CURRENT DEVELOPMENTS IN THE LAW

A Survey of Cases Affecting the Anti-terrorism and Effective Death Penalty Act of 1996

This section presents a selection of issues currently being litigated and resolved in courts at various levels of the federal system and is not intended to be a comprehensive selection of cases.

Felker v. Turpin, 116 S. Ct. 2333 (1996). (1) TITLE I, SECTION 106 (B) (3) (E) OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT DOES NOT PRECLUDE THE SUPREME COURT OF THE UNITED STATES FROM ENTERTAINING ORIGINAL HABEAS CORPUS PETITIONS. (2) THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT DOES NOT VIOLATE THE SUSPENSION CLAUSE OF THE CONSTITUTION, ARTICLE I, S. 9, CL. 2. (3) THE CLAIMS IN THE PETITION FOR WRIT OF HABEAS CORPUS DO NOT SATISFY THE REQUIREMENTS NECESSARY TO GRANT THE WRIT.

I. BACKGROUND

Ellis Wayne Felker ("Felker") was convicted of murder, rape, aggravated sodomy, and false imprisonment.[1] He was subsequently sentenced to death for the murder charge.[2] The Georgia Supreme Court affirmed Felker's conviction and death sentence[3] and the Supreme Court of the United States later denied certiorari.[4] Felker failed to obtain relief following numerous appeals in the state system and after a petition for writ of federal habeas corpus.[5] On April 24, 1996, President Clinton signed the Anti-terrorism and Effective Death Penalty Act (the "Act") into law.[6] On May 2, 1996, Felker filed "a motion for stay of execution

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[1] *See* Felker v. Turpin, 116 S. Ct. 2333, 2336 (1996).

[2] *See id.*

[3] *See id.* at 2336.

[4] *See id.* (citing Felker v. Georgia, 469 U.S. 873 (1984)).

[5] *See id.* After conviction, a Georgia trial court denied collateral relief, the Georgia Supreme Court refused to issue a certificate of probable cause to appeal the denial, and the Supreme Court of the United States again denied certiorari. *See id.* Felker then filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Georgia alleging various constitutional violations. *See id.* The district court denied the petition. *See id.* The United States Court of Appeals for the Eleventh Circuit affirmed and extended on denial of petition for rehearing. *See id.* The Supreme Court of the United States again denied certiorari. *See id.* Georgia scheduled Felker's execution between May 2-9 1996. *See id.* On April 29, 1996, Felker filed a second petition for state collateral relief. *See id.* The Georgia trial court denied the petition and the Supreme Court of Georgia denied certiorari. *See id.*

[6] *See id.* The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1217. Title I, subsections 106 (b)(1) and (b)(2) of the Act amended 28 U.S.C. § 2244(b) to read:

and a motion for leave to file a second or successive federal habeas corpus petition under 28 U.S.C § 2254."[7] The Eleventh Circuit denied both motions on the following grounds: (1) Felker did not present his claims in the first habeas petition, (2) the claims did not meet the standards of § 106(b)(2) of the Act, and (3) the claims would not have satisfied the standards used before the Act for obtaining review of the merits of second or successive claims.[8] Felker then filed a writ of habeas corpus with the Supreme Court of the United States.[9] The Court granted Felker's stay application and petition for certiorari and ordered briefing on the following subjects:

> 1) [T]he extent to which the provisions of Title I of the Act apply to a petition for habeas corpus filed in this Court; 2) [W]hether Title I of the Act, especially § 106(b)(3)(E), constitutes an unconstitutional restriction on the jurisdiction of this Court; and 3) [W]hether application of the Act suspended the writ of habeas corpus in this case.[10]

II. ANALYSIS

A. *Title I of the Antiterrorism and Effective Death Penalty Act does not deprive the Court of jurisdiction to entertain original habeas petitions filed under 28 U.S.C §§ 2241 and 2254, and thus does not unconstitutionally restrict the Court's jurisdiction under Article III, § 2.*

1. Original Habeas Corpus Petition-Ex Parte Yerger

The Court first stated that section 106(b)(3)(E) of the Act prevents the Court "from reviewing a court of appeals order denying leave to file a second habeas petition by appeal or by writ of certiorari."[11] The Court then examined whether

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(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) 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, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

110 Stat. 1220-1221.

[7] *Turpin*, 116 S. Ct. at 2337.

[8] *See id.* at 2337.

[9] *See id.*

[10] *Id.*

[11] *Id.*

a statute barring the Supreme Court review of a habeas petition on appeal precludes the Court from entertaining an original habeas petition.[12]

The Court held that Title I of the Antiterrorism and Effective Death Penalty Act does not repeal the original habeas jurisdiction of the Supreme Court.[13] First, the Court noted that no provisions of the Act expressly mention the Court's authority to entertain original habeas petitions.[14] Second, the provisions of the Antiterrorism and Effective Death Penalty Act do not repeal the power to hear original habeas petitions under 28 U.S.C. § 2241 by implication.[15]

2. The Constitutionality of AEDPA Under Article III, § 2

Next, the Court looked at whether the Act was unconstitutional under Article III, § 2. The Court found that while limiting appellate habeas jurisdiction, the Act does not deprive the Court of appellate jurisdiction in violation of Article III, § 2.[16] Article III, § 2 provides that "[i]n all the other Cases . . . the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[17] The Court said that previous decisions have shown that the Constitution confers appellate powers that congressional acts may limit. In this case, the Act removes the Court's power to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its "gatekeeping" function over a second petition.[18] The Act, however, does not remove the Court's authority to entertain petitions for original habeas corpus and therefore has not deprived the Court of appellate jurisdiction in violation of Article III, § 2.[19]

B. *Title I of the Antiterrorism and Effective Death Penalty Act has changed the requirements that a state prisoner must satisfy to show that he is entitled to a writ of habeas corpus from the Supreme Court.*

The Court noted that section 2254(a) limits its authority to grant habeas relief to state prisoners.[20] Several sections of the Act change the requirements that the

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[12] *See id.*

[13] *See Turpin*, 116 S. Ct. at 2338.

[14] *See id.* (By comparison, the Court mentions § 103 which amends the Federal Rules of Appellate Procedure to bar original habeas petitions in the courts of appeals.) *See id.*

[15] *See id.* at 2339.

[16] *See id.*

[17] *Id.* at 2339 (quoting U.S. CONST. art. III, § 2).

[18] *See id.*

[19] *See id.*

[20] *See id.* (The Court noted that § 2254(a) specifically limits the conditions under which relief may be granted to "a person in custody pursuant to the judgment of a State court." *Id.* (quoting 28 U.S.C. § 2254(a)). The Court also noted that as originally enacted, 28 U.S.C. § 2254 specified that "[a]n application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." *Id.* (quoting 28 U.S.C. § 2254 (Supp. III 1946)).

Court must look at when granting relief under § 2254(a).[21] The Court found that § 106(b)(3)'s "gatekeeping" system applies to applications "filed in the district court" and does not affect the Court's consideration.[22] Sections 106(b)(1) and (2), however, affect the Court's consideration of original habeas petitions filed as second or successive applications under § 2254(a) by applying additional restrictions.[23]

C. *The restrictions the Act places on second habeas petitions do not amount to a "suspension" of the writ in violation of Article I, § 9, cl. 2 of the Constitution.*

The Court stated that the Suspension Clause of Article I, § 9 refers to the writ as it exists today, rather than as it existed in 1789.[24] Thus, the new restrictions on the writ do not constitute a "suspension;" rather, they provide a "modified res judicata rule," or a restraint on the "abuse of the writ."[25] Therefore, the new restrictions are within congressional authority and do not violate Article I, § 9.[26]

D. *The Claims in the Petition Do Not Satisfy the Requirements Justifying the Issuance of a Writ.*

Rule 20.4(a) explains what is necessary for the Court to grant an original writ

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[21] *See id.*

[22] *Id.*

[23] *See id.*

[24] See *id.* at 2340. (citing Swain v. Pressley, 430 U.S. 372, 385 (1977) (Burger, C.J., concurring). The Court further explains that the writ known to the Framers differs from the writ of habeas corpus today in a number of ways. *See id.* 116 S. Ct. at 2340. The first Congress made the writ available only to federal prisoners not state prisoners. *See id.* Also, there were more restrictions on the class of judicial actions reviewable by the writ. *See id.* It was not until the Act of 1867 that Congress made the writ available in "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty of law of the United States." *Id.* (quoting Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (1867). It was not until this century that the Court interpreted the Act of 1867 to allow a final judgment of conviction in a state court to be collaterally attacked on habeas. *See id.* (citing Waley v. Johnston, 316 U.S. 101 (1942); Brown v. Allen, 344 U.S. 443 (1953)).

[25] *Id.*

[26] *See id.* The Court specifically looked at two restrictions. *See id.* One requires a petitioner to obtain a leave from the court of appeals before filing a second habeas petition in the district court. *See id.* The Court stated that this restriction merely transfers a screening function originally performed by the district court under 28 U.S.C. § 2254 to the court of appeals. *See id.* The second restriction codifies some pre-existing limits and further limits the availability of relief to petitioners. *See id.* The Court determined that this is acceptable because the Court has previously recognized that the power of the writ comes from written law, and that judgments about the scope of the writ are " 'normally for Congress to make.' " *Id.* (quoting Lonchar v. Thomas 116 S. Ct. 1293, 1298 (1996)).

of habeas corpus.[27] The Court, in denying habeas corpus, determined that Felker's claims "materially differ" from other claims which the Court has reviewed for successive habeas petitioners, and thus do not meet the requirements set out in Rule 20.4(a) or the Act's relevant sections.[28]

V. CONCURRING OPINION - JUSTICE STEVENS

In a concurring opinion, Justice Stevens examined the Act's effect on the Court's appellate jurisdiction in light of Article III, § 2.[29] Justice Stevens said that the Court's analysis of this aspect was incomplete.[30] Justice Steven said that the Act does not preclude the Court from entertaining original writs of habeas corpus.[31] Justice Stevens rejected Felker's argument that the limited exception violates Article III, §2 for the following reasons: 1) The Court still has the jurisdiction to review the gatekeeping orders pursuant to the All Writs Act; 2) The Court can review a court of appeals disposition of a motion for leave to file a second or successive habeas application under its jurisdiction to review interlocutory orders; and 3) Reviewing earlier gatekeeping orders entered by the court of appeals will inform the Court's view and provide the parties with the "functional equivalent of direct review."[32] Justice Stevens concluded that Felker's claims do not satisfy the requirements needed before the Act, or the requirements of the Act, including the standards governing the court of appeals' gatekeeping function.[33]

VI. CONCURRING OPINION - JUSTICE SOUTER

Justice Souter also reiterated the Courts opinion: the Antiterrorism and Effective Death Penalty Act of 1996 precluded the Court's appellate review of the

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[27] *See id.* Rule 20.4(a) states:

"A petition seeking the issuance of a writ of habeas corpus shall comply with the requirements of 28 U.S.C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242 requiring a statement of the 'reasons for not making application to the district court of the district in which the applicant is held.' If the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary power and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted."

Id. at 7340-41 (quoting FED. R. CIV. P. 20.4(a)).

[28] *Id.* at 2341.

