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by Jay E. Grenig

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ISSUE

If a person's petition for habeas corpus is dismissed for failure to exhaust state remedies, and the person then exhausts his state remedies and refiles the petition, are the claims within that petition that were not included in the initial filing "second or successive" habeas applications?

FACTS

In 1989, 19-year-old Antonio T. Slack was charged with first-degree murder of 12-year-old Alanna Holmes, who had died from a single, close-range shot in the neck. Slack turned himself in to police soon after the shooting because he was having nightmares about seeing Holmes die. At the trial, Slack admitted that he had shot Holmes but claimed that the killing was accidental. The jury convicted Slack of second-degree murder. The court sentenced him to life imprisonment in the Nevada State Prison and imposed a consecutive life sentence because he had used a deadly weapon in connection with the killing.

Slack appealed his conviction to the Nevada Supreme Court, claiming that there was insufficient evidence adduced at his trial to convict him, that state law improperly allowed evidence of Slack's sexual relationship with the victim, that the jury instruction regarding reasonable doubt was improper, and that the trial court erred by not adequately defining premeditation in the jury instruction.

After his appeal was dismissed by the Nevada Supreme Court in 1991, Slack, representing himself, filed a petition for a Section 2254 writ of habeas corpus in the U.S. District Court for the District of Nevada. Slack contended that insufficient evidence was adduced at trial to convict him of second-degree murder, that the trial court improperly allowed prejudicial evidence of a sexual relationship between Slack and the 12-year-old victim, that the reasonable doubt instruction violat-

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SLACK V. MCDANIEL, WARDEN
DOCKET NO. 98-6322

RE-ARGUMENT DATE:
MARCH 29, 2000
FROM: THE NINTH CIRCUIT

Case at a Glance

The Supreme Court is asked to determine whether a prisoner may include claims in a Section 2254 petition for habeas corpus that were not included in an earlier petition that had been dismissed for failure to exhaust state remedies.

ed the due process clause of the Constitution, and that the trial court had erred in not adequately defining premeditation in the jury instructions regarding murder.

Slack later moved to stay the proceedings on his petition for a writ of habeas corpus so that he could pursue post-conviction relief proceedings in the Nevada state courts. Included in the motion was a list of unexhausted issues, not contained in his initial filing, that Slack proposed to exhaust during the state court habeas corpus proceedings. The district court dismissed this petition without prejudice so that Slack could exhaust his state remedies.

In July 1992, Slack, again representing himself, filed a petition for post-conviction relief in a Nevada state court. In his petition, Slack alleged he had been denied his Sixth and Fourteenth Amendment rights to the effective assistance of trial counsel in that his counsel (1) failed to find out what kind of deal was made with co-defendant Kamal Bey; (2) failed to file a pretrial motion *in limine* to stop the introduction of prior evidence regarding Slack's sexual relationship with the victim; (3) failed to file a pretrial motion *in limine* to stop the testimony of Bey, as Bey's plea bargain with the prosecution was contingent on his trial testimony; (4) failed to interview Slack's brother to refute the testimony of Bey; (5) failed to ask Bey what deals he had made with the state for his testimony; (6) failed to request an accomplice instruction; (7) failed to have evidence presented to the jury that the only fingerprints found on the murder weapon were those of Bey; and (8) that these alleged errors prejudiced him.

Slack also claimed that he had been denied effective appellate counsel in that counsel on appeal to the Nevada Supreme Court (1) failed to raise a violation of state law relating to testimony by a co-defendant; (2) failed to raise the issue that counsel failed to request an accomplice instruction; (3) failed to raise the issue that Bey was a co-defendant and that his testimony was questionable; and (4) failed to raise an issue of prosecutorial misconduct when the prosecutor failed to inform the jury that Bey was a co-defendant as well as of the fact that Bey's fingerprints were the only fingerprints found on the murder weapon. The Nevada trial court denied the petition and the Nevada Supreme Court dismissed the appeal in December 1993.

In 1995, Slack filed a Section 2254 petition for a writ of habeas corpus in federal court, containing the same claims Slack had presented in the Nevada courts as well as the issues raised in the 1991 filing. After counsel was appointed to represent Slack, an amended petition was filed on Dec. 24, 1997. This amended petition alleged (1) there was insufficient evidence to support the conviction; (2) there was insufficient notice provided by the charging documents; (3) there was improper introduction of Slack's sexual relationship with the victim; (4) the court failed to instruct the jury properly on (a) reasonable doubt, (b) premeditation and deliberation, and (c) malice aforethought; (5) there was ineffective assistance of trial; (6) there was ineffective assistance of appellate counsel; and (7) there was cumulative error.

