SUPREME COURT OF THE UNITED STATES

No. 01–301

TOM L. CAREY, WARDEN, PETITIONER *v.* TONY EUGENE SAFFOLD

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

[June 17, 2002]

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

Respondent is a California prisoner who did not file a notice of appeal. The Court, however, begins by considering a question not presented, whether the statute of limitations would have been tolled for a hypothetical prisoner who filed an appeal somewhere else. This is a strong indication that the Court is off in the wrong direction. After holding that tolling applies for its hypothetical appellant, the Court finally gets to California, where no appeal was filed. On the Court's view, California's procedures are "unique," *ante*, at 1, so giving them special treatment under the statute will affect only that one State. It is quite wrong about this. In fact, today's ruling will disrupt the sound operation of the federal limitations period in at least 36 States. This is what happens when the Court departs from the text of a nationwide statute to reach a result in one particular State.

The Court's conclusion that an application is pending before the filing of an original writ in the California Supreme Court rests on three propositions: First, "application" means "petition, appeal from the denial of a petition, and anything else that functions as an appeal." Second, California's procedures are very different from those in other States. Third, a petition for an original writ in the

California Supreme Court functions as an appeal. The first is an untenable interpretation of statutory text. The second and third, however, are wrong on both the facts and the law. The remedies available in the California Supreme Court are no different from those available in most other state supreme courts. Like 36 other States, California allows its high court both to reverse the denial of habeas corpus in the lower court and to grant an original petition for habeas outright. In California, as in other States, these procedures differ in more than name. They differ with respect to the question in this case: whether an application was pending in the 4-month period between the denial of respondent's habeas petition in the California Court of Appeal and his filing of a new petition in the California Supreme Court.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. §2244(d)(1), provides a 1-year statute of limitations for filing a federal habeas corpus petition, but it tolls the limitations period while a "properly filed application" for collateral review is "pending" in the state courts. The Court now holds that on the day before respondent filed an original petition in the California Supreme Court, his application was "properly filed" and "pending" somewhere. The Court does not say what that application was, nor does it identify the court in which it was filed. This is because nothing had been under consideration or awaiting the result of an appeal for four months, since the California Court of Appeal had denied respondent's previous application.

Instead of identifying a particular pending application, the Court relies upon an expansive definition of the term. The Court begins by defining "pending," offering one definition for when the word is used as an adjective and another for when used as a preposition. See *ante*, at 4. As the statute only uses the word as an adjective (tolling while the application "is pending"), the latter definition is

irrelevant and misleading. When used as an adjective, the definition does not help the Court. The Court says "pending" means "'in continuance' or 'not yet decided.'" *Ante*, at 4 (quoting Webster's Third New International Dictionary 1669 (1993)). The real issue though is not what "pending" means, but when is an "application . . . pending." The Court asserts that "an application is pending as long as the ordinary state collateral review process is 'in continuance' . . ." *Ante,* at 4. That is only true, of course, if "application" means the "ordinary state collateral review process," a proposition that finds no support in Webster's Third. Indeed, it is inconsistent with *Artuz* v. *Bennett*, 531 U. S. 4 (2000), which recognized that an "application" is a "document" distinct from the legal claims contained within it. *Id.*, at 8, 9. The word, "application," appears in numerous other places in the laws governing federal habeas corpus. *E.g.*, 28 U. S. C. §2242 ("application for a writ of habeas corpus shall be in writing signed and verified"); §2243 (a "judge entertaining an application for a writ of habeas corpus"). In each place, it is clear that the statute refers to a specific legal document; in none is the word used as a substitute for the ordinary collateral review process. Without discussing *Artuz* or these many statutory references, the Court gives "application" a new meaning, one that does not even require the existence of any document evidencing the "application," and one that embraces the multiple petitions, appeals, and other filings that constitute the "ordinary state collateral review process." *Ante,* at 4.

The Court explains that the original petition in the California Supreme Court is part of the ordinary collateral review process because it functions as an appeal under California law. California, the Court says, "does not require, technically speaking, appellate review of a lower court determination. Instead it contemplates that a prisoner will file a new 'original' habeas petition." *Ante*, at 6.

This is an incorrect statement of California law. While California does not permit appeals of the California Superior Court's denial of habeas corpus, it does provide for "appellate review" of the denial of a petition for habeas corpus by the California Court of Appeal. That appeal is not just available; as the Court concedes, *ante,* at 9, the California Supreme Court has said that it is the preferred practice. See *In re Reed*, 33 Cal. 3d 914, 918, and n. 2, 663 P. 2d 216, 217, and n. 2 (1983). Section 1506 of the California Penal Code Ann. (West 2000) provides: "[I]n all criminal cases where an application for a writ of habeas corpus has been heard and determined in a court of appeal, either the defendant or the people may apply for a hearing in the Supreme Court." Respondent had 10 days after the Court of Appeal denied his petition to file a petition for review. Cal. App. Rules of Court 28(b), 50(b) (2002). The Court's analysis is thus premised on a misinterpretation of California law.