[29] *See id.*

[30] *See id.*

[31] *See id.*

[32] *Id.*

[33] *See id.*

court of appeals gatekeeping functions.[34] He added, however, that the Act does not preclude the Court from exercising all of its appellate jurisdiction.[35] Justice Souter acknowledged that the Act is not unconstitutional on its face or as applied in this case. Nevertheless, Justice Souter noted that if no other procedures for reviewing a gatekeeping determination existed, there would be a question of whether the Act exceeds Congress' power under the Exceptions Clause.[36]

VII. CONCLUSION

The Antiterrorism and Effective Death Penalty Act of 1996 limits the Court's power to review petitions for writs of habeas corpus. The Court no longer has the power to review a court of appeals decision denying leave to file a second habeas petition. While the Court still has the power to review original second habeas petitions, sections 106(b)(1) and (2) change the standards governing the Court's consideration of habeas petitions under 28 U.S.C. § 2254(a). While maintaining the jurisdiction to hear Felker's original petition for a writ of habeas corpus, the Court determined that the claims for the writ did not satisfy the requirements necessary for the Court to grant the writ.

James O. Nygard

Hatch v. Oklahoma, 92 F.3d 1012 (10th Cir. 1996). THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT DOES NOT APPLY RETROACTIVELY AND DOES NOT VIOLATE THE EX POST FACTO CLAUSE AND THUS APPLIES TO THE DEFENDANT'S PETITION FOR HABEAS CORPUS.

I. INTRODUCTION

Plaintiff Keith Hatch ("Hatch") brought a successive petition for habeas corpus relief pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("Act").[1] Hatch argued that the Act did not apply to his case, but filed this petition for habeas corpus relief in the event that the court found otherwise.[2] Additionally, Hatch requested a stay of execution until the Supreme Court of the United States decided the matter.[3] The Court denied both requests, deciding that the Act applied to Hatch's case and that the claims presented failed to satisfy the

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[34] *See id.* (citing 28 U.S.C. § 2244(b)(3)(E)).

[35] *See Turpin*, 116 S. Ct. at 2341. (Justice Souter mentions four examples of current appellate jurisdiction not repealed by the Act. (1) The Court can answer certified questions from the court of appeals, 28 U.S.C. § 1254(2). (2) The Court has authority to issue appropriate writs in aid of another exercise of appellate jurisdiction, 28 U.S.C. § 1651(a). (3) The Court has a procedure for petitions for extraordinary writs, Rule 20.3. The Court can still entertain original petitions, which Justice Souter explains is actually an exercise of the Court's appellate jurisdiction. *Id.* at n.1).

[36] *See Turpin*, 116 S. Ct. at 2342.

[1] *See* Hatch v. Oklahoma, 92 F.3d 1012, 1013 (10th Cir. 1996).

[2] *See id.*

[3] *See id.* at 1013-1014.

Act's requirements.[4] Furthermore, the Court decided that applying the Act's standards of evaluation to successive habeas corpus petitions did not violate the Ex Post Facto Clause in cases where a party filed such a petition after the Act's effective date.[5]

II. BACKGROUND

The Oklahoma state court convicted Hatch of two counts of first degree murder.[6] The state court then invalidated his first two sentencing hearings, after the court sentenced him to death by lethal injection in his third sentencing hearing.[7] The Oklahoma Court of Criminal Appeals affirmed this sentence on July 10, 1992.[8] Hatch subsequently filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Oklahoma; the District Court affirmed the denial on appeal.[9] The Supreme Court of the United States denied Hatch's petition for a writ of certiorari on June 3, 1996, and set Hatch's execution date for August 9, 1996.[10]

Hatch filed this "Application for Order Authorizing consideration of Successive Petition for Writ of Habeas Corpus" on July 9, 1996 pursuant to the requirements of Title I of the Act.[11] Although Hatch claimed that the Act did not apply to his case, he filed his application to the Supreme Court of the United States as a precaution in case the Court denied his challenge to the Act.[12] Additionally, Hatch requested a stay of execution.[13] The issues before the Court were (1) whether the Act applied to Hatch's case; (2) whether Hatch made a prima facie case pursuant to the Act; and (3) whether the court should grant Hatch's request for a stay of execution.[14] The Court rejected all of Hatch's claims.[15]

III. ANALYSIS

A. *Hatch's Claim that the Act is Inapplicable*

The Court found that the Act's requirements applied to Hatch's case and that such application did not violate the Ex Post Facto Clause.[16] The Court reiterated its standard that for a law to violate the Ex Post Facto Clause it must "be retro-

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[4] *See id.* at 1014.
[5] *See id.*
[6] *See id.* at 1013.
[7] *See id.*
[8] *See id.*
[9] *See id.*
[10] *See id.*
[11] *Id.*
[12] *See id.*
[13] *See id.* at 1013-1014.
[14] *See id.* at 1014.
[15] *See id.*
[16] *See id.*

spective, that is, it must apply to events occurring before its enactment."[17] President Clinton signed the Act into law on April 24, 1996.[18] Hatch filed the application at issue on July 9, 1996.[19] Because the Act did not establish an effective date for the provisions in dispute, the Court assumed that the provisions became effective on April 24, 1996.[20] The Court reasoned, therefore, that because the Act was effective at the time Hatch filed his petition, its application to his case was not retroactive, and therefore, did not violate the Ex Post Facto Clause.[21]

B. *Hatch's Successive Habeas Corpus Petition*

Under the Act, a petitioner seeking to file a successive habeas corpus petition in the district court must first apply to the court of appeals for an order authorizing the district court to hear the petition.[22] The court of appeals may grant such an application only if the applicant meets the Act's criteria.[23]

1. Jurisdiction is not Grounds for a Successive Habeas Corpus Petition.

Hatch claimed that the underlying facts were an insufficient basis for granting subject matter jurisdiction in the Oklahoma trial court.[24] The Court, however, did not decide this issue because under the Act, a successive petition may not be filed on the grounds of a lack of jurisdiction.[25] The Court reasoned that, according to the Act's provisions, Hatch's successive petition presented neither a "new rule of constitutional law," nor did it rely on a "factual predicate which was previously undiscoverable."[26]

2. *Cooper v. Oklahoma* Does not Entitle Hatch to Relief.

Cooper v. Oklahoma involved a competency law that presumed a criminal defendant's competency to stand trial unless such defendant could prove his incompetence to the court "by clear and convincing evidence."[27] The *Cooper* Court ruled that this provision violated the Due Process Clause because it resulted in a criminal defendant being "put to trial even though it is more likely than not that he is incompetent."[28] Hatch argued that his competency hearing

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[17] *Id.* (citing Miller v. Florida, 482 U.S. 423, 430 (1987) (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981))).

[18] *See id.*

[19] *See id.*

[20] *See id.* at 1014.

[21] *See id.*

[22] *See id.* at 1013.

[23] *See id.* at 1015 (citing 28 U.S.C. § 2244(b) (1996)).

[24] *See id.* at 1014-15 (stating that the basis for Hatch's claim was that the information was insufficient to prove the underlying crime of robbery with a dangerous weapon).

[25] *See id.* at 1015.

[26] *Id.* (citing 28 U.S.C. § 2244(b)(2) (1996)).

[27] *Id.* (citing Cooper v. Oklahoma, 116 S. Ct. 1373 (1996)).

[28] *Id.*

was flawed in light of *Cooper*, and consequently that the Act entitled him to file his petition under the provision that allowed claims based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court."[29] The Court found that *Cooper* did not apply because the trial court determined Hatch's competency under a scheme that did not possess the elements that invalidated the statute in *Cooper*.[30] The statute under which the trial court found Hatch competent did not involve a "clear and convincing" standard, but rather involved medical assessments by state doctors about whether Hatch was "presently sane" or "presently insane."[31]

Hatch argued that the Oklahoma system was "standardless;" The Court, however, responded that the system "applied a constitutionally adequate preponderance standard."[32] Therefore, the Court concluded that, because the Oklahoma system did not involve the clear and convincing standard invalidated in *Cooper*, Hatch did not have the right to successive habeas corpus relief, even if *Cooper* would fall under the Act.[33]

Hatch also argued that he received less due process than the defendant in *Cooper* because Hatch's competency was determined by medical doctors and not by a judicial competency hearing.[34] The Court decided that *Cooper* did not establish the right to a judicial competency hearing; rather, previous Supreme Court cases had decided this principle.[35] Therefore, even if the provision deprived Hatch of due process, such deprivation did not rely on a "new rule of constitutional law that was previously unavailable" under the Act.[36]

The Court also noted that exhaustion on the *Cooper* claim was irrelevant to a decision of whether the Act provides for successive petition for habeas corpus relief.[37] The district court was to make an exhaustion ruling should the Court grant Hatch's application.[38]

3. Hatch's Claim That He Did not Have the Right to Argue Effectively for Clemency Did not Meet Habeas Corpus Standards.

Hatch based his third claim for relief on the fact that prison officials could not testify on his behalf at the clemency proceeding.[39] Hatch claimed that this denied him the opportunity to present an effective argument for clemency.[40] The Court decided that Hatch's claim did not meet the Act's requirements as it relied on

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[29] *Id.* at 1015 (citing 28 U.S.C. § 2244(b)(2)(A) (1996)).
[30] *See id.* at 1015.
[31] *Id.* at 1015 (citing OKLA. STAT. TIT. 22, §§ 1173-1174 (repealed 1980)).
[32] *Id.* at 1015.
[33] *See id.* at 1016.
[34] *See id.* at 1016 n.3.
[35] *See id.*
[36] *Id.* (citing 28 U.S.C. § 2244(b)(2)(A) (1996)).
[37] *See id.* at 1016.
[38] *See id.*
[39] *See id.*
[40] *See id.*

neither a "new rule of constitutional law," nor previously undiscovered facts.[41] Furthermore, the Court noted that the its holding in *Greenholtz v. Nebraska Penal Inmates*, that "an inmate has 'no constitutional or inherent right' to commutation of his sentence," precluded Hatch from having a constitutional right recognizable in a motion in federal court for habeas corpus relief.[42] Therefore the Court concluded that this claim did not meet the Act's standards set for granting a successive petition for habeas corpus.[43]

4. Hatch Had Already Presented a Claim of Errors in His First and Second Sentencing Hearings and Therefore the Court Denied Them.

Hatch claimed that because of errors during his first and second sentencing hearings, the state court did not have the jurisdiction to sentence him to death.[44] He admitted that he raised this issue during the first proceeding for habeas corpus relief.[45] Hatch argued, however, that because the Court did not decide the issue of error on the merits, he could properly raise it in this successive petition.[46] The Court stated that, even though there was no decision as to whether error occurred at the first and second sentencing hearings, any errors committed became "moot and irrelevant" by the third sentencing hearing which "superseded the prior sentencing proceedings and was not marred by constitutional error."[47] The Court concluded that the error claims were "presented in a prior application" and it had to dismiss them according to the Act.[48]

IV. CONCLUSION

The court held that Hatch did not make a prima facie showing that his claims satisfied the requirements of the Act.[49] Therefore, the court rejected Hatch's application for successive habeas corpus relief and his petition for a stay of execution.[50]

Alison B. Bianchi

Austin v. Bell, 927 F. Supp. 1058 (M.D. Tenn. 1996). PROVISIONS OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 DO NOT APPLY TO TENNESSEE HABEAS CORPUS CLAIM IN A CAPITAL CASE BECAUSE: (1) TENNESSEE HAS NOT ESTABLISHED PROCEDURES FOR ENSURING THAT INDIGENT CLAIMANTS SEEKING HABEAS RELIEF IN CAPITAL CASES RECEIVE COMPETENT ASSISTANCE OF COUNSEL

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[41] *Id.* (citing 28 U.S.C. § 2244(b)(2) (1996)).
[42] *Id.* (citing Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1979)).
[43] *See id.* at 1016.
[44] *See id.*
[45] *See id.*
[46] *See id.* at 1016-1017.
[47] *Id.*
[48] *Id.* (citing 28 U.S.C. § 2244(b)(1) (1996)).
[49] *See id.* at 1017.
[50] *See id.*

DURING STATE POST-CONVICTION REVIEW; AND (2) COURTS SHOULD NOT CONSTRUE THE ACT TO APPLY TO CASES THAT ARE CURRENTLY THE SUBJECT OF EVIDENTIARY HEARINGS IN FEDERAL DISTRICT COURTS.

