ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ANTONIO TONTON SLACK, Petitioner v. E. K. McDANIEL, WARDEN, ET AL.

CASE NO: 98-6322 c.1

PLACE: Washington, D.C.

DATE: Wednesday, March 29, 2000

PAGES: 1-44

Please see OT 1999 Transcripts With Concordance (vol. 3) for the Oral Argument in this case, heard Oct. 4, 1999.

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IN THE SUPREME COURT OF THE UNITED STATES

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ANTONIO TONTON SLACK, :

Petitioner :

v. : No. 98-6322

E. K. McDANIEL, WARDEN, ET AL. :

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Washington, D.C.

Wednesday, March 29, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

MICHAEL PESCETTA, ESQ., Las Vegas, Nevada; on behalf of the Petitioner.

MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States.

DAVID F. SARNOWSKI, ESQ., Carson City, Nevada, on behalf of the Respondents.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 98-6322, Antonio Slack v. E. K. McDaniels.

Mr. Pescetta.

ORAL ARGUMENT OF MICHAEL PESCETTA

ON BEHALF OF THE PETITIONER

MR. PESCETTA: Thank you, Your Honor.

QUESTION: Spectators are admonished, do not talk until you get out of the courtroom. The Court remains in session. Please proceed, Mr. Pescetta.

MR. PESCETTA: Thank you, Your Honor.

Mr. Chief Justice, may it please the Court:

In the first argument in this case last fall, I asked the Court to apply a common-sense rule to the questions on which it granted certiorari, and to hold that previous dismissals of the petition for exhaustion do not render a subsequent petition second or successive within the meaning of habeas Rule 9(b) because that's the only position --

QUESTION: Well, Mr. Pescetta, I do have a problem right off the bat with the fact that in a case here called Hohn, H-o-h-n, we said that a request for a certificate of appealability is a case itself and, if that's correct, it looks to me like your client's case,

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insofar as we treat it as a certificate of appealability, anyway, was filed after what we call AEDPA's effective date, and is governed by section 2253(c).

MR. PESCETTA: Respectfully, Your Honor, I don't agree that that's exactly what Hohn said. I think what Hohn said was that the case enters the court of appeals on the application for the certificate of appealability.

QUESTION: Well, I certainly thought that's what it said, I have to tell you, so if I think that, then what do we do?

MR. PESCETTA: Well, I would refer Your Honor to the authorities that we've cited, in fact, an old one decided by Justice Oliver Wendell Holmes, that a case proceeds, that the appeal is a stayed in the case that's begun in the district court, and the respondents, and the amici on behalf of respondents, have not offered an alternative definition of the case. Mr. Slack's case was indisputably --

QUESTION: So if I'm correct about what I think Hohn stood for, you'd say it was wrong and we should get rid of it?

MR. PESCETTA: I don't think I would put it quite that way, Your Honor. I would say that the motion for a certificate of appealability addressed to the court of appeals in Hohn, and in this case, elevates the case

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that is in the district court into the court of appeals. That is a case that is at that point ending in the court of appeals, but it's not a case that's different or separate from the case that's in the district court. It's not --

QUESTION: But it's a totally -- you know, if you simply don't file a notice of appeal from the judgment of the district court, the case is over. If you file a notice of appeal, a brand new case starts in the court of appeals.

MR. PESCETTA: I disagree with that, Your Honor. It's the case that's in the district court that is going into a different phase. That's my understanding of McKenzie v. Engelhardt, is that the case --

QUESTION: Well, but Hohn came considerably after that.

MR. PESCETTA: Yes.

QUESTION: And certainly I think -- I agree with Justice O'Connor. A fair reading of Hohn is that this is a new case.

MR. PESCETTA: I don't think that that was this Court's intent and, of course, this Court will tell me if I'm wrong, but my understanding was that the point in Hohn was that the filing of the motion for a certificate of appealability gets the case from the district court in

some fashion to the court of appeals, in the same way that in a case where you don't need a certificate of appealability at all, simply the notice of appeal gets the case into the court of appeals, but --

QUESTION: It held that it was a case. It didn't hold that it was a new case.

MR. PESCETTA: Yes, Your Honor.

QUESTION: And in order to make your opponent's point here, it would have to be a new case.

MR. PESCETTA: Exactly, Your Honor. Mr. Slack's case was pending in the district court at the time the AEDPA was enacted. That case didn't go away. It didn't transmute in some way. It's the same case that went to the court of appeals on our motion for a certificate of probable cause because, of course, since this was a pre-AEDPA case, we asked under the old law for a certificate of probable cause, and not a certificate of appealability, and we entered the court of appeals with that case in the same way that if we had prevailed in the court below and the State had appealed to the court of appeals, the notice of appeal would have vested jurisdiction in the court of appeals over this case. The case hasn't changed.

Now, the point I think that was being focused on in Hohn was whether there was anything pending in the court of appeals on the motion for a certificate of

appealability in that case, and this Court said yes, that's correct, and it's our position that our case, the case that was pending at the time the AEDPA was enacted, did vest jurisdiction in the court of appeals to decide whether to bring that case up by granting a certificate of appealability, and it's the same case that's before this Court on the propriety of the court of appeals' denial of that certificate of appealability -- certificate of probable cause.

