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Supreme Court, U.S.
FILED
DEC 15 1999
CLERK

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 BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

This Court granted certiorari to address the following question:

> If a person's petition for habeas corpus under 28 U.S.C. § 2254 is dismissed for failure to exhaust state remedies and he subsequently exhausts his state remedies and refiles the § 2254 petition, are claims included within that petition that were not included within his initial § 2254 filing 'second or successive' habeas applications?

After briefing and oral argument, the Court ordered supplemental briefing and reargument on the following issues:

(1) Do the provisions of AEDPA, specifically including 28 U.S.C. § 2253(c) and 28 U.S.C. § 2244(b), control the proceedings on appeal?

(2) If AEDPA does control the proceedings on appeal, may a certificate of appealability issue under 28 U.S.C. § 2253(c)?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

I. Introduction

In the previous briefing, petitioner Slack demonstrated that a habeas corpus petition is not a "second or successive" application within the meaning of Rule 9(b) of the Rules Governing Section 2254 Cases, when previous petitions have been dismissed "without prejudice" for exhaustion of state remedies.[1] The intent of Congress in enacting Rule 9(b) was to limit repeated applications for writs of habeas corpus after previous petitions had been fully litigated, not to apply a res judicata rule on the basis of a prior dismissal without prejudice. Congress itself inserted the "abuse of the writ" terminology in Rule 9(b), and explicitly stated that "[t]he abuse of the writ standard brings Rule 9(b) into conformity with existing law." H.R. Rep. No. 94-1471 at 5, reprinted in U.S. Code, Cong. and Admin. News at 2482 (1976). In 1976, "existing law" included former 28 U.S.C. § 2244(b). That provision made it absolutely clear that a subsequent petition could not be dismissed unless a previous petition had been decided on the merits. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618, 1625 (1998) (Thomas, J., dissenting); see also Rules Governing Section 2255 Cases, Rule 9(b) (using identical terminology with respect to § 2255 motions, in which dismissals for exhaustion do not exist.) Thus petitioner must prevail on the issue upon which this Court originally granted certiorari because his habeas corpus application, filed after a previous dismissal without prejudice for exhaustion, cannot be "second or successive."

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[1] This is the only rule consistent with the "without prejudice" character of a dismissal for exhaustion under *Rose v. Lundy*, 455 U.S. 509 (1982) which can have no preclusive effect, *see Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618, 1621 (1998); and it is the only rule that recognizes the abuse of the writ doctrine as a "modified res judicata rule," *Felker v. Turpin*, 518 U.S. 651, 664 (1996); *McCleskey v. Zant*, 499 U.S. 467, 489-490 (1991), which depends upon a "prior adjudication" to apply. *Id.* at 482.

In response to the amicus curiae brief filed by various state attorneys general, this Court ordered briefing on whether the provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) apply to this case and, if so, whether a certificate of appealability can issue under 28 U.S.C. § 2253(c). AEDPA does not apply to this case at all and, even if it did, AEDPA does not leave the federal appellate courts powerless to address procedural errors in habeas corpus cases.

AEDPA clearly does not apply to this case. Even if the state had not waived any issue as to the applicability of AEDPA by failing to invoke the Act in the district court or the court of appeals, AEPDA still could not apply here because Mr. Slack indisputably commenced this action by filing a petition for writ of habeas corpus in the district court before the enactment of AEDPA. Mr. Slack's case was therefore one of the "cases pending" prior to AEDPA, to which the amendments to Chapter 153 do not apply under *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997). Both the successive petition provisions of 28 U.S.C. § 2244(b), and the appeal provisions of 28 U.S.C. § 2253, are contained in the Chapter 153 amendments of the Act and amici have not offered any rational theory upon which to avoid the force of the holding in *Lindh*. Holding that parts of AEDPA apply to pending cases while others do not would lead to the kind of confusion that characterized the welter of conflicting cases before *Lindh* resolved these issues by imposing a simple, bright-line rule of application, based upon the intent of Congress.

Even if AEDPA applied to this case, it would not change the result. The certificate of appealability provisions of AEDPA do not make the radical change in the availability of appellate review invented by amici. Congress intended that the certificate of appealability provision retain the substantive standard of *Barefoot v. Estelle*, 463 U.S. 880 (1983) – which allowed for review of procedural and substantive questions – and appellate review in this case remains available under

Hohn v. United States, 524 U.S. 236, 118 S.Ct. 1969 (1998). Substantively, it does not matter whether AEDPA governs review of this case because the definition of "second or successive" petition is the same under AEDPA and pre-AEDPA law, and that definition does not include petitions filed after previous petitions have been dismissed without prejudice for exhaustion. *Stewart v. Martinez-Villareal*, 118 S.Ct. at 1621-22. This Court therefore must resolve the question on which it granted certiorari and hold that Mr. Slack's habeas corpus application was not "second or successive."

II. The State Has Waived Any Right To Rely Upon AEDPA Under Any Of The Theories Posed By This Court's Order For Further Briefing.

