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When Is a State Post-Conviction Application “Properly Filed” Within the Meaning of the AEDPA?

by Jay E. Grenig

PREVIEW of *United States Supreme Court Cases*, pages 23–26. © 2000 American Bar Association.

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ISSUE

Can a state post-conviction application be “properly filed” within the meaning of 28 U.S.C. § 2244(d)(2) if it were procedurally barred from review under state law?

FACTS

Early in the morning of Feb. 1, 1983, two New York City police officers observed a parked blue Chevrolet occupied by four African-American men. Before making contact with the car or the men in it, the officers responded to another call. When the officers returned to the car, they observed that one of its occupants had left the vehicle. The officers then pulled up behind the car as it let a second passenger out. When the officers turned on their red lights, the Chevrolet sped away with two of the occupants. The officers pursued the car, believing it was connected with several robberies. Shots were exchanged, but no one was injured. The officers cornered the car behind a school, and its two remaining occupants fled. Twenty-two days later, Tony Bruce Bennett and his co-defendant

were arrested and charged with offenses relating to the chase.

The prosecution’s case rested entirely on the identification testimony of the two officers, both of whom testified that they picked Bennett out of a lineup on Feb. 23, 1983. The prosecution did not offer any physical evidence against Bennett. At trial, an officer who assisted in the investigation testified that both officers told him two days after the incident that they were uncertain whether they could identify who was in the car.

Julian Ishmael testified that Bennett was with him at the time of the incident. He stated that he and Bennett were about to leave Ishmael’s home when they heard shots and saw flashing lights.

Following a 1984 jury trial, Bennett was convicted of two counts of attempted murder in the first

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ARTUZ V. BENNETT
DOCKET NO. 99-1238

ARGUMENT DATE:
OCTOBER 10, 2000
FROM: THE SECOND CIRCUIT

Case at a Glance

A federal statute, 28 U.S.C. § 2244(d)(2), tolls the one-year statute of limitations for habeas corpus petitions. In this case, the Court is asked to determine whether a state post-conviction application should be deemed “properly filed” within the meaning of that federal statute even if it were procedurally barred from review under state law.

degree, criminal possession of a weapon in the second degree, criminal possession of stolen property in the first degree, and unauthorized use of a motor vehicle. Evidence introduced at trial indicated that Bennett had fired two shots at a police car during the car chase. The Appellate Division, Second Department, of the New York Supreme Court affirmed Bennett's conviction. *People v. Bennett*, 128 A.D.2d 540, 512 N.Y.S.2d 472 (1987).

Bennett's 1991 motion to vacate his conviction on the grounds of newly discovered evidence and ineffective assistance of counsel was denied in state court. In June 1995, Bennett again moved to vacate his conviction. The 1995 motion asserted that the trial court had denied him the right to be present at the *Sandoval* hearing and at other critical stages of the trial and to offer certain testimony at trial. (In New York, a "*Sandoval* hearing" is a pretrial proceeding in which a court makes an advance ruling as to whether the prosecutor can use prior convictions or proof of the prior commission of specific criminal, vicious, or immoral acts for the purpose of impeaching a defendant's credibility. *People v. Sandoval*, 314 N.E.2d 413 (N.Y. 1974).)

The prosecution responded that all of Bennett's claims were subject to a mandatory procedural bar. It explained that under New York law, a court cannot hear either a claim that was previously raised on appeal and decided adversely to the defendant or a claim that could have been raised on direct appeal but was not.

The court denied Bennett's motion without elaboration in a Nov. 30, 1995, oral decision. Bennett claims that he never received a copy of this

order despite having written numerous letters to the state court requesting information and a written copy of its disposition.

On Feb. 11, 1998, Bennett filed a petition for habeas corpus in the U.S. District Court for the Eastern District of New York. In his petition, Bennett alleged that he had been denied his constitutional rights to present witnesses in his defense and to a fair trial, to be present at all material stages of the trial, and to the effective assistance of counsel. The district court dismissed the petition on the ground that it was not timely filed because it had been filed more than 21 months after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

At the time the district court dismissed Bennett's petition, his representations concerning his 1995 motion to vacate were not before it. That information only came to light later, when Bennett moved the district court for a Certificate of Appealability (COA). Under the AEDPA, an appellate case is "commenced" for purposes of determining its appealability under the AEDPA when an application for a certificate of appealability is filed. 28 U.S.C. § 2253(c). A COA should issue if the petitioner shows that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 120 S.Ct. 1595 (2000). (See ABA *PREVIEW* 212 (March 8, 2000).)

