Slack v. McDaniel October 4, 1999

98-6322

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Please see OT 1999 Oral Argument Transcripts (vol. 5) for the Oral Argument in this case, heard March 29, 2000.

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IN THE SUPREME COURT OF THE UNITED STATES

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ANTONIO TONTON SLACK, :

Petitioner :

v. : No. 98-6322

ELDON McDANIEL, WARDEN, ET AL. :

----------X

Washington, D.C.

Monday, October 4, 1999

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., Assistant Federal Public Defender, Las Vegas, Nevada; on behalf of the Petitioner.

DAVID F. SARNOWSKI, ESQ., Chief Deputy Attorney General, Carson City, Nevada; on behalf of the Respondents.

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PROCEEDINGS

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Antonio Slack v. Eldon McDaniel.

Mr. Pescetta.

ORAL ARGUMENT OF MICHAEL PESCETTA
ON BEHALF OF THE PETITIONER

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

Although this case also arises in the thicket of habeas proceedings, I think the question that this Court posed on certiorari can be answered by answering two common-sense questions. One is, can we have a dismissal without prejudice, that is, a dismissal with some prejudice? Two, can we apply a res judicata rule when there has been no previous adjudication in the matter? Can we have res judicata without judicata?

I submit that the common-sense answers to both of those questions are no, we can't, and that those answers control the disposition of this case.

QUESTION: If you're right, Mr. Pescetta, would it be possible for a habeas corpus applicant to have his first petition dismissed because it contained unexhausted claims and then come back the second time and have a bunch of new claims, as I think your client did here, and simply

have them considered, or perhaps be dismissed as unexhausted, and keep going that way?

MR. PESCETTA: In theory, yes, Your Honor, but as we pointed out in our briefing, there are other ways to control that problem if it becomes a problem in the case. The conditional --

QUESTION: What are they?

MR. PESCETTA: The conditional dismissal order or practice that can be used under Rule 41 of the Federal Rules of Civil Procedure can control that if a petitioner -- if a Federal district judge believes that there is a problem with what the State refers to in this case as the ping-pong effect of going back and forth from State to Federal court by filing repeated unexhausted petitions.

That can be controlled by a district court saying, this is your last chance. We're going to issue an order that dismisses you without prejudice but, as a condition of that order, when you come back we will entertain only your exhausted claims. That is a technique that has been used successfully in capital cases in the District of Nevada --

QUESTION: Well, that's not what this judge did. Just -- this judge just dismissed in compliance with Rose for exhaustion.

MR. PESCETTA: Yes, Your Honor.
QUESTION: And didn't go on to speculate that the prisoner might come back with new unexhausted claims, right?
MR. PESCETTA: That's true, Your Honor, and that may not occur.
QUESTION: So what does the judge do when the judge hasn't speculated in advance about this possibility?
MR. PESCETTA: I --
QUESTION: So back the prisoner comes with, yes, some that are exhausted now, but adding on some new, unexhausted claims.
MR. PESCETTA: But I think, Your Honor, that's a decision that the judge can make in the district judge's discretion when the district judge perceives that that is a problem.
QUESTION: Well, in light of Rose v. Lundy, what does the judge do, faced with the situation that happened here --
MR. PESCETTA: I think --
QUESTION: -- with the unexhausted claims?
MR. PESCETTA: I think the district judge in this case had followed what we believe to be the law, that is that the prior dismissal without prejudice does not make this petition a second or successive petition.

QUESTION: As to the exhausted claims.
MR. PESCETTA: As to any claims, Your Honor, because our position is --
QUESTION: Well, what does the judge do, then, faced with this mixed petition with exhausted and unexhausted claims --
MR. PESCETTA: The judge --
QUESTION: -- when it comes back?
MR. PESCETTA: Excuse me, Your Honor. The judge can issue an order dismissing the case without prejudice, but directing that this is the petitioner's last opportunity to exhaust, and that when he returns to Federal court, the Federal court will only address unexhausted claims, and that order could be enforced under Rule 41(b).
QUESTION: Well, what is the authority to issue that order?
MR. PESCETTA: Rule 41(a). A conditional dismissal without prejudice is clearly allowed by the Federal rules, and in fact --
QUESTION: Well, it's allowed by the rules, but the problem I have with the argument is that it seems to me that the strongest point in your favor is that we have never -- I think we have never viewed as the term second or successive as a term to refer to a case which is

brought when the preceding history includes nothing but a dismissal without prejudice, so that as a matter of law -- your strongest argument is, as a matter of law, assuming that Congress uses the terms the way this Court had been using these terms of art, the statute cannot possibly mean that this would be a second or successive petition.

If that is the case, it seems to me that your argument here is a weak one, because if ultimately what the court does on the first round is dismiss without prejudice, it can put all the caveats in that it wants to, you know, do it all this time, only one bite of the apple and so on. When they get back in front of the court again, it would still not be a second or successive petition.

MR. PESCETTA: That's correct, Your Honor, but then it would be subject to a dismissal with prejudice under Rule 41(b) by the court enforcing its previous order in that case --

QUESTION: But you --

MR. PESCETTA: -- and that's the distinction -- excuse me, Your Honor.

QUESTION: It seems to me you haven't given us a reason, or a source of authority for the district court to make a conditional dismissal like that. I mean, Rule 41 certainly doesn't give the district court authority to

enter any sort of an order conditioning dismissal that he pleases, does it?

MR. PESCETTA: Certainly it's -- the power is not unlimited, but a reasonable condition on an order of dismissal is always upheld.

Now, the concern that we are faced here is that there are two parallel tracks of jurisprudence. One is Rule 9(b), the second 2244(b), which enact what this Court has consistently and uniformly referred to as a res judicata rule. This was clearly stated in the congressional materials and reports in the enactment in 1966 of section 2244. It was emphasized --

QUESTION: Mr. Pescetta, I follow that with respect to the first clause of 9(b), where there was a prior determination on the merits, but the second clause says, if new and different grounds, that is, unadjudicated grounds, are alleged, the judge finds that the failure to assert those grounds in a prior petition constituted an new use.