The two questions presented for further briefing cannot form the basis for a judgment in favor of the state respondents because they have waived any reliance on the legal arguments posed by the Court's questions. The state never argued that any provision of AEDPA applied, either in the district court or the court of appeals, and it affirmatively argued in this court that AEDPA does not apply.[2] The district court and the

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[2] Mr. Slack's current habeas corpus proceeding was commenced on May 20, 1995, with the filing of a petition in district court. JA 35. Pursuant to the district court's order, the amended petition at issue here was filed on December 24, 1997. JA 66. At no time in the lower court proceedings did respondents suggest in any way that any portion of AEDPA applied to the proceedings in this matter. The state's motion to dismiss the amended petition, filed after the adoption of AEDPA, did not rely on or mention AEDPA. JA 92. When petitioner sought a certificate of probable cause for appeal, relying on pre-AEDPA standards, JA 163, the state's opposition (filed after the district court's denial of the certificate of probable cause, JA 182, 184, but transmitted to the court of appeals along with the record), did not claim that the certificate of appealability standards of AEDPA applied. The state did not claim that the procedural issues involved were unreviewable; instead, it argued under the standard of *Barefoot v. Estelle* that a certificate of probable cause should not be issued because the procedural issues were frivolous in light of *Farmer v. McDaniel*, 98 F.3d

court of appeals, which denied certificates of probable cause under pre-AEDPA law, did not apply the Act. *E.g.*, *Miree v. Dekalb County*, 433 U.S. 25, 34 (1977); *cf. United States v. Williams*, 504 U.S. 36, 40-45 (1992) (court of appeals passed on issue raised in petition for certiorari although not raised by party). This case is therefore indistinguishable from *Buchanan v. Angelone*, in which this Court held that a claim that the petitioner "belatedly attempted to adopt at oral argument . . . was waived, since . . . petitioner never raised this claim previously." *Buchanan v. Angelone*, 522 U.S. 269, 118 S.Ct. 757, 762 n.4 (1998); Sup. Ct. Rule 15.2. Here, the state seeks to preclude federal court consideration of Mr. Slack's substantial constitutional claims by invoking entirely procedural impediments. It would be grossly unequal treatment to allow the state, in the same proceeding, to ignore procedural rules itself.

The arguments advanced by the attorney general amici do not involve this Court's subject matter jurisdiction or that of the lower courts. Every court of appeals has held that a state waives reliance on AEDPA by failing to invoke the statute.[3]

1548 (9th Cir. 1996), *cert. denied*, 520 U.S. 1188 (1997). JA 185-186, 195. The state also distinguished cases cited by the petitioner in part on the ground that those cases arose under AEDPA. JA 187-188. The state did not argue that the underlying constitutional claims asserted by petitioner were not substantial ones. JA 184-195. Both the district court and the court of appeals denied certificates of probable cause, under pre-AEDPA law, not certificates of appealability. JA 182, 197. Finally, the state respondents explicitly argued in this Court that AEDPA is irrelevant to this case. Resp. Br. at 29-30; 40 ("Slack's arguments center around 28 U.S.C. § 2244 as amended by the AEDPA. *This statute does not govern Slack's petition and the issues Slack raises are not before this Court.*" (Emphasis supplied.)) The state's brief also did not adopt the arguments made by the attorney general amici. Only at oral argument, under questioning by the Court, did counsel for the state purport to join in amici's arguments under AEDPA.

[3] *Emerson v. Gramley*, 91 F.3d 898, 900 (7th Cir. 1996), *cert. denied*, 520 U.S. 1122, 1139 (1997); *Arnold v. Evatt*, 113 F.3d 1352, 1362 n.57 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 715 (1998); *Belgarde v. Montana*, 123 F.3d 1210, 1214 n.5 (9th Cir. 1997); *Davis v. Executive Director of Dept. of Corrections*, 100 F.3d 750, 755 n.1 (10th Cir. 1996), *cert. denied*, 520 U.S. 1215 (1997).

The state therefore cannot properly assert amici's arguments that any part of AEDPA applies on the theory that the amended petition and the notice of appeal were filed after its enactment, because those arguments have been waived by the state's failure to make them in the district court or the court of appeals. Similarly, the state cannot properly rely upon any argument with respect to the permissible scope of a certificate of appealability, since that argument was never previously made.[4] Accordingly, respondents have waived any right to assert amici's arguments.

III. AEDPA'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 successor petition and appeal provisions of AEDPA do not apply to Mr. Slack's case. This Court held in *Lindh v. Murphy*, 521 U.S. at 326-27, that the Chapter 153 provisions of the Act do not apply to "cases pending" before its enactment, based on the clear contrast with the explicit Congressional intent to apply the Chapter 154 provisions to "cases

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[4] The certificate provision is a screening mechanism, not a jurisdictional element carrying a substantive content independent of the issues on appeal. *Young v. United States*, 124 F.3d 794, 799 (7th Cir. 1997) (defect in certificate of appealability does not implicate subject matter jurisdiction and issue waived by government's failure to raise it), *cert. denied*, 118 S.Ct. 2324 (1998); *accord Gatlin v. Madding*, 189 F.3d 882, 886-87 (9th Cir. 1999) (per Rymer, J.) (failure of state to oppose request for certificate of appealability to review exhaustion issue waived any issue as to propriety of certificate); *United States v. Talk*, 158 F.3d 1064, 1068 (10th Cir. 1998) (failure to object to erroneously-issued certificate of appealability waives issue), *cert. denied*, 119 S.Ct. 1079 (1999).

pending" at the time the Act took effect. Mr. Slack indisputably filed his petition for writ of habeas corpus before AEDPA's enactment. JA 35. A "case," once begun, remains "pending" until final on appeal. "An appeal is a proceeding in the original cause and the suit is pending until the appeal is disposed of." *Mackenzie v. Engelhard & Sons Co.*, 266 U.S. 131, 142-43 (1924) (per Holmes, J.); *see Hohn v. United States*, 118 S.Ct. at 1974-75. This Court's ruling in *Lindh* is therefore controlling.

