No. 98-6322

In the Supreme Court of the United States

ANTONIO TONTON SLACK, PETITIONER

v.

ELDON MCDANIEL, WARDEN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Court has invited the Solicitor General to express the views of the United States on the following questions:

1. Do the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), specifically including 28 U.S.C. 2253(c) and 28 U.S.C. 2244(b) (Supp. III 1997), control the proceedings on appeal?

2. If AEDPA does control the proceedings on appeal, may a certificate of appealability issue under 28 U.S.C. 2253(c) (Supp. III 1997)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes, regulation and rules: Page

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

In 1990, petitioner was convicted of second degree murder with the use of a deadly weapon in violation of Nevada law and sentenced to life imprisonment with the possibility of parole. J.A. 25. The Nevada Supreme Court dismissed his appeal. J.A. 3-4.

In 1991, petitioner filed a pro se petition for a writ of habeas corpus under 28 U.S.C. 2254 in the United States District Court for the District of Nevada. J.A. 6 (*Slack* v. *Director*, Case No. CV-N-91-561-HDM). The district court dismissed the petition without prejudice for failure to exhaust all state remedies. J.A. 21-22. Petitioner then filed a petition for post-conviction relief in state trial court. J.A. 25. The state trial court denied

the petition, J.A. 24-30, and the Nevada Supreme Court dismissed petitioner's appeal, J.A. 31-33.

On May 30, 1995, petitioner returned to federal court and filed a pro se petition for writ of habeas corpus under 28 U.S.C. 2254. J.A. 35 (*Slack* v. *McDaniel*, Case No. CV-N-95-00194-DWH). On October 8, 1996, he filed an amended petition. J.A. 96. On February 13, 1997, the district court appointed counsel and ordered him to file an amended petition or a notice indicating his intent to proceed with the first amended petition. J.A. 64-65. On June 10, 1997, petitioner filed a second amended petition. Pet. App. 190. On December 3, 1997, acting on respondents' motion for a more definite statement, the district court gave petitioner 20 days to file a third amended petition. *Id.* at 196.

On December 24, 1997, petitioner sought (and the district court subsequently granted) leave to file a third amended petition. J.A. 66. On March 30, 1998, the district court dismissed several of the claims in the third amended petition for abuse of the writ because petitioner had not included those claims in his 1991 federal habeas petition. J.A. 152, 156. The court dismissed the remainder of the petition without prejudice because one of the remaining claims had still not been exhausted. J.A. 157-158.

In taking those actions, the court determined that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which went into effect on April 26, 1996, "is not applicable to this case" because the case "was commenced March 27, 1995." J.A. 156. The court therefore applied the pre-AEDPA abuse-of-the-writ doctrine reflected in Rule 9(b) of the Rules Governing Section 2254 Cases. J.A. 156.

On April 29, 1998, petitioner filed a notice of appeal, J.A. 161, and, on May 11, 1998, he applied for a certifi-

cate of probable cause, J.A. 163. The district court denied the certificate. J.A. 182-183. The Ninth Circuit assigned the case docket number 98-15943. See App., *infra*, 1a. On July 7, 1998, a two-judge panel of that court denied the certificate, and the court entered that judgment on its docket. *Id.* at 2a.

On February 22, 1999, this Court granted the petition for a writ of certiorari limited to the following question:

> If a person's petition for habeas corpus under 28 U.S.C. § 2254 is dismissed for failure to exhaust his state remedies and he subsequently exhausts his state remedies and refiles the § 2254 petition, are claims included within that petition that were not included within his initial § 2254 filing "second or successive" habeas applications?

J.A. 198. That question was briefed, and the case was argued on October 4, 1999. On October 18, 1999, the Court restored the case to the calendar for reargument and called for briefing on whether 28 U.S.C. 2253(c) and 28 U.S.C. 2244(b) (Supp. III 1997) of AEDPA control the proceedings on appeal, and if so, whether a certificate of appealability may issue under 28 U.S.C. 2253(c) (Supp. III 1997).

SUMMARY OF ARGUMENT

I. This Court has determined that the general amendments to the law of habeas corpus in Chapter 153 of Title 28, United States Code, made by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA or Act), Pub. L. No. 104-132, 110 Stat. 1214, were not made applicable to habeas cases pending on the date of enactment of AEDPA. *Lindh* v. *Murphy*, 521 U.S. 320, 336 (1997). The Court reached that result by drawing an inference from AEDPA's Section 107(c):

since Congress specifically provided that Chapter 154's provisions for habeas review of certain state capital cases were made applicable to "cases pending on or after the date of enactment of this Act," § 107(c), 110 Stat. 1226, Congress did not intend the Chapter 153 amendments to apply to pending cases. The first question here is whether two of the provisions of Chapter 153 as amended by AEDPA, 28 U.S.C. 2253(c) and 28 U.S.C. 2244(b) (Supp. III 1997), are applicable to the appellate proceedings. Petitioner here filed his underlying habeas petition before enactment of AEDPA, but amended it to include new claims, and sought to appeal the district court's dismissal of those claims, after enactment of AEDPA.

Lindh's analysis and general principles of habeas law indicate that AEDPA's requirement that a petitioner obtain a certificate of appealability (COA), Section 2253(c), is applicable to petitioner's appellate proceedings. As this Court made clear in *Hohn* v. *United States*, 524 U.S. 236 (1998), an application for a certificate of appealability is itself a "case," and that case is not "pending" until leave to appeal is requested. The negative implication of Section 107(c), *i.e.*, that the provisions of Chapter 153 are not applicable to pending cases, is therefore not relevant to applications for authorization to appeal that are made *after* the effective date of AEDPA.