That seems to me clearly to contemplate grounds that were not adjudicated, new and different grounds, and then says, judge, you look at the particular case, and if you find that the failure to bring those up earlier constituted an abuse, then you toss it out.

MR. PESCETTA: Yes, Your Honor. That's part of

the res judicata component of the rule. Our position is that a second or a successive petition in the first sentence of Rule 9(b) means what this Court has always taken it to mean. That is, a petition that's filed after a previous petition has been adjudicated on the merits in some form.

The remainder of that rule referred to different kinds of situations that can arise in a second or a successive petition, and if you look at the parallel provisions in section 2244(b) and former section 2244(b), it doesn't use the term, second or successive petition.

It says, when after an evidentiary hearing on the merits -- and this is on page 2 of our brief, of the appendix to our brief. When, after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody is -- pursuant to a judgment of a State court has been denied by a court of the United States. That is boiled down, I submit, in Rule 9(b) into a second or a successive petition.

The rest of 2244(b) tracks closely the rest of Rule 9(b), so I think those rules have to be harmonized. Now, I think we also --

QUESTION: But would you agree with me that if you just read, if new and different grounds are alleged,

the judge find that the failure to assert those earlier constituted an abuse of -- abuse of the writ. That sounds like new, unadjudicated grounds. The judge finds in a particular case that it's an abuse of the writ.

Now, I thought that your argument was, or should have been, that here the judge shouldn't make such a finding because all of the new grounds were asserted the very first time that this petitioner was represented by counsel. Isn't it true that those new grounds were asserted by counsel in Federal court the second time?

MR. PESCETTA: The majority of them, yes, but our position is that that second clause that Your Honor just read is limited by the beginning of the rule which narrows its application to a second or successive petition, so that you don't have any application of Rule 9(b) unless --

QUESTION: So if I read it the way I -- it seems is the literal meaning of new and different grounds, then you lose? You were saying that this is a res judicata rule. If something wasn't adjudicated --

MR. PESCETTA: It's a res judicata rule which covers both adjudicated and unadjudicated claims as long as there is a previous petition that was decided on the merits. That's what res judicata is, of course, all about.

QUESTION: Well, I don't understand why we have to go that far. I mean, I would think your position could be narrower, which is just that a dismissal without prejudice to permit exhaustion doesn't count as a first petition. I mean, that's all you need to say for your purposes. I don't know why you have to go on with this, has to be adjudicated on the merits argument.

MR. PESCETTA: You've said it better than I, Your Honor, and I can only agree with you. The problem is --

QUESTION: Well, let me ask you this. Why doesn't 2253 of AEDPA apply, that there has to be a certificate of appealability for you to get here at all, and there never was in this case. Is that jurisdictional?

MR. PESCETTA: I submit, Your Honor, the AEDPA does not apply.

QUESTION: Why?

MR. PESCETTA: Because under Lindh v. Murphy, this Court held that the Chapter 153 amendments that were enacted by AEDPA do not apply retroactively. Those provisions of section 2253, and of Federal Rule of Appellate Procedure 22, are part of the Chapter 153 amendments to -- that were enacted by AEDPA. Therefore, if this Court adheres to Lindh, in which it said the provisions of that chapter do not apply retroactively,

there's no question that Mr. Slack's petition was filed before AEDPA was enacted --

QUESTION: Was that a holding or a dictum?

MR. PESCETTA: -- and therefore it doesn't apply.

QUESTION: Was that a holding or a dictum as to all the provisions of 153?

MR. PESCETTA: I believe that the -- I believe that it would be dictum outside the particular facts of that case. Nonetheless, I think the same policies that apply, that were applied in Lindh by this Court, apply here. When the Congress wanted to eliminate a certain kind of review, it did so. It said so explicitly. There is nothing in AEDPA that remotely suggests the kind of radical change that the amici suggest was worked by section 2253.

QUESTION: Well, you have -- you had here neither a CPC nor a COA, which is what the prior law would require, right?

MR. PESCETTA: Yes. We applied for a certificate of probable cause. It was denied by the trial court, it was denied by the Ninth Circuit, and we are here under Hohn v. United States.

QUESTION: But under the --

QUESTION: Well --

QUESTION: Under the prior law before section 153, wouldn't you have had to obtain a certificate of appealability?

MR. PESCETTA: No, Your Honor. That -- the prior law, pre-AEDPA, called it a certificate of probable cause for appeal.

QUESTION: I'm sorry, I got the two reversed. And you were denied that.

MR. PESCETTA: And we were denied that, and we were denied that sua sponte by the court of appeals.

QUESTION: So whether you rely on pre-AEDPA or post-AEDPA, it seems to me you don't have what's necessary to get here.

MR. PESCETTA: On the contrary, Your Honor, we are here under Hohn v. United States.

QUESTION: Well, you're saying we can review the denial of a certificate of probable cause. Isn't that what you're saying?

MR. PESCETTA: That's what I understand Hohn means.

QUESTION: Whereas presumably we cannot review post-AEDPA denial of a COA.

MR. PESCETTA: I don't think --

QUESTION: You don't have to take a position on that. All you have to take a position on is that in the

pre-AEDPA law we could decide ourselves whether there should have been a certificate of probable cause granted and go ahead and review it.

MR. PESCETTA: Yes.

QUESTION: That's your position.

MR. PESCETTA: Yes.

QUESTION: But --

QUESTION: Well, but that has some shortcoming, it seems to me. At least one court of appeals has held that AEDPA's COA requirements apply where the petition was filed pre-AEDPA but dismissed post-AEDPA.

MR. PESCETTA: Well, the difficulty there, Your Honor, is it doesn't take Hohn into consideration, I don't think, because it is part of the section 153 amendments, and that's what gets us here.

