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 PETITIONER

FRANNY A. FORSMAN
Federal Public Defender For the District of Nevada
TIMOTHY P. O'TOOLE
*MICHAEL PESCETTA
Assistant Federal Public Defenders
330 S. Third St., Ste. 700
Las Vegas, Nevada 89101
(702) 388-6577
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. INTRODUCTION

Petitioner Slack demonstrated in his supplemental brief that the Anti-Terrorism and Effective Death Penalty Act of 1996 does not apply to the appellate proceedings in this case. Even if it did, AEDPA does not alter the power of the federal appellate courts to address procedural errors which bar review of substantive claims. This Court accordingly has jurisdiction to review the erroneous decision of the district court applying the abuse of the writ doctrine, when Mr. Slack's previous petition had been dismissed without prejudice for exhaustion, without any federal adjudication. The state respondents' supplemental brief and the briefs filed by the amici curiae do not refute Mr. Slack's arguments.

II. ANY ARGUMENT BASED ON THE APPLICATION OF AEDPA OF THIS CASE HAS BEEN WAIVED BY RESPONDENTS

Following the injection of the issue of the application of AEDPA to this case by the attorney general amici, petitioner Slack noted that any such issue had been waived by the failure of respondents to raise it at any point in the proceedings. Pet. Reply Br. at 16-17. The supplemental briefs submitted by the respondents and the amici curiae do not address the issue of the state's forfeiture of any right to rely on the provisions of AEDPA, as a result of its failure to invoke the statute at any point before oral argument in this Court and of its affirmative assertion in its principal brief in this court that AEDPA does not apply to this case. The failure of the respondents to address this issue should be taken as a concession that, if this court applies the same procedural rules to respondents that it applies against habeas corpus petitioners, any issue as to the application of AEDPA which does not implicate the subject matter jurisdiction of this Court has been waived. *See* Pet. Supp. Br. at 3-5.

III. ADEPA'S AMENDMENTS TO CHAPTER 153, INCLUDING THE AMENDMENTS TO 28 U.S.C. §§ 2253 AND 2244(b), DO NOT GOVERN THE APPELLATE PROCEEDINGS IN MR. SLACK'S CASE, WHICH WAS COMMENCED BEFORE APRIL 24, 1996

The AEDPA amendments to Chapter 153, including the appeal and successor petition provisions, do not govern the appellate proceedings in this case. In *Lindh v. Murphy*, 521 U.S. 320 (1997), this Court held that the Chapter 153 provisions of the Act do not apply to "cases pending" before its enactment, based on the contrast with the explicit Congressional command to apply the Chapter 154 provisions to "cases pending" at the time the Act took effect. This case was pending in the district court at the time AEDPA was enacted.

Amicus Criminal Justice Legal Foundation argues that *Lindh* was wrongly decided and that its holding should not be applied to any other provisions of Chapter 153. The primary authority on which Criminal Justice Legal Foundation relies, however, is *Martin v. Hadix*, 119 S.Ct. 1998 (1999), in which this Court approved of the analysis of *Lindh*, based on the clear negative inference showing the Congressional intent to apply only the provisions of Chapter 154 to cases pending at the time of its enactment. *Id.* at 2005; *see id.* at 2008 (Scalia, J., concurring in part and in judgment); *id.* at 2011 (Ginsburg, J., dissenting). *Martin* thus forms no basis for an argument that AEDPA applies to this case despite the holding in *Lindh* that the Chapter 153 amendments of AEDPA do not apply to cases pending at the time of its enactment. Further, Congress has had ample time to amend the statute if it disapproved of the interpretation of AEDPA adopted in *Lindh*, and it has not done so. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 384 (1982).

The state respondents argue that the post-AEDPA amendment to Mr. Slack's petition in the district court commences a new "case" to which AEDPA applies. Resp. Supp. Br. at 9. Respondents cite no legal authority in support of this proposition. There is no authority suggesting that the amendment of a pleading in a pending case begins a new case, and such a position is refuted by 28 U.S.C. § 2242, which provides that the rules generally applicable to

amendments of pleadings in civil cases apply to habeas proceedings. The brief of the United States as amicus curiae thoroughly refutes the respondents' argument, by demonstrating that their position is inconsistent with the ordinary use of the word "case" adopted in other decisions of this Court;[1] it is inconsistent with Congress's use of the words "cases" and "claim" in other provisions of AEDPA;[2] and it is inconsistent with traditional habeas practice.[3] *See*

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[1] *Hohn v. United States*, 524 U.S. 236, 241 (1998) ("a proceeding seeking relief for an immediate and redressable injury"); *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 595 (1871) ("a proceeding in court, a suit, or action.")