In *Lindh*, this Court held that Congress intended to exclude *all* non-capital and non-opt-in capital cases filed on or before April 24, 1996 from the application of *all* the habeas corpus and § 2255 revisions made by AEDPA. This Court concluded that the statutory language of AEDPA, examined as a whole, "reveals Congress' clear intent to apply the amendments to Chapter 153 only to such cases as were filed after the statute's enactment (except where Chapter 154 otherwise makes select provisions of Chapter 153 applicable to pending cases)." 521 U.S. at 326; *see also Landgraf v. USI Film Products*, 511 U.S. 244, 263-64, 272-73, 286 (1994).[5] Virtually every pertinent post-*Lindh* decision explicitly or

[5] This Court's reference to "select provisions" of Chapter 153 explains its statement that "the new provisions of Chapter 153 *generally* apply only to cases filed after the Act became effective," *Lindh*, 521 U.S. at 336 (emphasis added), which does not imply that the *Lindh* court was undermining its own holding. Some of the new provisions of Chapter 153, such as the appeal and successive petition provisions, are common to all types of habeas proceedings, including Chapter 154 proceedings, since Chapter 154 does not contain parallel appeal and successive petition provisions. *See Lindh*, 521 U.S. at 335-36. To the extent that the opt-in provisions of Chapter 154 apply to pending cases, the "new provisions" of Chapter 153 common to all habeas cases could also apply to these qualifying Chapter 154 cases. Thus *Lindh* was accurate in saying that the new provisions of Chapter 153 "generally" could not be applied to pending cases, because those provisions could not be applied to pending non-capital (or capital non-opt-in) cases, but they could be applied in the limited situation where an opt-in capital case qualified for such retroactive application under Chapter 154.

implicitly confirms this analysis. In *Dickey v. United States*, 118 S.Ct. 2365 (1998), this Court granted certiorari, vacated and remanded for reconsideration in light of *Lindh* a lower court decision applying AEDPA's amended § 2253 in a § 2255 case in which the appeal was filed after, but the § 2255 motion was filed before, April 24, 1996.[6] The GVR order in *Dickey* makes sense only if § 2253 does not apply to any case commenced before AEDPA's enactment, even if the appellate proceedings begin afterward.[7]

The courts of appeals have almost unanimously recognized that AEDPA is inapplicable to a case in which a federal

[6] This Court issues GVR orders only when "intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests on a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996); *Stutson v. United States*, 516 U.S. 193 (1996).

[7] This Court's decision in *Hohn* is not to the contrary. There, prior to *Lindh*, this Court denied certiorari on the propriety of applying new § 2253 to pending cases while granting certiorari on other issues. *See Hohn v. United States*, 99 F.3d 892, 893 (8th Cir. 1996) (per curiam), *cert. granted in part & denied in part*, 118 S.Ct. 361 (1997), *vac'd & remanded*, 118 S.Ct. 1969 (1998). On review, the Court treated the case as if it were subject to AEDPA, *see Hohn v. United States*, *supra*, 118 S.Ct. at 1972, an action consistent with the Court's denial of certiorari on this particular issue, which rendered the Eighth Circuit's ruling on the issue the "law of the case" without implying any validation of the ruling by this Court. *See Brown v. Allen*, 344 U.S. 443, 488-97 (1953). In resolving the issue on which certiorari was granted, the Court did not express or indicate any views on the propriety of the Eighth Circuit's ruling on the applicability of AEDPA to the case and, indeed, framed its holding in terms that expressly covered pre-AEDPA certificates of probable cause as well as AEDPA certificates of appealability. *See id.* at 1977 (overruling *House v. Mayo*, 324 U.S. 42 (1945) (per curiam), which held that the Court "lack[s] statutory certiorari jurisdiction to review refusals to issue certificates of probable cause"). Because *Hohn* is silent on the question at issue here, while the Court's later decision in *Dickey* suggests that the Eighth Circuit's approach is inconsistent with *Lindh*, *Hohn* provides no support for the proposition that the amendments to § 2253 apply here.

habeas corpus petition or § 2255 motion was filed on or before April 24, 1996, regardless of the timing or status of the appeal at any point thereafter.[8] The Third Circuit properly analyzed this issue in *United States v. Skandier*, 125 F.3d 178, 180-82 (3d Cir. 1997):

> The essential message of *Lindh*, we believe, is that we need not resort to default rules of retroactive/prospective application when the intent of Congress is clear and no Constitutional violation would be worked by applying the statute as Congress intended. . . . We conclude that the most plausible reading of the Court's language is that the amendments to Chapter 153 should not be given retroactive effect unless expressly provided for elsewhere in the text of the Act and that that reading is most consistent with the tenor and analysis of *Lindh*. Thus, since § 2253(c) is part of Chapter 153, we hold that that section should not apply to a § 2255 motion that was filed before AEDPA's effective date. Because we dispose of the case on the grounds of Congressional intent, as the Supreme Court itself has found it, we need not address the matters that would be predicate to determining the applicability of the default rules. Nor are we persuaded that the filing of a notice of appeal after AEDPA's effective date institutes a new proceeding such that we could find that Skandier's case was not pending on April 24, 1996 and thus that the new § 2253(c) should apply. Rather, we believe that the better view for present purposes is that there is but one case, which commences with the filing of the petition or motion and continues throughout the appellate process. Thus, so long as the § 2255 motion was filed before April 24, 1996, there was a case pending on that date even if the notice of appeal was filed after that date. At all events, we are controlled by *Lindh*, and our decision here is compelled by the Court's reasoning in that case.

[8] Because of the number of these cases, and the extreme limitation on the length of this brief, petitioner has compiled the Court of Appeals cases recognizing that AEDPA is inapplicable to a case in which a federal habeas corpus petition or § 2255 motion was filed on or before April 24, 1996 – which include decisions from the First, Second, Third, Fifth, Sixth, Ninth, Tenth, Eleventh and District of Columbia Circuits – in an accompanying appendix.