The same cannot be said, however, about the second-or-successive provisions of amended Section 2244(b). Those provisions include substantive restrictions on when second or successive habeas applications may be made and procedural requirements that establish a gatekeeping mechanism administered by the courts of appeals. If a habeas petition is filed before AEDPA's effective date, none of those provisions of Section

2244(b) is applicable, even if the habeas petitioner seeks to appeal after AEDPA's effective date. To hold otherwise would mean that the district court's adjudication of the case under pre-AEDPA law, as required under *Lindh*, would be nullified by appellate review under AEDPA's new legal standards. If, however, a second or successive habeas application is initiated after AEDPA's effective date, that "case" is controlled by Section 2244(b).

The issue here is whether petitioner's new claims in his post-AEDPA amended petition can properly be treated as a separate "case" that is subject to AEDPA's restrictions on second or successive petitions. In our view, they cannot. Such treatment is inconsistent with the usual meaning of "case," which applies to an entire proceeding rather than to separate claims for relief within it. It is also inconsistent with AEDPA's separate use of the terms "case" and "claim" and with traditional habeas practice, which has not treated amendments to a habeas petition as second or successive petitions.

II. If AEDPA's COA provisions are applicable, the second question presented is whether a COA may issue when a petitioner argues that the district court committed a non-constitutional procedural error that foreclosed consideration of an underlying constitutional claim arising from the state criminal proceedings. Under AEDPA, a COA may issue only if the applicant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). That showing has two components: first, that the petitioner's underlying habeas case contains a claim of a constitutional violation that is "debatable among jurists of reason," *Lozada* v. *Deeds*, 498 U.S. 430, 432 (1991) (per curiam), and, second, if procedural obstacles exist that may bar relief

on that claim, that there is a reasonably debatable argument that the petitioner can surmount those procedural obstacles.

Because of those requirements, a petitioner who claims that the district court has denied his habeas application on procedural grounds cannot obtain a COA simply because the procedural ruling is reasonably open to question; that, standing alone, would not demonstrate a "substantial showing of the denial of a constitutional right." By the same token, however, the fact that the procedural ruling on which the district court denied relief is non-constitutional in character does not preclude the issuance of a COA. If there is a possibly meritorious claim of constitutional error in the state criminal proceedings, and the claim of procedural error by the habeas court is reasonably debatable, a COA may issue to decide whether adjudication of the underlying constitutional claim was foreclosed by the habeas court's procedural error.

ARGUMENT

I. AEDPA'S CERTIFICATE OF APPEALABILITY PROVISIONS APPLY TO THE PROCEEDINGS IN THE COURT OF APPEALS, BUT AEDPA'S PROVISIONS GOVERNING SECOND OR SUCCESSIVE PETITIONS DO NOT

Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA or Act), Pub. L. No. 104-132, 110 Stat. 1214, made substantial revisions to federal law governing petitions for collateral relief. Sections 101 through 106 of AEDPA amended 28 U.S.C. 2244 and 2253-2255 (collectively, Chapter 153), which generally govern post-conviction review proceedings in

federal courts.[1] 110 Stat. 1217-1221. Section 107 created a new Chapter 154 concerning habeas proceedings in state capital cases. Chapter 154 contains more stringent procedural and substantive limitations on relief in capital cases but is applicable only if the State meets certain conditions. 110 Stat. 1221-1226. Congress provided, in Section 107(c) of AEDPA, that "Chapter 154 * * * shall apply to cases pending on or after the date of enactment of this Act." 110 Stat. 1226.

In *Lindh* v. *Murphy*, 521 U.S. 320, 336 (1997), this Court held that the negative implication of Section 107(c) is that AEDPA's amendments to Chapter 153 "generally apply only to cases filed after the Act became effective," April 24, 1996. The Court specifically held that amended Section 2254(d) in Chapter 153, which prescribes standards for granting federal habeas relief to a state prisoner, did not apply to Lindh, who had filed his habeas petition and his appeal before AEDPA's enactment. 521 U.S. at 322-323. The Court did not provide further clarification concerning when a "case" is "pending" within the meaning of Section 107(c) so that the amendments to Chapter 153 do not apply to it.

Petitioner here filed his petition for habeas corpus before the advent of AEDPA, but, unlike in *Lindh*, the petition was amended to add new claims, and appellate proceedings were commenced, after the advent of AEDPA. The question before the Court is whether those post-AEDPA events trigger the applicability of two of AEDPA's provisions: the certificate of appealability (COA) provisions, which control whether a

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[1] Citations in this brief to sections of Title 28 of the United States Code are to Supplement III 1997, unless otherwise indicated.

habeas petitioner may bring an appeal to the court of appeals, 28 U.S.C. 2253(c), and the provisions governing the filing of a second or successive application for habeas relief, 28 U.S.C. 2244(b). We believe that the COA provisions are applicable to petitioner's appeal-authorization proceedings, but AEDPA's second-or-successive provisions are not.

A. The COA Provisions In Amended 28 U.S.C. 2253(c) Apply To The Proceedings In The Court Of Appeals

As amended by AEDPA, 28 U.S.C. 2253(c) provides that "an appeal may not be taken to the court of appeals" from the denial of a petition for collateral relief filed by a state or federal prisoner, "[u]nless a circuit justice or judge issues a [COA]." Section 2253(c) further provides that a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). The COA requirements govern only the threshold screening proceeding in which a petitioner seeks authorization to appeal; they have no application to the underlying collateral relief proceedings in district court.