QUESTION: What was filed here was a certificate of probable cause, I guess, not a certificate of appealability.

MR. PESCETTA: Yes, Your Honor, because at no point in the prior proceedings in the district court or in the court of appeals, or in this Court until the argument in the fall, did the respondent State ever say that any portion of the AEDPA applied to this case.

QUESTION: Well, haven't a number of courts of appeal treated those two things just interchangeably? They've treated certificates of probable cause as certificates of appealability.

MR. PESCETTA: Only because the courts of appeals have uniformly -- have not uniformly, but in the main treated the -- or, the substantive requirements for certificate of appealability as the same as those for a

certificate of probable cause and if, as we argue in the second part of our argument, that all the certificate of appealability was intended by Congress to do, which was the only position asserted by the proponents of the legislation, was to adopt the Barefoot standard, then it's purely a question of terminology, terminology and, of course, the specification of issues provision.

But I would submit that the State can't rely on any defect either in the specification of issues provision, or in whether we call this a certificate of appealability or a certificate of probable cause, because we asked the district court for a certificate of probable cause. Issue was joined under pre-AEDPA law. The court of appeals denied the certificate of probable cause under pre-AEDPA law, and this Court granted certiorari on our petition under pre-AEDPA law, and the question of whether any portion of the AEDPA would apply to this case was injected into this case by the State Attorney General amici, who claimed that there was a jurisdictional problem under section 2253.

But our position is simply that Lindh controls this case. Our case was pending at the time the AEDPA was enacted. There's no dispute about that.

QUESTION: Well, what Lindh held was essentially that there is no retroactivity provision in section 153,

and therefore the normal rules of nonretroactivity apply, and the normal rules of nonretroactivity for a statute that sets forth the substantive requirements for habeas would not apply that statute to any cases that were filed already when the statute was enacted.

But the normal rules of retroactivity do not apply uniformly to every matter governed by a statute. I mean, you might have in the same statute the alteration of the substantive requirements for a crime, okay, the alterations of the requirements for filing a lawsuit, and the alteration of evidentiary requirements in the course of a trial. Now, what would constitute a retroactive application of each one of those three is quite different.

MR. PESCETTA: I agree that they might be different, Your Honor.

QUESTION: That's right, and what Lindh involved was the substantive requirements for habeas, and it said this would be retroactive if you applied the new substantive requirements to a case already filed.

But it's an entirely different question as to whether requirements concerning the requirements for appeal are being applied retroactively so long as you apply them to cases that are not yet on appeal, and I think that's what's going on here, and it seems to me not at all contrary to Lindh to say that the requirements for

appealing are governed by the new law.

MR. PESCETTA: Your Honor, my understanding of Justice Souter's opinion for the Court in Lindh was that we have these two chapters, 154 and 153. By clearly mandating that the chapter 154, the opt-in provisions, apply to cases pending at the time of the act, the negative, the strong negative inference arose that the chapter 153 provisions and the amendments to section 2253 and the Federal Rules of Appellate Procedure are in chapter 153, don't.

QUESTION: They say generally. Would you say generally do not apply?

MR. PESCETTA: Yes, Your Honor.

QUESTION: And I think the reason it said generally was because some of those provisions do not deal with the initial substantive requirements for getting relief, but deal to such matters as what are the conditions for appeal. That's why it said generally.

MR. PESCETTA: Respectfully, Your Honor, I think that there is a different explanation. The opt-in provisions are not stand-alone. They do not have the, for instance, the review provisions of section 2254(d), which were in the chapter 153 amendments. They don't have the separate appeal section.

And it's our view of what Lindh intended to hold

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by that use of the word, generally, was that anything that falls within the opt-in provisions that are covered by chapter 154, take along with them the general provisions that were enacted by the AEDPA as to those cases which qualify for the opt-in treatment.

I'd emphasize Mr. Slack's case is not only a nonopt-in case, it's not a capital case, and so under those circumstances, if you are in the opt-in world, all of the amendments to both chapter 153 and 154 would apply.

But if you're not under chapter 154 there, I think, is no basis for saying that the chapter 153 amendments which apply to everybody else apply to a case pending, which Mr. Slack's case clearly was at the time the AEDPA was enacted.

QUESTION: They certainly don't apply retroactively, but what constitutes a retroactive application of them is another question, and I don't consider it a retroactive application of them to say that they apply to all cases that seek an appeal after the enactment insofar as their provisions governing appeals are concerned.

MR. PESCETTA: I submit that the inference that this Court drew in Lindh with respect to the difference between the opt-in and the nonopt-in chapters, is exactly the same in both situations, especially since we have the

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additional problem that applying different parts of AEDPA to different parts of the case and different cases, depending on whether they're on appeal or not, would raise the same kind of -- I think Justice Breyer referred to it as a mare's nest of problems.

QUESTION: But I thought, Mr. Pescetta, that you said in the second part of your argument, this is a nice, academic discussion. It really doesn't matter, because for the issue that's before this Court, whether it's a COA or whether it's a CPC, that what you have to satisfy is the same.

That is, since you're not relying -- you're not saying the State court misapplied any Federal statute. You're claiming a constitutional right, as is usual in habeas cases, so I thought you were saying in the second part of your argument that it doesn't make any difference.