I. INTRODUCTION

Petitioner, Richard H. Austin ("Austin"), amended his Habeas Corpus Petition with twenty-two additional claims after the court granted him habeas relief based on three arguments raised in his motion for summary judgment.[1] The court initially determined that "the provisions of the recently enacted Antiterrorism and Effective Death Penalty Act of 1996 ("the Act") . . . [did] not apply to Petitioner's claims."[2] The court then considered each of the additional claims, determined that none of them warranted habeas relief[3] and accordingly, denied relief on the basis of those claims.[4]

II. BACKGROUND

Petitioner raised twenty-two claims for the court's disposition.[5]

III. ANALYSIS

A. *Applicability of the Act*

The court's determination that the Act did not apply to Austin's claims was based on two factors.[6] First, the court concluded the Act inapplicable "until Tennessee establishes procedures for ensuring that indigent prisoners seeking habeas relief in capital cases receive competent assistance of counsel during state post-conviction review."[7] Although Tennessee provided for appointment of counsel for indigent defendants, it failed to impose sufficient standards to "ensure that only qualified, competent counsel will be appointed to represent habeas petitioners in capital cases."[8] The court held that "[i]t is crucial under the Act that only qualified attorneys be appointed to represent habeas petitioners in capital cases because the Act does not permit the ineffectiveness or incompetence of counsel

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[1] *See* Austin v. Bell, 927 F. Supp. 1058, 1060 (M.D. Tenn. 1996).

[2] *Id.* at 1061.

[3] *See id.*

[4] *See id.* at 1067.

[5] *See infra* III.B.

[6] *See id.* at 1061.

[7] *Id.* The court cited section 2261(b) of the Act which provides in pertinent part:

> This chapter is applicable if a State establishes . . . a mechanism for the appointment . . . of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State . . . . *The rule of court or statute must provide standards of competency for the appointment of such counsel.*

Id.

[8] *Id.* at 1061-62.

during State or Federal post-conviction proceedings to be grounds for relief in a proceeding arising under section 2254" of the Act.[9]

Second, the court held that section 2262 of the Act indicates that "the Act should not be construed to apply to cases that are currently the subject of evidentiary hearings in federal district court."[10] The court interpreted the language of section 2262 to imply that once the Act is implemented, a prisoner may recommence the review process at any stage of the habeas review by filing a new habeas application.[11] The court held that if this provision applied to cases where an evidentiary hearing and review of habeas relief claims were already commenced it would have the effect of forcing the same court "to start over from the beginning and reanalyze each of the petitioner's claims under the revised Act. Such a reading of the Act would conflict with the very goal of judicial economy that the Act seeks to promote."[12]

B. Disposition of Twenty-two Additional Claims

After holding the Act inapplicable to the current action, the court then considered the merits of the Petitioner's following claims:

(1) The jury instruction regarding heinous, atrocious, or cruel and aggravating circumstances renders Petitioner's sentence unconstitutional.[13]

Decision: Petitioner's claim was moot because the jury did not cite this aggravating circumstance as justification for its verdict.[14]

(2) The allegedly misleading premeditation instruction requires habeas relief.[15]

Decision: Petitioner's claim is dismissed because it was "vague, conclusory, and failed to set forth the facts supporting the claim . . . ."[16]

(3) The jury instructions were unconstitutionally vague and overbroad because they failed to instruct the jury on how to properly weigh aggravating and mitigating circumstances and failed to sufficiently limit the jurors' discretion in accord with the Eighth Amendment.[17]

Decision: A jury instruction on the weighing of mitigating and aggravating

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[9] *Id.* at 1062. "Instead, such incompetence may only result in the appointment of different counsel on the motion of the state or the petitioner." *Id.* (citing 28 U.S.C.A. § 2261(e)).

[10] *Id.*

[11] *See id.*

[12] *Id.*

[13] *See id.* at 1062.

[14] *See id.* The only aggravating circumstance that the jury used to support its verdict was "defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration." *Id.* at 1062-63.

[15] *See id.*

[16] *Id.*

[17] *See id.* Petitioner reasons that once the jury finds aggravation, they have the discretion to impose the death sentence regardless of mitigation shown. *See id.*

circumstances was not required.[18] "The Eighth Amendment requires that once the class of homicides is genuinely narrowed, the sentence be allowed discretion to impose a lesser punishment and be allowed to consider any relevant mitigating evidence."[19] Additionally, the jury instructions at sentencing were not unconstitutionally vague or overbroad because they did not prevent the jurors from considering mitigating circumstances.[20] Furthermore, the jury instructions were not necessary to limit the jury's discretion because the Tennessee Death Penalty Act "mandates that a jury shall impose life imprisonment instead of the death penalty where the aggravating circumstances are outweighed by the mitigating circumstances."[21]

(4) The absence of written findings of fact regarding the presence or absence of mitigating circumstances is constitutionally impermissible and creates a problem for appellate review.[22]

Decision: "The Constitution does not require a jury that imposes a death sentence make specific written findings of mitigating circumstances."[23]

(5) The requirement that the sentence "shall be death" violates the Eighth Amendment by limiting the jury's discretion through the use of mandatory language.[24]

Decision: Petitioner's argument lacked merit because "in Tennessee the death penalty may only be imposed after the jury unanimously concludes that aggravating circumstances outweigh mitigating circumstances."[25]

(6) Jury instructions in accordance with the provisions of Tenn. Code Ann. § 39-2404 allegedly shift the burden of proving mitigating circumstances to Petitioner in violation of the Eighth and Fourteenth Amendment.[26]

Decision: Tenn. Code Ann. § 39-2404(g) places the burden of proving aggravating circumstances on the state.[27] "There is no statutory language that places the burden . . . on the defendant [and] to the extent that the statute may implicitly place the burden on the defendant, that is not unconstitutional."[28]

(7) The prosecution's allegedly improper final argument at the sentencing phase, mandates a writ of habeas corpus.[29]

Decision: Tenn. Code Ann. § 39-2404(d) specifically allows the state to make

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[18] *See id.*

[19] *Id.* (citing Lowenfield v. Phelps, 484 U.S. 231, 244-46 (1988)).

[20] *See id.* at 1063.

[21] TENN. CODE ANN. §39-2404(f).

[22] *See Austin*, 927 F. Supp. at 1063.

[23] *Id.*

[24] *See id.* This claim is based on the language of TENN. CODE ANN. § 39-2404(g), providing that if the jury unanimously finds aggravating circumstances and they are not outweighed by any mitigating circumstances, "the sentence shall be death."

[25] *Id.* (citing TENN. CODE. ANN. § 39-2404(f)).

[26] *See id.* at 1064.

[27] *See id.*

[28] *Id.* at 1064.

[29] *See id.*

a closing argument.[30] The sequence of final arguments did not violate the Fifth Amendment's due process requirements because those requirements only apply to the federal government.[31] Furthermore the order of argument "did not violate the Fourteenth Amendment because the proceedings still offered sufficient opportunity for the defendant to present his argument."[32]

(8) Tenn. Code Ann. § 39-2404 unconstitutionally allows the jury to accord insufficient weight to non-statutory mitigating factors.[33]

Decision: "The statute does not direct the jury to treat statutory and non-statutory mitigating circumstances differently . . . [and] comports with the Eighth Amendment . . ."[34]

(9) Tenn. Code Ann. § 39-2404's alleged failure to require that the jury be told that it may impose a life sentence out of mercy violates the Eighth Amendment.[35]

Decision: The Tennessee Death Penalty Act does not violate the Eighth Amendment because a jury instruction that directs jurors not to be swayed by sentiment, sympathy, passion or prejudice is constitutional.[36]

(10) The Tennessee Death Penalty Act is unconstitutional for failing to sufficiently narrow the death eligible population.[37]

Decision: Tennessee's "bifurcated proceeding provided for under the statute sufficiently narrows the population of death eligible defendants in accordance with the Eighth Amendment."[38] Additionally, "[t]he jury may only impose the death penalty upon finding that one or more statutory aggravating circumstances are present and . . . not outweighed by any mitigating circumstances."[39]

(11) The death penalty in Tennessee is imposed in an unconstitutional inconsistent manner.[40]

Decision: "[T]he inconsistency with which the Tennessee Death Penalty is imposed does not justify granting Petitioner a writ of habeas corpus."[41]

(12) Tennessee's three year post-conviction statute of limitations violates Petitioner's Fourteenth Amendment due process right and constituted an *ex post facto* violation.[42]

Decision: Because the state allowed petitioners seeking relief three years from the statute's effective date to bring any post-conviction petitions, the statute was

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[30] *See id.*

[31] *See id.*

[32] *Id.* (citing Herring v. New York, 422 U.S. 853, 863 (1975)).

[33] *See id.*

[34] *See id.*

[35] *See id.* at 1064-65.

[36] *See id.* at 1064-65 (citing California v. Brown, 479 U.S. 538, 539-43 (1987)).

[37] *Id.* at 1065.

[38] *Id.* (citing Gregg v. Georgia, 428 U.S. 153, 168-87 (1976)).

[39] *Id.* (citing TENN. CODE ANN. § 39-2404(g)).

[40] *See id.*

[41] *Id.*

[42] *See id.*

not an ex post facto law and did not violate petitioner's due process rights.[43]

(13) The prosecution engaged in alleged vindictiveness by seeking the maximum sentence for first degree murder *after* Petitioner rejected the state's guilty plea offer.[44]

Decision: The sentence was not vindictive because it "was within the authorized range for the crime with which Petitioner was charged."[45]

(14) The Tennessee Death Penalty Act violates the Sixth Amendment by failing to require notice of prosecution's intended proof of aggravating circumstances.[46]

Decision: Since "the Tennessee statute itself defines the aggravating circumstances upon which the jury may rely to justify imposing the death penalty . . . [the] statutory notice satisfies constitutional requirements."[47]

(15) The Tennessee Death Penalty Act improperly allows introduction of inadmissible evidence at the sentencing phase.[48]

Decision: "There is no requirement that the Rules of Evidence apply at a capital sentencing hearing."[49] Moreover, although it is "constitutionally permissible for the jury to consider the defendant's criminal record at sentencing,"[50] "the jury did not list those convictions as aggravating factors justifying imposition of the death penalty."[51]

(16) Tennessee's bifurcated approach to death penalty proceedings violates double jeopardy.[52]

Decision: Bifurcated procedures, such as Tennessee's, are constitutionally permissible.[53] In Tennessee, the sentencing phase of a capital trial deals "only with punishment and does not constitute a second trial for the same offense or create a separate and additional offense."[54]

(17) Jury instructions at the guilt phase were inadequate and improper as to the mandatory presumptions of an element of the crime in question.[55]

Decision: Because Petitioner "fails to cite to specific deficiencies . . . [Petitioner's] allegations are conclusory and insufficiently plead."[56]

(18) The death penalty, as administered in Tennessee, is cruel and unusual punishment because of allegedly unconstitutional conditions on Tennessee's

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[43] *See id.*

[44] *See id.*

[45] *Id.*

[46] *See id.* at 1065-66.