Accord, *Crowell v. Walsh*, 151 F.3d 1050, 1051-52 (D.C. Cir. 1998) (noting express disapproval in *Lindh* of contrary ruling in *Hunter v. United States*, 101 F.3d 1565, 1569 (11th Cir. 1996) (en banc)).

Crowell also analyzes and rejects the Eighth Circuit's ruling in *Tiedeman v. Benson*, 122 F.3d 518, 520-21 (8th Cir. 1997), the one decision that has strayed from the otherwise solid wall of circuit authority on this issue. *Tiedeman* relies upon a retroactivity, rather than statutory intent, analysis to conclude that AEDPA's amendment of 28 U.S.C. § 2253 applies to cases in which a petition was filed before April 24, 1996, if the appeal was filed after that date.[9] Contrary to the Eighth Circuit's position, the Congressional intent that the Chapter 153 amendments apply only to "cases" filed after the statute's enactment (as this Court held in *Lindh*, 521 U.S. at 326) is controlling. *See also Landgraf*, 511 U.S. at 263-64, 286. In enacting AEDPA, Congress sought to reduce confusion and delay in habeas proceedings. Adopting a rule that would apply different versions of the habeas corpus statutes

[9] The Eighth Circuit's analysis was also premised on an express concession by both parties, and adopted by the court, that the new provisions of § 2253 were substantively identical to the old ones, which eliminated any need to analyze adequately whether retroactive application of the appeal provisions was permitted by *Lindh* or *Landgraf*. *Id.* at 521. The *Tiedeman* position has been questioned by other panels of the same circuit. *See Ramsey v. Bowersox*, 149 F.3d 749, 759-60 (8th Cir. 1998); *Roberts v. Bowersox*, 137 F.3d 1062, 1067-68 (8th Cir. 1998)

to the same case, depending on how far that case had progressed through the federal courts, would engender substantial confusion and create increased litigation. *Cf. Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (importance of clear and specific rules in habeas proceedings).

The "second or successive" petition provisions of AEDPA, 28 U.S.C. § 2244(b), also do not apply here. The brief of the amici state attorneys general does not cite a single authority remotely suggesting that the filing of an amended pleading begins a new habeas "case." To the contrary, an amended pleading is a continuation of the pending action. *See* 28 U.S.C. § 2242 (habeas petition "may be amended or supplemented as provided in the rules of procedure applicable to civil actions."); *United States v. Skandier*, 125 F.3d at 182; see also *Hohn v. United States*, 118 S.Ct. at 1974-75; *Mackenzie v. Englehard & Sons Co.*, 266 U.S. at 142-3. Mr. Slack's "case" was indisputably "pending" before the enactment of AEDPA, and there is no rational basis for disregarding *Lindh* because of the filing of an amended pleading.[10] There is no basis in the language or legislative history of AEDPA (any more than there is in the language or legislative history of Rule 9(b)) suggesting an intent to turn the abuse doctrine into

[10] *Lindh*'s reasoning itself compels the conclusion that an amended pleading cannot constitute a new "case." Congress included a specific provision only in the opt-in scheme of Chapter 154 for treating an attempt to amend as if it were an attempt to file a "second or successive" petition. 28 U.S.C. § 2266(b)(3)(B). That distinction in treatment conclusively shows that Congress intended that an amendment could not be treated as a "second or successive" petition under Chapter 153. This conclusion is also consistent with the abuse of the writ doctrine itself, which is a "modified res judicata rule." *Felker v. Turpin*, 518 U.S. at 664. An amended pleading almost never follows an adjudication of the claims of any previous pleading, so the primary requirement of res judicata – a prior adjudication – is as much absent with respect to an amendment as it is to a previous dismissal without prejudice for exhaustion.

a mere anti-amendment rule. See Pet. Br. at 27-31; *Stewart v. Martinez-Villareal*, 118 S.Ct. at 1622.[11]

IV. Applying The Chapter 153 Amendments To Cases Like Mr. Slack's – Where The Case Was Commenced Before The Passage Of AEDPA But The Appeal Was Commenced Afterward – Would Undermine The Straightforward Result In *Lindh* By Creating Substantial Confusion As To Which Statutory Provisions Would Govern On Appeal And By Creating The Potential For Applying Different Rules On Appeal Than Were Used At Trial

The bright line drawn by AEDPA distinguishes "cases pending on . . . [t]he date of enactment of this Act," from cases that were not. Pub. L. 104-132 § 107(c). AEDPA and *Lindh* makes the pendency of the "case" as a whole, and not the "appeal" or some other "stage" of the case the critical point; and the statute's bright-line character is preserved only by treating the case's original filing date as determinative of the applicability of all portions of AEDPA. This clarity is imperative because, pre-*Lindh*, the lower courts had formulated many conflicting rules regarding the timing of the application of AEDPA's provisions, including the amendments to 28 U.S.C. § 2253. One of *Lindh*'s substantial virtues is that it ended disagreement on the subject of the application of AEDPA's provisions. Indeed, other than the Eighth Circuit's ruling in *Tiedeman*, every other post-*Lindh* ruling has held

[11] Any argument to the contrary would founder on the principle that Congress did not intend absurd results. Claims in a "second or successive" petition are almost necessarily barred under AEDPA: Claims raised in a previous petition are absolutely barred, 28 U.S.C. § 2244(b)(1), and new claims are barred except in extraordinarily narrow circumstances, 28 U.S.C. § 2244(b)(2). If an amended petition were considered a "second or successive" one, the mere filing of an amended petition would eliminate any habeas review, since both claims raised in the pre-amendment petition and new claims would be barred. If Congress intended so radical and absurd a result, it would have said so.