MR. PESCETTA: I will turn to that now. I think the fact that it shouldn't make any difference reduces somewhat the force of the negative inference to be drawn, as in Lindh, from the focus on pending cases in chapter 154. I think the more -- the greater the impact that the state argues for of the appeal provisions, the stronger that negative inference is that they shouldn't be applied.

But to turn to Your Honor's question, and to the question that I think Justice O'Connor raised about

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jurisdictions in the last argument, the current certificate of appealability standard is that you have to show -- make a substantial showing of a denial of a constitutional right.

And, in using that terminology, I submit that there is no evidence of any sort suggesting that Congress had any intent in using that phrase, other than to use it as a shorthand for the phrase, violation of the constitutional laws or treaties of the United States that appears in section 2254 and in 2241, and that's consistent both with this Court's practice, with this Court's use of the terminology, and with the use of the indiscriminate use of the term, Federal right, constitutional right, throughout the AEDPA. I would just like --

QUESTION: You're saying, then, that when the AEDPA says constitutional right it really means any sort of a right claimed under a Federal statute?

MR. PESCETTA: I think, Your Honor, it means constitutional laws or treaties of the United States as a shorthand.

QUESTION: That's a strange way of expressing it.

MR. PESCETTA: I don't think so, Your Honor. If you look at McCleskey v. Zant, for instance, where this Court is discussing the history of the great writ, at

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pages 478 to 479 of 499 U.S., this Court's majority opinion, authored by Justice Kennedy, refers to and quotes Wainwright v. Sykes as saying, quote, review is available for claims of, quote, disregard of the constitutional rights of the accused and later on, quote, the writ today appears to extend to all dispositive constitutional claims presented in a proper procedural manner.

So my position is, if that kind of shorthand -- because I don't think that there was any intent in McCleskey or in Wainwright v. Sykes --

QUESTION: What was being discussed in McCleskey was a constitutional right, so it makes perfectly good sense there to talk about -- that language wasn't intended to cover the whole scope of habeas.

MR. PESCETTA: Well, Your Honor, that's exactly, I think, my point, is that this Court uses shorthand the same way that Congress does. When you say habeas is there to redress constitutional rights, you don't say -- in every opinion you don't repeat the phrase from section 2254 --

QUESTION: Well, but in an opinion where the habeas claim is based on a constitutional right, it makes perfectly good sense to say, here we have a constitutional claim made under the habeas statute, but when Congress says it's not talking about any particular claim that's

being raised in a case, such as we do, when it says the denial of a constitutional right, I think it's certainly a very plausible inference it means that and nothing more.

MR. PESCETTA: The difficulty with that, Your Honor, is, it doesn't look at the whole statute which, of course, is one of the standards of statutory construct --

QUESTION: But this is the provision that is dealing with what can be raised.

MR. PESCETTA: Yes, Your Honor, but if you look, as we have argued in our briefing, at the use of the term, constitutional right and Federal right, throughout the AEDPA, particularly -- and I would cite as kind of exhibit A, you know, under section 2254(d), a grant of habeas relief is allowed if the State court's disposition violates clearly established Federal law.

QUESTION: Isn't your underlying claim here one of constitutional right?

MR. PESCETTA: Well, yes.

QUESTION: And don't you think there is a substantial claim?

MR. PESCETTA: Yes, Your Honor, and that has not been argued --

QUESTION: So wouldn't you fall within it?

MR. PESCETTA: -- and the State hasn't argued to the contrary.

QUESTION: In fact, do you have even any right -- as far as I can see, what he's complaining about in the State criminal process is a deprivation of constitutional rights. He's not raising any Federal statute. He's not raising any treaty.

MR. PESCETTA: Yes, Your Honor, and that's the second part of our argument, is that whatever this provision means, it can mean only the review of the substantive underlying claim. There is no decision by any court that says a denial of a -- a substantial showing of a denial of a constitutional right cannot be made on the basis of showing, as in this case, that the district court erroneously refused to address a substantive constitutional claim at all because of a procedural error.

QUESTION: That's interesting, and you would apply that consistently? You would always look at the underlying claim, so that even if the underlying claim -- if the underlying claim was statutory, or based upon a treaty, and then in the disposition of that claim the procedural right that was denied was so fundamental that it was a violation of the Constitution to deny that procedural right, and then the violation of that procedural right is sought to be appealed on habeas, you would dismiss it because the underlying claim, after all, is not a constitutional claim. That's what you said.

MR. PESCETTA: Your Honor --

QUESTION: I'm not sure you'd do that.

MR. PESCETTA: -- we don't have to reach that point, because our underlying claims are constitutional. Our --

QUESTION: I understand that, but I'd like to know what your theory is.

MR. PESCETTA: Our --

QUESTION: Whether your theory is that you always look to the underlying claim, or the defeat of the underlying claim, or the procedural claim is a -- arises to the level of a constitutional claim.

MR. PESCETTA: Our position in this case, Your Honor, is that to decide this case the Court does not have to reach whether the underlying claim is constitutional or a violation of the constitutional laws or treaties of the United States. This Court can --

QUESTION: I thought your -- the point you were making is, you look to see what you are complaining about in the State criminal process, not when you get to the district court complaining on habeas.