The State of Nevada moved to dismiss grounds 2, 3, 4(c), 5, 6, and 7, alleging that Slack had failed completely to exhaust his state remedies. The State also argued that grounds 2, 4(c), 5, 6, and 7 were not raised in Slack's first federal petition and constituted an abuse of the writ of habeas corpus.

On March 13, 1998, the district court entered an order dismissing grounds 2, 4(c), 5, 6, and 7 as "abusive" under *Farmer v. McDaniel,* 98 F.3d 1548 (9th Cir. 1996), *cert. denied,* 520 U.S. 1188 (1997), since they had not been raised in Slack's first federal petition. The court also found that ground 3 of Slack's petition was unexhausted and therefore dismissed his petition.

The district court gave Slack the option of reopening the proceeding and abandoning his claim on ground 3 if he wished to continue in federal court with the remaining, exhausted claims. Rather than proceeding with the remaining, exhausted claims, Slack filed a notice of appeal. In May 1998, the district court denied Slack's application for a certificate of probable cause to appeal. On July 7, 1998, a two-judge panel of the U.S. Court of Appeals for the Ninth Circuit summarily denied Slack's request for a certificate of probable cause. On Feb. 22, 1999, the Supreme Court granted Slack's petition for a writ of certiorari.

After briefing and oral argument, the Supreme Court ordered supplemental briefing and oral argument on the following issues:
1. Do the provisions of the Antiterrorist and Effective Death Penalty Act (AEDPA), specifically including 28 U.S.C. § 2253(c) and 28 U.S.C. § 2244(b), control the proceedings on appeal?
2. If the AEDPA does control the proceedings on appeal, may a certificate of appealability issue under 28 U.S.C. § 2253(c)?

Case Analysis

The writ of habeas corpus provides a means by which the legal authority under which a person is detained can be challenged. A writ of habeas corpus may be used to re-examine federal constitutional issues even

after trial and review by the state courts. *Brown v. Allen,* 344 U.S. 443 (1953). By means of a writ of habeas corpus, a federal court may order the discharge of any person held by a state in violation of the federal Constitution or laws. *See* 28 U.S.C. § 2241(c)(3).

A state prisoner is ordinarily not able to obtain a writ of habeas corpus from a federal court unless the prisoner has exhausted the remedies available in state court. *Ex parte Royall,* 117 U.S. 241 (1886). The exhaustion requirement gives the state an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights. *See Vasquez v. Hillery,* 474 U.S. 254, 257 (1986). This requirement was put in statutory form in 1948 in 28 U.S.C. § 2254 ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears ... the applicant has exhausted the remedies available in the courts of the State.")

In *Rose v. Lundy,* 455 U.S. 509 (1982), the Supreme Court adopted a "total exhaustion" rule requiring a district court to dismiss petitions containing grounds on which the petitioner has exhausted state remedies and other grounds on which the state remedies are not exhausted. However, the Court stated that prisoners who submit such "mixed petitions" nevertheless are entitled to resubmit a petition with only exhausted claims or to exhaust the remainder of their claims. Justice O'Connor's plurality opinion warned, however, that a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of any later petitions.

Shortly after the adoption of the Fourteenth Amendment, Congress passed the Habeas Act of 1867, providing for appeals as a matter of right for habeas corpus petitioners whose petitions for writs have been denied. *See Craemer v. Washington,* 168 U.S. 127 (1897). In 1908, Congress decided to reduce the time spent on meritless appeals by adopting the requirement that a prisoner obtain a certificate of probable cause in order to appeal. The certificate requirement is designed to reduce the volume of meritless appeals.

The State of Nevada argues that there is nothing in *Rose* supporting the proposition that a state prisoner is entitled to multiple dismissals without prejudice when the prisoner returns to federal court with new unexhausted claims despite a previous dismissal without prejudice that was granted for the purpose of allowing the petitioner to fully exhaust his state court remedies. The State explains that the application of the abuse of the writ doctrine to new claims, regardless of whether a prior petition was adjudicated on the merits, is consistent with the principle that a habeas petitioner may not engage in piecemeal litigation. According to the State of Nevada, state respondents should not be required to appear in federal court time and again only to have serial federal petitions dismissed for failure to exhaust state court remedies.

