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 BREYER, with whom JUSTICE GINSBURG joins, dissenting.

The federal habeas corpus statute limits the period of time during which a state prisoner may file a federal habeas petition to one year, ordinarily running from the time the prisoner's conviction becomes final in the state courts. See 28 U. S. C. §2244(d) (1994 ed., Supp. V). Section 2244(d)(2) tolls that 1-year period while "a properly filed application for State post-conviction or other collateral review . . . is pending." The question before us is whether this tolling provision applies to federal, as well as state, collateral review proceedings. Do the words "other collateral review" encompass federal habeas corpus proceedings? I believe that they do.

To understand my conclusion, one must understand why the legal issue before us is significant. Why would a state prisoner ever want federal habeas corpus proceedings to toll the federal habeas corpus limitations period? After all, the very point of tolling is to provide a state prisoner adequate time to file a federal habeas petition. If the petitioner has already filed that petition, what need is there for further tolling?

The answer to this question– and the problem that gives rise to the issue before us– is that a federal court

may be required to dismiss a state prisoner's federal habeas petition, not on the merits, but because that prisoner has not exhausted his state collateral remedies for every claim presented in the federal petition. See 28 U. S. C. §2254(b)(1) (1994 ed., Supp. V) (requiring petitioners to exhaust state remedies before filing federal habeas petition); cf. *Rose* v. *Lundy,* 455 U. S. 509, 510 (1982) (holding, under predecessor to current §2254, that district courts cannot reach the merits of "mixed" petitions containing both exhausted and unexhausted claims). Such a dismissal means that a prisoner wishing to pursue the claim must return to state court, pursue his state remedies, and then, if he loses, again file a federal habeas petition in federal court. All this takes time. The statute tolls the 1-year limitations period during the time the prisoner proceeds in the state courts. But unless the statute also tolls the limitations period during the time the defective petition was pending in federal court, the state prisoner may find, when he seeks to return to federal court, that he has run out of time.

This possibility is not purely theoretical. A Justice Department study indicates that 63% of all habeas petitions are dismissed, and 57% of those are dismissed for failure to exhaust state remedies. See U. S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions 17 (1995) (hereinafter Federal Habeas Corpus Review). And it can take courts a significant amount of time to dispose of even those petitions that are not addressed on the merits; on the average, district courts took 268 days to dismiss petitions on procedural grounds. *Id.*, at 23–24; see also *id.*, at 19 (of all habeas petitions, nearly half were pending in the district court for six months or longer; 10% were pending more than two years). Thus, if the words "other collateral review" do not include federal collateral review, a large group of federal

habeas petitioners, seeking to return to federal court after subsequent state-court rejection of an unexhausted claim, may find their claims time barred. Moreover, because district courts vary substantially in the time they take to rule on habeas petitions, two identically situated prisoners can receive opposite results. If Prisoner *A* and Prisoner *B* file mixed petitions in different district courts six months before the federal limitations period expires, and the court takes three months to dismiss Prisoner *A*'s petition, but seven months to dismiss Prisoner *B*'s petition, Prisoner *A* will be able to return to federal court after exhausting state remedies, but Prisoner *B*– due to no fault of his own– may not.

On the other hand, if the words "other collateral review" include federal collateral review, state prisoners whose federal claims have been dismissed for nonexhaustion will simply add to the 1-year limitations period the time they previously spent in both state and federal proceedings. Other things being equal, they will be able to return to federal court after pursuing the state remedies that remain available. And similarly situated prisoners will not suffer different outcomes simply because they file their petitions in different district courts.

The statute's language, read by itself, does not tell us whether the words "State post-conviction or other collateral review" include federal habeas proceedings. Rather, it is simply unclear whether Congress intended the word "State" to modify "post-conviction" review alone, or also to modify "other collateral review" (as the majority believes). Indeed, most naturally read, the statute refers to two distinct kinds of applications: (1) applications for "State post-conviction" review and (2) applications for "other collateral review," a broad category that, on its face, would include applications for federal habeas review. The majority's reading requires either an unusual intonation– "*State* post-conviction-or-other-collateral *review*"– or a

slight rewrite of the language, by inserting the word "State" where it does not appear, between "other" and "collateral." Regardless, I believe that either reading is possible. The statute's words, by themselves, have no singular "plain meaning."

Neither do I believe that the various interpretive canons to which the majority appeals can solve the problem. Invoking the principle that "'Congress acts intentionally and purposely in the disparate inclusion or exclusion'" of particular words, *Bates* v. *United States,* 522 U. S. 23, 29–30 (1997) (quoting *Russello* v. *United States,* 464 U. S. 16, 23 (1983)), the majority attempts to ascertain Congress's intent by looking to the tolling provision's statutory neighbors. It points to other provisions where Congress explicitly used the words "State" and "Federal" together, expressing its intent to cover both kinds of proceedings. See *ante,* at 4–5 (citing 28 U. S. C. §2254(i) (1994 ed., Supp. V); §2261(e); §2264(a)(3)). And it reasons that Congress's failure to do so here displays a different intent.