The application for a certificate, rather than the case in district court, is thus the relevant "case" for purposes of applying to the COA provisions the negative implication of AEDPA's Section 107(c). In *Hohn* v. *United States*, 524 U.S. 236, 241 (1998), this Court held that an "application for a [COA] constitutes a case under [28 U.S.C. 1254(1) (1994)]," which gives the Court jurisdiction to review "[c]ases in the courts of appeals" (*ibid.*). It is logical to apply the same approach to hold that the application for a COA is also a case within the meaning of Section 107(c). As the Eighth Circuit explained in *Tiedeman* v. *Benson*, 122 F.3d 518, 521 (1997), there is "no reason why a new provision exclu-

sively directed towards 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." In accord with that reasoning, this Court has applied amendments to the Federal Rules of Appellate Procedure to "all proceedings in *appellate cases* thereafter commenced." 517 U.S. 1257 (1996) (emphasis added).[2]

Treating an application for a certificate as the relevant "case" under Section 107(c) is consistent with that term's ordinary legal meaning. "Case" is "[a] general term for an action, cause, suit, or controversy, at law or in equity" and includes "*any* proceeding judicial in its nature." *Black's Law Dictionary* 215 (6th ed. 1990) (emphasis added). See also *Random House Dictionary of the English Language* 321 (2d ed. 1987) ("10. *Law*: a suit or action at law"). The analysis in this Court's precedent supports the same approach. The Court in *Hohn* did not attach any special meaning to the term "case" in Section 1254(1) but instead relied on the term's usual meaning. See 524 U.S. at 241 (citing *Blyew* v. *United States*, 80 U.S. (13 Wall.) 581, 595 (1871) ("case" is "a proceeding in court, a suit, or action")). The Court also observed that the courts of appeals treat applications for certificates as they treat other cases, *i.e.*, by assigning a docket number, sub-

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[2] The Court has also applied those amendments, "insofar as just and practicable, [to] all proceedings in appellate cases then pending." 517 U.S. 1257 (1996). That action reflects the principle that new procedural rules may generally be applied to pending litigation provided they were enacted before the phase of the case to which they apply. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 275 & n.29 (1994).

mitting the matter to a panel, and entering judgment. 524 U.S. at 242.[3]

An application for a COA is "pending" within the meaning of Section 107(c) once the application or a notice of appeal is filed. See Fed. R. App. P. 22(b) ("If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals."); *Black's Law Dictionary* 1134 (6th ed. 1990) ("[A]n action or suit is 'pending' from its inception until the rendition of final judgment."); *Ex parte Quirin*, 317 U.S. 1, 24 (1942) ("Presentation of the petition for judicial action is the institution of a suit.").

Petitioner filed his notice of appeal on April 29, 1998, and applied for a certificate of probable cause (CPC) (the pre-AEDPA predecessor to a COA) on May 11, 1998. J.A. 161, 163. Because neither his notice of appeal nor his application for a certificate had been filed by AEDPA's effective date, his "case" seeking authorization to appeal was not "pending" at that time. Therefore, the negative implication of Section 107(c), which the Court relied on in *Lindh*, does not preclude application of the COA provisions to the proceedings in the court of appeals.[4]

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[3] The application here, although handled under pre-AEDPA procedures requiring a certificate of probable cause, followed the same course: the court of appeals assigned petitioner's application a separate docket number, distinct from his district court case, and entered judgment on that application. Compare p. 3, *supra* (No. 98-15943) with p. 2, *supra* (No. CV-N-95-00194-DWH).

[4] Aside from the Eighth Circuit, the courts of appeals have not agreed with our view that the applicability of AEDPA's COA provisions depends on the date on which the notice of appeal or application for a certificate was filed. Those courts have focused instead on the date when the underlying habeas case was filed. See, *e.g.*, *United States* v. *Kunzman*, 125 F.3d 1363, 1364 n.2 (10th Cir.

Nor would application of the COA provisions to those proceedings have "retroactive effect." *Landgraf* v. *USI Film Prods.*, 511 U.S. 249, 280 (1994). The requirement that petitioner obtain a COA was in place before petitioner was obliged to seek one. Indeed, petitioner addressed whether AEDPA applied in his application for a CPC. See J.A. 166-167. Application of the COA provisions is therefore prospective and raises no retroactivity concerns.

Finally, the COA requirement applies to the proceedings in the court of appeals whether or not respondents properly preserved the claim that it applies. Section 2253(c) provides that "an appeal may not be taken to the court of appeals" absent a COA. In *Hohn*, this Court termed issuance of a COA "a threshold prerequisite for court of appeals jurisdiction." 524 U.S. at 248. That view accords with the Court's longstanding position that the absence of a CPC deprived an appellate court of the power to review a denial of habeas corpus relief. See, *e.g.*, *Bilik* v. *Strassheim*, 212

1997), cert. denied, 523 U.S. 1053 (1998); *United States* v. *Skandier*, 125 F.3d 178, 182 (3d Cir. 1997). As discussed above, that view is incorrect because it fails to recognize the distinct "case" that is commenced when a habeas petitioner seeks to initiate proceedings in the court of appeals. We note that the Eighth Circuit has declined to extend its holding in *Tiedeman*, which involved a state prisoner, to cases involving federal prisoners. See *United States* v. *Navin*, 172 F.3d 537 (1999). The court concluded that, because federal prisoners, unlike state prisoners, did not need authorization in order to appeal before enactment of AEDPA, applying the COA requirement to federal prisoners with petitions pending in district court when AEDPA was enacted would present retroactivity concerns. *Id.* at 539. As we explain in the text following this note, application of the certificate requirement to prisoners who initiated appellate proceedings after AEDPA's enactment is not retroactive.