[2] *See, e.g.*, 28 U.S.C. §§ 2244(b) and (d)(1); 28 U.S.C. §§ 2254(d) and (e)(2); 28 U.S.C. § 2255; 28 U.S.C. §§ 2261(a), (d) and (e); 28 U.S.C. § 2262(c); 28 U.S.C. § 2264; 28 U.S.C. §§ 2265(b) and (c); 28 U.S.C. § 2266(b)(1). When Congress used "case" in other provisions of AEDPA, it employed that word in its ordinary sense, to refer to a judicial proceeding or action. *See, e.g.*, 28 U.S.C. 2244(b)(2)(A) ("a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court"); 28 U.S.C. 2261(e) ("a capital case"); 28 U.S.C. 2262(c) ("no Federal court thereafter shall have the authority to enter a stay of execution in the case"); 28 U.S.C. § 2262(b)(1)(B) (if necessary, district court shall afford a hearing before "submission of the case for decision"). Congress used the word "claim" to refer to a legal basis for relief within a "case." *See, e.g.*, 28 U.S.C. §§ 2244(b)(1) and (2) ("[a] claim represented in a second or successive habeas corpus application"); 28 U.S.C. § 2254(e)(2) (if applicant "failed to develop the factual basis of a claim in State court proceedings," court shall not hold an evidentiary hearing unless specified conditions are met). Because Congress clearly differentiated throughout AEDPA between "case" and "claim" in this manner, if Congress had meant AEDPA's application to turn on whether a particular claim was pending on enactment rather than on whether the habeas proceeding was pending, Congress presumably would have used "claim" rather than "case" in Section 107(c)'s timing provision. The use of the term "case" clearly indicates Congress' intent to have the Chapter 153 amendments apply only to "cases" that were pending on the date of AEDPA's enactment, not merely to "claims."

[3] The Solicitor General recognizes that courts have not viewed amendments to pending pre-adjudication habeas petitions as new cases

U.S. Br. at 15-18. Respondents' argument on this point must be rejected.[4]

Respondents also claim that *Hohn v. United States*, 118 S.Ct. 1969 (1998), limited *Lindh* sub silento by applying AEDPA to a pending case when the notice of appeal was filed after its enactment. Resp. Supp. Br. at 7-8. Respondents do not address the fact that the petitioner in *Hohn* sought certiorari on the question of whether the Eighth Circuit erred by applying the amended § 2253 to his case, and this Court denied certiorari on the question, although it granted certiorari on other issues. *See Hohn v. United States*, 99 F.3d 892, 893 (8th Cir. 1996) (per curiam), *cert. granted in part and denied in part*, 118 S.Ct. 361 (1997). This Court's assumption that AEDPA applied in the appeal, *see Hohn v. United States*, 118 S.Ct. at 1872, is only a recognition that the denial of certiorari rendered the Eighth Circuit's ruling on that particular issue final without implying any validation of the ruling by the Court. *See Brown v. Allen*, 344 U.S. 443, 488-97 (1953).

Respondents also do not discuss the post-*Hohn* decision in *United States v. Dickey*, 118 S.Ct. 2365 (1998), in which this Court granted certiorari, vacated a lower court decision applying the AEDPA amendment to § 2253 in a § 2255 case in which the appeal

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subject to the limitations on second or successive petitions, but instead have permitted amendments under Federal Rule of Civil Procedure 15. *See Johnson v. United States*, 196 F.3d 802, 804 (7th Cir. 1999); *see also Calderon v. Ashmus*, 523 U.S. 740, 750 (1998) (Breyer, J., concurring). Congress also treated amendments as part of the overall habeas "case" when it subjected only amendments in capital cases governed by the new Chapter 154 provisions to AEDPA's limitations on second or successive petitions. *See* 28 U.S.C. § 2266(b)(3)(B). This is another reason why the state respondents' focus on individual claims cannot be correct.