that, if a "case" originally was commenced on or before April 24, 1996, then pre-AEDPA law governs at all stages of the case, including stages initiated after that date by filing an amendment to the original habeas corpus petition or § 2255 motion, or filing a notice of appeal.[12]

The *Tiedeman* decision ignores Congress' clear intent, recognized by this Court in *Lindh*, to treat Chapter 153 "cases" differently from Chapter 154 cases, and it fails to acknowledge Congress' legitimate concern with drawing a clear line of demarcation regarding when AEDPA should be applied. The only arguable rationale for *Tiedeman* is that it treats the appeal as the commencement of a new "case." Brief of Attorney General Amici at 8-9. Such a rule would have no conceivable limiting principle, because if the appeal constitutes a new "case," then **all** of AEDPA's provisions would govern this new "case." Thus, the appellate proceedings – or the appeal "case" in amici's terms – would not only be governed by the amended provisions of § 2253, but also by the provisions of amended § 2244 and § 2254 (which would be in flat contradiction to the explicit holding of *Lindh* with respect to § 2254).

The problems with such a rule are manifest. First, any such rule would run afoul of this Court's decision in *Hohn v. United States*, 118 S.Ct. 1969 (1998). In that § 2255 proceeding, the Court concluded that a preliminary pleading filed in a court must be treated, for jurisdictional purposes, as an indivisible part of the overall "case" in that court. *Id.* at 1974-1975 (denial by district court of leave to file habeas petitions was "judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals" since presentation of petition was "institution of a suit").

Second, any rule that would treat the district court proceedings as one "case" and the appellate court proceedings as a separate "case" would lead to absurd results. Under the erroneous pre-AEDPA law of the Ninth Circuit, which is

[12] *See* fn. 6, above.

under review here, Mr. Slack's petition (filed after a previous dismissal without prejudice for exhaustion) was treated as a "second or successive" petition under *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996). Under post-AEDPA law, it could not be a "second or successive" petition. *Stewart v. Martinez-Villareal*, 118 S.Ct. at 1622; *In re Turner*, 101 F.3d 1323 (9th Cir. 1997). If AEDPA applies to the proceedings on appeal, the court of appeals would be required to remand this case to the district court; but if pre-AEDPA law governs the district court proceedings, the district court could maintain that it was still bound by *Farmer*. Such a situation would be simply absurd.

Similar examples abound, since confusion will necessarily arise from using different rules on appeal than apply during the trial court proceedings. For example, would the standard of review provisions of amended § 2254(d) apply to appellate proceedings commenced after the passage of AEDPA, despite the holding in *Lindh*, even though the pre-AEDPA standard of review provisions had been applied by the trial court? If so, how would the appellate court review a decision of the district court that was rendered under one substantive standard when its review is governed by an altered substantive standard? Would the statute of limitations provisions of § 2244(d) govern appellate proceedings commenced after AEDPA's enactment and, if so, does this mean that even if the district court addresses the entire pre-Act petition on the merits, the appellate court must apply the Act's statute of limitations, which was not in place when the petition was filed in the district court? Under amici's analysis, the answer to all of these questions would appear to be "yes," but such results would be absurd. Congress, in attempting to clarify habeas procedure, cannot have intended to adopt a confusing regime, productive of increased litigation, where different rules govern the appellate proceedings than governed the trial proceedings in the same case. *See Landgraf*, 511 U.S. at 291-92 (Scalia, J. concurring in judgment) ("relevant retroactivity event" analysis would not require reversal

on appeal on basis of admission of evidence proper at time of trial). This Court should squarely reject the position advanced by amici and by the Eighth Circuit, and hold instead that if the "case" was originally filed on or before April 24, 1996, then pre-AEDPA law governs at all stages of the case.

V. 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

Even assuming *arguendo* that AEDPA could apply to this case, it remains clear that a certificate of appealability properly can issue under amended § 2253(c). The state attorney general amici argue in their brief that the adoption of 28 U.S.C. § 2253(c) by AEDPA removed any jurisdiction in the federal appellate courts to correct procedural errors committed by the district courts, but only when those errors favor the state. According to amici, Congress accomplished this by codifying the standard for issuing a certificate of appealability as requiring "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), rather than "a substantial showing of the denial of a federal right," which was the language used in the judicial decisions to describe the necessary showing for a certificate of probable cause. *Barefoot v. Estelle*, 463 U.S. 880 (1983). Amici's argument on this point has been rejected by every court of appeals to consider it, and Congress could not have reasonably intended that AEDPA radically change habeas practice as suggested by amici.

A. The History Of The Appealability Provisions Demonstrates Both The Longstanding Practice Of Considering Appeals By Habeas Corpus Petitioners On Procedural Issues, And The Established Nature Of The Appealability Standard Set Forth By This Court In *Barefoot v. Estelle*

In 1908, Congress decided to reduce the time spent on meritless habeas corpus appeals, which were previously allowed as a matter of right, by adopting the requirement that a prisoner obtain a certificate of probable cause in order to appeal. Act of March 10, 1908, ch. 76, 35 Stat. 40; *see* H.R. Rep. No. 23, 60th Cong. 1st Sess., 1-2 (1908); 42 Cong. Rec. 608-09 (1908).[13] The statute provided no guidance on the proper standard for the issuance of a probable cause certificate, but the certificate requirement was designed to reduce the volume of meritless appeals as such, rather than to limit the ability of a habeas corpus petitioner to raise particular issues on appeal.[14] The federal cases applying the standard referred to the substantial or insubstantial character of the issues presented, without distinguishing between procedural issues and the underlying substantive claims. *See House v. Mayo*, 324 U.S. 42, 46 (1945) (per curiam).