MR. PESCETTA: It's --

QUESTION: So if you're in the State, and whether you say it was a procedural violation or a substantive violation, I -- as long as the focus of

2253(c) is on the State criminal process, what went wrong there, then all you have is constitutional objectives.

MR. PESCETTA: I've expressed myself badly, Your Honor. What we are saying is, you have a substantive underlying constitutional claim which attacks something, whether substantive or procedural, that happened in the State proceedings. That's the basis for relief.

The State, and amici's position, is that if review of that underlying claim that you've raised in your Federal petition is barred by a procedural error that the district court commits, such as in this case by holding that a petition is second or successive when it's not, it's their position that this amendment to 2253 prevents us from ever getting any appellate review of that question, either as to the underlying substantive question or as to the validity of the procedural ruling.

And our position is, this is utterly inconsistent with this Court's practice, it is contradicted by the use of the -- by AEDPA's explicit limits on this Court's jurisdiction such as in 224 -- such as in 22 -- section 2244(c), or rather 2244(b)(3)(E), where in AEDPA the Congress said, you cannot review on certiorari or a rehearing decision by the court of appeals whether or not to allow the filing of a second or a successive petition.

It's our position that this was not in Congress' mind, that the only thing before Congress at the time that this provision was enacted that Mr. Lundgren, who was then the Attorney General of California and one of the major proponents of this legislation said, was, we want to codify Barefoot. It's our position that that is all that happened in --

QUESTION: Codify what?

MR. PESCETTA: Barefoot v. Estelle.

QUESTION: Barefoot.

MR. PESCETTA: If I could reserve the remainder of my time, Your Honor.

QUESTION: Very well, Mr. Pescetta.

Mr. Roberts, we'll hear from you.

ORAL ARGUMENT OF MATTHEW D. ROBERTS

ON BEHALF OF THE UNITED STATES

MR. ROBERTS: Mr. Chief Justice, and may it please the Court:

The certificate of appealability provisions applied to petitioner because he filed his notice of appeal after AEDPA was enacted. Petitioner may obtain --

QUESTION: Is that -- on what theory? On the theory that it's a new case, or on the theory that Lindh doesn't cover that?

MR. ROBERTS: We accept the -- a reading of

Lindh that the question of whether the provisions apply turns on whether the case that they governed was pending when AEDPA was enacted and, because those provisions govern only the discrete proceeding in which the habeas petitioner seeks authorization to appeal, we think that's the relevant case for determining their applicability.

QUESTION: But why? Why? That is -- I mean, I read your brief. It's very logical. It's very good. The question in my mind is, why make this so complicated?

I mean, if you're right, there are very few lawyers in the country who will understand it, let alone the judges and all the courts of appeals, and who knows what they've decided, and the certificate isn't the most -- the name on the certificate, whether it's CPC or some other name, isn't so important, and all of a sudden appeals are generated, and the law's about the same anyway, and so why isn't the simplest thing just to say, this is part of the case? It means new cases, and that's it.

MR. ROBERTS: It's --

QUESTION: What harm would be done?

MR. ROBERTS: Our position isn't any more -- isn't materially more complex, Justice Breyer. It's just that the -- whether the provision at issue is applicable turns on whether the case that it governs is pending, and

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for all the provisions of AEDPA except for the certificate requirements, that will mean that it's triggered by the filing of the petition in the district court, because all of those provisions --

QUESTION: And so what we've done is introduced a little curlicue and told all the lawyers, by the way, it's when you file the petition in the district court, but for the CPC, and eventually I guess that word would get out. But why?

MR. ROBERTS: That makes --

QUESTION: I mean, after all, case can mean different things in a different context.

MR. ROBERTS: Yes, case can mean different things in a different context, and that's why we think that it's justifiable to do it here, because it makes sense, because appellate --

QUESTION: Well, all we're talking about here is a transitional rule anyway.

MR. ROBERTS: Yes.

QUESTION: It's perfectly clear that eventually AEDPA will apply to all appeals.

MR. ROBERTS: That's right. It is just a transitional rule, and there are probably very few cases that are still pending that it applies to, and it makes sense, because traditionally and logically appeal

procedures like the certificate requirement have applied to appellate proceedings that commence after the procedures are enacted, and --

QUESTION: Yes, but didn't we -- no, please.

Didn't we put it -- I just took a quick look at Hohn, the principal opinion in Hohn, and didn't we speak of case there in more or less the following terms: we said that the denial of this threshold condition does not prevent a case from being in the court of appeals.

We in effect -- we did not say in Hohn that the COA request was itself a separate case, as -- and Justice Scalia suggested a moment ago, we didn't say it was something new, and in fact elsewhere we spoke of the, in essence the indivisibility of the merits of the case from the COA, so if we read Hohn not as indicating that a COA is a new and separate proceeding, why do we have to be as complicated as you would have us be?

MR. ROBERTS: Well, first, I don't think that you can read Hohn that way, Your Honor, because -- because under Hohn the case couldn't have been in the court of appeals, the underlying case couldn't be in the court of appeals because a certificate hadn't issued, so Hohn had to hold that it was a separate case to achieve the result of making the case in the court of appeals.

But in any case, as I was trying to explain to

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Justice Breyer, it doesn't make it materially more complicated. It means that for this purpose, for the purpose of the certificate provisions only, they apply if the notice of appeal was filed after AEDPA was enacted, and that makes sense because they govern only appeal procedures, and it makes sense to apply a provision that governs only appeal procedures to appellate proceedings that begin after they're enacted.