Slack recognizes that, under *Rose,* a federal habeas petitioner is presumptively entitled to only a single adjudication of his claims by the federal courts and that adjudication can occur only after the petitioner has fully exhausted any available state remedies for all the constitutional claims on which he or she wants to proceed. Slack asserts that the requirement that a petitioner exhaust state remedies contemplates that a federal court's dismissal "without prejudice" in order to permit proceedings in state courts does not have a preclusive effect on any later federal habeas proceedings.

Congress made a number of important changes to the habeas corpus statutes in 1996 as part of the AEDPA. Although the requirement of exhaustion of state remedies was preserved, 28 U.S.C. § 2244(b) was amended to provide a limit on second or successive applications by prisoners in state custody. Under this provision, a claim presented in a second or successive application that was presented in an earlier application will be dismissed. 28 U.S.C. § 2244(b)(1).

If the claim in a second or successive application was not presented in a previous application, it will be dismissed unless the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, which was previously unavailable. Similarly, Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts provides: "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure to assert those grounds in a prior petition constituted an abuse of the writ." Once a federal adjudication occurs, the litigation is presumptively over and the federal adjudication creates the potential that later proceedings will constitute an abuse of the writ under Rule 9(b).

Slack's petitions were filed before the enactment of the AEDPA, but he asserts that the definition of a

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"second or successive" habeas corpus application is the same under both AEDPA and pre-AEDPA law. According to Slack, the Supreme Court's precedents on exhaustion and abuse of the writ of habeas corpus have rested on the premise that a second or successive habeas corpus application is one filed after a previous federal application has been adjudicated on the merits.

With respect to the applicability of the AEDPA to this case, Slack argues that even if the State had not waived any issue as to the applicability of the AEDPA by filing to invoke the Act in the district court or the court of appeals, the AEDPA could not apply here because Slack commenced this action by filing a petition for writ of habeas corpus before the enactment of the AEDPA.

According to Slack, the Ninth Circuit's ruling improperly give preclusive effect to any claim not in the prematurely filed petition that was dismissed "without prejudice." Slack claims that the Ninth Circuit has substantially deprived prisoners of any opportunity to be heard in federal habeas corpus proceedings by adopting an ad hoc definition of the term "second or successive" that attaches preclusive, or res judicata, effect to a prior "without prejudice" dismissal for lack for complete exhaustion.

Slack argues that the unfairness inherent in such a rule is demonstrated by this case, in which the district court applied the Ninth Circuit's punitive rule to bar Slack from pursuing his claims simply for trying to do what the Supreme Court has contemplated under the complete exhaustion rule of *Rose v. Lundy.* Slack contends that the Ninth Circuit's treatment of a post-exhaustion petition as a second or successive habeas corpus petition will introduce substantial uncertainty and unfairness into habeas corpus litigation.

The State of Nevada contends that Slack's argument ignores the fact that this case does not deal with the preclusion of properly exhausted claims. After one dismissal without prejudice designed to allow Slack to exhaust his state court remedies, the State says that Slack returned to federal court and improperly raised five *unexhausted* claims that had never appeared in any of his prior federal or state challenges to his conviction.

The State stresses that application of the "abuse of the writ" doctrine does not require a prior adjudication on the merits. Relying on *Sanders v. United States,* 373 U.S. 1 (1963), the State argues that the Supreme Court has made a clear distinction between, on the one hand, successive petitions that follow a petition that was determined on the merits, and on the other hand, successive petitions that follow a petition that was not determined on the merits. It contends that the Court's opinion in *Sanders* and Rule 9(b) make it clear that a prior adjudication on the merits is not necessary for a finding that new claims raised in a successive petition constitute an abuse of the writ.

Even if the AEDPA applied to this case, Slack asserts that it would not change the result. According to Slack, the certificate of appealability provisions of the AEDPA retain the substantive standard of *Barefoot v. Estelle,* 463 U.S. 880 (1983), and that appellate review in this case remains available under *Hohn v. United States,* 118 S.Ct. 1969 (1998). Slack claims that it does not matter whether the AEDPA governs this appellate review because the definition of "second or successive" petition is the same under AEDPA and pre-AEDPA law and does not include petitions filed after previous petitions have been dismissed without prejudice for exhaustion.

SIGNIFICANCE

In 1998, the Supreme Court held that a habeas corpus claim that the defendant was incompetent to be executed, raised for a second time after the defendant's first claim was dismissed without prejudice by the district court as premature, was not a "second or successive" application. *Stewart v. Martinez-Villareal,* 118 S.Ct. 1618 (1998). The Court stated that the defendant was entitled to an adjudication of all the claims presented in his earlier application for habeas corpus. The Court explained that it has never suggested that a prisoner whose habeas petition was dismissed for failing to exhaust state remedies, and who then exhausted those remedies and returned to federal court, should be considered to have filed a successive petition.