U.S. 551 (1908) (dismissing appeal for want of jurisdiction, under Act of March 10, 1908, ch. 76, 35 Stat. 40, a forerunner of Section 2253(c), which required certification of probable cause before appeal to this Court from the denial of a habeas petition). And it comports with the Court's holding that the courts of appeals lack jurisdiction over an appeal absent the filing of a timely, proper notice of appeal. See *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988); *United States* v. *Robinson*, 361 U.S. 220, 224 (1960). Appellate courts must consider jurisdictional limits on their power on their own initiative, and those limits cannot be waived or forfeited. See, *e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).[5]

B. The Provisions Restricting The Filing Of Second Or Successive Petitions In Amended 28 U.S.C. 2244(b) Do Not Apply To Petitioner's Third Amended Petition

As amended by AEDPA, 28 U.S.C. 2244(b) imposes limitations on the filing of a "second or successive habeas corpus application." Those limitations include both substantive standards that determine when a claim presented in a second or successive application may form the basis for habeas relief, Section 2244(b)(1) and (2), and a procedural gatekeeping provision that requires authorization by a court of appeals before a second or successive application may be filed in a district court, Section 2244(b)(3). See *Felker* v. *Turpin*, 518 U.S. 651, 656-657 (1996). The question here is

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[5] Cases holding that other, non-jurisdictional provisions of AEDPA, such as 28 U.S.C. 2254(d), may be forfeited (*e.g.*, *Arnold* v. *Evatt*, 113 F.3d 1352, 1362 n.57 (4th Cir. 1997), cert. denied, 522 U.S. 1058 (1998); *Emerson* v. *Gramley*, 91 F.3d 898, 900 (7th Cir. 1996), cert. denied, 520 U.S. 1122, 520 U.S. 1139 (1997)) do not alter that conclusion.

whether the proceedings on appeal, which were initiated after the effective date of AEDPA, are controlled by Section 2244(b). We believe that they are not. Unlike the COA provisions, which are exclusively concerned with initiating an appellate case, the provisions in Section 2244(b) affect the entire course of the collateral relief proceedings, including the prisoner's ability to file his petition for collateral relief in the district court. See *Felker*, 518 U.S. at 662-663. Accordingly, when a habeas petition is filed before the effective date of AEDPA, none of Section 2444(b) is applicable to it. That is true even when the habeas petitioner seeks leave to appeal after the effective date of AEDPA. To hold otherwise would mean that the district court's determination of the case would be governed by pre-AEDPA law, under *Lindh*, but the appellate court would review the district court's decision under the different legal standards of AEDPA. That result would essentially nullify Congress's intention to apply Chapter 153 only to habeas cases that were not pending at the time of AEDPA's enactment. In contrast, when a habeas petitioner seeks to initiate a second or successive habeas application after AEDPA's effective date, that habeas "case" is controlled by Section 2244(b).

Here, petitioner's case was "pending" once he filed his petition for collateral relief in the district court on May 30, 1995. See *Ex parte Quirin*, *supra*; *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 112-113 (1866) (cause commences when habeas petition is filed); 28 U.S.C. 2254(e)(1) (discussing "a proceeding instituted by an application for a writ of habeas corpus"); 28 U.S.C. 1914(a) (requiring the filing fee for "instituting any civil action" to be paid "on application for a writ of habeas corpus"). That view is consistent with ordinary civil

practice, see Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."), which informs proper procedure in habeas cases. See Rule 11 of the Rules Governing Section 2254 Cases. And the majority of the courts of appeals look to the date on which the petition was filed in district court to determine whether AEDPA applies.[6]

Because petitioner's case in district court was pending when AEDPA was enacted, the negative implication of Section 107(c) recognized in *Lindh*, *supra*, dictates that amended 28 U.S.C. 2244(b) does not apply to petitioner's third amended habeas petition. Respondents (Supp. Br. 9) suggest that a different result is warranted because the third amended petition was filed

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[6] See, *e.g.*, *Gosier* v. *Welborn*, 175 F.3d 504, 506 (7th Cir.), cert. denied, 120 S. Ct. 502 (1999); *Graham* v. *Johnson*, 168 F.3d 762, 775 (5th Cir. 1999), petition for cert. pending, No. 98-10002; *Williams* v. *Coyle*, 167 F.3d 1036, 1039-1040 (6th Cir. 1999); *Mancuso* v. *Herbert*, 166 F.3d 97, 101 (2d Cir.), cert. denied, 119 S. Ct. 2376 (1999); *United States* v. *Marmolejos*, 140 F.3d 488, 489 n.1 (3d Cir. 1998); *Pratt* v. *United States*, 129 F.3d 54, 58 (1st Cir. 1997), cert. denied, 523 U.S. 1123 (1998). Petitioner's case was not pending before his May 30 application was filed, even though he first filed a federal habeas petition in 1991, because the 1991 petition was dismissed before enactment of AEDPA. See, *e.g.*, *Libby* v. *Magnusson*, 177 F.3d 43, 46 (1st Cir. 1999); *Graham*, 168 F.3d at 782; *Mancuso*, 166 F.3d at 101. The Ninth Circuit has held that, in capital cases in which the prisoner moves for appointment of counsel before filing a habeas petition, a case is pending under AEDPA Section 107(c) once the motion for counsel is filed. *Calderon* v. *United States Dist. Court for the Cent. Dist. of Cal. (Kelly)*, 163 F.3d 530, 540 (1998) (en banc), cert. denied, 119 S. Ct. 1377 (1999). We disagree with the Ninth Circuit that a motion for appointment of counsel commences a habeas "case" within the meaning of Section 107(c), but this Court need not address that question here, because petitioner, who is not a capital prisoner, filed his habeas petition before he moved for counsel. See J.A. 35, 56.

after AEDPA's enactment. Respondents (*id.* at 15) and their amici States (Br. Amici Curiae States of Cal. *et al.* at 8, 11 (June 23, 1999)) argue that this Court should construe "case" as used in Section 107(c) and *Lindh* in a "claim-specific fashion," so that pre-AEDPA law applies to *claims* pending on AEDPA's enactment, and AEDPA governs *claims* presented after its enactment. We do not agree.