QUESTION: Well --

QUESTION: But Hohn described what a case was, and I think that does not help you.

MR. PESCETTA: I disagree, Your Honor. An application for a certificate of appealability to the court of appeals is for these purposes, I believe, no different from an application for a certificate or probable cause. In detail it may be different.

QUESTION: Well, I thought Hohn said that a habeas petitioner's application for a certificate of

appealability is a separate case in and of itself, and here that would make you post-AEDPA, so I don't see why that isn't a jurisdictional barrier in this case.

MR. PESCETTA: I think, Your Honor, having applied, properly applied, we believe, for a certificate of probable cause in the district court, and having been denied it, the same application for a certificate of probable cause, whether it is an application for a certificate of probable cause or an application for a certificate of appealability, and the Seventh Circuit has held that the fact that you call it the wrong thing doesn't affect the court's jurisdiction, that invests the court of appeals with jurisdiction in the same way under AEDPA that it did under pre-AEDPA law.

QUESTION: Even if there's jurisdiction, you have difficulty on the merits, don't you, since you never alleged a constitutional violation.

MR. PESCETTA: Well, the underlying constitutional violations are the claims of the petition that are the denials of the constitutional right. There is no case that has ever suggested in any way, shape, or form that a procedural issue that covers an underlying substantive claim can't be addressed under a certificate of appealability or a certificate of probable cause. That language, denial of a Federal right, or, under AEDPA,

denial of a constitutional right, clearly refer to the underlying claim.

I mean, in Barefoot v. Estelle, where some of this language came from originally, the question at issue there was a stay, and the standard for a stay was the substantiality of the underlying claim that entitles you to the stay.

QUESTION: But AEDPA has modified what you can raise. You know, it says denial by constitutional rights, whereas pre-AEDPA law was a Federal right, which could be statutory.

MR. PESCETTA: But I submit, Your Honor, that that still refers to the underlying claim. Congress could have narrowed the class of claims to constitutional claims that it would allow to be reviewed on the merits, but that doesn't mean that the procedural questions that are involved in determination of those issues could never be reached by any appellate court.

What that would mean is that the Federal courts of appeals would be utterly powerless to police the activities of the district courts in habeas cases on procedural issues, and the only case that has addressed an argument like that that was cited by amici is Trevino v. Johnson out of the Fifth Circuit, and that court said no, that's not right, it refers to the underlying quality of

the claim.

QUESTION: Well, they are utterly disabled from reviewing them so long as the underlying claim is not a constitutional one.

MR. PESCETTA: But that's a --

QUESTION: I mean, it is thinkable that they would be disabled from review.

MR. PESCETTA: I don't think that would have happened in this way, Your Honor. If you look at the mechanism for reviewing a second or successive petition under the AEDPA, Congress was very clear that no court could review the decision of a panel of the court of appeals on a hearing on certiorari when that court has made a decision whether or not to allow the filing of a second or a successive petition.

When that issue was -- when Congress decided not to allow that issue to be addressed, it said so. Allowing just an inference to arise from the change from a Federal right to a constitutional right in language that has always been viewed as applicable to the underlying claim, not to the character of the procedural issues that may cover that underlying claim, then I think, contrary to Jones v. United States, this Court would be assuming that Congress intended to make a very radical change in habeas jurisprudence without giving any indication that that was

what it meant.

Also, if you look at section -- former section 2244(c), the same language --

QUESTION: Where is that?

MR. PESCETTA: It's at appendix 2, page 2 of our opening brief, in about the middle of the paragraph, it -- that section refers to denial of a Federal right, which constitutes grounds for discharge. The term, I submit, denial of a Federal right, or denial of a constitutional right, refers to the underlying claim in the petition, and I think we would also have to consider the possibility that there would be a constitutional problem if that reading were adopted.

QUESTION: Why?

MR. PESCETTA: Because what that would allow would be entirely one-sided review of procedural issues in habeas cases.

Now, again, when Congress legislated that no court could review a decision of a panel of a court of appeals deciding whether or not to allow the filing of a second or successive petition, it said so explicitly, and it applied equally to both parties, whether it was granted or denied.

To infer, simply from the change of the word Federal to constitutional, that Congress intended to erect

a system in which the Federal appellate courts could never address anything but an error that favored the petitioner but could never address an error that favored the State would, I believe, present serious equal protection --

QUESTION: I don't see why you read it the way you do. I mean, if you can have any Federal constitutional claim reviewed, certainly the petitioner can have it reviewed if it's decided adversely to him, can he not?

MR. PESCETTA: Well, that question depends on whether, under the amici's reading of the jurisdictional statute, whether that is covered by a procedural issue, which on their reasoning you could never get past.

So the State could come into the court of appeals and say, yes, we agree, the petitioner has an absolutely meritorious constitutional claim that entitles him to relief, and the district court erred in concluding that the petitioner was 1 day late under the statute of limitations under AEDPA, when, in fact, it was 1 day early, but the court of appeals could never address that claim, because no matter how compelling the underlying claim is, no procedural issue could ever be reviewed by any Federal appellate court, and I submit that that's simply an irrational inference to make about what Congress intended by this language.

QUESTION: But I -- it may be a very restrictive view, but I don't think it's necessarily one-sided, because supposing the district court had come out just the opposite way and said that the petition was timely when in fact it was a day late, could the State get that reviewed?

MR. PESCETTA: Yes, Your Honor, because they don't need a certificate of appealability, so what you would have is a system of review in which, if the district court errs one way and says incorrectly it's a day early, so that the petitioner really shouldn't be there, the State can appeal that, and that can be corrected.

If the district court, concededly erroneously, says the petition is a day late, it doesn't matter how compelling the underlying claims are, no Federal appellate court could ever reach that, and that would be the consequence of adopting amici's view of what that language means.