Noting that the first petition had been dismissed without prejudice for failure to exhaust state remedies, the Court declared that the defendant had not received an adjudication of his claim. To hold otherwise, the Court said, would mean that a dismissal of a first habeas petition for technical procedural reasons, having nothing to do with the claims' merits, would bar the prisoner from ever obtaining federal habeas review.

A number of courts of appeals have also held that, where a first petition is dismissed on exhaustion grounds, the filing of a later petition is not a second or successive petition. In *Camarano v. Irvin,* 98 F.3d 44 (2d Cir. 1996), the government argued that a habeas petitioner was limited to those claims contained in the initial habeas corpus filing, which had previously been dismissed without prejudice. The Second Circuit

rejected this argument, reasoning that "because application of the gate keeping provisions to deny a resubmitted petition in cases such as this would effectively preclude any habeas review, such a holding would conflict with the doctrine of writ abuse." *See also Dickinson v. Maine,* 101 F.3d 791 (1st Cir. 1996); *Christy v. Horn,* 115 F.3d 201, 208 (3d Cir. 1997); *In re Gasery,* 116 F.3d 1051, 1052 (5th Cir. 1997); *Woods v. Whitley,* 933 F.2d 321, 322 n.1 (5th Cir. 1991); *Carlson v. Pitcher,* 137 F.3d 416 (6th Cir. 1998); *Benton v. Washington,* 106 F.3d 162, 164 (7th Cir. 1996); *Dellenbach v. Hanks,* 75 F.3d 820, 822 (7th Cir. 1996); *Hill v. Lockhart,* 894 F.2d 1009, 1010 (8th Cir. 1990); *McWilliams v. State of Colorado,* 121 F.3d 573, 575 (10th Cir. 1997).

In *Farmer v. McDaniel,* 98 F.3d 1548 (9th Cir. 1996), *cert. denied,* 520 U.S. 1188 (1997), the Ninth Circuit, relying on Rule 9(b), held that a prior adjudication on the merits was not a prerequisite to the application of the doctrine of abuse of the writ. It pointed out that Rule 9(b) appears to contemplate two possibilities for dismissal of a second or successive petition. The first occurs when a judge finds that the petition does not allege new or different grounds and that the prior determination was on the merits. The second arises when new and different grounds are alleged and the judge finds that the petitioner's failure to assert them in a prior petition was an abuse of the writ. The Ninth Circuit reasoned that Rule 9(b) distinguishes between "same ground" and "new and different ground" petitions and that a court may dismiss a "new and different ground" petition if the government shows there has been an abuse of the writ.

The use of federal habeas corpus for state prisoners has long been a controversial subject even though prisoners are successful in no more than 4 percent of the cases. More than 100 years ago there were protests against "the prostitution of the writ of habeas corpus under which the decisions of the state courts are subjected to the superintendency of the Federal judges." Note, *Federal Abuses of the Writ of Habeas Corpus,* 25 *Am.L.Rev.* 149, 153 (1898). In 1954, the attorneys general of 41 states attempted to have the habeas corpus statute, insofar as it applies to state prisoners, declared unconstitutional. *United States ex rel. Elliot v. Hendricks,* 213 F.2d 922 (3d Cir.), *cert. denied,* 348 U.S. 851 (1954). In 1954, the Judicial Conference of the United States also unsuccessfully proposed an amendment to 28 U.S.C. § 2254 that would have virtually ended federal habeas corpus for state prisoners.

If the Supreme Court upholds the Ninth Circuit's decision in this case, it will be more difficult for state prisoners to challenge their convictions in federal court. In particular, such a decision would greatly restrict the ability of state prisoners to bring successive petitions for habeas corpus alleging new grounds even if their earlier petitions had not been decided on the merits. On the other hand, a reversal of the Ninth Circuit will make it easier for state prisoners to have a federal court decide whether their federal constitutional rights had been violated.

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For E.K. McDaniel, Warden (David F. Sarnowski, Chief Deputy Attorney General, State of Nevada (775) 684-1265)

Amicus Briefs (as of Feb. 25)

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National Association of Criminal Defense Lawyers and the Federal Defenders Association (Edward M. Chikofsky (212) 289-1062)

The Rutherford Institute (John W. Whitehead (804) 978-3888)

In Support of E.K. McDaniel, Warden

States of California, Alabama, Florida, Idaho, Kansas, Mississippi, Montana, Nebraska, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Virginia, and Washington (A. Scott Hayward (213) 897-2392)