# SUPREME COURT OF THE UNITED STATES

No. 00–121

GEORGE DUNCAN, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY, PETITIONER *v.* SHERMAN WALKER

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

[June 18, 2001]

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, concurring in part and concurring in the judgment.

For substantially the reasons stated at pages 4–10 of the Court's opinion, I agree that the better reading of 28 U. S. C. §2244(d)(2) (1994 ed., Supp. V) is that it encompasses only "State" applications for "post-conviction or other collateral review." Thus, as the Court holds, "an application for federal habeas corpus review is not an 'application for State post-conviction or other collateral review' within the meaning of 28 U. S. C. §2244(d)(2)." *Ante*, at 13. I write separately to add two observations regarding the equitable powers of the federal courts, which are unaffected by today's decision construing a single provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214.

First, although the Court's pre-AEDPA decision in *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982), prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies. Indeed, there is every reason to do so when AEDPA gives a district court the alternative of simply denying a petition

containing unexhausted but nonmeritorious claims, see 28 U. S. C. §2254(b)(2) (1994 ed., Supp. V), and when the failure to retain jurisdiction would foreclose federal review of a meritorious claim because of the lapse of AEDPA's 1-year limitations period.

Second, despite the Court's suggestion that tolling the limitations period for a first federal habeas petition would undermine the "purposes" of AEDPA, see *ante*, at 10–14, neither the Court's narrow holding, nor anything in the text or legislative history of AEDPA, precludes a federal court from deeming the limitations period tolled for such a petition as a matter of equity. The Court's opinion does not address a federal court's ability to toll the limitations period apart from §2244(d)(2). See *ante*, at 13. Furthermore, a federal court might very well conclude that tolling is appropriate based on the reasonable belief that Congress could not have intended to bar federal habeas review for petitioners who invoke the court's jurisdiction within the 1-year interval prescribed by AEDPA.

After all, federal habeas corpus has evolved as the product of both judicial doctrine and statutory law. See generally E. Chemerinsky, Federal Jurisdiction §15 (3d ed. 1999). In the context of AEDPA's 1-year limitations period, which by its terms runs from "the date on which the judgment became final," see §2244(d)(1)(A), the Courts of Appeals have uniformly created a 1-year grace period, running from the date of AEDPA's enactment, for prisoners whose state convictions became final prior to AEDPA.[1]

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[1] See, *e.g.*, *Gaskins* v. *Duval*, 183 F. 3d 8, 9 (CA1 1999); *Ross* v. *Artuz*, 150 F. 3d 97, 100–103 (CA2 1998); *Burns* v. *Morton*, 134 F. 3d 109, 111–112 (CA3 1998); *Brown* v. *Angelone*, 150 F. 3d 370, 374–376 (CA4 1998); *United States* v. *Flores*, 135 F. 3d 1000, 1002, n. 7, 1006 (CA5 1998); *Austin* v. *Mitchell*, 200 F. 3d 391, 393 (CA6 1999); *Lindh* v. *Murphy*, 96 F. 3d 856, 866 (CA7 1996) (en banc), rev'd on other grounds, 521 U. S. 320 (1997); *Ford* v. *Bowersox*, 178 F. 3d 522, 523 (CA8 1999); *Calderon*

Similarly, federal courts may well conclude that Congress simply overlooked the class of petitioners whose timely filed habeas petitions remain pending in district court past the limitations period, only to be dismissed after the court belatedly realizes that one or more claims have not been exhausted.[2] See *post*, at 2 (BREYER, J., dissenting) (district courts on average take 268 days to dismiss petitions on procedural grounds; 10% remain pending more than 2 years). As a result, equitable considerations may make it appropriate for federal courts to fill in a perceived omission on the part of Congress by tolling AEDPA's statute of limitations for unexhausted federal habeas petitions. Today's ruling does not preclude that possibility, given the limited issue presented in this case and the Court's correspondingly limited holding.[3]

I concur in the Court's holding on the understanding that it does not foreclose either of the above safeguards against the potential for injustice that a literal reading of §2244(d)(2) might otherwise produce.

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v. *District Court*, 128 F. 3d 1283, 1286–1287 (CA9 1997), overruled on other grounds, 163 F. 3d 530, 539–540 (CA9 1998); *Hoggro* v. *Boone*, 150 F. 3d 1223, 1225–1226 (CA10 1998); *Wilcox* v. *Florida Dept. of Corrections*, 158 F. 3d 1209, 1211 (CA11 1998).

[2] The question whether a claim has been exhausted can often be a difficult one, not just for prisoners unschooled in the immense complexities of federal habeas corpus law, see *post*, at 7 (BREYER, J., dissenting), but also for district courts, see, *e.g.*, *Morgan* v. *Bennett*, 204 F. 3d 360, 369–371 (CA2 2000) (disagreeing with District Court's conclusion that claim had not been exhausted); *Bear* v. *Boone*, 173 F. 3d 782, 784–785 (CA10 1999) (same).

[3] Thus the court below, which resolved the case based on its reading of 28 U. S. C. §2244(d)(2) (1994 ed., Supp. V), and which therefore did not reach the question whether it "should exercise its equitable powers to exclude the [time] during which the first [habeas] petition was pending," 208 F. 3d 357, 362 (CA2 2000), is free to consider the issue on remand.