[47] *Id.* at 1066.

[48] *See id.*

[49] *See id.* (citing Johnson v. Wainwright, 778 F.2d 623, 632 (11th Cir. 1985)).

[50] *Id.* (citing Barclay v. Florida, 463 U.S. 939, 951 n.8 (1983)).

[51] *Id.*

[52] *See id.*

[53] *See id.*

[54] *Id.* at 1066 (citing State v. Austin, 618 S.W.2d 738, 742 (Tenn. 1981)).

[55] *See id.*

[56] *Id.*

death row.[57]

Decision: A Petitioner must bring a claim regarding conditions of confinement under 42 U.S.C. § 1983.[58]

(19) Petitioner's prior convictions of robbery and larceny were improperly used as aggravating circumstances at sentencing.[59]

Decision: Because the jury did not list Petitioner's prior convictions as aggravating circumstances, any such error is "harmless beyond a reasonable doubt."[60]

(20) Prosecution improperly sought to diminish the jury's responsibility for imposing the sentence through an allegedly improper closing argument, in violation of the Eighth and Fourteenth Amendments.[61]

Decision: This claim was summarily dismissed because the allegation was conclusory and insufficiently plead.[62]

(21) Prosecution improperly argued victim impact evidence at both the guilt and sentencing phases of trial in violation of the Eighth and Fourteenth Amendments.[63]

Decision: "The argument that was presented at Petitioner's trial regarding the impact of Petitioner's crime was not unconstitutional under the Eighth or Fourteenth Amendment."[64]

(22) The prosecution created bias in their favor by improperly excluding jurors due to their opposition to the death penalty.[65]

Decision: The Petitioner's claims were rejected because they were conclusory and insufficiently plead.[66] Additionally, the Court noted that "a prospective juror may be excluded for cause because of [their] views on capital punishment if those views would prevent or substantially impair the juror from performing that juror's duty in accordance with the juror's instructions and oath."[67]

IV. CONCLUSION

Until a state establishes procedures to ensure that indigent prisoners seeking habeas relief in capital cases receive competent assistance of counsel during state post-conviction review, the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 will not be applicable to habeas corpus claims. Accordingly, when the Act becomes effective, the Act will not apply retroactively to cases under current habeas review in federal court in order to avoid indirect

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[57] *See id.*

[58] *See id.* (citing Preiser v. Rodriguez, 411 U.S. 475, 498-99 (1973)).

[59] *See id.* at 1067.

[60] *Id.* (citing Brecht v. Abrahamson, 507 U.S. 619 (1993)).

[61] *See id.*

[62] *See id.* (citing Spillers v. Lockhart, 802 F.2d 1007, 1010 (8th Cir. 1986)).

[63] *See id.*

[64] *Id.* (citing Payne v. Tennessee, 501 U.S. 808 (1991)).

[65] *See id.*

[66] *See id.* (citing Spillers, 802 F.2d at 1010).

[67] *Id.* (citing Lockhart v. McCree, 476 U.S. 162 (1986).

review which would defeat the goal of judicial economy that the Act seeks to promote.

Benjamin Bejar
Stacey Hiller

Leavitt v. Arave, 927 F. Supp. 394 (D. Idaho 1996). TITLE I OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 APPLIES TO ALL PENDING HABEAS CORPUS PETITIONS

I. INTRODUCTION

Title I of the Antiterrorism and Effective Death Penalty Act of 1996[1] (hereinafter "the Act") alters state prisoner access to habeas corpus relief in federal courts under the existing laws.[2] Congress intended the Act to take effect immediately and apply to all pending habeas corpus cases.[3] Moreover, the Act does not have a retroactive effect on pending habeas petitions since it addresses a petitioner's prospective relief and not any vested rights.[4] Thus, the Act applies to all pending habeas cases, including the petitioner's case.

II. BACKGROUND

On January 22, 1993, state prisoner Richard A. Leavitt filed a petition in the District Court of Idaho seeking habeas corpus relief from a first-degree murder conviction and death sentence.[5] The court requested briefing on the application of the Act to Leavitt's petition, since the Act was not signed into law until April 24, 1996, more than three years after Leavitt filed his petition.[6] The Act amends, among others, existing statutes 28 U.S.C. §§ 2244, 2253, and 2254 and creates new chapter 28 U.S.C. § 154, which jointly alter the statutory framework governing consideration by federal courts of a state prisoner's habeas petition.[7]

Petitioner argues that the Act does not apply to his petition according to canons of statutory construction and from the negative inference that only one part of the Act expressly applies to pending cases.[8] The court also considered whether the application of the Act to pending cases would be retroactive and invalid.[9]

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[1] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[2] *See* Leavitt v. Arave, 927 F. Supp. 394, 395 (1996).

[3] *See id.* at 398-399.

[4] See *id.*

[5] See *id.* at 395.

[6] See *id.*

[7] *See id.* According to the joint conference report, the Act was designed to correct the problems of abuse and unnecessary delay under the former habeas corpus laws. *See id.* at 397 (citing 142 CONG. REC. H3333 (daily ed. April 15, 1996)).

[8] See *id.* at 396.

[9] See *id.* at 398.

III. ANALYSIS

The court relied on the test established in *Landgraf v. USI Film Prod.*[10] to determine whether the Act applies to pending cases in which events predate the statute's enactment; if Congress does not specify either expressly or through clear intent the scope of the statute's reach, and the statute would have a retroactive effect, then the statute should not be applied to pending cases.[11] Because Congress did not expressly state the Act's proper reach, the court examined the purpose, structure, and legislative history of the Act for Congress' intent.[12] In so doing, the court found that a negative inference cannot be drawn in the absence of express reach because the unique nature of section 107 necessitated the inclusion of express reach.[13] Thus, while the court was unable to identify clear congressional intent on the statute's application to pending habeas petitions, the court determined that Congress intended a consolidated approach to achieving habeas reform, and that the sections of the Act were designed to work together.[14] Extrapolating from this interpretation of Congress' intent, the Court found that the Act does apply to pending habeas petitions.[15]

The court also held that the application of the Act to pending habeas petitions does not constitute a "retroactive effect."[16] Statutes with retroactive effects should not be applied to cases pending at the time of enactment since they would affect rights already vested in the parties involved.[17] In contrast, statutes which address merely prospective relief may be applied to pending cases, even though the events involved in the case predate the law's enactment.[18] The court decided that statutes addressing the scope of a state prisoner's habeas petition constitute prospective relief and thus may be applied to cases pending in federal court on the date of the statute's enactment.[19] Since under common law a state prisoner has no right to habeas corpus review, the Act merely changes the power of the court rather than the rights or obligations of the parties.[20]

IV. CONCLUSION

Since the application of the Act to pending habeas petitions will not have a retroactive effect, and since Congress intended it to govern existing cases, the

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[10] 511 U.S. 244 (1994).

[11] *See Leavitt*, 927 F. Supp. at 396 (citing *Landgraf*, 511 U.S. at 280).

[12] *See id.* at 396-97.

[13] *See id.* at 397-98.

[14] *See id.* at 397.

[15] *See id.*

[16] *Id.* at 398.

[17] *See id.* (quoting *Landgraf*, 511 U.S. 244, 280 (1994)).

[18] *See id.*

[19] *See id.*

[20] *See id.* (quoting Landgraf, 511 U.S. at 284). The court also notes that since the Eleventh Amendment limits "the ability of an individual to sue state officials in federal court," the writ of habeas corpus is a constitutional imperative. *Id.*

court held that the Act generally applies to pending habeas corpus cases.[21]

Paul J. Davenport

Reyes v. Keane, 90 F.3d 676 (2d Cir. 1996). A PETITION FOR HABEAS CORPUS PETITION IS NOT A CIVIL ACTION UNDER THE PRISON LITIGATION REFORM ACT (PLRA); THE ONE-YEAR STATUTE OF LIMITATIONS OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT (AEDPA) IS INAPPLICABLE TO A HABEAS CORPUS PETITION PENDING PRIOR TO THE AEPDA'S EFFECTIVE DATE; THE AEDPA'S CERTIFICATE OF APPEALABILITY PROVISION IS APPLICABLE TO A HABEAS CORPUS PETITION PENDING PRIOR TO THE AEDPA'S EFFECTIVE DATE; INSUFFICIENCY OF TRIAL COURT'S JURY INSTRUCTION REGARDING REASONABLE DOUBT MERITS ISSUANCE OF A CERTIFICATE OF APPEALABILTY.

I. INTRODUCTION

Edwardo Reyes ("Reyes") petitioned for a writ of habeas corpus to the United States District Court for the Southern District of New York, and was subsequently denied relief.[1] Reyes then appealed to the Second Circuit Court of Appeals, which dismissed his claim.[2] Reyes then moved for reinstatement of his appeal.[3] The Second Circuit Court of Appeals granted Reyes' motion for reinstatement and granted leave to proceed *in forma pauperis* on appeal.[4] The court also granted Reyes' request for a certificate of appealability limited to the issue regarding the reasonable doubt instruction.[5]

II. BACKGROUND

The New York Supreme Court sentenced Reyes to fifteen years to life in prison after convicting him of selling drugs in 1985.[6] His conviction was affirmed and leave to appeal to the court of appeals was denied.[7]

Reyes petitioned for a writ of habeas corpus to the District Court for the Southern District of New York on July 13, 1994, claiming the following: (1) the trial court's jury charge incorrectly defined the criterion for reasonable doubt; (2) the chain of custody of particular evidence was not sufficiently established; and (3) the trial judge had made inappropriate remarks.[8] The district court dismissed the petition, ruling that Reyes had effectively waived his right to challenge the jury instruction due to his failure to object at trial, and that his other two claims

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[21] *See id.* at 399.

[1] *See* Reyes v. Keane, 90 F.3d 676, 677 (2d Cir. 1996).

[2] *See id.*

[3] *See id.*

[4] *See id.*

[5] *See id.*

[6] *See id.*

[7] *See id.*

[8] *See id.*

were without merit.[9] In addition, the district judge rejected Reyes's petition for a certificate of probable cause.[10]

On September 11, 1995, Reyes filed a notice of appeal.[11] The Second Circuit interpreted Reyes' notice of appeal as a petition for a certificate of probable cause[12] but dismissed the appeal for failure to either pay a filing fee or submit a motion to proceed on appeal *in forma pauperis*.[13] Reyes moved to reinstate his appeal and to proceed *in forma pauperis* on October 13, 1995.[14] The court considered the following issues in Reyes' petition, in light of the recently enacted Prison Litigation Reform Act (the "PLRA") and the Antiterrorism and Effective Death Penalty Act (the "AEDPA") to determine whether: (1) the PLRA filing fee requirements apply to habeas corpus petitions; (2) the statute of limitations and certificate of appealability provisions of the AEDPA apply to a habeas corpus petition which was filed before the AEDPA took effect; and (3) the certificate of appealability provision applies, whether an application for a certificate of probable cause to appeal should be considered as a request for a certificate of appealability.[15]

III. ANALYSIS

A. *PLRA's applicability to Habeas Corpus Petition*

The PLRA, effective on April 26, 1996, requires that incarcerated prisoners pay a filing fee when instituting "civil actions" or appeals from "civil actions."[16] The court considered whether a petition for a writ of habeas corpus should be deemed a "civil action" for purposes of the PLRA.[17]

Courts have deemed a petition for a writ of habeas corpus a "civil action" for certain procedural purposes.[18] In this case, however, the court determined that Congress did not intend the PLRA to apply to petitions for writ of habeas corpus.[19] The court applied the test announced in *In re Nagy*[20] a case in which the court considered whether a writ of mandamus is a civil action under the PLRA.[21] In *Nagy* the court held that whether a writ of mandamus is subject to

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[9] *See id.*

[10] *See id.* (citing U.S.C. § 2253).