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[13] Placing a judicial gloss even on the plain language of the certificate statute began at its inception. The 1908 statute required a certificate of probable cause for appeal, without confining the requirement to the petitioner. Despite the plain language of the statute, most courts applied the requirement only to the petitioner. *E.g.*, *United States ex rel. Tillery v. Cavell*, 294 F.2d 12, 14-15 (3d Cir. 1961); *cf. United States ex rel. Carrol v. LaVallee*, 342 F.2d 641, 642 (2d Cir. 1965) (per curiam).

[14] The major sponsor of the legislation referred not only to habeas appeals where the underlying claims lacked merit, but also to appeals in which procedural issues predominated. 42 Cong. Rec. 608-09 (1908) (Rep. Littlefield) (citing ability of petitioner to "suggest frivolous or fictitious federal question" but also citing problem that "if a man has been there once [in federal habeas proceedings], he can go right back, and right over the same case.")

This Court's decision in *Barefoot v. Estelle*, 463 U.S. 880 (1983), reflects this history, describing the standard of probable cause as "a substantial showing of a denial of [a] federal right," and in turn describing that standard as requiring a "*question* of some substance," and "*issues* debatable among jurists of reason." *Id.* at 893 and n.4 (citations omitted; emphasis supplied). This Court made no distinction between the underlying substantive claims and procedural issues which might impede their consideration: One of the cases cited in *Barefoot*, *Gordon v. Willis*, 516 F.Supp. 911, 912 n.2 (N.D.Ga. 1980), held that the question of exhaustion could be a "substantial" issue. In light of the history of the language used in judicial decisions to describe the certificate requirement, which is the background of Congress' adoption of the AEDPA provision, it is at least ambiguous whether Congress intended to use the term "constitutional right" to refer only to the underlying substantive claim at issue.[15]

B. The Changes In The Statutory Language Effectuated By AEDPA Do Not Evince Any Intent By Congress To Abandon The Well-Established Practice Of Considering Procedural Appeals In Habeas Corpus Cases Or The Well-Established *Barefoot* Rule

The current § 2253 was adopted by Congress as Section 102 of AEDPA. There is not a hint in the legislative history of the statute that Congress intended to abandon the *Barefoot* standard.

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[15] The *Barefoot* "denial of a federal right" formulation is at best a clumsy way to describe a requirement for reviewing purely procedural questions. If a district court arguably errs in ruling that state remedies are "available" and thus must be exhausted, it is difficult to identify what "federal right" is denied to petitioner. Nonetheless, the *Barefoot* standard has always been understood to allow review of threshold procedural questions overlying the question of whether a substantive right has been denied, and the corresponding AEDPA provision, which codifies *Barefoot*, should be interpreted the same way.

Early versions of AEDPA used the exact language of *Barefoot*.[16] On March 24, 1995, a predecessor of the current version of § 2253 – which phrased the certificate of appealability requirement as a "substantial showing of the denial of a constitutional right" – was introduced as S. 623 on the Senate floor by Senators Hatch and Specter. 141 Cong. Rec. S4585-01 at S4593 (March 24, 1995). On March 28, 1995, the California Attorney General and the Colorado Attorney General gave statements to the Senate Judiciary Committee in support of habeas reform, and both took the position that the proposed changes to § 2253 would codify existing law.[17] This language then was included in the final statute without any other discussion and the Joint Conference report explaining the various provisions of the statute makes no mention of the changes to § 2253. H.R. Conf. Rep. No. 104-518, Anti-Terrorism and Effective Death Penalty Act of 1996, Joint Explanatory Statement of the Committee of Conference, Title

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[16] *See* H.R. 729, 104th Cong., § 102 (January 30, 1995); H.R. 2992, 104th Cong. § 502 (February 29, 1996) ("federal right"). Other versions indiscriminately used the terms "federal constitutional right," S. 3, 104th Cong. § 902 (January 30, 1995) or "constitutional right." H.R. 2768, 104th Cong. § 902 (December 13, 1995).

[17] Statement of Daniel E. Lungren Concerning Habeas Corpus Reform, Committee on Judiciary, United States Senate, 1995 WL 146423 (March 28, 1995); Testimony of Gale A. Norton Before the Committee on the Judiciary, United States Senate, 1995 WL 143184 (March 28, 1995) (discussing revised Senate version of S. 3 and H.R. 729 and arguing that "[t]he addition of the *Barefoot v. Estelle* standard to the appeal section of the habeas statute – 28 U.S.C. § 2253 – is an important codification of existing case law"); *see also* Statement of Daniel E.Lungren Concerning H.R. 3 and Habeas Corpus Reform, United States House of Representatives, Judiciary Committee, 1995 WL 18450 (January 19, 1995) (same position on bill using "federal right" language). One of the senators who sponsored the original Senate version of the habeas corpus legislation praised then-Attorney General Lungren for having "played a prominent role in the drafting of the habeas corpus reform provisions." 141 Cong. Rec. S53-01 *S76 (January 4, 1995) (Senator Dole).

I Habeas Corpus Reform (April 15, 1996). There is accordingly no indication of any intent by Congress to make a substantial change in the standard for pursuing an appeal in habeas cases or to eliminate all appeals by petitioners on procedural issues. Nor is there any evidence of Congressional intent to limit the scope of habeas corpus only to "constitutional" issues: AEDPA does not alter the federal courts' habeas jurisdiction over "violation[s] of the Constitution or laws or treaties of the United States." *See* 28 U.S.C. § 2254(a).