On review in the Second Circuit, the court held that the AEDPA's one-year limitations period on filing habeas corpus petitions did not

apply in this case because Bennett's conviction had become final before the AEDPA's enactment. The court noted that it had previously held that prisoners whose habeas claims accrued before the AEDPA's enactment are afforded the "reasonable time" of "one year after the effective date of the AEDPA to file a federal habeas petition." See *Ross v. Artuz*, 150 F.3d 97, 102-03 (2d Cir. 1998) (decided after the district court's decision in this proceeding).

The Second Circuit then held that the "tolling provision" of Section 2244(d)(2) applied to Bennett's case and tolled all of the time from the enactment of the AEDPA to the filing of his petition. The court determined that this tolling provision applied to the grace period that it had given state prisoners to file their petitions under *Ross*. It ruled that the 1995 motion had remained "pending" until Bennett filed his habeas petition because the state had never provided Bennett with a copy of the court's written decision, and thus the state court's review of his motion had never been completed. The court reasoned that the state's failure to serve Bennett with a copy of the order denying his 1995 motion had prevented him from applying for a certificate for leave to appeal. The court commented that Bennett did not bear the burden of persuading the New York courts to act expeditiously to avoid a time bar claim that was raised by the state itself. Concluding that Bennett's 1995 motion had been "properly filed" within the meaning of the tolling provision because the time for appealing the New York court's denial of the 1995 motion has not yet expired and the one-year grace period under *Ross* had not yet commenced, the Second Circuit reversed the district court and returned the matter to the lower court for further proceedings.

The Supreme Court agreed to review the Second Circuit's decision to apply the "tolling provision" of Section 2244(d)(2) to a state court application that was procedurally barred and could not be heard on the merits. 120 S.Ct. 1669 (2000).

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 reexamine 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. 28 U.S.C. § 2241(c)(3). The writ is addressed to the person having custody of the prisoner—in this case Christopher Artuz, superintendent of the Greenhaven Correctional Facility in New York.

In 1996, Congress made a number of important changes to the federal habeas corpus statutes as part of the AEDPA, including the addition of a one-year statute of limitations for state prisoner filings. Congress also provided a tolling provision intended to allow state prisoners to exhaust state remedies without having that time count against them before coming to federal court.

Before the enactment of the AEDPA, there was no formal time limit for filing a petition for habeas corpus under 28 U.S.C. § 2254. A delayed filing of a petition was a basis for dismissal only if the appellant knew or could have known the grounds for the petition earlier and if the state could demonstrate that the delay prejudiced its ability to respond to the petition. The AEDPA changed this by imposing a one-year limitations period on habeas peti-

tions that begins to run from the latest of several events, including the date on which the challenged state judgment becomes final. See 28 U.S.C. § 2244(d)(1).

However, the time during which a "properly filed" application for state post-conviction or other collateral review is pending is not counted toward any period of limitation under Section 2244(d)(2). By not counting the time during which a petition is pending in state court, the tolling provision preserves the long-standing federal policy of requiring habeas appellants to exhaust state court remedies before initiating suit in federal court.

In this case, Artuz argues that the Second Circuit's interpretation of "properly filed" eviscerates the statute of limitations by allowing state prisoners to extend the limitations period indefinitely, regardless of whether the state court could possibly hear the merits of the claim. He asserts that the Second Circuit's interpretation extends the tolling provision far beyond its intended scope, significantly undermines state procedural rules, and would allow state prisoners to obtain the benefit of tolling for entirely repetitive, procedurally barred applications in state court that serve no purpose other than delay.

Bennett, on the other hand, contends that the plain language of Section 2244(d) permits tolling of the limitations period during the pendency of any state application satisfying the prerequisites that must be met before a state court will allow the application to be filed. Because Bennett's 1995 state motion satisfied New York's filing requirements, he argues that it was and remains a "properly filed motion" for state post-conviction review.