But other statutory neighbors show that, when Congress wished unambiguously to limit tolling to state proceedings, "it knew how to do so." *Custis* v. *United States,* 511 U. S. 485, 492 (1994). In the special tolling provision governing certain capital cases, Congress said explicitly that the limitations period is tolled "from the date on which the first petition for post-conviction review or other collateral relief is filed *until the final State court disposition of such petition,*" thus making it clear that federal proceedings, for example, petitions for certiorari, do not count. 28 U. S. C. §2263(b)(2) (1994 ed., Supp. V) (emphasis added). Does Congress's failure to include a similar qualification in §2244's tolling provision show that it means that provision to cover both federal and state proceedings? In fact, the "argument from neighbors" shows only that Congress might have spoken more clearly than it did. It cannot prove the statutory point.

The majority also believes that only its interpretation gives effect to every word in the statute– in particular the word "State." It asks: If Congress meant to cover federal habeas review, why does the word "State" appear in the statute? Federal habeas proceedings are a form of post-conviction proceedings. So, had Congress meant to cover them, it would have just said "post-conviction and other collateral review." See *ante*, at 6.

But this argument proves too much, for one can ask with equal force: If Congress intended to exclude federal habeas proceedings, why does the word "post-conviction" appear in the statute? State post-conviction proceedings are a form of collateral review. So, had Congress meant to exclude federal collateral proceedings, it could have just said "State collateral review," thereby clearly indicating that the phrase applies only to state proceedings.

In fact, this kind of argument, viewed realistically, gets us nowhere. Congress probably picked out "State post-conviction" proceedings from the universe of collateral proceedings and mentioned it separately because State post-conviction proceedings are a salient example of collateral proceedings. But to understand this is not to understand whether the universe from which Congress picked "State post-conviction" proceedings as an example is the universe of *all* collateral proceedings, or the universe of *state* collateral proceedings. The statute simply does not say.

Indeed, the majority recognizes that neither the statute's language, nor the application of canons of construction, is sufficient to resolve the problem. It concedes that the phrase "other collateral review," if construed as "other [State] collateral review," would add little to the coverage that the words "State post-conviction . . . review" would provide in its absence. See *ante,* at 8 (noting that a state criminal conviction is "by far the most common" basis for seeking federal habeas review). The majority resolves this

difficulty by noting that "other collateral review" could also include either review of state civil confinement proceedings or state post-conviction review to which a State refers by some other name, such as state "habeas" proceedings. See *ante*, at 8–9.

But it is difficult to believe that Congress had state civil proceedings in mind, given that other provisions within §2244 indicate that Congress saw criminal proceedings as its basic subject matter. For instance, the exceptions to the bar against successive petitions in §2244(d) seem to presume that the petition at issue challenges a criminal conviction. See 28 U. S. C. §2244(b)(2)(A) (1994 ed., Supp. V) (requiring a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court"); §2244(b)(2)(B) (requiring new evidence establishing that, "but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense"). Nor does it seem likely that Congress would have expected federal courts applying the tolling provision to construe "post-conviction" review to exclude state "habeas" petitions challenging convictions. The statute in which the words "State post-conviction proceedings" appear is a *federal* statute, and federal courts would be likely to apply those words to whatever state proceedings in fact fall within this federal description, whatever different labels different States might choose to attach. It is simpler, more meaningful, and just as logical to assume that Congress meant the words "other collateral review" to cast a wider net– a net wide enough to include federal collateral proceedings such as those that precede a dismissal for nonexhaustion.

Faced with this statutory ambiguity, I would look to statutory purposes in order to reach a proper interpretation. And, while I agree that Congress sought to "'further the principles of comity, finality, and federalism,'" *ante*, at 10 (quoting *Williams* v. *Taylor*, 529 U. S. 420, 436 (2000)), I would also ask whether Congress would have intended to

create the kind of "unexhausted petition" problem that I described at the outset. The answer is no. Congress enacted a statute that all agree gave state prisoners a full year (plus the duration of state collateral proceedings) to file a federal habeas corpus petition. Congress would not have intended to shorten that time dramatically, at random, and perhaps erase it altogether, "den[ying] the petitioner the protections of the Great Writ entirely," *Lonchar* v. *Thomas,* 517 U. S. 314, 324 (1996), simply because the technical nature of the habeas rules led a prisoner initially to file a petition in the wrong court.