The suggestion that a "claim" is a "case" finds no support in the ordinary meaning of the word "case." In ordinary usage, "case" refers to a judicial proceeding rather than a specific pleading or claim in that proceeding. See p. 9, *supra* (citing dictionary definitions for "case"). This Court has construed "case" in precisely that manner. See *Hohn*, 524 U.S. at 241 ("a proceeding seeking relief for an immediate and redressable injury"); *Blyew*, 80 U.S. (13 Wall.) at 595 ("a proceeding in court, a suit, or action").

The suggestion is also inconsistent with Congress's use of the words "case" and "claim" in other provisions of AEDPA. See, *e.g.*, 28 U.S.C. 2244(b) and (d)(1); 28 U.S.C. 2254(d) and (e)(2); 28 U.S.C. 2255; 28 U.S.C. 2261(a), (d) and (e); 28 U.S.C. 2262(c); 28 U.S.C. 2264; 28 U.S.C. 2265 (b) and (c); 28 U.S.C. 2266(b)(1). When Congress used "case" in other provisions of AEDPA, Congress used that word in its ordinary sense, to refer to a judicial proceeding or action. See, *e.g.*, 28 U.S.C. 2244(b)(2)(A) ("a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court"); 28 U.S.C. 2261(e) ("a capital case"); 28 U.S.C. 2262(c) ("no Federal court thereafter shall have the authority to enter a stay of execution in the case"); 28 U.S.C. 2265(c) ("cases involving a sentence of death"); 28 U.S.C. 2266(b)(1)(B) (if necessary, district court shall afford a hearing before "submission of the

case for decision"). Congress used the word "claim," however, to refer to a legal basis for relief within a case. See, *e.g.*, 28 U.S.C. 2244(b)(1) and (2) ("[a] claim presented in a second or successive habeas corpus application"); 28 U.S.C. 2254(e)(2) (if applicant "failed to develop the factual basis of a claim in State court proceedings," court shall not hold an evidentiary hearing unless specified conditions are met). If Congress had meant AEDPA's application to turn on whether a particular claim was pending on enactment rather than on whether the habeas proceeding was pending, Congress presumably would have used "claim" rather than "case" in Section 107(c). Because it did not, Section 107(c)'s negative implication applies to a habeas "case," not a habeas "claim."

Finally, respondents' interpretation of "case" is inconsistent with traditional habeas practice. Courts have not viewed amendments to pending habeas petitions as new cases subject to the limitations on second or successive petitions, but instead have permitted amendments under Federal Rule of Civil Procedure 15. See *Johnson* v. *United States*, No. 97-2519, 1999 WL 1022126, *3 (7th Cir. Nov. 10, 1999); *Bonin* v. *Calderon*, 59 F.3d 815, 845-846 (9th Cir. 1995), cert. denied, 516 U.S. 1051 (1996); see also *Calderon* v. *Ashmus*, 523 U.S. 740, 750 (1998) (Breyer, J., concurring).[7] In AEDPA,

[7] By contrast, the abuse-of-the-writ standard has been held to apply once the court has disposed of the habeas petition; for example, to a motion to recall the mandate after judgment, see *Calderon* v. *Thompson*, 523 U.S. 538, 553 (1998), and to a motion to amend judgment under Federal Rule of Civil Procedure 60(b); see, *e.g.*, *In re Medina*, 109 F.3d 1556, 1561 (11th Cir.), cert. denied, 520 U.S. 1151 (1997). Although here the Ninth Circuit applied the abuse-of-the-writ standard to some of the claims that petitioner added in his third amended petition, the court did so not based on the fact that

Congress implicitly endorsed the traditional approach for non-capital cases when it subjected only amendments in capital cases under the new Chapter 154 to AEDPA's limitations on second or successive petitions. See 28 U.S.C. 2266(b)(3)(B).[8] Moreover, district courts do not assign separate docket numbers when prisoners file amendments to pending petitions, as this case illustrates. See p. 2, *supra* (all three amended petitions recorded under docket number assigned on filing of initial petition). Respondents and their amici have not identified, nor have we found, any court of appeals decision interpreting Section 107(c) and *Lindh* as they advocate.

Amici correctly point out that their theory would enable the courts to avoid some anomalous results that might occur in cases in which a petition for collateral relief was filed shortly before enactment of AEDPA and amended thereafter. See Br. Amici Curiae States of Cal. *et al.* at 8-9 (June 23, 1999). But bright-line rules often generate similar anomalies, and courts should not seek to avoid them by disregarding traditional principles of statutory construction. Moreover, any anomalies that might occur here would be transitory and would end with the disposal of those petitions pending when AEDPA was enacted. And respondents' approach has its own practical flaw: it would require

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those claims were amendments to petitioner's May 30 petition, but based on the fact that petitioner had filed a petition in 1991 that had been dismissed for failure to exhaust state remedies. See p. 2, *supra*.