QUESTION: Why don't you just do that directly, without -- I frankly find it very strange to regard this as a separate case. I think that's just contrary to normal usage.

Why don't you simply say that all that Lindh held was that the substantive requirements are governed by a nonretroactive principle, and what nonretroactivity means for the substantive requirements is that you apply them to all cases. You do not apply the new requirements to all cases that were already filed.

But what nonretroactivity means for new appellate procedures is that you do not apply them to any cases that have not -- that have already been appealed.

MR. ROBERTS: I agree with you, Justice Scalia --

QUESTION: And that gets -- it gets you to the same point without having to use the -- it seems to me a

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strange use of what's a case.

MR. ROBERTS: I agree with you, Justice Scalia, that that gets to the same point, and that it's not retroactive to apply it here. That's part of the reason that it makes sense.

QUESTION: You probably ought to say something about the merits --

MR. ROBERTS: Yes, okay.

QUESTION: -- before you have to sit down.

MR. ROBERTS: We believe that petitioner is entitled to a certificate only if he makes a substantial showing of the denial of a constitutional right and when, as in this case, the district court has denied relief on procedural grounds.

That showing has two parts, first, that there's a substantial argument that he can overcome the procedural bar and, second, that there's a substantial argument that his habeas petition raises a meritorious claim. He can appeal if there's a clear procedural bar to relief, because permitting appeals based on the abstract merit of the underlying claim when relief on that claim is unavailable would thwart the purpose of a certificate requirement to prevent frivolous or unnecessary appeals.

And he also can't appeal if his underlying constitutional claim clearly lacks merit, even if the

district court may have erred in denying relief on procedural grounds, and that limitation is imposed by the term, constitutional, in the certificate standard, and it accords with the purpose of the certificate requirement, because there's no need to correct a district court's procedural error if that error prevents consideration of only meritless claims.

We don't think that appeal is foreclosed just because the district court denies relief on procedural grounds. Precluding appeals from procedural orders in all cases would not further the purpose of the certificate requirement, because it would bar appeals of meritorious habeas petitions that raise constitutional claims, and it wouldn't be consistent with the text of the certificate standard either, because a prisoner makes a substantial showing of a denial of a constitutional right if he makes a substantial showing that his conviction was imposed in violation of the Constitution and the habeas court erred in refusing him relief.

QUESTION: What do you think we should do with this case?

MR. ROBERTS: Well, we think that you should hold that the certificate of appealability provisions apply, and that the standard in this circumstance has the two parts that we said, and then either, depending on what

the Court wanted to do, there would be two options in that circumstance.

One, the Court could address the question that it initially granted certiorari on in the course of answering the first part of that standard, and then remand to the court of appeals --

QUESTION: You're telling me what we could do. I'm just wondering what you think we should do.

MR. ROBERTS: Well, if the Court -- I think that if the Court thinks that the first -- that the question that it initially granted certiorari on is a question of continuing importance that it still wants to resolve, that would be an acceptable way to do it. Otherwise, the court should remand the case to the court of appeals for application of the standard.

If there are no further questions, thank you.

QUESTION: Thank you, Mr. Roberts.

Mr. Sarnowski.

ORAL ARGUMENT OF DAVID F. SARNOWSKI

ON BEHALF OF THE RESPONDENTS

MR. SARNOWSKI: Mr. Chief Justice, and may it please the Court:

It is indeed Nevada's position, consistent with the Eighth Circuit ruling upon which we rely and cite in our brief, Teeterman v. Benson, that the changes to

section 2253 regarding certificates of appealability apply to the appeal in this case, which was initiated after the effective date, April 24, 1996. In fact, the claims at issue which were the subject of the district court's dismissal and the circuit court's review, were filed after the effective date of the case.

In Teeterman, the Eighth Circuit, speaking to a question that Justice Scalia just asked, noted that while in Lindh this Court held that the changes generally didn't apply to the substantive issues. It indicated that the Court could think of no reason why a new provision exclusively directed toward appeal procedures would depend for its effective date on the filing of a case in a trial court instead of on the filing of a notice of appeal or similar document and, thus, it held in the 1997 ruling that AEDPA does apply and that the COA provisions apply.

Subsequent, the Hohn case also came to this Court out of the Eighth Circuit. That was a 2255 case in which initially the petitioner challenged the way the Federal statute had been applied to him. At some point in time in the litigation, after he appealed, the Government conceded that it was not merely a constitutional or, excuse me, a statutory issue, but, rather, a issue of constitutional dimension and ultimately, as this Court knows, the Hohn case ended up here for its determination

on the limited issue regarding whether it could review the denial of the COA.

QUESTION: Mr. Sarnowski, assuming AEDPA applies, are you going to talk about whether you agree or disagree with the standard that the Solicitor General would ask us to apply here?

MR. SARNOWSKI: Yes, I am. I would assert that the change in language was not, as Mr. Slack would assert, was nothing more than a mistake, or meant nothing. Congress changed the term, Federal, to the term, constitutional in the statute, keeping in mind that the COA provision has application to both State prisoners who bring their cases to the district courts and to Federal prisoners as well.

