponte. Doc. 6.
3. The Magistrate Judge issued a Report and Recommendation without requiring the Respondent to respond and found that the petition was untimely. Doc. 8.
4. In an Order dated July 1, 2005, the District Court adopted the Magistrate Judge's Report and Recommendation in its entirety and denied Petitioner's petition. Doc. 10.

5. Subsequently, Petitioner sought a Certificate of Appealability (COA) in this Court, invoking this Court's jurisdiction pursuant to 28 U.S.C. § 2253(c). Doc. 19.
6. On May 19, 2006, this Court issued an Order Granting Certificate of Appealability, and directed Respondent to file an answer brief in response to the question raised in that Order and in response to Petitioner's supplemental opening brief.
7. In its Order, this Court instructed the parties to address the issue of:
 - (1) Whether a petitioner, alleging that he received mistaken advice from his counsel regarding parole eligibility, exercises due diligence under § 2244(d)(1)(D) if he does not file a habeas petition until the asserted parole release date.

The Respondent submits that the issue which this Court has presented involves fact-finding which will result in a factual determination of an issue that is better left resolved in the District Court and if determined adversely to the parties, appealed to this Court under its appellate jurisdiction. Furthermore, this Court's initial determination of fact-driven issues in an appellate court, in effect results in the loss of a level of appeal for either party. The issue presented by this Court is better left determined by the District Court which is the fact-finding court in a habeas matter.

For the reasons set forth below, Respondent asks that this matter be remanded to the District Court for findings consistent with the issue presented with the COA.

ARGUMENT

The question presented by this Court to Respondent for a response cannot be properly answered at this time as no evidence exists in the record before this Court from which such answers could be derived. The COA and briefing requires the admission of evidence in this appellate Court which was not presented below. In fact, in presenting this issue to the parties this Court stated:

This inquiry is necessarily **fact-driven** and we note that interpretation of due diligence should not ‘ignore[] the reality of the prison system.’ *Eastwood v. Champion*, 213 F.3d 1321, 1323 (10th Cir. 2000).

Order Granting Certificate of Appealability, p. 5. As this Court acknowledged, whether a petitioner alleging that he received mistaken advice from his counsel regarding parole eligibility, exercises due diligence under § 2244(d)(1)(D), if he does not file a habeas petition until the asserted parole release date, is a question based on a factual determination which this Court found has not been adequately determined.

This Court has recognized that fact finding is the responsibility of the District Courts, not the appellate courts. *U.S. v. Ramstad*, 219 F.3d 1263, 1265 (10th Cir. 2000). This Court’s question requires the parties to build a factual record in an

appellate court to determine if Petitioner could have ascertained information regarding his eligible parole date prior to his asserted parole eligibility date. If the record does not support the District Court's conclusion as to whether the Petitioner could have with due diligence discovered this information and additional fact-finding is necessary then the proper relief would be to remand this case to the District Court. In *Harris v. Champion*, 15 F.3d 1538, 1565-1566 (10th Cir. 1994), this Court remanded the matter to the District Court for development of the petitioner's claim and held:

[b]ecause the district court has not yet conducted the individual inquiries necessary to resolve petitioners' due process claims, the record is not sufficiently developed for us to review those claims at this time. We therefore remand the action for the district court to conduct the necessary inquiry and make an appropriate record for review.

Furthermore, in *U.S. v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000) this Court held, "[t]his Court will not consider material outside the record before the district court". "[N]or can we resolve issues of fact not presented to the district court. *Graff v. Henderson*, 30 Fed.Appx. 809, 811 (10th Cir. 2002).¹ Moreover, "the only proper function of the court of appeals is to review the decision below on the basis of the record that was made before the district court." *Allen v. Minnstar, Inc.*, 8 F.3d 1470,

¹Unpublished opinion cited for persuasive value only pursuant to Tenth Circuit Rule 36.3, and attached as Exhibit 1.

1474 (10th Cir. 1993). Therefore, this Court's question cannot or should not be addressed at this time. This issue must be remanded to the District Court where the parties can present evidence relevant to the question so a proper determination may be made.

In addition, by requiring the parties to submit evidence pertaining to a fact-driven issue in this Court, causes the parties to lose an avenue of appeal and the right to have the factual findings made by the District Court reviewed under the proper standard of appellate review. In an appeal of the dismissal of a habeas petition, this Court reviews the District Court's decisions regarding the equitable tolling of the limitation period for an abuse of discretion. *Burger v. Scott*, 317 F.3d 1133, 1137-1138 (10th Cir. 2003); *Woodward v. Williams*, 263 F.3d 1135-1142 (10th Cir. 2001). Therefore, the case should be remanded to the District Court for proper factual determinations and then appealed to this Court. The proper avenue for this case to proceed would be to remand the case to the District Court to allow the parties to present evidence supporting the allegations and allow the District Court to make findings of fact and develop a record upon which to appeal. Once the case is in the District Court the Magistrate Judge would review the claims and issue a Report and Recommendation, to which either party could object. Next, the District Judge would issue an Order either adopting or rejecting the Magistrate Judge's Report and

Recommendation and said Order would be appealable to this Court and proper for review with a properly developed record.

The record on appeal from a denial of a Habeas Corpus Petition consists only of the original papers and exhibits filed in the federal district court, the transcript of any proceedings in the federal district court, and a certified copy of the docket entries prepared by the federal district court. FED. R. APP. P. 10; *Kennedy*, 225 F.3d at 1191. Respondent will state, however, that if it becomes necessary to present evidence in the District Court on this issue, he anticipates the following evidence might be relevant:

(1) Affidavit or testimony from Petitioner's trial counsel stating the information relayed to the Petitioner regarding parole and parole eligibility;

(2) Affidavit or testimony from the Oklahoma Department of Corrections indicating that Petitioner was informed of the date for his parole eligibility and the information was readily available to the Petitioner and he could have discovered it through due diligence;

This possible evidence cited above, as well as anticipated additional evidence to show Petitioner failed to exercise due diligence by waiting to file his habeas petition until his alleged parole date, is not contained within the record on appeal under the Federal Rules of Appellate Procedure and further supports Respondent's position that this issue should be remanded to the District Court. Since the issue presented by this

Court is a fact-driven issue as stated by this Court in the COA, which such evidence has not been presented below, this Court should remand this issue to the District Court for a proper factual determination on due diligence. The Magistrate Judge will be presented with evidence, then issue a Report and Recommendation to which the parties may object and present the issue to the District Judge. Thereafter, the parties should present the issue to this Court and a determination made under the proper standard of appellate review. Therefore, this Court should remand the case to the District Court so that court can review the claim in light of the available and relevant evidence which has not yet been determined and Respondent has not been given the opportunity to present in the proper court.

CONCLUSION

This Court must remand the case to the District Court so that the question posed in this Court's May 19, 2006, order can be answered in light of evidence presented to and the record created in the District Court. This is because "the only proper function of [this Court] is to review the decision below on the basis of the record that was made before the district court." *Allen*, 8 F.3d at 1474. As no adequate record on the issue of Petitioner's alleged exercising of due diligence exists for this Court to review, any determination of this Court's question would be improper at this stage.

Respectfully submitted,

**W.A. DREW EDMONDSON
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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

On this 26th day of June 2006, a true and correct copy of the foregoing was emailed and mailed by Federal Express to the Court Clerk and by First Class Mail through the U.S. postal service to:

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s/ HEATH ROBINSON