[8] That provision states: "No amendment to an application for a writ of habeas corpus under this chapter [154] shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b)," the provision governing second and successive habeas applications.

district courts to apply different versions of the same provisions of law to different claims in the same case, an administratively burdensome task that Congress should not lightly be presumed to have imposed.[9]

If the Court concludes that the COA requirement of AEDPA applies to petitioner's proceedings in the court of appeals but amended Section 2244(b) does not apply, the Court will then be presented with the question whether a COA may issue. We now turn to that question.[10]

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[9] One could arrive at an outcome similar to the one produced by the theory of respondents and the amici States by reasoning that, although petitioner's case was pending before enactment of AEDPA, that case includes only the claims in the May 30, 1995, petition and any claims added by amendment that "relate[] back" to that filing under Federal Rule of Civil Procedure 15(c). Under that reasoning, claims in the third amended petition that do not arise out of the "conduct, transaction, or occurrence" (*ibid.*) described in the May 30 petition are not part of the case pending before AEDPA's enactment; instead, they are a new case subject to the requirements of amended Section 2244(b). That approach would be even more complex than the one proposed by respondents and the amici States, and it should likewise be rejected. Section 107(c)'s reference to "cases pending" gives no indication that Congress intended the scope of those cases to be defined by Rule 15(c)'s relation back principle, which primarily applies in the statute-of-limitations context. See Fed. R. Civ. P. 15(c)(1) (allowing relation back when "permitted by the law that provides the statute of limitations applicable to the action"); Fed. R. Civ. P. 15(c) Advisory Committee Notes On 1966 Amendment ("Relation back is intimately connected with the policy of the statute of limitations."); *Baldwin County Welcome Ctr.* v. *Brown*, 466 U.S. 147, 150 n.3 (1984) ("The rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide.").

[10] On the other hand, if the Court agrees with respondents and their amici States that amended Section 2244(b) applies, then

II. A COA MAY NOT ISSUE UNLESS REASONABLE JURISTS COULD CONCLUDE BOTH THAT THE HABEAS PETITION IS NOT BARRED BY ABUSE OF THE WRIT AND THAT IT PRESENTS A CONSTITUTIONAL CLAIM ON WHICH PETITIONER COULD PREVAIL

Under AEDPA, a court may issue a COA only if an applicant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Consistent with pre-AEDPA law, a substantial showing requires an applicant to demonstrate that his right to relief on a claim in his habeas petition (including his ability to overcome any procedural obstacle to relief) is "debatable among jurists of reason." *Lozada* v. *Deeds*, 498 U.S. 430, 432 (1991) (per curiam). In a departure from pre-AEDPA law, the COA requirement permits appeal only when the showing is made as to a "constitutional

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presumably the gatekeeping provision of that Section, under which second or successive habeas applications may not be filed in district court without leave of the court of appeals, applies as well. See 28 U.S.C. 2244(b)(3)(A). Because of the prohibition in 28 U.S.C. 2244(b)(3)(E) against certiorari review of gatekeeping decisions, it would not be appropriate for this Court to treat the court of appeals' disposition in this case as a gatekeeping determination. Rather, the Court should either remand the case to the court of appeals with instructions to construe petitioner's notice of appeal as a gatekeeping motion, see, *e.g.*, *Pratt* v. *United States*, 129 F.3d 54, 59 (1st Cir. 1997), cert. denied, 523 U.S. 1123 (1998), or dismiss the petition for a writ of certiorari and allow petitioner to pursue any remedies he might have under Section 2244(b), such as formally filing a gatekeeping motion in the court of appeals. In passing on a gatekeeping motion, that court could decide whether petitioner's claims are "second or successive" within the meaning of Section 2244(b). Cf. *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 641-642 (1998).

right" rather than a "federal right." See *Barefoot* v. *Estelle*, 463 U.S. 880, 893 (1983).

1. The reference to a "constitutional" right in Section 2253(c)(2) requires that the underlying petition for collateral relief raise a constitutional claim, rather than a claim based on a federal statute or treaty, the other two bases for habeas relief, see 28 U.S.C. 2254(a). *Young* v. *United States*, 124 F.3d 794, 798-799 (7th Cir. 1997), cert. denied, 524 U.S. 928 (1998); *Murphy* v. *Netherland*, 116 F.3d 97, 99-100 (4th Cir.), cert. denied, 521 U.S. 1144 (1997).[11] The elimination of statutory and treaty-based claims from the appellate process is consistent with AEDPA's general purpose of streamlining habeas corpus review and with the certificate requirement's longstanding purpose of rooting out frivolous appeals. See 141 Cong. Rec. S4590-S4593 (daily ed. Mar. 24, 1995) (Sen. Specter); 141 Cong. Rec. H1400 (daily ed. Feb. 8, 1995) (Rep. McCollum); *id.* at H1402 (Rep. Young); *Barefoot*, 463 U.S. at 892, 893 n.3. Although some habeas petitions have invoked treaties, *e.g.*, *Breard* v. *Greene*, 523 U.S. 371 (1998), or federal statutes, *e.g.*, *Reed* v. *Farley*, 512 U.S. 339 (1994), collateral relief for non-constitutional violations is available only to rectify a "complete miscarriage of justice" or an "omission inconsistent with the rudiment[s] of fair procedure." See *Reed*, 512 U.S. at 348. Because few statutory or treaty claims meet that demanding

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[11] Some courts of appeals have suggested that the substitution of "constitutional" for "federal" was not intended to alter the pre-AEDPA standard. See, *e.g.*, *Green* v. *Johnson*, 116 F.3d 1115, 1120 (5th Cir. 1997); *Lyons* v. *Ohio Adult Parole Auth.*, 105 F.3d 1063, 1073 (6th Cir.), cert. denied, 520 U.S. 1224 (1997). The language of Section 2253(c)(2) makes that view untenable.

standard, appeals raising those claims are unlikely to succeed. See *Young*, 124 F.3d at 799.