[11] *See id.*

[12] *See id.* (citing FED. R. APP. P. 22(b)).

[13] *See id.*

[14] *See id.* Reyes also submitted the necessary affidavit of poverty pursuant to 28 U.S.C. § 1915(a). *See id.* at 677-78.

[15] *See id.* at 677.

[16] *See id.* at 678 (citing 28 U.S.C. § 1915(a)(2)).

[17] *See id.*

[18] *See id.* (citing Smith v. Bennett, 365 U.S. 708, 712 (1961)).

[19] *See id.*

[20] 89 F.3d 115 (2d Cir. 1996).

[21] *See Reyes*, 90 F.3d at 678 (citing In re Nagy, 89 F.3d at 115).

the requirements of the PLRA depends upon the nature of the claim.[22] The PLRA thus applies only to cases "analogous to the typical suits brought under 42 U.S.C. § 1983 complaining about prison conditions."[23]

Similarly, the court determined that Congress did not "intend the PLRA to apply to petitions for a writ of habeas corpus" for three reasons.[24] First, Congress intended the PLRA to address prisoner's suits challenging prison conditions.[25] Nothing in the legislative history indicates that Congress intended the filing fee requirement to apply to habeas corpus petitions.[26] Second, the difference in the fees imposed for filing a habeas corpus petition and a typical civil action indicate that Congress intended to make the filing of a habeas corpus petition easier than filing a civil complaint.[27] Third, in the AEDPA, Congress addressed potential abuses in the filing of habeas corpus petitions "impos[ing] several new restrictions on the filing of habeas corpus petitions, but mak[ing] no change in filing fees or in a prisoner's obligation to pay existing fees."[28] For these three reasons, the court held that "the PLRA does not apply to a habeas corpus petition or to an appeal from the denial of such a petition."[29]

B. *Determination of whether the AEDPA's one-year statute of limitations applies to a habeas corpus petition filed before the Act's effective date*

Section 101 of the AEDPA "amend[ed] 28 U.S.C. § 2244 to require that habeas petitions brought under 28 U.S.C. § 2254 be filed no later than one year after the completion of state court direct review."[30] Thus, the AEDPA's statute of limitations would bar Reyes' petition, which was filed "more than one year after leave to appeal . . . from the date affirmance of his state court conviction was denied in 1989."[31] The court decided, however, that retroactive application of the AEDPA's one-year statute of limitations to Reyes' case was unfair.[32]

The court had previously held that a new statute of limitations could apply to pending cases "where the full period of the new limitations period was available

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[22] *See id.*

[23] *See id.* (citing In re Nagy, 89 F.3d at 117).

[24] *See id.*

[25] *See id.* The court was careful to point out that this holding was not to limit the PLRA's application solely to cases involving prisoner's complaints about prison conditions. *See id.* at 678 n.1. The holding here, like that in Nagy, is limited to "determining whether the PLRA should be construed to cover special proceedings like habeas corpus petitions and mandamus applications against judges." *See id.* Prison conditions lawsuits provide a contrasting example of the primary purposes of the PLRA. *See id.*

[26] *See id.*

[27] *See id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 679.

[32] *See id.*

to the plaintiff after the effective date of the change."[33] The question remained open, however, as to "whether a new limitations period could be applied to a claim filed after the effective date of the new statute without affording a plaintiff an opportunity to comply with the new time period."[34] The court determined that Congress did not wish to deny prisoners who lacked notice of the new limitations period access to the federal courts.[35] The AEDPA's applicable time limit for Reyes to file his habeas corpus petition had expired before the Act became effective, and thus there was thus no issue of unfair retroactive application of a new statute of limitations with respect to Reyes.[36] The court held that "[s]ince Reyes' petition was filed before the effective date, the new time limit is inapplicable."[37]

C. *Determination of whether the certificate of appealability provision of the AEDPA applies to a habeas corpus petition filed before the Act's effective date*

Although Section 102 of the AEDPA requires a certificate of appealability ("COA") rather than a certificate of probable cause to appeal ("CPC"), the court held that the new requirement would not apply in this case.[38] The court determined that the standards for the newly-required COA were not significantly different from the standards for the formerly-required CPC.[39] "Section 102 of the AEDPA requires that a COA may be issued only upon a 'substantial showing of the denial of a constitutional right'[40] while the standard for a CPC had previously been stated as a 'substantial showing of the denial of a federal right.' "[41] The court indicated that the COA's more stringent requirement of a showing of a constitutional right as opposed to the CPC's requirement of a federal right is immaterial in the context of a habeas corpus petition.[42] The court thus held "that the substantive standard for a COA is the same as the standard for the prior CPC."[43]

The court applied an AEDPA requirement for a COA "that was not explicitly applicable to a CPC."[44] The AEDPA requires that the COA "shall indicate

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[33] *Id.* (citing Vernon v. Cassadaga Valley Central School District, 49 F.3d 886 (2d Cir. 1995)).

[34] *Id.* (citing Vernon, 49 F.3d at 889 n.1).

[35] *See id.* The court declined to decide "whether a state prisoner who files a habeas petition more than a year after state court direct review was completed but within a year after the effective date of the AEDPA will be allowed a full year from the effective date of the Act or only a reasonable time thereafter." *Id.*

[36] *See id.*

[37] *Id.*

[38] *See id.* at 679-680.

[39] *See id.* at 680.

[40] *Id.*

[41] *Id.* (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

[42] *See id.*

[43] *Id.*

[44] *Id.*

which specific issue or issues satisfy the showing required by paragraph (2) [requiring a substantial showing of the denial of a substantial right.]"[45] The court determined that the application of this requirement to a habeas petition filed before the effective date of the AEDPA would fall within the permissible category of procedural changes which would pose no retroactivity issues under *Landgraf*.[46]

The court held that it would treat a prisoner's request for a CPC as a COA request as long as the CPC petition meets the "substantive and procedural requirements of the new COA."[47] The difference in terminology is insignificant as long as the petition "make[s] a substantial showing of the denial of a constitutional right and . . . indicate[s] which specific issue or issues satisfy that standard."[48]

D. *Analysis of the merits of Reyes' request for a certificate of appealability*

The court concluded that Reyes' claim regarding the deficiency in the jury charge on reasonable doubt is a substantial issue warranting a COA.[49] The trial judge erred in stating that a reasonable doubt is "not even a feeling that a defendant may not be guilty . . . [i]t is not a requirement of proof beyond a reasonable doubt."[50] Although the court declined to determine whether the trial court undermined the reasonable doubt standard, the court nevertheless stated that this issue "is substantial within the meaning of 28 U.S.C. § 2253(c)(2)."[51] The court also determined that the issue of whether Reyes' objection to the jury instruction was forfeited by lack of objection at trial is a substantial, as failure to object may constitute a claim of ineffective counsel.[52] The court held that this claim may be sufficient to establish cause under *Wainwright v. Syke*.[53]

Finally, the court denied petitioner's claims regarding the chain of custody and affirmed the holding of the District Court.[54]

IV. CONCLUSION

The court granted Reyes' motion for restatement and gave him leave to proceed *in forma pauperis* on appeal.[55] The court also granted Reyes' request for a

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[45] *See id.* (quoting 28 U.S.C. § 2253(c)(3)).

[46] *See id.*

[47] *Id.*

[48] *Id.*

[49] *See id.*

[50] *Id.*

[51] *Id.*

[52] *See id.*

[53] *See id.* (citing Wainwright v. Syke, 433 U.S. 72, 87 (1970)).

[54] *See id.*

[55] *See id.*

certificate of appealability but limited it to the reasonable doubt instruction issue.[56]

Michelle L. Boltz

Boyle v. Johnson, 93 F.3d 180 (5th Cir. 1996). PETITION FOR WRIT OF HABEAS CORPUS DENIED BECAUSE PETITIONER FAILED TO PROVE ERROR WITH RESPECT TO HIS CLAIM OF (I) INFRINGEMENT OF FIRST AMENDMENT PROTECTIONS; (II) VIOLATION OF FOURTEENTH AMENDMENT DUE PROCESS RIGHTS; AND (III) INEFFECTIVE ASSISTANCE OF COUNSEL. PETITION FOR WRIT OF HABEAS CORPUS DENIED UNDER THE STANDARDS PRIOR TO ENACTMENT OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996.

I. INTRODUCTION

Boyle appealed the denial of his federal habeas corpus relief. Boyle claimed the following: (1) evidence of his sexual habits should not have been introduced at the sentencing phase of his trial; (2) the prosecution knowingly presented false and misleading testimony from its medical expert; and (3) he was denied effective assistance of counsel when his attorney failed to introduce mitigating evidence at the punishment phase of his trial. The Fifth Circuit Court of Appeals affirmed the district court's denial of a writ of habeas corpus, finding no reversible error on the part of the state trial court.

II. BACKGROUND

Gail Lenore Smith hitched a ride with a trucker from a rest stop outside Fort Worth, Texas while on her way to visit her mother.[1] The next day, her naked body was found bound with duct tape in a brushy roadside area.[2] Smith's relatives, who had dropped her off at the truck stop where she hitched the ride, were able to offer a description of the driver, the truck, and an inscription on the side of the truck.[3]

Authorities traced the truck to Boyle and subsequently arrested him.[4] The police received written consent from Boyle and Jewett Scott, the truck's owner, to search the truck.[5] Inside they found several of Smith's possessions, hair from Smith's head, and blood stains consistent with Smith's blood type.[6] Additionally, police found Boyle's fingerprints on the duct tape used to bind Smith and fibers from the truck's carpeting on her body.[7] Smith had been anally and orally raped,

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[56] *See id.*

[1] *See* Boyle v. Johnson, 93 F.3d 180, 182 (5th Cir. 1996).

[2] *See id.*

[3] *See id.* at 182-83.

[4] *See id.* at 183.

[5] *See id.* at 183 & n.1.