Even the most vocal proponents of habeas reform expressly represented to the United States Senate – after the Senate had already made the change in the language of the pending legislation from "federal" to "constitutional" – that the amended law would merely "codify" this Court's decision in *Barefoot*. It is thus inconceivable that Congress intended a momentous shift in habeas practice – the most radical alteration in appellate jurisdiction over habeas proceedings since 1868 – which amici ask this Court to invent. If Congress intended to eliminate all possibility of appeal of procedural errors which prejudice a habeas petitioner, it would have said so explicitly, as it did when it prohibited review on rehearing or certiorari of decisions of courts of appeals on motions for leave to file successive petitions. 28 U.S.C. § 2244(b)(3)(E); *see also* Act of March 27, 1868, ch. 34, 15 Stat. 44 (explicit elimination of Supreme Court jurisdiction to review habeas proceedings), repealed, Act of March 3, 1885, ch. 353, 23 Stat. 437. As the *Hohn* court said: "we think a Congress concerned enough to bar our jurisdiction in one instance would have been just as explicit in denying it in the other, were that its intention." *Hohn*, 118 S.Ct. at 1977 (citations omitted); *accord*, *Jones v. United States*, 119 S.Ct. 1215, 1220 (1999) ("fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so").

The most likely explanation for the use of the term "constitutional" in § 2253 is simply inconsistent drafting.

AEDPA "is not a silk purse of the art of statutory drafting." *Lindh*, 117 S.Ct. at 2068. It uses the terms "federal," "constitutional," "rights," and "claims" indiscriminately, at times referring to violations of all types of "Federal right[s]" or all types of "claim[s]" cognizable in habeas corpus, but at other times referring only to "violation[s] of the Constitution or laws [but not treaties] of the United States" or only to violations of "constitutional right[s]" or to "constitutional error."[18] The inexplicable discrepancies among these provisions, and between them and the unamended jurisdictional provisions of the habeas statutes, preclude this Court from attaching profound consequences to inconsistencies in language which do not imply rational differences in treatment. *See Stewart v. Martinez-Villareal*, 118 S.Ct. 1618, 1621 (1998) (congressional language would not have intended to eviscerate previous exhaustion practice by adopting a "far-reaching and seemingly perverse" new practice).

For example, the opt-in provisions, which are designed to be the most restrictive ones, *see Lindh*, 521 U.S. at 327, require imposition of a stay of execution throughout the collateral proceedings – a major intrusion upon state sovereignty – if the petitioner shows the "denial of a *federal* right." 28 U.S.C. § 2262(b)(2) (emphasis supplied); *see also* § 2254(d)(1) (granting relief allowed where state decision contrary to "Federal law"). Allowing such a stay under the plain terms of § 2262 during the pendency of federal appellate proceedings would be incoherent if a petitioner cannot appeal at all unless he shows "denial of a constitutional right." 28 U.S.C. § 2253(c). The only explanation for this inexplicable inconsistency is drafting error, not Congressional intent.[19]

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[18] These provisions are noted in the appendix to this brief. See note 8, above.

[19] Similarly, there is no rational explanation why the statute of limitations in non-opt-in habeas corpus cases begins to run upon this Court's recognition of a new and retroactive "constitutional right," § 2244(d)(1)(C), and procedural defaults in the state courts bar evidentiary

The long-standing jurisdictional provisions in the habeas corpus statute are often loosely described as creating a remedy for "constitutional violations."[20] – "violation[s] of the Constitution or laws or treaties of the United States" – It would harmonize the various provisions in the statutory scheme to treat AEDPA's references to "constitutional" error as serving the same shorthand function.

C. Every Lower Court Has Agreed That The Statutory Changes Made By AEDPA, Construed In Historical Context, Cannot Reasonably Be Read As Depriving The Federal Appellate Courts of Jurisdiction To Consider Procedural Issues Presented By Petitioners In Habeas Corpus Cases

The lower courts unanimously agree that the statutory changes made by AEDPA cannot be read to deprive the federal appellate courts of jurisdiction to consider procedural issues presented by petitioners in habeas corpus cases. Most of the lower appellate courts have adopted the construction of the statute urged by Mr. Slack here, holding that "notwithstanding a marginal variance in the language identifying the necessary showing with respect to certificates of probable cause and appealability, we conclude that the standard governing certificates of probable cause and appealability is materially identical." *Hardwick v. Singletary*, 126 F.3d 1312, 1313 (11th Cir. 1997).[21] This Court should adopt the same rule, holding that the amendments to § 2253 codify the substantive standard for pursuing an appeal in a habeas corpus action articulated in *Barefoot v. Estelle*.

But even if the Court holds that the use of the term "constitutional" has changed the substantive standard for appeal, despite the absence of any evidence that Congress intended to do so, it should interpret the scope of the change in a reasonable fashion and not in the radical manner proposed by amici. This Court should hold that Congress' use of the term "constitutional" at most limits the types of substantive claims eligible for federal appellate review,[22] but does not alter the power of the federal appellate courts to resolve threshold procedural issues. This is the result that every lower court to consider the issue has reached.[23] Petitioner submits that the proper analysis is found in *Morris v. Horn*, 187 F.3d 333, 340 (3d Cir. 1999). There, the Third Circuit rejected the argument raised by the Commonwealth of Pennsylvania that the lower court's procedural ruling in a habeas corpus case was not appealable because it had not deprived the petitioner of any constitutional rights:

> In effect, the Commonwealth's approach would preclude appellate review of all procedural issues relating to federal habeas corpus. The district courts would be left to themselves to develop the law relating to AEDPA's statute of limitations, the

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hearings in non-opt-in cases except upon the Court's recognition of "a new [and retroactive] rule of constitutional law," § 2254(e)(2)(A)(i), but the statute of limitations in § 2255 cases begins to run upon the Court's recognition of any new and retroactive "right," § 2255(3), and procedural defaults in opt-in cases are excused by this Court's "recognition of a new *Federal* right." § 2264(a)(2) (emphasis added).