2. The requirement in Section 2253(c)(2) that the prisoner's showing be "substantial" means that his right to prevail on the claim must be "debatable among jurists of reason." See *Barefoot*, 463 U.S. at 893 n.4; *Lozada*, 498 U.S. at 432. An applicant cannot make that showing if there is a clear procedural obstacle to his right to relief, even if there is merit to his underlying claim. Thus, when there may be a procedural bar to recovery, an applicant for a certificate must demonstrate that *both* the merits of his underlying claim *and* his ability to overcome the procedural obstacle are subject to reasonable debate. See, *e.g.*, *Morris* v. *Horn*, 187 F.3d 333, 340 (3d Cir. 1999); *Murphy* v. *Johnson*, 110 F.3d 10, 11 (5th Cir. 1997).

Congress could not have intended to permit appeals based solely on the abstract merit of an underlying claim if relief on that claim would clearly be procedurally barred. To allow such appeals would frustrate the certificate's core purpose of curbing meritless appeals. Therefore, before and after AEDPA, courts of appeals have held that a prisoner may not obtain appellate review of the merits of a petition for collateral relief unless it is at least arguable that he can overcome procedural obstacles to relief. See *Murphy* v. *Netherland*, 116 F.3d at 101; *Tucker* v. *Johnson*, 115 F.3d 276, 281 (5th Cir.), cert. denied, 522 U.S. 1017 (1997); *Murphy* v. *Johnson*, 110 F.3d at 11; *Hogan* v. *Zavaras*, 93 F.3d 711, 712 (10th Cir. 1996); *Sterling* v. *Scott*, 57 F.3d 451, 453 (5th Cir. 1995), cert. denied, 516 U.S. 1050 (1996). We are aware of no decision to the contrary.

3. Several courts of appeals have held, however, that they may review a procedural ruling denying collateral relief without a showing that an underlying constitu-

tional claim has potential merit. See, *e.g.*, *Gaskins* v. *Duval*, 183 F.3d 8, 9 n.1 (1st Cir. 1999); *Thomas* v. *Greiner*, 174 F.3d 260 (2d Cir. 1999); *Nichols* v. *Bowersox*, 172 F.3d 1068, 1070 n.2 (8th Cir. 1999) (en banc); *Whitehead* v. *Johnson*, 157 F.3d 384, 388 (5th Cir. 1998). We do not believe that those decisions can be reconciled with the plain language of Section 2253(c), which makes "a substantial showing of the denial of a *constitutional* right" a prerequisite to an appeal from "*the final order* in a habeas corpus proceeding." 28 U.S.C. 2253(c) (emphasis added). An erroneous procedural ruling by the habeas court, standing alone, does not meet that standard.[12] Nor would review of a procedural ruling, absent the existence of a potentially meritorious underlying claim, accord with the COA requirement's purpose of rooting out insubstantial appeals. There is no need to correct a district court's procedural error when that error prevents consideration of only meritless claims.

On the other hand, we do not agree with the view that a COA can *never* issue when a district court denies collateral relief on procedural grounds because that adverse procedural ruling does not deny any constitutional right. Resp. Supp. Br. 22-23; Br. Amicus Curiae States of Cal. *et al.* at 21 (June 23, 1999). We are not aware of any court of appeals that has adopted that view.[13] Nor does the text of Section 2253(c) support it.

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[12] Conceivably, a procedural error of constitutional dimension in the habeas proceedings might constitute the denial of a "constitutional right." Although Section 2253(c) could be read to cover that situation, the normal focus of a habeas petition, and any appeal, is on redressing the claimed denial of rights in the underlying state criminal process.

[13] Instead, appellate courts have continued to review procedural issues, sometimes explicitly holding that they have the power to do

Section 2253(c) requires a "substantial showing of the denial of a constitutional right," and a prisoner makes that showing if he demonstrates that his conviction or sentence may have been imposed in violation of the Constitution and that the district court may have erred in refusing him relief.

There is no evidence that Congress intended to preclude appellate review when a prisoner has a meritorious underlying constitutional claim, but the district court has erroneously denied it on procedural grounds. Although that limitation would reduce appeals, it would do so at the expense of meritorious appeals. The goal of the certificate requirement, however, is to screen out "frivolous" appeals. See *Barefoot*, 463 U.S. at 892 & n.3; see also, *e.g.*, 141 Cong. Rec. S4596 (daily ed. Mar. 24, 1995) (Sen. Hatch) ("Habeas corpus reform must not discourage legitimate petitions that are clearly meritorious and deserve close scrutiny."). Further, although a prohibition on issuance of a COA when relief is denied on procedural grounds would not preclude all appellate review of procedural rulings (because the government can appeal without obtaining a certificate, Fed. R. App. P. 22(b)(3)), it would increase the likelihood of divergent procedural rules among the district courts. There is no warrant for attributing to Congress an intention to foster disarray in the procedural rules governing habeas cases, given the interest in consistent disposition of those cases.

The COA standard that we espouse would mean that, in some cases, a court of appeals, in deciding whether to issue a certificate, will have to pass on questions that

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so, as in the cases we cite on pages 21-22, *supra*, and, at other times, implicitly assuming that power, see, *e.g.*, *Breard* v. *Greene*, 523 U.S. 371 (1998); *Morris*, 187 F.3d at 340 (citing cases).

the district court has not addressed. For several reasons, however, that consideration does not warrant rejection of our proposed standard. First, an application to the court of appeals for a COA is not an appeal from the district court's denial of a COA but an independent proceeding in the court of appeals. Viewed in that light, it is not anomalous for the court of appeals to address issues in the first instance.