[4] Notably, the state does not acknowledge that application of AEDPA to the question originally presented in this case would mean that petitioner would prevail. As petitioner pointed out in his principal brief, every decision, including this Court's decision in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998), holds that the dismissal of a petition without prejudice for exhaustion does not make a subsequent petition "second or successive" under AEDPA. Pet. Br. at 33-36.

was filed after the adoption of AEDPA, and remanded for reconsideration in light of *Lindh*. The GVR order in *Dickey* makes sense only as an acknowledgment that § 2253 does not apply to any case commenced before AEDPA's enactment, even if the appellate proceedings begin afterward.[5] This position has been followed by virtually every court of appeals. *See* Pet. Supp. Br. at 7-10 & n.8. In short, *Hohn* did not resolve this issue, but, in combination, *Lindh* and *Dickey* do.

The filing of the request for a certificate of probable cause after AEDPA does not start a new "case" for the purposes of applying AEDPA. The Solicitor General does not discuss the authorities holding that a "case," once begun, continues throughout the appellate proceedings. Pet. Supp. Br. at 6; *see also Calderon v. Thompson*, 118 S.Ct. 1489, 1502 (1998) (treating post-AEDPA recall of mandate as part of pre-AEDPA case); *cf.* U.S. Br. at 10 (citing dictionary definition of action as "pending from its inception until the rendition of final judgment."). An application for a certificate of probable cause (or certificate of appealability) is the means of bringing the "case" from the district court to the Court of Appeals, along with the notice of appeal which is necessary to invest the Court of Appeals with jurisdiction. The application to the Court of Appeals has no independent significance: granting or denying the certificate is based on the substantiality of the issues in the record of the case before the district court; and if the district court issued the certificate, there would be no doubt that the appeal is a continuation of the district court case. The fact that the application for a certificate means there is a case "in" the Court of

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[5] A GVR order, like other summary action by this Court, may have limited precedential value. *See Edelman v. Jordan*, 415 U.S. 651, 671 (1974) (summary affirmances). Nevertheless, it is a disposition of the case by this Court, an "alternative to summary reversal," *Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (per curiam); *id.* at 178 n.1 (Scalia, J., dissenting), based on this Court's determination that intervening events, such as a new decision of this Court "cast substantial doubt on the correctness of the lower court's . . . decision." *Id.* at 170; *see id.* at 176 (Rehnquist, C.J., concurring); *id.* at 191-192 (Scalia, J., dissenting) (GVR proper when intervening factor has "legal bearing upon the decision").

Appeals under this Court's decision in *Hohn* does not mean that it is a *new* case somehow different from the one before the district court.

The Solicitor General's position that a new "case" begins when the case reaches an appellate level would also produce absurd and incoherent results, because there is no rational way to limit the application of the provisions of AEDPA only to the appellate provisions: if the appeal starts a new case, as the Solicitor General suggests, all of the Chapter 153 provisions would apply, despite the holding of *Lindh* that the § 2254 amendments do not. Similarly, if a new "case" begins when the case proceeds to a new appellate court, then every case in which a petition for certiorari was granted after the enactment of AEDPA – including *Lindh* – would be subject to AEDPA. Such a result would be analytically incoherent, and it would produce significant confusion over the application of different pre- or post-AEDPA legal standards in the district courts and the courts of appeals. *See* Pet. Supp. Br. at 12-13. The Congressional intent to reform habeas corpus procedure did not seek to "foster disarray," as the United States acknowledges, U.S. Br. at 23; but disarray would be the primary result of accepting the Solicitor General's argument that the appellate provisions of AEDPA apply to this case.

IV. ASSUMING ARGUENDO THAT THE PROVISIONS OF AEDPA APPLY TO THIS CASE, A CERTIFICATE OF APPEALABILITY MAY PROPERLY ISSUE UNDER 28 U.S.C. § 2253(c) BECAUSE MR. SLACK'S CASE INVOLVES THE DENIAL OF SUBSTANTIAL CONSTITUTIONAL RIGHTS, WHICH CAN BE REVIEWED ONLY BY FIRST ADDRESSING THE THRESHOLD PROCEDURAL ISSUE RESOLVED BY THE DISTRICT COURT

