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HABEAS CORPUS

Supreme Court's Recent Decisions in *Richter* and *Pinholster* Further Tilt Playing Field Against State Prisoners Seeking Habeas Relief

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In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act with the clear intent to restrict state prisoners' ability to obtain habeas corpus relief in federal court. One of the most significant changes that the AEDPA wrought on the habeas statutes was the implementation of a standard of review that greatly restricted a federal court's authority to grant relief to state prisoners.

Specifically, this brand new standard of review, set forth in 28 U.S.C. § 2254(d)(1), provides that a federal court cannot grant habeas relief on a claim that was ''adjudicated on the merits'' in state court unless the habeas petitioner can show that the adjudication ''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.''[1]

Since the inception of the AEDPA, the U.S. Supreme Court has stated that, as a result of this new standard of review, a state court's decision on a constitutional claim is entitled to a great deal of deference. Granting state court decisions such deference has certainly cut back

[1] Relief is also available, however, if the state court decision involved an unreasonable determination of the facts.

 ISSN 0011-1341

on the number of habeas grants in federal court. But it still has provided some latitude for a habeas petitioner to argue that habeas relief should be granted.

However, in the October 2010 term, the court issued two decisions—*Harrington v. Richter*[2] and *Cullen v. Pinholster*[3]—that dramatically shifted the analysis under the AEDPA standard of review. Strictly interpreting the language of the statute, the Supreme Court has now established that a state court decision on a constitutional issue must be given near-preclusive effect on the federal court's power to grant habeas relief. In particular, in *Richter*, the Supreme Court adopted an exceedingly demanding—if not nearly impossible to meet—standard of what it takes for a state court decision to be an ''unreasonable application'' of federal law. Just as important, the court described the standard of review as a ''bar'' to ''relitigating'' constitutional claims, explicitly incorporating res judicata principles for the very first time into a federal court's review of the merits of a constitutional claim.

Then, in *Pinholster*, the Supreme Court extended these principles to hold that a federal court's consideration of a claim under the AEDPA standard of review is restricted to the factual record that existed at the time of the state court decision, even if it is clear that more facts are necessary to adequately address a claim. As a result, federal courts are now required to give preclusive effect to a state court's decision that no further evidentiary exploration of a claim was required—even if such a decision seems unreasonable.

There can be no doubt that these two decisions are going to make it significantly more difficult for state prisoners to obtain habeas relief in federal court. The court has now given full force to the AEDPA standard of review's capacity to restrict a state prisoner's ability to obtain habeas relief. But beyond the practical effect of these two cases, the court has dramatically shifted the habeas landscape. The court's movement toward preclusion has altered the careful federalism balance that always carved out habeas corpus as an exception to the typical rules governing res judicata. Such a tectonic shift in jurisprudence does not happen very often, but it occurred with habeas corpus during the October 2010 term.

What to Make of a Summary Adjudication

Joshua Richter was charged with murder, attempted murder, and lesser crimes based on the shootings of Patrick Klein, who died as a result, and Joshua Johnson. At trial, Johnson and Richter provided divergent accounts of what occurred. According to Johnson, Richter and a man named Christian Branscrombe shot both him and Klein in cold blood. In contrast, Richter testified that Branscrombe shot at Johnson and Klein after they had attacked him. Investigators found serological evidence at the crime scene. Trial counsel did not present expert testimony on the serological evidence or even consult an expert on this evidence. Richter was convicted of murder and attempted murder and was sentenced to life without parole.

After his conviction became final on direct appeal, Richter petitioned the California Supreme Court for a state writ of habeas corpus. He argued, among other things, that counsel was ineffective for failing to present expert testimony on serology, pathology, and blood-spatter patterns. The California Supreme Court denied the petition in a one-sentence summary order.

Richter then raised this same ineffective-assistance claim in a federal habeas corpus petition. The district court denied habeas relief, and a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit affirmed. However, an en banc panel of the Ninth Circuit reversed the district court and granted the petition. The en banc court concluded that counsel's failure to consult an expert on the serological evidence matters constituted deficient performance and that this failure was prejudicial to Richter. In conducting its analysis under the AEDPA standard of review, the circuit court stated that, since the state court did not explain its reasoning, it was going to ''conduct 'an independent review of the record to determine whether the state court's decision was objectively unreasonable.' '' After conducting the independent review, the court concluded that there was a constitutional violation and that the state court's decision to the contrary was unreasonable.

In a footnote, the Ninth Circuit noted that the case presented the procedural issue of whether the Section 2254(d) standard of review was appropriate in the face of an unreasoned state court decision. However, the court decided that it did not need to address the question because relief was appropriate even under the deferential standard of review.