QUESTION: But again, you acknowledge that this situation exists so long as the -- whenever the underlying claim is not a constitutional claim. Let's assume that the basis for the habeas request is that evidence was wrongfully admitted in that shouldn't have been admitted in, but without violating the Constitution. You acknowledge that in that situation exactly what you say is unthinkable would occur, that because there is a later

procedural obstacle, you cannot get the matter before the habeas court.

MR. PESCETTA: I'm not sure I understand your question, Your Honor, but my understanding of the context of these habeas proceedings is, Congress does get to limit what kind of claims ultimately can be adjudicated, constitutional claims rather than Federal claims.

This Court has done it -- this Court has done it itself in the Interstate Agreement on Detainers case, where it said that's not really an error that rises to the dignity of allowing habeas corpus relief. It's very different when you say that only one side can get review of procedural errors which bar you or purportedly bar you from considering the underlying claims, whatever those claims are, and that's our problem with this one-sided system that the reading that amici give the statute would erect.

It would say the State can always get procedural, review of procedural errors committed by the district courts and the petitioner never can --

QUESTION: Other than the --

MR. PESCETTA: -- and that's very different from saying that the quality of the underlying claim can be decided -- can be decided by Congress as having to have sufficient substantiality to warrant relief.

QUESTION: Other than the Interstate Agreement on Detainers statute, are there any -- in habeas, do they ever raise any Federal claims except constitutional claims?

MR. PESCETTA: Occasionally treaty claims, of course.

QUESTION: Oh, I see.

MR. PESCETTA: And Breard -- this Court, for instance, addressed the Breard case, in a case where under the reading that amici submit is the jurisdictional reading of section 2253 this Court couldn't have addressed that case, because there could not have been a -- it could not have addressed the procedural default issue in that case, because that was a procedural issue and not a constitutional issue.

I would just like to go back to where we started on this. There are two parallel tracks, exhaustion, which is not a doctrine of preclusion. Exhaustion is a doctrine of deferral. Exhaustion says, go and do what you need to do in the State court, and our doors will be open when you return.

Abuse is a res judicata doctrine of preclusion. That doctrine says to the petitioner, if you have had what McCleskey described as a full round of habeas review, don't come back. The problem with the rule in this case

is, it has crossed those and made a -- basically a monstrosity of combining those two concepts improperly.

QUESTION: Certainly our opinions do not refer to the abuse of the writ cases as purely cases of res judicata. They seem to indicate that it includes something beyond raising a claim that was raised before.

MR. PESCETTA: I disagree, Your Honor. Every statement of this Court in Kuhlmann v. Wilson, in McCleskey, in which the majority opinion written by Justice Kennedy went into an extraordinarily long analysis in demonstrating this is a qualified res judicata doctrine, and that can't be applied when that previous petition, as Justice O'Connor pointed out, was dismissed without prejudice.

QUESTION: Well, that's certainly not what we said in McCleskey, when we say a petitioner may abuse the writ by failing to raise a claim through inexcusable neglect.

MR. PESCETTA: After --

QUESTION: Our recent decisions confirm that petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it stems from a deliberate choice.

MR. PESCETTA: After the litigation of that

first round of habeas, not as in Lonchar, from the first petition.

If I may, could I save a couple of minutes for rebuttal?

QUESTION: Very well, Mr. Pescetta.

Mr. Sarnowski, we'll hear from you.

ORAL ARGUMENT OF DAVID A. SARNOWSKI
ON BEHALF OF THE RESPONDENTS

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

This case at its essence is about whether State prisoners may file serial mixed petitions in the Federal courts and repeatedly hail the State into Federal court without a consequence, as long as they assert the lack of a prior merits decision by a Federal court.

QUESTION: Mr. Sarnowski, did the State raise the 2253(c) problem, the applicability of AEDPA and the timeliness, the failure to file, get a certificate of appealability?

MR. SARNOWSKI: The State did not, Justice O'Connor. In fact --

QUESTION: And it was not dealt with by the lower courts?

MR. SARNOWSKI: It was not. The circuit court motions panel of two judges denied it.

QUESTION: Is it jurisdictional, do you think, here as well as in the court of appeals?

MR. SARNOWSKI: Having --

QUESTION: If there is some violation, or failure to obtain it under AEDPA, if AEDPA applies, is that then jurisdictional here?

MR. SARNOWSKI: We believe it is, having reviewed the -- what amici has had to say about the issue.

We approached this case by opposing in the district court the application for a certificate of appealability, which was sought after the effective date of AEDPA, in fact, 2 years, almost 2 years.

The district judge having earlier disposed of an argument that AEDPA did apply when counsel for Mr. Slack asserted that it did, also indicated that he was going to apply the old probable cause rule and declined it accordingly. We did oppose that. Our motion papers are contained in the appendix.

Thus, the question then became the one that Mr. Slack initially posed to the court, and the one upon which this Court granted certiorari, rather than the jurisdictional question that the amici have briefed at some length.

The problem with Mr. Slack's suggestion that a rule of civil procedure, and specifically Rule 41, could

apply to allow the district court some control over the litigation, is twofold. Number 1, that suggestion was never asserted by Mr. Slack at any point in time in the prior proceedings, and it has been heard for the first time in this Court.

More importantly, it would then leave individual application of individual rules to apply perhaps in individual districts, such as Nevada, which does not have multiple Federal districts, although we have six judges, whereas the rule that we made our motion under and the court applied to this case is a system-wide rule, Rule 9(b).

QUESTION: Wouldn't it have been rather difficult for Mr. Pescetta to make that point to the Ninth Circuit, which had established a rule that this second petition under the Ninth Circuit rule was successive?

MR. SARNOWSKI: We suggest that it would not have been difficult for counsel for Mr. Slack to have informed the district court, Judge Hagan, before the case ever proceeded to the circuit court, that there was an alternative way and a suggestion that Mr. Slack had to try to dispose of the case, such that he wasn't found to have abused the writ.

And we need to recall that Judge Hagan just didn't file an outright dismissal order based on our

moving papers. He ordered Mr. Slack to explain why, after we had properly pled abuse of the writ, why he hadn't abused it.