Had respondent filed the appeal provided by Cal. Penal Code Ann. §1506 (West 2000), his application might have remained pending during the 10 days while he prepared his appeal and while the appeal was under consideration by the California Supreme Court. This is because an appeal is not a new application; rather, it is a request that the appellate court order the lower court to grant the original application. Congress used the word "application" in precisely this way for federal petitions for habeas corpus—distinguishing between "appeals," see 28 U. S. C. §2253, and second or successive "applications," see §2244. Thus, an application may remain "pending" in the lower court while the prisoner pursues his appeal, because the lower court may grant the original application at some point in the future.

An application does not remain pending, however, once the court that has denied it loses the power to ever grant it. When the Court of Appeal denied respondent's petition

and respondent did not appeal, the petition became final and was no longer pending before that court. See Cal. App. Rule of Court 24 (2002) ("When a decision of a reviewing court is final as to that court, it is not thereafter subject to modification or rehearing by that court . . ."). Respondent could not ask the Court of Appeal to grant the application, and respondent could not request that the California Supreme Court order the Court of Appeal to grant the application.

Instead respondent filed a new application, a petition for a writ of habeas corpus, invoking the original jurisdiction of the California Supreme Court. See Cal. Const., Art. VI, §10 (Supp. 2001). Under California law, the original petition began a new proceeding that had no proximate connection to the proceedings in the California Court of Appeal. See *People* v. *Romero*, 8 Cal. 4th 728, 737, 883 P. 2d 388, 391 (1994). The California Supreme Court had no power to grant the previous petition, and it did not even have the power to vacate the judgment of the lower state court. See *In re Michael E.,* 15 Cal. 3d 183, 192–193, n. 15, 538 P. 2d 231, 237, n. 15 (1975). There is no sense in which, before or after the filing of a petition for an original writ, an application remained pending below.

Even if California recognized an original writ as an equivalent procedure to an appeal for purposes of state law, the two procedures would differ with respect to the federal statutory question in this case. When a prisoner files an appeal, the original application remains pending in the lower court, but when a prisoner files an original writ, there is no application pending in any lower court. As it turns out, however, California law does not regard an appeal and an original writ as equivalents. California recognizes that a prisoner may obtain relief through either procedure, but the California Supreme Court has said an appeal is preferred. *In re Reed, supra,* at 918–919, and n. 2, 663 P. 2d, at 217, n. 2. At the same time, a prisoner

may use an original writ in circumstances where an appeal is not available. Although California encourages prisoners to exhaust claims in the lower courts, the claims within an original petition need not be the same as those presented earlier. *E.g.*, *In re Black*, 66 Cal. 2d 881, 428 P. 2d 293 (1967); Cal. App. Rule of Court 56(a)(1) (2002) (directing prisoners to explain why the exhaustion rule should not apply). Indeed, the California Supreme Court may grant relief even if the prisoner has not filed any petition in the lower courts. *E.g.*, *In re Moss*, 175 Cal. App. 3d 913, 922, 221 Cal. Rptr. 645, 649 (1985). As the new petition constitutes a new application in form and function, the California Supreme Court has long recognized what our Court today refuses to see. After the denial of a habeas petition, there is no application "pending" in any court:

> "Where a petitioner was remanded to custody by a superior court, and the proceeding instituted in that court was thus terminated and was no longer a matter *pending therein*, he could inaugurate a *new proceeding* for relief in another court and can still do so, but is now limited in the making of a new application by statutory provision to a higher court, either the district court of appeal having jurisdiction, or the supreme court." *In re Zany*, 164 Cal. 724, 727, 130 P. 710 (1913).

The petition thus is not pending even under state law: Each habeas petition is a "*new proceeding* for relief," *ibid.*, and is not the same case, let alone the same application. Each time a California court denies a petition, the application is "no longer a matter *pending*," *ibid.*, before any court, because it can no longer be granted by that court or any other court in the future.

The Court's contrary conclusion does not depend upon any reasonable construction of a "pending application." It

depends entirely upon the proposition that when California says "original writ," it means "appeal," and federal courts must not privilege form over substance. But California provides for an appeal, see Cal. Penal Code Ann. §1506 (West 2000), and none was taken here. It is impossible to understand why the Court has ignored this provision by which California provides for an appeal, just like every other State.