Artuz suggests that by filing such motions, a state prisoner could extend the statute of limitations at will by the simple expedient of filing motion after motion, even if all the prisoner's claims have already been raised and decided adversely to the prisoner. According to Artuz, under the Second Circuit's interpretation, a prisoner need only refile an old, procedurally barred motion in order to generate delay. Because Bennett's 1995 state post-judgment application was procedurally barred under state law, Artuz says it was not "properly filed" and did not toll the statute of limitations.

Bennett responds that the availability of tolling under Section 2244(d)(2) does not depend on the procedural default status of the individual claims presented in a prisoner's application for post-conviction relief. According to Artuz, however, an interpretation that denies tolling for post-conviction applications that are procedurally barred under state law would curb unnecessary delays, amply allow for exhaustion of state remedies, and show respect for state procedural rules in a manner that promotes comity and federalism. He contends that the objections to this interpretation are insubstantial and do not outweigh its benefits. He says that his interpretation would neither involve the federal courts in an inappropriate and burdensome examination of state procedural rules nor be too harsh on petitioners. Moreover, he says, well-established doctrines of habeas jurisprudence, most notably the exhaustion doctrine, already require an examination of and respect for state procedural rules.

Bennett counters that defining a "properly filed application" as an application raising claims that are not "mandatorily procedurally barred" would afford prisoners no

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meaningful guidance as to the types of claims that will result in tolling under Section 2244(d)(2).

SIGNIFICANCE

In addition to the Second Circuit, several other courts (including the First, Third, Fifth, Seventh, Eighth, Tenth, and Eleventh) have held that the tolling provision of Section 2244(d) applies to petitions challenging pre-AEDPA convictions.

However, the Ninth Circuit has reached a different conclusion, holding that, when a claim cannot be heard on the merits because it is barred by a state procedural rule, it is not “properly filed.” In *Dictado v. Durchame*, 189 F.3d 889 (9th Cir. 1999), the Ninth Circuit held that a state petition that did not comply with the state of Washington’s filing rules was not properly filed. The court explained that a “properly filed application” means an application submitted in compliance with the procedural laws of the state in which the application was filed.

The Fifth Circuit has held that it would deny tolling for applications that are untimely, but that it would grant tolling if the state’s time bar contained any exception at all. In *Smith v. Ward*, 209 F.2d 383 (5th Cir. 2000), the court said that for Section 2244(d)(2) purposes, a state habeas application is “properly filed” when it conforms with a state’s applicable procedural filing requirements. (“Procedural filing requirements” refers to the prerequisites that must be satisfied before a state court will allow a petition to be filed and given judicial review.)

Other courts have declined to allow tolling for any application that a state court has held was procedurally defective. In *Freeman v. Page*, 208 F.3d 572 (7th Cir. 2000), the Seventh Circuit stated that the question of whether a state collateral attack is “properly filed” so as to toll the limitations period for filing a federal habeas petition is determined by looking at how the state courts treated the claim. If the state courts considered the claim on the merits, then it will be deemed to have been properly filed. If, on the other hand, they dismissed the claim for procedural flaws such as untimeliness, then the claim was not properly filed—that the petitioner may have offered a “colorable argument” for his position under state law is not enough to make it “properly filed.”

Similarly, in *Weekley v. Moore*, 204 F.3d 1083 (11th Cir. 2000), a divided panel found that a petitioner’s state post-conviction application was not “properly filed” because it was “successive” and thus did not toll Section 2244(d)(2).

The Supreme Court is now given the opportunity to resolve this disagreement among the circuits. A decision upholding the Second Circuit will make it more difficult for prisoners to obtain post-conviction review by means of a habeas petition in federal court. A decision reversing the Second Circuit will increase the availability of post-conviction review through habeas proceedings in federal court. It will be interesting to see what significance the Supreme Court attaches to the alleged failure of the state court to provide Bennett with written notice of its decision in the case.

ATTORNEYS FOR THE PARTIES

For Christopher Artuz (John M. Castellano (718) 286-5801)

For Tony Bruce Bennett (Alan S. Futerfas (212) 684-8400)

AMICUS BRIEFS (AS OF SEPT. 1)

In Support of Christopher Artuz
Florida, Alaska, Arkansas, Colorado, Connecticut, Delaware, Georgia, Illinois, Louisiana, Mississippi, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, and Virginia
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