Respondents argue, essentially without legal analysis, that the AEDPA amendment to 28 U.S.C. § 2253(c) abolishes any jurisdiction to review procedural errors committed by the district court in an appeal by the petitioner, because it provides that a certificate of appealability will issue upon a "substantial showing of the denial of a constitutional right." Neither respondents, nor the amici state attorneys general who first made this claim, explain how the

Congressional intent that "[h]abeas corpus reform must not discourage legitimate petitions that are clearly meritorious and deserve close scrutiny," Resp. Supp. Br. at 12, quoting 141 Cong. Rec. § 4596 (Senator Hatch), would be forwarded by precluding review to correct procedural errors which prevent meritorious claims from being addressed.[6] As the Solicitor General points out, such a scheme could only lead to confusion on procedural questions, U.S. Br. at 23, which Congress could not have intended. Petitioner showed in his supplemental brief that the use of the term "constitutional right" in § 2253(c) must be taken as a shorthand reference to violations of the "Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The indiscriminate use of the terms "constitutional" and "federal" in the AEDPA amendments compels the conclusion that Congress did not intend to alter the existing substantive standard for certificates of probable cause under *Barefoot v. Estelle*, 463 U.S. 880 (1983). *See* Pet. Supp. Br. at 18-20, App. 3-5. Neither respondents nor amici make any attempt to analyze the irreconcilably inconsistent use of these terms in AEDPA; nor do they explain why, for instance, a petitioner in an opt-in jurisdiction would be entitled to a stay of execution throughout the proceedings on a showing of denial of a "federal right," 28

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[6] The respondents and amici rely upon general congressional statements in favor of habeas reform as a justification for interpreting all provisions of AEDPA as intended to give every habeas petitioner, in essence, the bum's rush. To the contrary, Congressional reform of habeas procedures was intended to preserve access to one full and fair round of federal habeas review: that was the basic thrust of the Powell Committee report, which stimulated calls for habeas reform. *See* Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, *Committee Report and Proposal* 6, 15 (1989). In fact, Congress did not adopt one proposed provision which suggested that the courts should interpret the opt-in provisions of AEDPA in favor of speed rather than fairness. *See* H.R. 729, 104th Cong. (1995) (proposed § 2263) ("This chapter shall be construed to promote the expeditious conduct and conclusion of State and Federal court review in capital cases.") This Court has also rejected a "seemingly perverse" interpretation of AEDPA, *Stewart v. Martinez-Villareal*, 118 S.Ct. at 1621, even though the proffered interpretation would have reduced the volume of habeas litigation.

U.S.C. § 2262(b)(2), if there could be no appeal on the basis of denial of such a right under § 2253(c).[7] Reviewing the statute as a whole, *see Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993), the confusion in these provisions is evident: what is absent is any evidence of Congressional intent to change the substantive standard of *Barefoot. Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222, 227 (1957) ("it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.").[8]

In this case, Mr. Slack alleged substantial constitutional claims in his amended petition. The state did not oppose issuance of a certificate of probable cause on the ground that the underlying claims were insubstantial, but only on the ground that the procedural abuse of the writ question was insubstantial. JA 186-194; *see* p. 1, above; Pet. Supp. Br. at 3-5.[9] The Solicitor General, and

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[7] The point is further demonstrated by the application of the certificate provision to proceedings under 28 U.S.C. § 2255. Motions under § 2255 are clearly proper to correct non-constitutional errors. 28 U.S.C. § 2255 ¶ 1; *see, e.g., Russell v. United States*, 507 F.2d 1029, 1032 (4th Cir. 1974). There is no evidence of any Congressional intent to bar review of substantive errors in federal sentencing by means of the amendment to § 2253(c).

[8] The language of AEDPA is not a change in previous statutory language, which might furnish some evidence of an intent to alter the meaning of an existing provision. *See McElroy v. United States*, 455 U.S. 642, 650 n. 14 (1982). Rather, Congress was apparently attempting to codify the judicial standard of *Barefoot*, which was stated in a variety of ways in *Barefoot* itself; and the legislative history indicates an intent to adhere to the standard of *Barefoot* with an additional intent only to require specification by the court of the issues which met the standard. *See* Pet. Supp. Br. at 16-20. If Congress had intended the radical change in habeas practice suggested by respondents, it is highly unlikely that no mention of it would have been made in the legislative history. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979) ("silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." [Footnote omitted]).