It frankly does what we see Congress having intended to do, which is to put limitations on the types of issues that the courts would have to adjudicate. In this case, the Congress used the word constitutional, and this Court has indicated --

QUESTION: Well, but if that's the underlying claim, and if the problem is where the petitioner makes a substantial showing that the district court erred on the preliminary question of whether it's second or successive, you would say that the court of appeals could never address that problem --

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MR. SARNOWSKI: Our position --

QUESTION: -- and that the law then would evolve in district court, without any appellate review on legal questions such as exhaustion or procedural default and so on.

MR. SARNOWSKI: Our position, consistent with that brief by the several States in this matter, is just that. We would see the evolution of the law --

QUESTION: Well, I think that's unfortunate and troublesome, I have to tell you, and I wonder if the Solicitor General's position wouldn't be the better view here.

MR. SARNOWSKI: It is what I would call a middle ground view. However, sometimes better doesn't necessarily mean that is one consistent with what Congress has mandated. We do see that there would be an availability of remedy by way of an extraordinary writ proceeding if a ruling by a Federal district court, or even a circuit court for that matter, on a procedural issue such as exhaustion or procedural bar were such that this Court may not be able to entertain it, or could entertain it.

QUESTION: What sort of an extraordinary writ would you envision, Mr. Sarnowski?

MR. SARNOWSKI: I would say an extraordinary

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writ would include an original filing in this Court to seek mandamus or other appropriate extraordinary remedies.

QUESTION: Well, quite apart from the proper construction of the statute, one would hope it's not likely that Congress intended to transfer from what would otherwise be review in the court of appeals to direct review in this Court.

MR. SARNOWSKI: I don't think that was Congress' intent to transfer all those -- many cases here, and my response was what sort of remedy could occur if, in fact, a holding on a procedural matter was so egregious in the district court, and we assert that the holding in this case is a run-of-the-mil type of holding and not egregious in any way.

QUESTION: But my experience -- if I understand you correctly, it would be relevant -- it seems to me the vast percentage, maybe the overwhelming percentage of cases on appeal in habeas proceedings do have to do with procedural issues, whether there was an adequate State ground, whether there's a basis for new evidence and therefore you're excused from not raising the claim before, things like that, and your position is that all those, you can't get a COA at all.

MR. SARNOWSKI: There are a large number of procedural issues, that is correct, and --

QUESTION: And I'm right in thinking that's your position?

MR. SARNOWSKI: That is our position.

QUESTION: Wouldn't this have been the most controversial provision in the whole reform package, if that were so?

MR. SARNOWSKI: It certainly would be controversial if this Court were to say that that is what the statute means.

QUESTION: I'm not thinking of controversy by this -- I'm saying I couldn't find anything in the history that suggested that this was the major change in the law, but the way you're reading it, it sounds as if it would be an enormous change. Am I right about that?

MR. SARNOWSKI: I agree that there is nothing directly in the history. I believe Mr. Pescetta referred to statements by then-Attorney General Lundgren, who, as he accurately described, was a proponent, although not a sponsor, obviously.

While he asserted that the Court should codify, or the Congress should codify what this Court said in Barefoot and limit review to substantial Federal rights, what, in fact, happened is the sponsors, the Congressmen and Senators who ended up agreeing on the legislation, used a different word, so I think in order to give import

to that word you have to look at what it is that can be gleaned from the use of that word, and it is not procedure, and that is all of what Mr. Slack had to argue about, because the district court's rulings were wholly procedural.

QUESTION: Well, the statute doesn't say that you can only appeal a constitutional right. What it says is, you cannot issue a COA. You can issue a COA only if there is a substantial claim. Now, that's perfectly consistent with their being there in the case that you're trying to appeal a substantial claim. It doesn't say that has to exhaust the grounds on which you are appealing.

MR. SARNOWSKI: If you read the section, that being -- or Rule 2(c)(1), subsection (B)(ii) to mean that, while it says you have to make a substantial showing of the denial of a constitutional right, but that doesn't limit what you can litigate, then I would agree with your question. Our position simply is, I don't think you can read where one provision is included and then say, but it could include other provisions as well, just by practice.

In this instance, a case cited by the petitioner in this case, the Nichols case, Nichols v. Bowersox, a First Circuit case, it assumed Congress had the power to do this, and we would assert it certainly did.

We -- everyone who litigates these cases on a

daily basis may think that was a really bad choice if it indeed exercised its power to do so, but where Congress has spoken, as we believe they have in the COA provision, then it has spoken, and we assert that in this instance, where Mr. Slack's petition, the five claims that were really at issue, all of which he brought in well after AEDPA became effective, all of which we believed and the district judge believed accordingly that were unexhausted and four of the five were abusive, abuse and unexhaustion, simply don't have anything to do with having a meritorious claim.

QUESTION: But the claims that he brought were constitutional claims, so one could surely read this subsection (c) of section 2253 to mean that even if you could surmount the procedural hurdle of adequate, independent State grounds, still you don't get a certificate of appealability unless you show that you had made a claim about what went on in the State criminal proceedings of the denial of a constitutional right.

So that seems to me the most logical reading of this provision, that it's talking about what is your basic habeas claim. Why am I being detained unlawfully? Because there was a constitutional flaw in the proceedings in the State court.