The majority's argument assumes a congressional desire to strengthen the prisoners' incentive to file in state court first. But that is not likely to be the result of today's holding. After all, virtually every state prisoner already knows that he must first exhaust state-court remedies; and I imagine that virtually all of them now try to do so. The problem arises because the vast majority of federal habeas petitions are brought without legal representation. See Federal Habeas Corpus Review 14 (finding that 93% of habeas petitioners in study were *pro se*). Prisoners acting *pro se* will often not know whether a change in wording between state and federal petitions will be seen in federal court as a new claim or a better way of stating an old one; and they often will not understand whether new facts brought forward in the federal petition reflect a new claim or better support for an old one. Insofar as that is so, the Court's approach is likely to lead not to fewer improper federal petitions, but to increased confusion, as prisoners hesitate to change the language of state petitions or add facts, and to greater unfairness. And it will undercut one significant purpose of the provision before us– to grant state prisoners a fair and reasonable time to bring a first federal habeas corpus petition.

Nor is it likely that prisoners will deliberately seek to delay by repeatedly filing unexhausted petitions in federal

court, as the Court suggests. See *ante,* at 12. First, prisoners not under a sentence of death (the vast majority of habeas petitioners) have no incentive to delay adjudication of their claims. Rather, "[t]he prisoner's principal interest . . . is in obtaining speedy federal relief." *Rose* v. *Lundy,* 455 U. S., at 520. Second, the prisoner who chooses to go into federal court with unexhausted claims runs the risk that the district court will simply deny those claims on the merits, as it is permitted to do, see 28 U. S. C. §2254(b)(2) (1994 ed., Supp. V), before the prisoner has had the opportunity to develop a record in state court. Third, district courts have the power to prevent vexatious repeated filings by, for instance, ordering that a petition filed after a mixed petition is dismissed must contain only exhausted claims. See *Slack* v. *McDaniel,* 529 U. S. 473, 489 (2000). Thus, the interest in reducing "piecemeal litigation," *ante,* at 12, is not likely to be significantly furthered by the majority's holding.

Finally, the majority's construction of the statute will not necessarily promote comity. Federal courts, understanding that dismissal for nonexhaustion may mean the loss of any opportunity for federal habeas review, may tend to read ambiguous earlier state-court proceedings as having adequately exhausted a federal petition's current claims. For similar reasons, wherever possible, they may reach the merits of a federal petition's claims without sending the petitioner back to state court for exhaustion. To that extent, the majority's interpretation will result in a lesser, not a greater, respect for the state interests to which the majority refers. In addition, by creating pressure to expedite consideration of habeas petitions and to reach the merits of arguably exhausted claims, it will impose a heavier burden on the district courts. (While JUSTICE STEVENS' sound suggestions that district courts hold mixed petitions in abeyance and employ equitable tolling, see *ante*, at 1–3 (opinion concurring in part and concurring in judgment), would properly ameliorate some of the un-

fairness of the majority's interpretation, they will also add to the burdens on the district courts in a way that simple tolling for federal habeas petitions would not.)

In two recent cases, we have assumed that Congress did not want to deprive state prisoners of first federal habeas corpus review, and we have interpreted statutory ambiguities accordingly. In *Stewart* v. *Martinez-Villareal,* 523 U. S. 637 (1998), we held that a federal habeas petition filed after the initial filing was dismissed as premature should not be deemed a "second or successive" petition barred by §2244, lest "dismissal . . . for technical procedural reasons . . . bar the prisoner from ever obtaining federal habeas review." *Id.*, at 645. And in *Slack* v. *McDaniel,* we held that a federal habeas petition filed after dismissal of an initial filing for nonexhaustion should not be deemed a "second or successive petition," lest "the complete exhaustion rule" become a "'trap'" for "'the unwary *pro se* prisoner.'" 529 U. S., at 487 (quoting *Rose, supra,* at 520). Making the same assumption here, I would interpret the ambiguous provision before us to permit tolling for federal habeas petitions.

In both *Martinez-Villareal* and *Slack*, the Court discerned the purpose of an ambiguous statutory provision by assuming that (absent a contrary indication) congressional purpose would mirror that of most reasonable human beings knowledgeable about the area of the law in question. And the Court kept those purposes firmly and foremost in mind as it sought to understand the statute. See *Slack, supra,* at 486–487; *Martinez-Villareal*, *supra,* at 644 (refusing to adopt an interpretation whose "implications for habeas practice would be far reaching and seemingly perverse"). Today it takes a different approach– an approach that looks primarily, though not exclusively, to linguistic canons to dispel the uncertainties caused by ambiguity. Where statutory language is ambiguous, I believe these priorities are misplaced. Language, diction-

aries, and canons, unilluminated by purpose, can lead courts into blind alleys, producing rigid interpretations that can harm those whom the statute affects. If generalized, the approach, bit by bit, will divorce law from the needs, lives, and values of those whom it is meant to serve— a most unfortunate result for a people who live their lives by law's light. The Court was right in *Martinez-Villareal* and *Slack* to see purpose as key to the statute's meaning and to understand Congress as intending the same; it is wrong to reverse its interpretive priorities here.

With respect, I dissent.