Second, courts of appeals not infrequently must address issues that district courts have not discussed in written opinions. In fact, district courts sometimes summarily dismiss entire habeas petitions without written opinions. See 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 15.2a, at 630 (3d ed. 1998) (noting that "some" courts of appeals require written opinions explaining summary dismissals). And, even though Federal Rule of Appellate Procedure 22(b) requires a district court that denies an application for a COA to "state why a certificate should not issue," the explanation may be brief and thus provide little guidance to a court of appeals. See, *e.g.*, J.A. 182-183.

Third, only in limited instances will a court of appeals, in passing on an application for a COA, in fact have to address the underlying claim raised in a petition for collateral relief without any prior discussion of the claim by the district court. The appellate court need do so only if (1) the district court has rejected the petition for collateral relief solely on procedural grounds; (2) the district court has denied a COA solely on procedural grounds, because it has concluded that the applicant's ability to overcome the procedural obstacle is not even debatable; but (3) the court of appeals disagrees with that conclusion, and therefore

cannot itself dispose of the application for a COA on procedural grounds.

CONCLUSION

The Court should hold that petitioner is subject to the COA requirements of amended 28 U.S.C. 2253(c) and therefore may not appeal from the district court's dismissal of his habeas petition unless he obtains a COA. The Court should also hold that petitioner is not entitled to a COA unless reasonable jurists could conclude both that his habeas petition is not barred by abuse of the writ and that it presents a constitutional claim on which petitioner could prevail. The Court may wish to remand this case to the court of appeals for application of that standard. Alternatively, the Court may wish to address the question on which it initially granted review in the course of deciding whether reasonable jurists could reject the district court's finding of abuse of the writ, and then dispose of the case accordingly.

Respectfully submitted.

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DECEMBER 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 98-15943

ANTONIO TONTON SLACK, PETITIONER-APPELLANT

v.

E. K. MCDANIEL, ATTORNEY GENERAL OF
THE STATE OF NEVADA, RESPONDENT-APPELLEE*

DOCKET ENTRIES

DATE	DOCKET NUMBERS	PROCEEDINGS
5/22/98	1	Filed request for a certificate of appealability. Date COA denied in DC: 5/19/98. DC file included (y/n): yes (MOATT).
5/22/98	2	Rec'd original DC file in 2 vol pldgs to (MOATT). (jr.)

* So in original.

DATE	DOCKET NUMBERS	PROCEEDINGS
5/22/98	3	Rec'd (coa pending) certificate of record. RT filed in DC none. [98-15943] (jr)
6/29/98	5	Case to motions panel. [98-15943] (rc) [Entry date 07/07/98]
7/7/98	6	Order filed, the request for a COA is DENIED. (Procedurally Terminated After Other Judicial Action; Certificate of Appealability. David R. THOMPSON; Edward LEAVY, author) [98-15943] (rc)
7/8/98	7	District court casefile returned. (ups) (stev)
10/13/98	8	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 98-6322 filed on 10/7/98. (Casefiles) [98-15943] (gva) [Entry date 10/15/98]

APPENDIX B

RELEVANT STATUTES AND RULES

1. Section 107(c) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1226, provides:

> Chapter 154 of title 28, United States Code (as added by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act.

2. Section 2244 of Chapter 153 of Title 28, United States Code (Supp. III 1997), provides in relevant part:

* * * * *

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a

whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

* * * * *

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

* * * * *

3. Section 2253(c) of Chapter 153 of Title 28, United States Code (Supp. III 1997), provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from —
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

4. Section 2254 of Chapter 153 of Title 28, United States Code (1994 & Supp. III 1997), provides in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

* * * * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review

> by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> * * * * *

5. Section 2255 of Chapter 153 of Title 28, United States Code (Supp. III 1997), provides in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * *
>
> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

* * * * *

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the

> Supreme Court, that was previously unavailable.

6. Section 2261 of Chapter 154 of Title 28, United States Code (Supp. III 1997), provides in relevant part:

> (a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) [establishing procedures for appointment of counsel in State post-conviction proceedings] are satisfied.
>
> * * * * *
>
> (d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.
>
> (e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. * * *

7. Section 2262(c) of Chapter 154 of Title 28, United States Code (Supp. III 1997), provides in relevant part:

> If one of the conditions in subsection (b) [specifying circumstances under which a stay of execution shall expire] has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the

filing of a second or successive application under section 2244(b).

8. Section 2264 of Chapter 154 of Title 28, United States Code (Supp. III 1997), provides:

> (a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—
>
> > (1) the result of State action in violation of the Constitution or laws of the United States;
> >
> > (2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or
> >
> > (3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.
>
> (b) Following review subject to subsection (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

9. Section 2265 of Chapter 154 of Title 28, United States Code (Supp. III 1997), provides in relevant part:

> (a) For purposes of this section, a "unitary review" procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. * * *

* * * * *

(b) * * * No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(c) Sections 2262, 2263, 2264, and 2266 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. * * *

10. Section 2266 of Chapter 154 of Title 28, United States Code (Supp. III 1997), provides in relevant part:

* * * * *

(b)(1)(A) A district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 180 days after the date on which the application is filed.

(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.

* * * * *

(3) * * *

> (B) No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).

11. Rule 22(b) of the Federal Rules of Appellate Procedure provides:

> (1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a State court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.
>
> (2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.
>
> (3) A certificate of appealability is not required when a State or its representative or the United States or its representative appeals.

12. Section 1914(a) of Title 28, United States Code (Supp. III 1997), provides:

> The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $150, except that on application for a writ of habeas corpus the filing fee shall be $5.

13. Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides:

> The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

14. Rule 3 of the Federal Rules of Civil Procedure provides:

> A civil action is commenced by filing a complaint with the court.