The Court also has ignored the fact that most other States provide for original writs, just like California. As a consequence, the Court's error is of substantial significance beyond this case; for the California Supreme Court's original jurisdiction to issue writs of habeas corpus is not some quirk of California law. At least 36 other States grant their supreme courts original jurisdiction over petitions for habeas corpus as well as appellate jurisdiction over a habeas determination in the lower courts. See Appendix, *infra*. Congress, of course, understands this distinction, since it has provided both procedures for our own Court. A state prisoner seeking to challenge the validity of his sentence may seek review of a lower court's decision by filing a petition for certiorari, 28 U. S. C. §1257, or he may file a petition for an original writ of habeas corpus, §2241. While the prisoner may obtain relief through either procedure, there is a clear distinction between an appeal—which requests that we order the lower court to grant an application pending before it—and a petition for a writ of habeas corpus—which requests that we grant the relief ourselves. Before this case no one thought that distinction to be merely one of form and not substance.

The Court is thus quite mistaken to conclude that its decision concerns only the procedures within California. The Court distinguishes California from other States because California "has engrained original writs—both at the appellate level and in the supreme court—into its

normal collateral review process." *Ante*, at 9. This statement is not correct even for California. See *supra*, at 5–6. It may or may not be true for the four other States the Court cites, but even so the federal courts will have to test that point for dozens more. The Court's distinction between "appeal States" and "original writ States" is its own creation with no clear meaning under state law, not to mention a tie to the law Congress has enacted. Having departed from the sensible meaning of application, and the well-understood distinction between an appeal and an original writ, the Court now requires federal courts to define the ordinary collateral review procedures in each State. It may not be clear in how many States original writs will fall on the side of the ordinary, but it is clear that the question will be litigated. In many, if not all, of the States mentioned above, a prisoner like respondent, relying upon today's decision, will be able to extend the federal tolling period, perhaps indefinitely, by filing a petition for an original writ of habeas corpus in a state supreme court many months after his state appeal has been denied. See *Welch* v. *Newland*, 267 F. 3d 1013 (CA9 2001) (tolling the federal limitations for a 4-year gap).

In those jurisdictions the Court will create a strange anomaly. Now an application can be both pending and not pending, taking on what the Seventh Circuit has described as a "Cheshire-cat like quality, both there and not there at the same time." *Fernandez* v. *Sternes*, 227 F. 3d 977, 980 (2000). If, for instance, the Court's hypothetical prisoner declined to file an appeal to the State's highest court, and he went to federal court more than a year later, his petition would be dismissed as time barred. As no application had been on the docket of any court for a year, and no petition that he had addressed to any state court could ever be granted, no "properly filed application" was "pending" anywhere. Under the Court's view, however, it would be premature to say that the federal statute of

limitations had expired. The prisoner could file a new petition invoking the original jurisdiction of the state high court, and if the court denied it on the merits (or without comment), a subsequent federal application could be timely even though the earlier one was too late.

Under today's ruling, the federal court would be required to rule that the state petition, which was not pending before, had retroactively become so, and the prisoner's new federal application was timely. This is not a sensible way of determining when an application is "pending" under the federal tolling provision. Whether an application is pending at any given moment should be susceptible of a yes or no answer. On the Court's theory the answer will often be "impossible to tell," because it depends not on whether an application is under submission in a particular court but upon events that may occur at some later time.

The Court's insistence on treating an original writ as an appeal will create serious confusion in California—and elsewhere—for another reason. Federal courts will have to determine when an original writ is timely under California law because on the Court's holding only timely petitions cause an application to be (retroactively) pending. The problem, however, is that an original writ in California—like original writs elsewhere and unlike appeals in California and most everywhere else—does not have a strict time limit. Under California law the question is not whether a petition is "timely" but whether the prisoner exercised "due diligence" in filing his petition within a reasonable time after he becomes aware of the grounds for relief. *In re Harris*, 5 Cal. 4th 813, 828, n. 7, 855 P. 2d 391, 398, n. 7 (1993). This equitable concept is designed to be flexible, and it allows California courts to correct miscarriages of justice, even those which happened long ago. *E.g.*, *In re Stankewitz*, 40 Cal. 3d 391, 396, n. 1, 708 P. 2d 1260, 1262, n. 1 (1985) (hearing the merits

despite an 18-month delay); *In re Moss*, 175 Cal. App. 3d, at 921, 221 Cal. Rptr., at 648 (hearing the merits despite a 9-month delay). Nothing about AEDPA suggests that Congress wanted to inject this degree of unpredictability into the 1-year statute of limitations, and it is hard to see how federal courts are to approach this state-law inquiry.

