No. 98-6322

IN THE

Supreme Court of the United States

ANTONIO TONTON SLACK,

Petitioner,

v.

E. K. McDANIEL, Warden, Ely (Nevada) State Prison, and FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL REPLY BRIEF FOR RESPONDENTS

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I. ARGUMENT

A. Respondents have not waived the right to rely on the AEDPA.

In his supplemental brief Petitioner Antonio Slack (hereinafter Slack) argues that Respondents have waived any right to rely on the AEDPA because they never raised the applicability of

the AEDPA. However 28 U.S.C. §2244(b) and §2253(c) are jurisdictional and cannot be waived. Congressional statutes granting or withdrawing jurisdiction generally "speak to the power of the court rather than the rights or obligations of the parties." *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994). Sections 2244(b) and 2253(c) share characteristics common among jurisdictional statutes. Their commands are addressed to the power of the federal courts, rather than the rights and obligations of the parties. These sections constitute a limitation on the Article III habeas corpus jurisdiction of the federal courts. "Jurisdiction over applications for federal habeas corpus is controlled by statute." *Brown v. Allen*, 344 U.S. 443, 460 (1953). Since these provisions are jurisdictional they cannot be waived by the parties. *See e.g., Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978); *Sosna v. Iowa*, 419 U.S. 393, 398 (1975); *California v. LaRue*, 409 U.S. 109, 112 n.3 (1972).[1]

[1] Respondents would note that, while they never affirmatively argued below that the AEDPA applied to this case, Slack did. In his motion for reconsideration of the district court's order finding he had abused the writ Slack argued that the AEDPA had superceded Rule 9(b). JA 145-150. Slack specifically stated: "This case is governed by the AEDPA because it was commenced after April 25, 1996." JA 147. Slack was obviously referring to the date he first raised the five claims that were dismissed as abusive and were first filed on December 24, 1997, since Slack initiated the current federal proceeding on May 30, 1995. JA 35, 66.

B. The provisions of 28 U.S.C. §2244(b) and 28 U.S.C. §2253(c) as amended by the AEDPA should apply to this case.

Slack argues that the questions presented in this supplemental briefing have been answered by this Court's decision in *Lindh v. Murphy*, 521 U.S. 320 (1997). However, as pointed out in Respondents' supplemental brief, *Lindh* simply does not apply to this case. First of all, *Lindh* involved the applicability of 28 U.S.C. §2254 to cases pending on the AEDPA's effective date. That section is not at issue in this case. All of the claims at issue in this case appeared for the first time one year and eight months after the AEDPA's effective date. Therefore, the negative inference this Court discussed in *Lindh* cannot apply to the claims at issue here. Additionally, 28 U.S.C. §2253 requires the initiation of an appeal before it can have any impact. Thus, the time when the section 2254 petition was filed is meaningless.

Slack next contends that applying the AEDPA would lead to absurd results. Slack appears to be arguing that an amended pleading cannot constitute a new case and therefore, the AEDPA cannot apply. Respondents have never argued that Slack's amended petition constituted a new case. Rather, Respondents'

position is that the new claims that appeared in that amended petition should be governed by the AEDPA.

Slack argues that Congress could not have intended this result because it included 28 U.S.C. §2266(b)(3)(B) in chapter 154 which treats amendments as second or successive petitions. According to Slack if Congress had intended chapter 153 amended petitions to be treated as second or successive it would have included a similar section in chapter 153. The negative inference Slack is attempting to establish simply has no application to this case. Respondents have never argued that the five claims at issue here were second and successive because they appeared in an amended pleading. Rather, Slack's claims are second and successive because they did not appear in his first federal proceeding in 1991. JA 6-22.

Slack next argues that an appeal cannot constitute a new case. According to Slack, if an appeal constitutes a new case then all of the provisions of the AEDPA would apply and an appellate court would be applying different law to claims than the district court that applied pre-AEDPA law. Slack misapprehends

Respondents' argument. Respondents have never argued that section 2253 applies to an appeal filed after AEDPA because an appeal constitutes a new case.[2] Section 2253 applies to post-AEDPA appeals because the action that triggers section 2253 is the filing of a notice of appeal not the filing of a section 2254 petition.

Once section 2253 has been applied and a certificate of appealability granted, the appeals court would apply the same law to the individual claims that was applied by the district court. If a claim appeared in a petition prior to April 24, 1996, then pre-AEDPA law would apply. If the claim appeared in a petition after April 24, 1996, the AEDPA would apply.