Rather than doing so, Mr. Slack merely reargued his point that he argues now, is that Rule 9(b) doesn't apply, that as long as he brings in mixed petitions serially, there is no control and there's nothing that the court could have done to make him.

QUESTION: You're talking now about the arguments on the second petition.

MR. SARNOWSKI: Yes.

QUESTION: Before Judge Hagan.

MR. SARNOWSKI: Yes. The first petition was dealt with by the judge, and he allowed Mr. Slack to return to the State courts. This case is not about whether he'll ever get a review, in our view, on those claims that he initially identified. It was only what Judge Hagan, the district judge, felt to have been the belatedly included and unexhausted issues that counsel amended into the second petition.

QUESTION: Mr. Sarnowski, suppose that the defendant, when he went to the State court to exhaust, had indeed exhausted everything, not only the claims that he put in the Federal habeas petition, but new and different ones that weren't in the first Federal petition, so he's

exhausted everything. He comes back to the Federal court.
Is your argument that that would be okay, or do I understand correctly you to say he can't put in additional claims in the Federal petition?
MR. SARNOWSKI: Our position is that he -- under the rule, he is not allowed to include additional claims beyond those that he had already identified. Of course --
QUESTION: Even though he's exhausted them now.
MR. SARNOWSKI: That's correct. Of course, it would thus then be up to the State to assert any affirmative defense that may be available to it. In a pre-AEDPA situation, rule 9(b) --
QUESTION: Well, I don't know why we get to affirmative defenses if those additional claims are simply out, even though they've been exhausted, under your view.
MR. SARNOWSKI: For purposes of this case -- I don't think that's the question presented -- it is a more difficult question as we look at the abuse rule applied to those facts.
QUESTION: But I thought your position was a categorical rule. If you haven't got it in the first petition, you can't have it in the second.
MR. SARNOWSKI: That is our position, but it's always up to the State to assert the affirmative defense, and if it does so, it's then --

QUESTION: A State can waive it, of course, but would you explain to me how your categorical rule is compatible with the 9(b) language that says, if new and different grounds are alleged, the judge finds. Finds sounds like a case-specific assessment and not a categorical rule.

MR. SARNOWSKI: If the judge were to find that those additional new and different grounds that you say in your hypothetical were not included in the first petition, if he finds that they are new and different, then under the rule, assuming we asserted the affirmative defense --

QUESTION: But it doesn't say, if he finds they're new and different. He says, they are new and different, and the judge finds that the failure to assert them earlier.

MR. SARNOWSKI: Correct. Those are the two predicates that the Ninth Circuit decision in Farmer requires, that they be new and different grounds alleged, and that the failure to assert those grounds in a prior petition constituted an abuse of the writ.

QUESTION: But I thought that the Ninth Circuit rule was they automatically do. If you haven't got them in the first petition, then there isn't a case-by-case examination.

MR. SARNOWSKI: We don't read the Ninth

Circuit's opinion in Farmer to go nearly that far, because -- and we have never argued otherwise, that Rule 9(b) allows discretion. We think it allows much more discretion than the AEDPA statutory version alluded to.

QUESTION: Well, are you saying that there is a general rule that anything new is categorically subject to dismissal, but that that is subject to an exception under the clause of 9(b) that Justice Ginsburg was referring to? In other words, the petitioner could say, let me argue this particular issue, because it was not abusive of me to leave it out. Is that what you're saying?

MR. SARNOWSKI: Correct, and at that point, that's where we found ourselves in this case when Judge Hagan told Mr. Slack to, under these facts to explain why he was raising new issues.

QUESTION: Well, the --

MR. SARNOWSKI: You can extend the same logic --

QUESTION: Yes, but the odd thing with your argument is that abuse is normally a defense to a claim raised, and you're in effect arguing that what the rule means is that abuse in effect is an affirmative basis for a petitioner to allege as a basis for getting around the categorical rule, and that is -- at least starts with very odd procedural language usage. For that reason, I'm not sure that I think it's plausible.

MR. SARNOWSKI: Our reading of the rule requires us, as we did in this case, to affirmatively plead with specificity what the abuse of the writ consists --

QUESTION: Why?

MR. SARNOWSKI: -- the procedural --

QUESTION: Why don't you merely on your rule, or the Ninth Circuit rule, have to plead the fact that wasn't included in the first petition, and you only get into abuse, on your view, as I understand it, if the petitioner says, but it's not abusive for me to raise it. Then you get into abuse, and that is anomalous procedurally.

MR. SARNOWSKI: Well, relying on the former opinion, we rely on it in its entirety, and the circuit court instructed us through that opinion that the requirement is to plead the affirmative defense. It's not up to the petitioner to come in and say, and I'm not abusing the writ, first.

QUESTION: But there are some new grounds that would not be an abuse of the writ, such as a new ground that arose after the last one was decided, a claim of incompetency to be executed, for example.

MR. SARNOWSKI: We agree with that statement, Justice Scalia.

QUESTION: So that there is a need to put in that language the judge finds that the failure to assert

those grounds in a prior petition constituted an abuse of the writ.

MR. SARNOWSKI: And that is by an individual case determination that the judge makes. Here, the judge had no explanation whatsoever for Mr. Slack. Rather, he merely had Mr. Slack's continuing argument that the rule doesn't apply because there wasn't a merits determination.

QUESTION: I thought one explanation was that counsel finally got to shape these pleadings, and so these claims appear as they do in the first petition that was filed by counsel.

MR. SARNOWSKI: There was an argument, I believe, to that effect after the court's dismissal, when Mr. Slack sought a certificate of probable cause. I frankly do not recall that argument having been made prior to the judge's first decision.

QUESTION: But is it the case that this is the first petition in which the petitioner was represented by counsel?

MR. SARNOWSKI: In the Federal court, that is correct. He, of course, had counsel at trial and on direct appeal in the State court.