[20] *See, e.g., Herrera v. Collins*, 506 U.S. 390, 403 (1993) (habeas corpus available to remedy "any constitutional violation").

[21] *Accord Tejeda v. Dubois*, 142 F.3d 18 (1st Cir. 1998) ("identical substantive requirements"); *Nelson v. Walker*, 121 F.3d 828, 832 n.3 (2d Cir. 1997) (same); *Murphy v. Johnson*, 110 F.3d 10, 11 (5th Cir. 1997) (same).

[22] *See Murphy v. Netherland*, 116 F.3d 97, 99-100 (4th Cir. 1997) (amendment to § 2253 changed substantive standard for obtaining permission to appeal in habeas corpus case by requiring petitioner to demonstrate that underlying claim rests on constitutional grounds).

[23] The relevant cases are listed in Appendix III. See footnote 8, above.

> exhaustion requirement, etc., potentially leading to unreviewable contradictions in the law of the circuit of the erroneous denial of relief to a petitioner under sentence of death. We do not accept the proposition that appellate review is unavailable on these issues.
>
> A well-reasoned rule has been set forth in a series of cases from the Fifth Circuit. [Citations.] Under this approach, a certificate is granted only if the petitioner makes (1) a credible showing that the district court's procedural ruling was incorrect; and (2) a substantial showing that the underlying habeas petition alleges a deprivation of constitutional rights. At oral argument, the Commonwealth conceded the merit of the Fifth Circuit standard.

Morris, 187 F.3d at 340.[24] Where the district court ruling rests entirely on erroneous procedural grounds, "the prudent course [is] to grant the certificate of appealability and take jurisdiction, and then remand to the district court for further proceedings." *Id.* at 341.

The courts of appeals are in agreement that they may continue to review procedural issues in habeas corpus cases, under the amendments to § 2253. Amici, by contrast, cite no case, and nothing in the legislative history, remotely suggesting that AEDPA was intended to abolish appellate review of errors relating to exhaustion, procedural default, discovery, or any of the numerous procedural issues which may arise in the course of resolving the underlying substantive claims. Amici also cite no policy in favor of leaving the district courts entirely without guidance or appellate supervision on these

[24] Despite Pennsylvania's acknowledgement before the Third Circuit that the argument advanced in *Morris* was baseless (by its concession of the "merit of the Fifth Circuit rule"), Pennsylvania has nonetheless advanced the same baseless argument here by joining the state attorney general amici brief.

issues.[25] When Congress wanted to eliminate review of procedural issues in AEDPA, it did so explicitly, and in a way that precluded review by either party. 28 U.S.C. § 2244(b)(3)(E) (prohibiting review on rehearing or certiorari of court of appeals' screening decision to allow a second habeas petition to be filed); *see Hohn v. United States*, 118 S.Ct. at 1976. This Court cannot conclude that Congress intended to make the radical change in habeas procedure posited by amici, which is far broader than the limitation imposed by § 2244(b)(3)(E), without making the limitation explicitly, "in terms," *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868), as Congress did in 1868.

If there were any doubt about the matter, however, the interpretation of AEDPA proposed by amici must also be rejected because it would render the statute unconstitutional. Removing jurisdiction to review procedural errors by the district court, which in turn would destroy the availability of habeas relief on meritorious substantive claims, would violate the anti-suspension clause of the Constitution. U.S. Const. Art. II § 9. Such a system is entirely unlike the restrictions imposed by AEDPA on review by either party of motions to

[25] Adoption of the position proposed by amici would call into question the validity of important procedural decisions of this Court. In *Calderon v. Ashmus*, 523 U.S. 740, 118 S.Ct. 1694 (1998), this Court concluded that a declaratory judgment action to determine whether a state satisfied the "opt-in" standards of AEDPA was premature, in part on the theory that the question of compliance with the "opt-in" standards could be litigated in the habeas proceeding. 118 S.Ct. at 1699. If amici's view is adopted, the decision in *Ashmus* would have to be reconsidered, since that procedural issue could not be reviewed on appeal in federal court at the instance of a petitioner. Likewise, in *Breard v. Greene*, 523 U.S. 371, 118 S.Ct. 1352, 1355 (1998), this court addressed procedural default issues and *Teague* issues raised by a petitioner, which, under amici's theory, it did not have jurisdiction to review. Again, if Congress had actually intended to leave this Court powerless to review procedural errors made by the district court which disfavor a petitioner, some less cryptic method of indicating its intention would be necessary.

file successive habeas proceedings, which this Court found to be within the "evolutionary" development of the abuse of the writ doctrine in *Felker v. Turpin*, 518 U.S. at 664. Further, under AEDPA, the state respondents in a habeas case do not have to obtain a certificate in order to appeal, but the petitioner must obtain one. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). If, as amici argue, a certificate cannot be issued to review procedural errors committed by a district court, then one party, the state, can obtain review as a matter of right of all procedural errors which disfavor it, but the petitioner could never obtain such review. Such a scheme of entirely one-sided review would violate the equal protection and due process clauses of the Fifth and Fourteenth Amendments. *E.g.*, *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *see M.L.B. v. S.L.J.*, 519 U.S. 102, 126-127 (1996); *Douglas v. California*, 372 U.S. 353 (1963). It would also constitute a legislative attempt to manipulate judicial outcomes, which has been recognized as impermissible for over a century. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871); *see United States v. Sioux Nation of Indians*, 448 U.S. 371, 404 (1980). This Court must reject amici's interpretation of AEDPA, since it calls into question the constitutionality of the statute, and a reasonable alternative construction of § 2253 is available.

VI. 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 issue 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 15th day of December, 1999.

Respectfully submitted,

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