MR. SARNOWSKI: Mr. Slack couched his claims in

terms of Federal constitutional violations, certainly, as many prisoners do. However, many prisoners also couch their claims in terms of violations merely of State law, for instance, evidentiary rulings that this Court had occasion to visit.

QUESTION: But that you didn't need -- you didn't need any new legislation to toss that out. Habeas, you can't complain about a violation of purely State law.

MR. SARNOWSKI: You are not supposed --

QUESTION: Federal habeas.

MR. SARNOWSKI: You're not supposed to be able to, but it happens with great regularity in State -- or Federal habeas proceedings involving State prisoners, and they raise other issues as well.

QUESTION: Would such cases merit a CPC?

MR. SARNOWSKI: We would argue a COA or a CPC, Your Honor.

QUESTION: I didn't think that those cases were problematic for the Federal courts before or now.

MR. SARNOWSKI: Well, the Fourth Circuit recently in Gray v. Netherland indicated, for example, when a prisoner there asserted the violation of a treaty right, that that didn't raise a constitutional right, so --

QUESTION: Yes, so I don't know why that differs

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from what I was saying, that if this -- except that under the old law you could raise something under a treaty or a Federal statute, and you brought up a rare case, where the underlying claim would be a treaty or a statute, but mostly these are complaints about something that violated your constitutional right, and it's usually some procedural right.

MR. SARNOWSKI: That is the great majority of the type of claims that are filed, I would grant you that, and I would also indicate that, while it would forge or require a significant change to disallow rulings by the Federal circuit courts on those issues, it is not one that is outside the boundaries of Congress' power to make, unless you just buy the argument, if you will, that petitioner has asserted here that Congress didn't mean anything, and they didn't change anything at all, and some courts have.

QUESTION: Well, that's not the Solicitor General's argument. Why isn't that a sensible reading of 2255?

MR. SARNOWSKI: I don't necessarily understand --

QUESTION: 53.

MR. SARNOWSKI: -- the Solicitor's argument to mean it didn't change anything.

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QUESTION: No, I don't -- but you seem to be distancing yourself from the Solicitor General's argument, and I want to know first, are you, or do you agree with the Solicitor General?

MR. SARNOWSKI: We don't agree wholly on that provision. We believe it disallows review of procedural rulings such as the ones that Mr. Slack sought review on in the Ninth Circuit, and was denied review on.

QUESTION: Well, when they say constitutional right, certainly I take it it would no longer be available to raise a claim under the Interstate Agreement on Detainers Act, that the State court had violated that.

MR. SARNOWSKI: That would be our position.

QUESTION: And that could have been raised before.

MR. SARNOWSKI: Correct.

QUESTION: And -- so that there is some change in that sense.

MR. SARNOWSKI: There is, but the very small number of cases that arise under the IADA or Federal treaties is so small, frankly, as to be of little import in the universe of State habeas cases that Federal or State prisoners bring to the Federal courthouses.

I would say that we recognize that even some of the courts in this country, the Tenth Circuit, for

example, have indicated that it was a -- that the wording change was a distinction without a difference. The Lennox case, which is cited by the petitioner, the court literally said that.

However it -- in the same breadth it indicated that -- it characterized changes to AEDPA section 2253 as significant, but yet it says it replicated the standard for a certificate. I don't see how the change can be significant if it didn't change anything, and that is our position in the matter.

While certainly the historical record and the development of a statute which occurred over a long period of time --

QUESTION: Well, the Solicitor General's argument, I think, recognizes a change, that in order to get a certificate of whatever it is now, COA, you would not be able to get it simply by showing that there was a substantial showing of a denial of a procedural right under the habeas statute. It was -- something was called second and successive, and it wasn't.

You would also have to show that your underlying claim was substantial, and I don't think you had to do that before.

MR. SARNOWSKI: I understand that to be their argument, and I think it's a good one. However, it does

not necessarily seem to go as far as what the word constitutional means under the statute, and that is, of course, the question that the Court has asked us to try to speak to and, unfortunately, there aren't -- there isn't a lot of case law, and the case law that is out there has been cited by both sides, the Teeterman case being the one on which we primarily rely from the Eighth Circuit.

In briefly addressing the other question that this Court had asked the parties to look at, and that is the change to the actual statute itself, that is, the abuse-of-the-writ statute, we have submitted our assertion that the abuse-of-the-writ statute in this case, the application of the new statute frankly would make no major difference in the outcome compared to the old statute.

And particularly the application of Rule 9(b) you asked the question, Justice Stevens, what should happen, and the Solicitor General answered that this Court could revert to the first question that was posed and decide whether it was of continuing import. We suggest that it is of continuing import, certainly in our jurisdiction.

There was an assertion that there were very few cases, or will be very few cases. I can tell you there are many in our jurisdiction, and particularly from the State of California. You may recall the assertion in the

brief that the Ninth Circuit has adopted what we colloquially call the parking lot procedure, whereby they treat pre-AEDPA filings dating back to the early 1990's as actual filings, merely where prisoners sought the appointment of counsel.

Those -- many cases are still pending, and frankly may not even get back into the Federal district courts where they have been, quote-unquote, parked, and it is in that context that I say the first question that you all -- that we argued in the fall is of continuing importance.