[6] *See id.*

[7] *See id.*

beaten with a blunt instrument, and strangled to death.[8]

Boyle pled not guilty to charges of capital murder during the course of committing or attempting to commit aggravated sexual assault, and capital murder during the course of a kidnapping.[9] The evidence presented at trial included physical evidence linking the defendant to the crime, medical evidence showing the sexual nature of the crime, and other evidence tending to show Boyle's obsession with sex.[10] A jury convicted Boyle on all counts and sentenced him to death.[11]

The Texas Court of Criminal Appeals reversed Boyle's conviction, holding that his arrest had been unlawful and therefore the evidence obtained pursuant to his arrest was inadmissible.[12] The state moved for a rehearing *en banc*, and the full Court of Criminal Appeals reinstated Boyle's conviction.[13] The Supreme Court denied Boyle's petition for certiorari.[14] After Boyle's petitions for state habeas relief were denied, he pursued federal habeas relief.[15] The Northern District of Texas denied Boyle's petition, but granted him a certificate of probable cause to appeal.[16] Consequently, Boyle appealed to the Fifth Circuit Court of Appeals.[17]

III. ANALYSIS

A. *Evidence of Boyle's Sexual Habits*

Boyle argued that the trial court violated his First Amendment rights of freedom of association and expression by admitting evidence relating to his sexual habits.[18] The admission of evidence concerning one's belief and associations is not inadmissible per se; the First Amendment provides protection against admission at trial of evidence relating to associations and expressions only if that evidence is essentially irrelevant to the issues at trial.[19]

In this instance, Boyle was found guilty of murder with a sexual component.[20] At sentencing, the prosecution presented three letters, testimony, and Boyle's graphic sexual drawings to demonstrate Boyle's preoccupation with sex and the

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[8] *See id.*

[9] *See id.*

[10] *See id.*

[11] *See id.*

[12] *See id.*

[13] *See id.*

[14] *See id.*

[15] *See id.*

[16] *See id.*

[17] *See id.*

[18] *See id.*

[19] *See id.* at 183-84 (citing Dawson v. Delaware, 503 U.S. 159, 165 (1992) (holding evidence inadmissible because the state failed to show that it was in any way linked to an issue at trial, and thus proved nothing more than abstract beliefs)).

[20] *See id.* at 185.

violent aspects of his sexual expression.[21] The court found that there was a sufficient nexus between the crime charged and the evidence presented to withstand a First Amendment challenge.[22]

B. *Violation of Due Process*

1. Presumption of False Testimony

Boyle claimed that his right to a fair trial was denied because the prosecution used false and misleading testimony from an expert witness, violating the Fourteenth Amendment Due Process Clause.[23] Boyle asserted that Dr. Erdmann ("Erdmann"), a clinical pathologist, probably perjured his testimony in Boyle's case considering his gross misconduct in past cases, including falsifying autopsy reports.[24] In addition, Boyle maintained that the prosecutor had knowledge of Erdmann's unreliability, but failed to notify the defense of this fact.[25]

In order to establish a Due Process violation, the defendant must show that the witness' testimony was actually false, that the testimony was material, and that the prosecution knew that the witness' testimony was false.[26] The remedy for the presentation of tainted testimony is reversal of the conviction.[27] If the state is aware of information that would serve to impeach a witness, the state must disclose that information to the defendant.[28] If they do not, the conviction will be reversed if it is "reasonably probable" that disclosure of such evidence would have produced a different result at trial.[29]

Boyle attacked Erdmann's testimony, noting that his experts disagreed with Erdmann's analysis and interpretation of the evidence.[30] He also pointed out that Erdmann is presently imprisoned after pleading no contest to falsifying autopsy reports in previous cases.[31] The state trial court, however, made a finding of fact

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[21] *See id.* at 183-85.

[22] *See id.* at 185. The court also briefly discussed Boyle's contention that the presentation of sexual evidence at the guilt-innocence phase of the trial violated the *Dawson* standard. *Dawson* explicitly addressed only the sentencing phase of the trial. Having found the requisite *Dawson* nexus with respect to the sentencing phase, however, the court declined to rule on whether *Dawson* applies to the guilt-innocence phase as well as the sentencing phase of the trial. *See id.* at 185 n.9.

[23] *See id.* at 185.

[24] *See id.* at 185-86.

[25] *See id.* at 186 (citing Brady v. Maryland, 373 U.S. 83, 87 (1963) which held that suppression of evidence favorable to the accused by the prosecution violates Due Process).

[26] *See id.* (citing Westley v. Johnson, 83 F.3d 714, 726 (5th Cir. 1996); East v. Scott, 55 F.3d 996, 1005 (5th Cir. 1995)).

[27] *See id.* (citing United States v. Blackburn, 9 F.3d 353, 357 (5th Cir. 1993)).

[28] *See id.* (citing United States v. Martinez-Mercado, 888 F.2d 1484, 1488 (5th Cir. 1989)).

[29] *See id.* (citing Kyles v. Whitley, 115 S. Ct. 1555, 1566 (1995)).

[30] *See* Boyle, 93 F.3d at 186.

[31] *See id.* at 186 & n.11.

that Erdmann had not perjured himself in the Boyle case. The Court of Appeals granted a "presumption of correctness" to the trial court's findings, noting that this presumption is particularly strong where, as here, the habeas court was the same court that presided over the trial.[32]

Boyle failed to overcome this presumption.[33] There was a great deal of physical evidence in the case and Dr. Erdmann's testimony was consistent with that evidence.[34] Boyle failed to show that Erdmann acted inappropriately on this occasion.[35]

2. Failure to Disclose Impeachment Material

Boyle also argued that the prosecution knew of Erdmann's unreliability, yet failed to disclose that information to the defense.[36] The state court found that the prosecution had no such knowledge at the time of the trial.[37] Since the Court of Appeals afforded a presumption of correctness to the state habeas court's findings, it found that the prosecutor was unaware of Erdmann's deficiencies at the time of trial.[38]

C. *Ineffective Assistance of Counsel*

Boyle claimed that his attorney rendered ineffective assistance of counsel by failing to present mitigating evidence at the penalty phase of the trial.[39] Boyle's counsel did not introduce evidence of his mental illness, violent family background, economic hardships, drug and alcohol addictions, and evidence of his positive traits.[40] The trial counsel testified that the evidence in question had a "double-edged quality" and could have been aggravating.[41]

To be successful in this claim, the defendant must show that (i) the counsel's performance was deficient and (ii) the deficient performance prejudiced the defense.[42] Deficient performance requires a showing that counsel's performance fell below the objective standard of reasonableness.[43] Informed strategic decisions, however, are given a heavy measure of deference.[44] Prejudice must be shown by demonstrating that the outcome was rendered unfair or that the proceeding was

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[32] *See id.* (citing May v. Collins, 955 F.2d 299, 314 (5th Cir. 1992) (presumption of correctness accorded to findings made where trial judge able to compare later information with own first-hand knowledge of case)).

[33] *See id.* at 186-87.

[34] *See id.* at 186.

[35] *See id.*

[36] *See id.* at 187.

[37] *See id.*

[38] *See id.*

[39] *See id.*

[40] *See id.*

[41] *See id.* at 188.

[42] *See id.* at 187 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

[43] *See id.*

[44] *See id.* (citing Mann v. Scott, 41 F.3d 968, 984 (5th Cir. 1994)).

fundamentally unfair.[45] The court held that Boyle failed to prove his claim of ineffective assistance of counsel.[46] Boyle's counsel chose not to introduce evidence based on strategic and tactical considerations, reasoning that such evidence was, at best, "double-edged," and, at worst, potentially aggravating.[47]

D. *The Antiterrorism and Effective Death Penalty Act*

While Boyle's appeal was pending, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996.[48] The AEDPA modifies the statutory provisions relevant to the ability of federal courts to grant petitions for writs of habeas corpus, Congress did not, however, specify a date after which the provisions became effective.[49] The Court of Appeals rejected Boyle's claims under the old standards, which were more permissive.[50] The court declined to address the issue of whether the AEDPA applies to appeals pending, reasoning that since Boyle's petition was denied under the more permissive standards it would definitely not be granted if the amendments were held to apply.[51]

In addition, section 107 of the AEDPA incorporates a more restrictive standard of review for death penalty habeas cases which explicitly applies to all pending cases.[52] Operation of the more restrictive standards of review, however, is contingent upon fulfilling other requirements designed to ensure appointment of counsel.[53] Ultimately, the court rejected Boyle's claim under the old standards of review and, therefore, declined to address whether Texas met its burden under the amended statute.[54]

IV. CONCLUSION

Although attempting to challenge his conviction, Boyle failed to overcome the presumption of correctness granted to the lower court's findings.[55] The Court of Appeals denied Boyle's petition for a writ of habeas corpus under the standards

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[45] *See id.*

[46] *See id.*

[47] *See id.* at 188.

[48] *See id.* (citing The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (hereinafter the "AEDPA")).

[49] *See id.*

[50] *See id.*

[51] *See id.* (citing Callins v. Johnson, 89 F.3d 210, 216 (5th Cir. 1996) (demonstrating that the issue of whether the amendments to the AEDPA apply to cases pending prior to enactment of the amendments is the subject of considerable litigation)).

[52] *See id.* at 189 (citing the AEDPA, Pub. L. No. 104-32, § 107(c), 110 Stat. 1214 (1996)).

[53] *See id.* at 189, n.20 (noting that § 107 is applicable only if the state establishes, subject to restrictions, "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the State post-conviction proceedings brought by indigent prisoners.").

[54] *See id.* at 189.

[55] *See id* at 186-87.

used prior to the enactment of the AEDPA.[56] Since the court believed that this was a more lenient standard, it left open the question of whether the AEDPA is applicable to appeals pending when the statute was enacted.[57]

Alison M. Fee

Lindh v. Murphy, No. 95-3608, 96 F.3d 856 (7th Cir. 1996). 28 U.S.C. SECTION 2254 (d) AS AMENDED BY THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, ESTABLISHED THE CIRCUMSTANCES UNDER WHICH A FEDERAL COURT MAY ISSUE A WRIT OF HABEAS CORPUS, AS IT APPLIES TO CASES PENDING AT THE TIME OF THE ENACTMENT. IN ADDITION, A DEFENDANT DOES NOT HAVE A FUNDAMENTAL SIXTH AMENDMENT RIGHT TO CROSS-EXAMINE AN EXPERT'S TESTIMONY THAT IS GIVEN DURING THE SECOND PHASE OF A BIFURCATED TRIAL.

I. INTRODUCTION

The Seventh Circuit Court of Appeals upheld the District Court's denial of Aaron Lindh's ("Lindh") federal court collateral attack petition seeking a writ of habeas corpus under 28 U.S.C. Section 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA").[1] The court rejected Lindh's argument that an investigation of the prosecution's psychiatrist Dr. Leigh Roberts ("Roberts") may have impacted the credibility of Roberts' analysis of Lindh.[2] In addition, the court rejected Lynch's contention that Lindh's attorney should have been permitted to cross-examine Roberts in order to explore the possibility of bias in Roberts' testimony.[3]

II. BACKGROUND

On January 15, 1988, Lindh entered the City-County Building of Madison, Wisconsin, and shot three strangers, killing two people.[4] During the incident Lindh was also shot and taken to the hospital under police custody.[5] Lindh was arraigned in the Dane County Circuit Court on February 26, 1988.[6] Lindh pleaded guilty to carrying and using a firearm in a public building. He pleaded not guilty by reason of mental disease to murder.[7]

After the police took Lindh to the hospital, the Dane County District Attor-

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[56] *See id.* at 188.

[57] *See id.*

[1] *See* Lindh v.Murray, No. 95-3608, 1996 96 F.3d 856, 857 (7th Cir. 1996) (citing 28 U.S.C. § 2254 (1996)); (Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-32, 110 Stat. 1214 (1996)).

[2] *See id.* at 860.

[3] *See id.* at 875.

[4] *See id.* at 860.