While there may be cases, like this one, where the California courts expressly deny a petition for lack of diligence, the California courts routinely deny petitions filed after lengthy delays without making specific findings of undue delay. Brief for Respondent 40–41, n. 27. Under the Court's rule, federal courts will be required to assess, without clear guidance from state law, whether respondent exercised due diligence. This inquiry will create substantial uncertainty, and resulting federal litigation, over whether a prisoner had filed his habeas petition within a reasonable time. The uncertainty may vex prisoners as well, for they cannot know whether the federal statute of limitations is running while they prepare their state petitions.

The Court's disposition in this very case proves that the timing question is often unanswerable. Even though this is the rare case where the California Supreme Court made a specific finding of "lack of diligence," the Court does not hold respondent's petition untimely. Instead, the Court concludes that the lack of diligence finding is ambiguous, because it might refer, not to respondent's 4-month delay in filing his final writ, but to his 5-year delay in pursuing any collateral relief at all. *Ante*, at 11. This ambiguity, however, should not benefit respondent. If the California court held that all of respondent's state habeas petitions were years overdue, then they were not "properly filed" at all, and there would be no tolling of the federal limitations period. See *Artuz* v. *Bennett*, 531 U. S., at 8. Our consideration whether respondent's petition was "pending" presupposes that it was "properly filed" in the California

courts.

The Court takes a different view, but in delivering the case back to the Court of Appeals, it provides no guidance for resolving the ambiguity. As the question has been thoroughly briefed before our Court, it is difficult to see how the lower court would resolve it, if we could not. The Court says that the Court of Appeals might certify a question to the California Supreme Court, but it gives no indication what that court might ask. Presumably, it is not suggesting that in every case where the California Supreme Court issues a summary denial, the Court of Appeals should certify the factbound question of what it really meant to say.

The Court begins in a hypothetical jurisdiction, and it ends without answering the question presented. Both points are telling. By leaving the text of the federal statute behind and calling California's procedures something they are not, the Court has complicated the disposition of the thousands of petitions filed each year in the federal district courts in California. See U. S. Dept. of Justice, Bureau of Justice Statistics, Prisoner Petitions Filed in U. S. District Courts, 2000, with Trends 1980–2000, p. 3 (Jan. 2002) (California state prisoners filed 4,017 federal petitions in 2000). The Court also raises these questions in the numerous jurisdictions that permit original writs in addition to appeals. Applying the clear words of the statute to the clear law in California would have been much easier.

I would reverse the judgment of the Court of Appeals.

APPENDIX TO OPINION OF KENNEDY, J.

Ala. Code §12–2–7(3) (1995); Ariz. Const., Art. VI, §5(1); Ark. Const., Art. VII, §4; Colo. Const., Art. VI, §3; Fla. Rule App. Proc. 9.030(a)(3) (2002); Haw. Rev. Stat. §660–3 (1993); Idaho Code §19–4202(1) (Supp. 2001); Ill. Const., Art. VI, §4(a); Iowa Const., Art. V, §4; Kan. Const., Art.

III, §3; La. Const., Art. V, §2; Me. Rev. Stat. Ann., Tit. 14, §5301 (1980); Md. Cts. & Jud. Proc. Code Ann., §3–701 (1974–1998); Mich. Comp. Laws Ann. §600.4304(1) (West 2000); Mo. Const., Art. V, §4(1); Mont. Const., Art. VII, §2(1); Neb. Rev. Stat. §24–204 (1995); Nev. Const., Art. VI, §4; N. H. Rev. Stat. Ann. §490:4 (1997); N. M. Const., Art. VI, §3; N. C. Gen. Stat. §7A–32(a) (1999); N. D. Cent. Code §27–02–04 (1991); Ohio Const., Art. IV, §2; Okla. Const., Art. VII, §4; Ore. Const., Art. VII, §2; 42 Pa. Cons. Stat. §721(1) (1981); R. I. Gen. Laws §8–1–2 (1997); S. C. Code Ann. §14–3–310 (1977); S. D. Const., Art. V, §5 (1978); Tex. Const., Art. V, §3 (Supp. 2002); Utah Code Ann. §78–2–2 (2001 Supp.); Vt. Stat. Ann., Tit. 4, §2(b) (1999); Va. Const., Art. VI, §1; Wash. Rev. Code §2.04.010 (1994); W. Va. Code §51–1–3 (2000); Wyo. Const., Art. V, §3.