QUESTION: Yes. I mean on collateral review.

MR. SARNOWSKI: That's correct.

QUESTION: Why can't you say, to pick up what

Justice Ginsburg, I think, was saying, the case is first petition, ground one and ground two, one is not exhausted, two is. It goes to the State court, comes back, we add ground three.

Could a judge say, in this circumstance there is no abuse of the writ the first time for the reason that, a) the petitioner had no lawyer the first time, and most of them are pretty mixed up, and b), since I dismissed it immediately because it wasn't mixed, no harm to the court was done.

MR. SARNOWSKI: To answer the first prong, while a judge may look at that in the exercise of his discretion, we don't understand this Court's jurisprudence, and particularly now, if we are informed by AEDPA, the section of AEDPA that says whatever counsel that they had did or didn't do doesn't matter, I know of no case that says that if a Federal habeas petitioner didn't have a lawyer at all, that that is excuse enough.

QUESTION: I didn't say that. What I said was, because it was immediately sent out of the Federal court back to the State no harm to the court was done. No time was wasted. It was dismissed, because it was a mixed petition, and that's why there was no abuse of the writ the first time.

MR. SARNOWSKI: I would suggest that while there

may not have been harm in the literal sense, the court was not the only party to be considered. Our position is that the serial -- the filing of serial mixed petitions also impacts very deleteriously on the resources of the State.

In this particular instance, we did, in fact, appear in the second case, not the first case as your example is given to us, and under Mr. Slack's theory, he's going to get to go back to State court, and we're going to have to be hailed back into Federal court again and do all the things that we do to respond.

QUESTION: Mr. Sarnowski, look at the appendix for a moment, if you will, the joint appendix, page 197, and it's before a two-judge motions panel of the Ninth Circuit, and it simply says the request for a certificate of probable cause is denied. Is that the only opinion we have from the Ninth Circuit in this case?

MR. SARNOWSKI: It is, Chief Justice.

QUESTION: So we don't know the reason for the Ninth Circuit's denial of a certificate of probable cause, do we?

MR. SARNOWSKI: No, we don't.

QUESTION: May I ask a question that focuses on the language of the statute for a minute? We are talking, are we not, about 2244(b)(1) and (b)(2), and (b)(1) says, a claim presented in a second or successive habeas corpus

application under 2254 that was presented in a prior application shall be dismissed, and I have two questions.

The first question is, if the first petition was not exhausted, presented three claims, 1, 2, and 3, and then it was exhausted, and it came back and presented just those three claims, would that be a second or successive petition within the meaning of (b)(1) in your view?

MR. SARNOWSKI: No.

QUESTION: It would not. Now, (b)(2) has similar language, and then talks about the addition of new claims, and it says, it shall be dismissed, a second -- a claim presented in a second or successive habeas petition that was not presented in a prior application shall be dismissed unless.

Now, is that also not a second or successive if there were three claims in the first that were not exhausted, then three new claims were added when it comes back. Is that second or successive, or is it just like the first, it was not second or successive because the first one was dismissed for failure to exhaust?

MR. SARNOWSKI: I would state that then the rule -- and I believe you're referring to the new statute.

QUESTION: I'm referring to 2244, whether the claim -- my question really is whether the word second or successive habeas application have the same meaning in

(b)(1) as in (b)(2).

MR. SARNOWSKI: Now I understand the question you asked me. I -- they have the same meaning in both instances.

QUESTION: Then if it's not a second or successive under (b)(1) in my first example, it's also not a second or successive in the second.

MR. SARNOWSKI: And I'm -- I would agree. I misstated the answer based on what I understood your question to be, and I apologize. You can't have two different meanings --

QUESTION: So if it's not a second or successive in this case it should not be dismissed under (b)(2).

MR. SARNOWSKI: If that statute even applies, which we have contended it does not. We have never contended the AEDPA abuse of the writ statute, if you will, applies, but rather, Rule 9, which was in effect at the time of filing and has never been rescinded even after enactment of AEDPA.

QUESTION: This is Rule 9 of what? Where --

MR. SARNOWSKI: Rule 9 of the rules governing section 2254 cases in the United States Supreme Court.

QUESTION: Adopted by?

MR. SARNOWSKI: This Court through the Congress in 1976, and I think that's a point worth noting, that the

Rule 9(b) was enacted some 13 years after the Sanders case on which we rely, and approximately 10 years after the statute on which Mr. Slack relies to say that they must be read consistently with one another. We suggest that the later enactment, which is applicable, that is, Rule 9(b), does, in fact, take precedence and does apply. In --

QUESTION: Finish it.

MR. SARNOWSKI: I was finished, Your Honor.

QUESTION: I would like to get away from the language of the rule for a minute. I'll make the assumption that in fact we could go either way on this case. That may or may not be true, but assume it for the sake of argument.

What kind of a real world problem is this? Are, in fact, petitions coming back repeatedly in significant numbers following dismissals without prejudice for exhaustion, with a new parcel of still unexhausted, of new unexhausted claims, or is this case more or less a sport?

MR. SARNOWSKI: This case is I would say representative, and the only --

QUESTION: Are there any -- has anybody does a study of this, or are there any figures to indicate that this is a serious problem?

MR. SARNOWSKI: We have not done any study. I'm not aware of any. I think the Farmer case, the history of

the Farmer case upon which the district court relied, the Ninth Circuit opinion, shows you just what a problem it is.

QUESTION: If it's such a problem, why doesn't the State just have this rule against successive petitions?

MR. SARNOWSKI: We do, and in fact, in Mr. Farmer's --

QUESTION: Why doesn't that solve it?

MR. SARNOWSKI: In Mr. Farmer's case he pinged-pong -- to use the words of the concurrence in Harris v. Reid, three times. The second --

QUESTION: No, but why doesn't -- Justice Kennedy has asked you, why doesn't the State rule act as a bar to be applied in the Federal claim?