[9] Contrary to the suggestion of amici, *see* CJLF Br. at 15; U.S. Br. at 21-22, a showing of merit as to an underlying substantive claim cannot be required as a condition of issuing a certificate of appealability, when procedural error has prevented the petitioner from making any such showing. Mr. Slack's petition was disposed of on a motion to dismiss, in which the allegations of the petition must be taken as true. *E.g., Sutton v. United Air Lines, Inc.*, 119 S.Ct. 2139, 2143 (1999); *United States v. Gaubert*, 499 U.S. 315, 327 (1991). The district court's error in finding the petition barred as "second or successive" prevented any litigation or evaluation of the merits of petitioner's claims. As in *Bracy v. Gramley*, 520 U.S. 899 (1997), a petitioner cannot be required to prove the underlying claim before obtaining review of the procedural error – denial of discovery in *Bracy* – which prevents him from proving the claim.

even amicus Criminal Justice Legal Foundation, agree that there is no indication in AEDPA of Congressional intent to take the radical step of barring all review of procedural issues at the bequest of a habeas petitioner. *See Jones v. United States*, 119 S.Ct. 1215, 1220 (1999); U.S. Br. at 22-23; CJLF Br. at 13. Mr. Slack has demonstrated that the district court erred in dismissing his amended petition under the abuse of the writ doctrine, and that is a "question of some substance" which presents "issues debatable among jurists of reason." *Barefoot*, 463 U.S. at 893 and n.4 (citations omitted). Accordingly, even if the appeal provisions of AEDPA do apply here, Mr. Slack's case is properly before this Court under the substantive standard of *Barefoot*, which AEDPA codifies.

Even assuming *arguendo* that Congress intentionally departed from *Barefoot* by using the term "constitutional" in § 2253, it would be irrational to conclude that Congress meant to eliminate procedural appeals in habeas corpus cases. If that was Congress' intent, it could and would have done so as clearly as it precluded review on certiorari of decisions granting or denying leave to file successive habeas petitions. 28 U.S.C. § 2244(b)(3)(E). Nonetheless, the state respondents and their amici assert that AEDPA accomplished this result on the theory that procedural errors involve the denial of "federal" rights and not "constitutional" rights and thus fall among the class of issues Congress supposedly meant to eliminate from appellate review. But the truth is, procedural errors do not constitute the denial of "federal rights" any more than they would constitute denial of "constitutional rights;" a ruling misapplying the exhaustion or abuse of the writ doctrines, or

discovery rules, does not deprive a petitioner of any "federal right" or "constitutional right" unless it prevents examination of the underlying substantive claim. Thus, under respondents' analysis, *Barefoot* should not have allowed federal appellate review of procedural errors because such errors did not amount to "a substantial showing of a denial of a federal right," *Barefoot*, 463 U.S. at 893.

But *Barefoot* **did** allow appeals on "debatable" procedural issues, as respondents and amici do not dispute, and it did so because a procedural error that prevents consideration of the underlying right results in the "denial" of the underlying right itself. Thus, even if respondents and their amici were correct that Congress' use of the term "constitutional" was meant to alter the *Barefoot* standard, the most it can mean is that Congress limited the types of substantive issues susceptible to review, while permitting the federal appellate courts to address procedural issues that prevent consideration of those substantive claims. That distinction would not affect Mr. Slack's case, because the substantive claims contained in his petition rest on federal constitutional grounds.

V. CONCLUSION

AEDPA does not control any portion of this case. Even if it did, the new Act does not prevent this Court from addressing the procedural issues presented by Mr. Slack's case, and Mr. Slack has not filed a "second or successive" application for habeas corpus under either the pre-AEDPA law (which properly applies to his case) or under AEDPA. This Court should accordingly vacate the order of the Court of Appeals denying the certificate of probable cause, and remand the case for further proceedings.

DATED this 13th day of January, 2000.

Respectfully submitted,

FRANNY A. FORSMAN
Federal Public Defender For the District of Nevada
TIMOTHY P. O'TOOLE
*MICHAEL PESCETTA
Assistant Federal Public Defenders
330 S. Third St., Ste. 700
Las Vegas, Nevada 89101
(702) 388-6755
Counsel of Record