[5] *See id.*

[6] *See id.*

[7] *See id.*

ney's office contacted Roberts, a forensic psychiatrist, to interview Lindh.[8] Roberts met with Lindh that evening and on several occasions thereafter.[9] Roberts reported that Lindh did not seem be experiencing suicidal feelings, depression, or hallucinations.[10]

In March of 1988, the University of Wisconsin Hospitals had investigated Roberts for engaging in sexual misconduct with a patient.[11] Roberts discovered that the Medical Examining Board was investigating allegations made by three female patients.[12] By September 1988, the Milwaukee District Attorney had started a criminal investigation of Roberts.[13] Despite the investigations, however, Roberts remained involved in the Lindh case.[14]

In the first phase of a bifurcated trial, the jury convicted Lindh of two murders and one attempted murder.[15] During the second phase, Lindh argued that he was insane at the time of the shootings. Under Wisconsin law, successfully proving insanity would change the location of Lindh's confinement from a prison to a prison-hospital and thus would entitle Lindh to possible release if he "recovered" in the future.[16]

Lindh hoped to prove that Roberts' testimony, was biased.[17] Although different prosecutors were assigned to the Lindh and Roberts cases, Lindh argued that Roberts may have believed that testifying for the prosecution in the Lindh case could potentially earn him lenity.[18] The trial judge did not allow Lindh to cross-examine Roberts about the investigations pending against him.[19] On appeal, Lindh asserted that state law and the Sixth Amendment Confrontation Clause, allowed him to cross-examine Roberts about potential sources of bias.[20]

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[8] *See id.*

[9] *See id.* at 856.

[10] *See id.* at 860.

[11] *See id.*

[12] *See id.*

[13] *See id.* at 856. The Roberts investigation was initiated by the Dane County District Attorney, who recused himself upon recognizing a potential for a conflict of interest with respect to the Lindh case. *See id.* at 860. The Dane County District Attorney's office then promptly referred the Roberts case to a special prosecutor from the Milwaukee District Attorney's office. *See id.*

[14] *See id.* at 856, 860.

[15] *See id.* at 856. Wisconsin law governing cases in which the mental responsibility of the defendant is at issue requires bifurcated proceedings. *See id.* at 880. The first phase adjudicates the plea of not guilty. *See id.* If the defendant fails on this plea, the trial continues to the second phase, which adjudicates the affirmative defense of not guilty by reason of mental disease or defect. *See id.* (Wood, J., concurring in part and dissenting in part).

[16] *See id.* at 880.

[17] *See id.* at 879.

[18] *See id.* at 856.

[19] *See id.* at 861.

[20] *See id.*

The Wisconsin Supreme Court concluded that the trial judge did not abuse his discretion by refusing to allow Lindh to cross-examine Roberts about the pending investigations.[21] Lindh brought a collateral attack in federal court seeking a writ of habeas corpus under 28 U.S.C. Section 2254. The district court denied the petition, stating that it agreed with the Wisconsin Supreme Court.[22] Lindh subsequently appealed to the Seventh Circuit Court of Appeals.[23] Soon thereafter, President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA").[24]

III. ANALYSIS

A. 28 U.S.C. Section 2254, as amended by the AEDPA

Section 104 of AEDPA amends 28 U.S.C. Section 2254, the law under which Lindh sought relief.[25] The Act's major change involves the addition of the new section 2254(d), which specifies the appropriate treatment of legal determinations by state courts. The new section 2254(d) states that

> a federal court *shall not* grant a writ of habeas corpus *unless* the adjudication on the merits of any claim either:
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of a clearly established federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[26]

New section 2254(d) contains no explicit effective date.

The Court of Appeals heard reargument en banc to determine whether section 2254(d) applies to pending cases, and if so, how it would affect the Lindh case.[27] The court noted that Congress did not directly answer the question.[28]

Lindh argued that other effective date provisions of the statute indirectly established that the Act does not apply to pending cases. The court ultimately found that the statute was silent, and that other explicit effective date provisions neither addressed the effective date of section 2254(d) nor were made irrelevant

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[21] *See id.* at 861.

[22] *See id.*

[23] *See id.*

[24] *See id.* (citing Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996)).

[25] *See id.* at 861.

[26] *Id.* (emphasis added). Prior to the enactment of new section 2254(d), federal courts were free to disregard findings of law of state courts, and to reach independent judgments on the issues presented to them. *See id.* at 861.

[27] *See id.* at 861.

[28] *See id.* at 862.

by applying section 2254(d) to pending cases.[29]

The court noted that the Supreme Court has historically applied statutory changes to the rules of collateral attacks to pending cases.[30] The court determined that section 2254(d) does not bestow upon a court the power to issue a writ; rather it *forbids* issuance of a writ unless it meets specific requirement.[31] The court addressed the implications of applying the statute as amended to the Lindh case, including whether such application is retroactive.[32] The court found that the amended section 2254(d) does not operate retroactively, but instead curtails collateral review to reinforce the finality of state court judgments.[33] Therefore, the court held that it was appropriate to uphold the judgments made by the state courts.[34]

Lindh, argued that an alteration in the scope of collateral review after the filing of a petition effected a suspension of the writ of habeas corpus.[35] The court noted that Lindh cited neither case law nor statutory precedent in support of this theory.[36] The court determined that section 2254(d) does not wholly "suspend" the privilege of the writ of habeas corpus and, therefore, does not violate the Constitution.[37]

The court emphasized that although section 2254(d) mandates a deferential mode of review by the reviewing court with respect to state courts' opinions and conclusions, this requirement operates to preserve rather than to undermine federal courts' independent power.[38] The court held that Section 2254(d) does limit the sources to which a federal court may look when dealing with a collateral attack involving a writ of habeas corpus.[39] The court noted, however, that the new section 2254(d) is unique because of its explicit requirement that judges may only apply federal law as declared by the Supreme Court.[40]

The American Bar Association also contended that restricting the scope of applicable authority to Supreme Court precedent impermissibly restricts the power of the judiciary.[41] The court found that this interpretation would both conflict with settled constitutional doctrine and eviscerate the rules of collateral attack.[42] The court instead determined that the statute presents a distinction between rights and remedies; Congress has no power to restrict the scope of judicial in-

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[29] *See id.*

[30] *See id.* at 865. (citing Felker v. Turpin, 116 S. Ct. 2333 (1996); Smith v. Yeager, 393 U.S. 122, 124-25 (1968); Gusik v. Schilder, 340 U.S. 128, 131-33, n.4 (1950)).

[31] *See id.*

[32] *See id.* at 863.

[33] *See id.* at 866.

[34] *See id.*

[35] *See id.* at 868.

[36] *See id.* at 867.

[37] *See id.*

[38] *See id.* at 868.

[39] *See id.* at 869.

[40] *See id.* at 873.

[41] *See id.* at 871.

[42] *See id.* at 872.

terpretive authority (a right), but does indeed have ample power to restrict the circumstances under which habeas corpus may be granted (a remedy).[43] In analyzing both Constitutional issues, the court ultimately held that the requirement that judges apply federal law as declared by the Supreme Court instead of applying their own understanding of the law is consistent with the hierarchical nature of the judicial system, and simply reinforces well-established judicial practice.[44]

B. *The Sixth Amendment Confrontation Clause*

The court of appeals held that the refusal by the state courts to allow the cross-examination of Roberts was not contrary to federal law because the Supreme Court has never held that such witnesses testifying during the second phase of a bifurcated trial, are subject to cross-examination.[45] In addition, Lindh's Sixth Amendment Confrontation Clause argument failed because the trial judge was within his power to use discretion when considering whether to allow the cross-examination of Roberts.[46] Furthermore, the trial judge's limitation was not excessive.[47] The court explained that the cross-examination issue arose during the second phase of trial, and hence was more analogous to a sentencing hearing than to a trial on the merits.[48] The court noted that requiring a right to cross-examination of all testimony bearing on the mental state of the defendant, regardless of how the trial and sentencing process is structured, is a nontrivial extension of current law.[49] Thus, the court held that the trial court did not abuse its discretion in refusing to allow cross-examination of Roberts.[50]

The concurrence and dissent agreed that Section 2254(d) applies to pending trials and that section 2254(d) as amended does not place an impermissible restraint upon the power of judicial review; the court determined, however, that Lindh's right to cross-examine Roberts under the Sixth Amendment Confrontation Clause had not been violated.[51] The concurrence and dissent found that applying the Confrontation Clause to the sentencing phase of the trial would not expand established Supreme Court precedent.[52] The concurrence and dissent asserted that the trial judge should have permitted Lindh's attorney to cross-examine Roberts during phase two of the bifurcated trial in order to demonstrate the personal motives for lenient treatment in his own case if Roberts co-operated with the state.[53]

The dissent disagreed with the court's conclusion that the statute does not

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[43] *See id.*
[44] *See id.* at 873.
[45] *See id.* at 876.
[46] *See id.*
[47] *See id.* at 874, 875.
[48] *See id.* at 876.
[49] *See id.* at 876.
[50] *See id.*
[51] *See id.* at 878, 882.
[52] *See id.* at 882.
[53] *See id.* at 884.

place an impermissible restraint upon the power of judicial review.[54] The dissent noted that by operation of statute, Congress has both restricted the source of authority to which the judiciary may look in construing the statute, and dictated a mechanism of decision-making within the judiciary.[55] In addition, the dissent noted that the statute requires federal courts to defer to state courts' interpretations of the Constitution, if one exists that reasonably interprets the clear Supreme Court precedent.[56] Ultimately, the dissent found a constitutional difference between Congress' power to fix the time to apply federal law (permissible), and its power to require a federal court to defer to any application of a constitutional principle as unreasonable (impermissible).[57]

III. CONCLUSION

The Supreme Court has not yet considered the question of whether a defendant's attorney may cross-examine witnesses providing expert testimony during the second phase of a bifurcated trial. Thus, the court acknowledged that, when hearing a collateral attack, it must respect the state court rulings unless the state courts violated federal law. Lindh's challenge to the amendments of the statute governing procedures for granting writs of habeas corpus failed. Thus, in accordance with the amendment of Section 2254(d) by the Antiterrorism and Effective Death Penalty Act of 1996, the federal courts may not grant a writ of habeas corpus to Lindh because the state courts did not unreasonably apply federal law.

Lisa Fields

Demelo v. Cobb, 936 F. Supp. 30 (D. Mass. 1996). THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 DOES NOT APPLY RETROACTIVELY TO LEGAL RESIDENTS WHO WERE CONVICTED AND RELEASED BEFORE THE ACT'S ENACTMENT DATE.

I. INTRODUCTION

The court denied Respondents' motion to dismiss and ordered that the court's provisional order for Petitioner's release on bond remain in effect pending further developments in this or a higher court, and allowed declaratory relief that the Antiterrorism and Effective Death Penalty Act of 1996 (the "Act") would not apply here.[1]

II. BACKGROUND

Petitioner Jose DeMelo ("DeMelo") was a permanent legal resident of the

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[54] *See* DeMelo v. Cobb, 936 F. Supp. 30, 37 (D. Mass. 1996).
[55] *See id.* at 886.
[56] *See id.* at 888.
[57] *See id.* at 889.
[1] *Id.* at 37.