MR. SARNOWSKI: It may, if we can ever get the district court to hold the Farmer hearing in that case, and hold what is now being called the Farmer hearing in the other cases on -- in which this has occurred. Farmer was decided --

QUESTION: Did you raise it as a bar in this case?

MR. SARNOWSKI: Yes, we did.

QUESTION: Okay.

MR. SARNOWSKI: Farmer was a capital case, and I

understand that on the surface of it, it may be seen that capital petitioners have more of a reason to do this very thing, and in fact that was our theory in Farmer.

He came back and forth between the Federal court three times, the Federal and State courts three times, over our objection the second and third time, and after the dismissal the third time, where the judge allowed him to go back yet again, we in essence said, enough is enough, we are appealing the judge's abuse of discretion for not at least considering our abuse of the writ defense, and the Ninth Circuit panel agreed that in fact the court should hold a hearing about that. It didn't necessarily say it should find abuse on those facts.

Here we have a noncapital petitioner, but the expenditure of the State's resources to ping-pong and to respond to --

QUESTION: What is the incentive? You said this is a recurrent problem. I can see in a death case spinning out the date of execution, but in a nondeath case, you can never get the attention of the Federal court. You cannot engage the Federal court until you've exhausted. Lundy makes that absolutely clear.

So what incentive would a defendant have for this kind of, what you call ping-pong?

MR. SARNOWSKI: Theoretically, the defendant may

well know facts about the case that the State does not know even well after the case, such as certain witnesses have died, certain witnesses have disappeared, evidence has been lost or destroyed, that if the State were required to refile the case and try it anew, that he would then have a benefit that he didn't have at the first trial.

QUESTION: Well, but that's --

QUESTION: What about the statute of limitations under AEDPA? There's a rather short statute of limitations. Wouldn't that be of some assistance?

MR. SARNOWSKI: We would -- in an appropriate case we would assert that. I suppose its total applicability to the serial petition coming back to Federal court would depend on what the court, how the court construes the provisions of the AEDPA, which speak to what a properly filed petition is.

The Ninth Circuit, as an example, has just ruled that if a State court rules that for some procedural default reason a petition is belated in the State courts, it will not be considered a properly filed one, and thus it will not have tolled the time to file a Federal petition under the AEDPA statute that we now --

QUESTION: Mr. Sarnowski --

MR. SARNOWSKI: -- existing.

QUESTION: -- may I go back to my question for a minute. As I understand it, you're relying primarily on Rule 9(b), but the question that the Court posed in the order granting certiorari related only to section 2254. You're aware of that. Page 198 of the transcript.

Am I correct in understanding that you would agree that if we confined our attention to the question raised in that -- in our order, the 2254, this is not a second or successive within the meaning of 2254, so you would agree with your opponent's answer to the question presented by the Court.

MR. SARNOWSKI: No, we would not agree, Justice Stevens. We don't believe that the rule has a different meaning than the statute as to what a second or successive petition is, and --

QUESTION: But in answer to my questions earlier, you said that the hypothetical I gave you was not a second or successive within the meaning of (b)(1) or (b)(2), and you said no, that's true, but that's why they relied on AEDPA and you didn't, and you're relying on 9(b).

MR. SARNOWSKI: Second or successive, the meaning thereof does not change. What may change is how the petition is handled, depending on what its prior history is.

QUESTION: Well, but do you agree that this is not a second or successive petition within the meaning of 2244(b)(2)?

MR. SARNOWSKI: No, we do not. We -- although we relied exclusively on the affirmative defense provided to us by the rule.

QUESTION: Well then, can I go back to my example under (b)(1). If it were just the same claims as in the State petition, which was unexhausted and refiled, I thought you agreed with me it would not be second or successive within the meaning of (b)(1). Am I wrong on that?

MR. SARNOWSKI: It would be within the meaning of that if it was presented in the application.

QUESTION: Here's my hypothetical. Let's be perfectly clear about it. You have -- the petitioner has one claim. He files in Federal court, and the district court says, you haven't exhausted, I'll dismiss without prejudice. He goes back and exhausts. Now he comes back. Is that a second or successive petition within the meaning of (b)(1)?

MR. SARNOWSKI: No, and --

QUESTION: All right. Now he is -- now this -- I change my example. He takes the first petition with one claim, goes back and exhausts that, adds a second claim

and comes back. Is that a second or successive within the meaning of (b)(2)?

MR. SARNOWSKI: Yes, because -- I assume your question posits that the second claim was not identified in the first petition, thus it would be new.

QUESTION: It would be new.

MR. SARNOWSKI: It was one not presented.

QUESTION: That would be a new claim presented in a second or successive, but you would give a different meaning to the words second or successive in (b)(1) than (b)(2).

MR. SARNOWSKI: Based on the wording of the statute, not to the words second or successive, but on how the petition is handled, because he's not coming in with an -- in your example, as I understand it, the issue he had previously identified is the one he was coming back with to apply (b)(1), whereas he came back with different issues in (b)(2).

QUESTION: Yes, but it's -- the (b)(2) as I read it, it says a claim presented in a second or successive that was not presented in a prior application. That deals with it. But you're saying that one is second or success -- my second example is second or successive, but the first one is not.

MR. SARNOWSKI: In any instance, and I think to

try to best answer your question, in any instance where something wasn't identified in that first petition and the petitioner comes back with it, it is new, or in the words of the new statute, or AEDPA, not presented, and thus then we look to the mechanism as to what the court is to do with --

QUESTION: But isn't it -- isn't the reason that it's not second or successive under one because there was no prior adjudication of anything on the merits under the original petition?

MR. SARNOWSKI: Some of --

QUESTION: Isn't that the reason that you had, that you gave Justice Stevens the answer you did on (1)?

MR. SARNOWSKI: Some of this Court's case law, and much of the case law that the circuit courts have issued, says that.