QUESTION: Mr. Sarnowski, can I ask you about your interpretation of 2253? Like Justice O'Connor, I'm inclined to think that the underlying -- if the underlying claim is a denial of a constitutional right, it may suffice.

It seems to me the strongest argument against that, and I haven't heard you assert it -- maybe I should have asked this question of the Solicitor General, but it seems to me the strongest argument against it is, if you do look to the underlying claim and say, has there been a substantial showing in the underlying claim that a constitutional right was denied, it seems to me then, even if the procedural ground from which appeal is immediately sought is entirely clear, even though there's not much of

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a doubt about the correctness of the procedural ruling, you would have to -- you would have to allow appeal.

I don't see -- in other words, I don't see how the Solicitor General gets the second half of his interpretation of 2253(c)(2). The first half he says is that you look to see whether the underlying claim is a substantial showing of a denial of a constitutional right, but, he says, if the procedural ruling was, you know, rolling off a log, there's no doubt about its correctness, you don't get a certificate of appealability. I don't see how we can impose that latter condition.

MR. SARNOWSKI: Well, in that regard, and the State's last brief, the amicus brief authored by California, I believe speaks to it, in that if you note the language of 2253 subsection (c)(1)(A) it requires, or it allows an appeal to be taken to the court of appeals only upon the final order in a habeas case, and the question then becomes, what is the court reviewing, or the higher court, if you will, what is it going to review?

In this instance, there was a written ruling which is contained in the joint appendix in this case, which basically outlines what the petitioner said his claims were at various times, and the court's conclusion that they were either unexhausted or abusive. The lower court ruling, the order itself, the final order is totally

devoid of any discussion of the merits.

So then you would have the higher, intermediate appellate court reaching down to try to figure out what was in terms of the merits of the underlying claims, what they were. In many instances, you don't have that.

QUESTION: Well, I guess -- could you argue that just the introductory phrase of (c)(1), unless a circuit justice or judge issued a certificate of appealability an appeal may not be taken, and maybe implicit in that is that they wouldn't issue a certificate of appealability unless they thought that the ruling was -- you know, was close? Could you say it's implicit in that language?

MR. SARNOWSKI: I think it's the practice. I don't know if the language makes it implicit. Perhaps the practice over time has made it so. I'm just not able to answer that.

QUESTION: Is that the answer?

QUESTION: Oh, yes. Your answer is right the second time, wrong the first time.

(Laughter.)

MR. SARNOWSKI: Unless the Court has any further questions, I would submit it on behalf of the State. Thank you.

QUESTION: Very well, Mr. Sarnowski. Mr. Pescetta, you have 3 minutes remaining.

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REBUTTAL ARGUMENT OF MICHAEL PESCETTA

ON BEHALF OF THE PETITIONER

MR. PESCETTA: Thank you, Your Honor.

There's a thread in this Court's statutory interpretations cases that's expressed in Justice Kennedy's opinion for the Court in Hohn, Justice Souter's opinion for the Court in Jones v. United States, that's expressed in many other cases, that we do not -- it is not reasonable to assume that Congress intended a major change in practice without making that intent clear.

What the State's position on the scope of the certificate of appealability is that without any indication, any discussion, Congress intended by enacting section 2253 to erect an entirely one-sided system of review of procedural errors in habeas cases in the Federal court, and the idea that Congress would have done that, would have imposed on this Court and on the courts of appeals the burden of regulating district court procedural rulings in habeas cases by extraordinary writ, simply is not reasonable.

The substantiality question that's been raised by the argument of the Solicitor General as to the substantiality of the underlying claim, we have to remember, Mr. Slack has never gotten a hearing, has never had any proceedings on the substantiality of his

underlying claim. All we have is a procedural ruling covering allegations which for the purpose of a motion to dismiss have to be taken as true.

It's our position that if the procedural ruling covers allegations of a substantial constitutional claim, then the procedural ruling has to be reviewable, otherwise we have a monstrosity of a statute which is replicated in no other area of the law, where one side has the right to have procedural errors reviewed and the other doesn't.

Third --

QUESTION: You agree that if the procedural ruling itself is clearly correct, you don't get a COA?

MR. PESCETTA: I don't necessarily -- well, I think the problem with the historical practice -- the short answer is yes, I would agree with that.

The problem is, because of the predominance of procedural issues in habeas practice, the practice has developed that we focus on the procedural issue as the grounds for denying the COA -- rather, the CPC, and the underlying merits of the constitutional claims are assumed because, for the purpose of a motion to dismiss, they have to be taken as true.

Third, there is no change, as it has been expressed, from Federal to constitutional in the statute. The law before the adoption of the AEDPA was Barefoot,

which used substantial showing of a denial of a Federal right, but which also used terms like, questions of some substance, issues debatable among jurists of reason. It's our position that Congress, in a number of bills which indiscriminately used the term Federal right or constitutional right, was trying to do one thing. It was simply trying to adopt the Barefoot standard.

It was not 100 percent clear, as many things in the AEDPA are not 100 percent clear, but there is not a shred of evidence in the record before this Court, or in all of the proceedings before Congress, that the congressional intent was anything else.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pescetta. The case is submitted.

(Whereupon, at 12:00 noon the case in the above-entitled matter was submitted.)

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BY Ann Marie Federico

(REPORTER)