As pointed out in Respondents' supplemental brief, applying the AEDPA to claims that appeared for the first time one year and eight months after its effective date is in keeping with this Court's case law recognizing Congress' authority to limit the habeas corpus jurisdiction of federal courts. *See Calderon v.*

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2 The Solicitor General also contends that an appeal constitutes a new case and that is why section 2253 applies. The Solicitor General relies on *Hohn v. United States*, 524 U.S. 236 (1998), in support of its argument. While Respondents believe the Solicitor General's position reaches the correct result it does so for the wrong reasons. Respondents submit that the Solicitor General has read the *Hohn* decision as more expansive than it is. All the *Hohn* court said is that the filing of an application for a certificate of appealability is a sufficient "case" for purposes of judicial review under 28 U.S.C. §1254.

Thompson, 523 U.S. 538 (1998); *Felker v. Turpin*, 518 U.S. 651 (1996); *Lonchar v. Thomas*, 517 U.S. 314 (1996). It is also in keeping with the clear intent of Congress. to enact meaningful, comprehensive habeas corpus reforms.

C. Slack is not entitled to a certificate of appealability under 28 U.S.C. §2253(c).

Under pre-AEDPA law a state prisoner had to make a substantial showing of the denial of a federal right in order to obtain a certificate of probable cause to appeal. *Barefoot v. Estelle*, 463 U.S. 880 (1983). The AEDPA changed this standard to a substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c). In his supplemental brief Slack argues that this change was merely the product of sloppy drafting. According to Slack there is not a hint in the legislative history of the AEDPA that Congress intended to change the *Barefoot* standard.

However, if the plain language of the statute is clear, and effect can be given to the words as written without offending the Constitution or reaching absurd results, the legislative history is a non factor in terms of applying the statute. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) (statutory words should be given

their ordinary meaning.) The fact is, there is nothing ambiguous about section 2253(c). A constitutional right is a right guaranteed under the Constitution of the United States. This is clearly different from mere federal rights which are products of statutes. By changing the standard from the denial of a federal right to the denial of a constitutional right Congress was making a clear distinction between the two.

Slack also argues that precluding appeals of procedural issues is such a radical change to habeas practice that it could not have been intended by Congress. However, the position advocated by Respondents is no more radical than placing a one year statute of limitations on the right to file a section 2254 petition. Nor is it more radical than prohibiting an evidentiary hearing in federal court if the factual basis for a claim was not developed in state court. The point is, the AEDPA was intended to be a radical change in habeas corpus proceedings. Respondents' position is in keeping with Congress' intent.

The Solicitor General contends that the change from "federal" right to "constitutional" right was only intended to

preclude the appeal of federal statutory or treaty claims. The problem with this position is that these type of claims make up an extremely small category of section 2254 petitions. As the Amici States' brief points out cases involving something other than alleged violations of the Constitution are extremely rare. (Amici States' brief, pg. 10, n.4.) Congress intended the AEDPA to streamline and speed up the resolution of habeas proceedings. Merely precluding appeals on treaty issues or federal statutory claims would not have that effect. In fact, these cases are so rare that there would be virtually no effect at all.

The Solicitor General and Amicus Criminal Justice Legal Foundation argue that courts must look to the underlying claims in a petition in order to determine if a showing of the denial of a constitutional right has been made. However, the purpose of an appeal is to determine the correctness of a district court's ruling. If an appeals court looks to the underlying claims, in an appeal involving a denial on procedural grounds, it would require the court to look somewhere beyond the district court's order to determine whether the COA should issue. Under section 2253 an appeal may

only be taken from the final order in a habeas corpus proceeding. Looking beyond the district court's order to the underlying claims of the petitions reads language into section 2253 that simply does not exist. In addition, requiring appeals courts to conduct its own analysis of the merits of a petitioner's underlying claims, when no such analysis was done in district court, is contrary to the intent of Congress to streamline the habeas process.

Section 2253(c) is clear and unambiguous. In order to obtain a certificate of appealability a petitioner must make a substantial showing of the denial of a constitutional right. The right to a section 2254 petition is statutory, not constitutional. The procedural requirements for obtaining a merits review of a section 2254 petition are also statutory. Dismissal of a petition based on procedural rules does not implicate constitutional rights. Therefore, a petitioner will not be able to make a substantial showing of the denial of a constitutional right in order to appeal a district court order based on procedural grounds. Slack is not entitled to a certificate of appealability.

II. CONCLUSION

The provisions of 28 U.S.C. §2244(b) and 28 U.S.C. §2253(c) should be applied to Slack's petition. Slack is unable to meet the requirements of 28 U.S.C. 2253(c) and his appeal should be dismissed.

Dated: January, 2000.

Respectfully submitted,

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