United States for almost thirty years.[2] Three years prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (the "Act" or "Antiterrorism Act") on April 24, 1996, Petitioner was convicted of a felony.[3] By the date the Act was signed into law, DeMelo had served the entire sentence imposed upon him as a result of that conviction.[4] In January 1996, three months before the enactment of the Act, DeMelo was arrested for driving while intoxicated and for a misdemeanor assault of a police officer.[5] Immigration and Naturalization Services ("INS") would have released him soon thereafter, but for the erroneous ruling of the Immigration Judge on March 11th.[6]

Petitioner filed for a writ of habeas corpus on May 3, 1996 so that INS would release him from custody pending the resolution of his deportation proceedings.[7] On May 7, 1996, Respondents submitted a motion to dismiss stating that the Act prohibited the INS from releasing DeMelo.[8] In a Memorandum and Order dated May 10, 1996, the court announced its provisional conclusion that the Act did not apply to DeMelo and that the INS should release DeMelo from custody pending the deportation proceedings.[9] At a subsequent hearing on May 24, 1996, the court took the Respondents' motion to dismiss under advisement and extended DeMelo's temporary release pending further order of this court.[10]

III. ANALYSIS

The Immigration and Nationality Act ("INA"), as amended by § 440 of the Antiterrorism Act states that the "Attorney General shall take into custody any alien convicted of any criminal offense . . . upon release of the alien from incarceration, [and] shall deport the alien as expeditiously as possible."[11] Therefore, the Act failed to indicate the effective date of many of its provisions.[12] The primary issue before the court was whether the Petitioner fell within the meaning of the statute and could be held in custody pending deportation proceedings.[13]

A. *Constitutionality Concerns*

The Act first examined the constitutional issues presented in the case.[14] The court determined that Respondents' assertion that DeMelo, a legal alien, did

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[2] *Id.*
[3] *See id.*
[4] *See id.*
[5] *See id.*
[6] *See id.*
[7] *See id.* at 32.
[8] *See id.*
[9] *See id.* at 34.
[10] *See id.* at 32.
[11] *Id.* at 36 (quoting 8 U.S.C. § 1252 (a) (c)).
[12] *See id.* at 36.
[13] *See id.* at 32.
[14] *See id.* at 33.

have a legally protected interest sufficient to support a deprivation of either substantive or procedural due process rights conflicted with precedent.[15] The court, however, decided to avoid the constitutional issue because it already determined that the statutory interpretation of the Antiterrorism and Effective Death Penalty Act of 1996 contradicted the Respondent's contention.[16]

B. *Statutory Interpretation: The Court Found There Was Retroactive Application of the Act*

Rather than base its decision on constitutionality concerns, the court questioned whether the Act even applied to the Petitioner.[17] The court stated that the Respondents' assertion that the Act's provisions became effective upon enactment was correct.[18] The court determined, however, that applying the Act to DeMelo was a retroactive application.[19] DeMelo had already served his complete sentence for the felony charge and would have been released from custody prior to the date of the Act's enactment if not for the erroneous ruling by an Immigration Judge regarding an unrelated offense.[20] This court held that applying the Act to DeMelo would be the equal to punishing him twice for the same crime.[21]

In order to apply any statute retroactively, the court stated that there must be a clear manifestation of legislative intent.[22] The court noted the "expression of the legislative will" must use terms so plain as to admit of no doubt that such was the intention" in order to apply a statute retroactively.[23] The court rejected the Respondents' contention that sections where Congress was silent were necessarily retrospective because other sections had specific text calling for prospective application.[24] The court held that this was not such a manifestation of legislative intent.[25] Congress' apparent silence as to the effective date of the Act was not enough evidence to infer clear legislative intent.[26]

The court maintained that even if it held that there was a clear legislative intent to apply the Act retroactively, it could not apply the Act to those who were convicted and released prior to the date of enactment.[27] The court cited the statutory language which provided that an alien could be held "upon release" as evi-

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[15] *See id.* at 32.

[16] *See id.* at 33.

[17] *See id.* at 32.

[18] *See id.* at 33.

[19] *See id.* at 33-34.

[20] *See id.* at 34.

[21] *See id.* at 34.

[22] *See id.* at 35.

[23] *Id.* (quoting Dion v. Secretary of Health and Human Services, 823 F.2d 669 (1st Cir. 1987)).

[24] *See id.*

[25] *See id.* (citing *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994)).

[26] *See id.* at 35.

[27] *See id.* at 36.

dence that the Act would not apply to DeMelo.[28] According to the court, the language "upon release" implied a time of release after the effective date of the Act.[29] The court also pointed to the Act's legislative history, which indicated that Congress did not intend for the Act to be applied to former prisoners.[30] Finally the court noted that the INS memorandum stating that it should not take aliens released before the effective date of the Act into custody also provided the court with further evidence that there was no requisite intent by the legislature to apply the Act retroactively.[31]

IV. CONCLUSION

The court refrained from ordering a final judgment. Instead, the court denied Respondents' motion to dismiss, and ordered that the provisional order for release on bond remain in effect pending further developments in the deportation proceedings. The court also allowed declaratory relief determining that the Act did not apply in this particular case.

Lisa K. Axelrod

Duldulao v. Immigration and Naturalization Service, 90 F.3d 396 (9th Cir. 1996). SECTION 440 (A) OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 DENIES JUDICIAL REVIEW OF ANY FINAL ORDER OF DEPORTATION AGAINST ALIENS CONVICTED OF FIREARMS OFFENSES. SECTION 440(A) ALSO APPLIES RETROACTIVELY AND DOES NOT OFFEND THE SEPARATION OF POWERS DOCTRINE OR DUE PROCESS.

I. BACKGROUND

In 1989, the Circuit Court of the State of Hawaii convicted Alfredo Duldulao, Jr ("Duldulao") of two firearms offenses.[1] Before Duldulao's release from prison in August 1994, the Immigration and Naturalization Service ("INS") served an order charging that Duldulao was subject to deportation under section 241(a)(2)(C) of the Immigration and Nationality Act ("INA") for his firearms convictions.[2] Although Duldulao conceded at his deportation hearing on August 19, 1994 that he was deportable under section 241(a)(2)(C), he applied for an

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[28] *Id.*

[29] *Id.*

[30] *See id.*

[31] *See id.*

[1] *See* Duldulao v. Immigration and Naturalization Service, 90 F.3d 396, 397 (9th Cir. 1996).

[2] *See id.* This section provides that any alien who at any time after entry is convicted under any law of attempting to or actually purchasing, selling, exchanging, using, owning, possessing, or carrying any weapon, part or accessory which is a firearm or destructive device in violation of any law is deportable. *See id.* at 397 n.1. (citing 8 U.S.C. § 1251(a)(2)(C) (1996)).

adjustment of status under INA section 245.[3] The Immigration Judge ("IJ") denied the application and ordered Duldulao deported.[4]

On March 3, 1995, Duldulao filed a petition for review with the Ninth Circuit Court of Appeals pursuant to INA section 106(a).[5] This section confers exclusive jurisdiction on that court to review a final order of deportation.[6] On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"). Section 440(a) of Title IV of the AEDPA revokes the circuit court's jurisdiction to review final orders of deportation against aliens convicted of enumerated criminal offenses, including Duldulao's firearms offenses.[7] The INS consequently filed a motion to dismiss claiming that the statute was retroactive and the court therefore lacked jurisdiction.[8] Duldulao argued that the statute is unconstitutional because it violates separation of powers and the due process clause.[9]

II. ANALYSIS

A. *The INS's Claim That Section 440(a) is Retroactive*

The Ninth Circuit Court of Appeals determined that Congress did not expressly prescribe the reach of the AEDPA.[10] The court rejected INS's argument that the presence of effective dates in other subsections and the absence of such in section 440(a), amounted to an express statement by Congress of the reach of section 440(a).[11]

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[3] *See id.* at 397 (citing 8 U.S.C. § 1255 (1996)).

[4] *See id.*

[5] *See id.* at 398 (citing 8 U.S.C. § 1105a(a) (1996)).

[6] *See id.* The INA provides that "[t]he procedures prescribed by, and all the provisions of chapter 158 of Title 28 shall apply to, and shall be the sole and exclusive procedure for, the judicial review of final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act . . ." *Id.* (quoting 8 U.S.C. § 1105a(a)(1996)).

[7] *See id.* Section 440(a) amends 8 U.S.C. § 1105a(a)(10) to read, "Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2) . . . shall not be subject to review by any court." *Id.* (quoting AEDPA Pub. L. No. 104-132, § 440(a), 110 Stat. 1214 (1996) (to be codified at 8 U.S.C. § 1105a(a)(10))).

[8] *See id.*

[9] *See id.* at 399.

[10] *See id.* at 398.

[11] *See id.* The INS used the example of section 440(e) which provides effective dates for its provisions. *See id.* The Court cited *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) which provides that Congress' silence signals the absence of any clear direction. *See id. Gozlon-Peretz* cites the Rusello rule of construction which states that "[i]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* (citing Gozlon-Peretz, 498 U.S. at 404 (citing Rusello v. United States, 464 U.S. 16, 23 (1983))).

In the absence of an express statement by Congress, the court applied judicial default rules to determine whether the AEDPA section 440(a) affects substantive rights or obligations, or only jurisdictional matters.[12] The court cited the general rule "that statutes affecting substantive rights apply prospectively only."[13] In contrast, the court noted that "the 'presumption against retroactive application of new legislation to pending cases . . . does not apply to rules conferring or withdrawing jurisdiction.'"[14]

The court held that the AEDPA section 440(a) affects the power of the court rather than any rights or obligations of the parties, and is therefore a jurisdictional statute.[15] Since the statute withdraws jurisdiction, the court held that it revokes the power of the court to review INS' deportation order.[16]

B. Duldulao's Claim that Section 440(a) Violates Separation of Powers and Due Process

The court held that section 440(a) does not violate separation of powers or due process.[17] The court addressed the separation of powers issue and stated that the power to expel or exclude aliens is a historical Congressional function.[18] The court noted that the Supreme Court of the United States recognized that this power is immune from judicial control.[19] Thus, Section 440(a) does not offend separation of powers because the Constitution confers to Congress the authority to define the jurisdiction of the lower federal courts.[20]

The court then determined whether section 440(a) violates the due process clause of the Fifth Amendment.[21] The court noted that the Supreme Court has established that executive officers may expel aliens as it is a power belonging to both the executive and legislative branches of government.[22] Congress has discretion whether to grant the opportunity for judicial review.[23] The court concluded that since aliens have no constitutional right to judicial review, section

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[12] *See id.* at 399.

[13] *Id.* (quoting Landgraff v. USI Film Products, 511 U.S. 244, __, 114 S. Ct. 1483, 1500-01 (1994)).

[14] *Id.* (quoting In re Arrowhead Estates Dev. Co., 42 F.3d 1306, 1311 (9th Cir. 1994)(citing *Landgraff*, 511 U.S. at __, 144 S.Ct. at 1501-02)).

[15] *See id.*

[16] *See id.* The court stated that "[w]hen a statute confers jurisdiction and Congress repeals that statute, 'the power to exercise such jurisdiction [is] withdrawn, and . . . all pending actions f[a]ll, as the jurisdiction depend[s] entirely upon the act of Congress,'" *Id.* (quoting The Assessors v. Osbornes, 76 U.S. (9 Wall.) 567, 575 (1870)).

[17] *See id.*

[18] *See id.* (citing Reno v. Flores, 507 U.S. 292, 305 (1993)).

[19] *See id.* (citing Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

[20] *See id.* at 399-400 (citing Keene Corp. v. United States, 508 U.S. 200, 207 (1993)).

[21] *See id.* at 400.

[22] *See id.* (quoting Carlson v. Landon, 342 U.S. 524, 537 (1951)).

[23] *See id.* (quoting *Carlson*, 342 U.S. at 537).

440(a) does not violate due process.[24]

III. CONCLUSION

The Ninth Circuit Court of Appeals held that section 440(a) of the AEDPA revoked judicial jurisdiction to review deportation orders for aliens convicted of firearms offenses. In reaching this decision, the court held that section 440(a) is a jurisdictional statute and, as such, it applies to all cases which fall under its jurisdiction. The court also held that the section does not violate separation of powers or the due process clause.

Ethan I. Davis

[24] *See id.*