QUESTION: All right. Then why don't you have to give him the same answer under (2)? Nothing -- on his second hypothetical under (2), nothing has been adjudicated on the merits.

MR. SARNOWSKI: Perhaps because I didn't -- because the question posits that there are additional claims.

QUESTION: Yes, there are additional claims, but if second and successive refers to the fact or not of an

adjudication on the merits of a prior petition, then I don't see why you don't have to give him the same answer under (2) that you did under (1).

MR. SARNOWSKI: The essence of the difference is that they take the position, and Mr. Slack does, that it requires a prior merits adjudication, we take the position that it doesn't. If I mistakenly or confusedly answered Justice Stevens' questions, I certainly didn't mean to.

The crux of the dispute is, we say it doesn't require a prior merits decision, be it under the Rule 9, or under the --

QUESTION: Then why doesn't it under (b)(1)?

MR. SARNOWSKI: -- statute that applied, or the new one.

QUESTION: Why doesn't it under (b)(1)?

MR. SARNOWSKI: Because it doesn't -- the statute doesn't speak to, as I understand it, whether or not there was a prior adjudication. It merely says, presented in a prior application.

QUESTION: What is the corresponding language of AEDPA, supposing that we decide that AEDPA does apply to this case?

MR. SARNOWSKI: That's the statute --

QUESTION: Is that the AEDPA language?

MR. SARNOWSKI: Yes. It appears in the brief

for the petitioner in appendix 3.

QUESTION: Mr. Sarnowski, I take it it's your position that the words second or successive application is not a phrase newly coined in AEDPA, but rather refers to a body of case law concerning what is second or successive.

MR. SARNOWSKI: It does. However, none of the cases --

QUESTION: And had re -- are there any cases that dismissed the return of a petitioner from exhausting his claims, and after having been told to do that, are there any cases that have dismissed such a reapplication as a second or successive habeas?

MR. SARNOWSKI: There are no cases from this Court of which I am aware. Of course, Farmer.

QUESTION: Of any court.

MR. SARNOWSKI: The Farmer case, which we cite.

QUESTION: I mean, the only way you are going to be able to answer Justice Stevens' question is by saying that second or successive habeas corpus application is a term of art, and that it may -- and that it does not include coming back a second time after you've been dismissed the first time and told to go back to State court and exhaust and then come back. It's the only way you're going to be able to do it, so does the case law

support you on that?

MR. SARNOWSKI: The case law, I have found no case that ever says what second or successive means. This Court, even as recently as Martinez-Villareal, its opinion of two terms ago --

QUESTION: Going the other way, have you found any case -- I refer specifically to Justice Kennedy's opinion, McCleskey and all the cases he cites, in which the abuse of the writ doctrine has been applied when there has not been a prior dismissal on the merits?

MR. SARNOWSKI: The Sanders case upon which the rule was fashioned, the 1963 decision in a 2255 case, in which this Court said, Mr. Sanders' first petition was dismissed for procedural reasons.

That is, it was inadequately pled, and while it reversed the finding of abuse, it did allow the Government, as the case was remanded back, to assert abuse, and we have cited that particular scenario in our brief to this Court, and the Ninth Circuit relied on it.

QUESTION: What about the Farmer case from the Ninth Circuit? That tends to support your --

MR. SARNOWSKI: Certainly. It's the first case, and I would readily admit there is no other case there, and like so many issues that get to this Court, this is a particular case on particular facts, and apparently we

were the first ones who had had enough of serial mixed petitions warranting the affirmative defense which we proffered successfully not only in Farmer, but in this case.

We would ask the Court to affirm the denial of the certificate. Thank you.

QUESTION: Thank you, Mr. Sarnowski.

Mr. Pescetta, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF MICHAEL PESCETTA
ON BEHALF OF THE PETITIONER

MR. PESCETTA: Let me just cite the Court the language of this Court's decision in Stewart v. Martinez-Villareal at page 1622 of 118 Supreme Court Reports.

The Chief Justice's opinion in that case said, we believe that respondent's fourth claim here, previously dismissed as premature, should be treated in the same manner as the claim of a petitioner who returns to a Federal habeas court after exhausting his State remedies.

Later on, in both situations, the habeas petitioner did not receive an adjudication of his claim. To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining Federal habeas review.

QUESTION: That would support you if there were no other claims tacked on here to the exhausted claim.

MR. PESCETTA: Respectfully, Your Honor, I disagree. Either we have a second or a successive petition, or we do not. If we have a second or a successive petition, then the res judicata body of law applies.

If a dismissal without prejudice, as this Court allowed in Rose v. Lundy, counts as toward counting a second or a successive petition, it's my understanding of Martinez-Villareal that that's the petition this Court rejected. A dismissal without prejudice is a dismissal without prejudice. It has no --

QUESTION: Unless second or successive is a term of art which does not include bringing back a petition previously dismissed without prejudice with the instruction to exhaust the State remedies.

MR. PESCETTA: The distinction there, Your Honor, is it has always been understood as a res judicata doctrine, not as a pleading limitation doctrine.

QUESTION: No, the real distinction is, the question of what do you identify as the first? There can't be a second unless there's a first, and if you dismiss it for not -- exhaustion, and you don't add any new claims, it wasn't a first.

MR. PESCETTA: It can't --

QUESTION: If you add a new claim, it suddenly

became a first.

MR. PESCETTA: It -- and that's our point, is, that is a res -- abuse is a res judicata doctrine. We can't mix that with a dismissal without prejudice before exhaustion.

QUESTION: Is there any reason to think that AEDPA froze the concept of a second or a successive petition, so that if something came to our attention that we regarded as in the same ball park, we could not decide that it was?

MR. PESCETTA: I think the problem there, Your Honor, there's no evidence of it. The courts of appeals are absolutely unanimous that under AEDPA a petition filed after a previous dismissal of that prejudice for exhaustion is not second or successive.

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

(Whereupon, at 12:05 p.m., the case in the above-entitled matter was submitted.)