Summary Dispositions Fall Under AEDPA Standard of Review

The Supreme Court agreed to review the question of whether the Ninth Circuit had not been sufficiently deferential when it evaluated the ineffectiveness claim. However, the court, on its own, added the procedural question of whether AEDPA deference applies to a state court's summary disposition of a claim.

Writing for a seven-judge majority, Justice Anthony M. Kennedy reversed the Ninth Circuit's grant of habeas relief. After first discussing the facts of the case, Kennedy turned to the procedural question. He concluded that a state court's summary disposition is an ''adjudicat[ion] on the merits'' that is entitled to deference under the Section 2254(d) standard of review. He held that, when a federal claim has been presented to a state court and the state court denied relief on the claim, ''it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.''

This conclusion was not a surprise. As Kennedy acknowledged in his opinion, every circuit court to have

[2] 131 S. Ct. 770, 88 CrL 453 (2011).
[3] 131 S. Ct. 1388, 89 CrL 5 (2011).

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  CRL ISSN 0011-1341

addressed this procedural issue had reached the same conclusion. But what is somewhat surprising is that the presumption that the court established for summary adjudications is not unfavorable to a habeas petitioner. Typically, the battle over a summary adjudication is whether it represented a denial on a procedural ground or a decision on the merits. If the denial was on a procedural ground, the petitioner cannot obtain relief in federal court absent a showing of cause for the procedural default and prejudice resulting from the error, or that the failure to address the claim would result in a miscarriage of justice (another way of saying that the petitioner is actually innocent). These are nearly insurmountable hurdles to overcome. Thus, in such a situation, a habeas petitioner wants the decision to be ''on the merits.'' Although it forces the habeas petitioner to overcome the deferential Section 2254(d) standard of review, that is better than having to overcome the even more burdensome procedural-default hurdles. In this way, the presumption actually works to a petitioner's benefit. Based on the restrictive view of habeas corpus that Kennedy took throughout *Richter*, it is highly doubtful that he intended to create such a favorable rule for the petitioner.

Shifting the Landscape in Habeas Law

After quickly addressing the ''summary adjudication'' issue, Kennedy dedicated the next section of the opinion to a harsh criticism of the Ninth Circuit's application of the Section 2254(d)(1) standard of review. Kennedy's main complaint was that the court completely failed to filter its analysis through the deferential standard of review. Instead, Kennedy said the circuit court treated the ineffectiveness claim as if it were being brought on direct appeal, where the court would be allowed to exercise its independent judgment on the matter. Kennedy believed that these actions showed a ''disregard for the sound and established principles that inform [the Writ's] proper issuance.''

Kennedy explained that the AEDPA standard of review establishes a stringent test for obtaining habeas relief. It requires a great deal of deference to state court decisions on the merits of constitutional claims. He clarified that, ''under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.'' Kennedy added that, if this standard sounds difficult to meet, it was Congress's intent to make it that way. In fact, according to Kennedy, the standard of review stops just ''short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings.'' He explained that this is consistent with the role of habeas corpus in the federal system as nothing more than ''a 'guard against extreme malfunctions in the state criminal justice systems.' '' He pointed out that the structure of the habeas statute is to make the state court proceedings the ''principal forum'' for litigating constitutional claims. Once the state court ruled on the merits, Kennedy said, a petitioner is ''barred'' from ''relitigating'' the constitutional claim unless the exceptions set forth in the standard of review have been met.

This section of the opinion is quite remarkable. Rarely has a Supreme Court majority described habeas corpus in such a restrictive way. It is a far cry from the decision in *Harris v. Nelson*,[4] where the court expressed a deep reverence for the Great Writ's ''preeminent role'' as ''the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.'' But beyond this, Kennedy's scathing, no-holds-barred attack on the Ninth Circuit actually altered the habeas corpus landscape in at least two significant ways: (1) it established a highly stringent meaning of ''unreasonable'' under the standard of review; and (2) it incorporated—for the first time—res judicata principles into a federal court's review of a state court's decision on the merits of a constitutional claim.

Silently Overruling Precedent As to Definition of Unreasonable

The first, and most immediate, alteration to habeas law concerned the court's new definition of the term ''unreasonable'' that appears in the AEDPA standard of review. Back in 2000, the Supreme Court decided *Williams v. Taylor*,[5] which was the first case in which the court interpreted the language of the standard of review. With respect to the definition of ''unreasonable,'' Justice Sandra Day O'Connor, writing for the majority on this issue, rejected the following definition of ''unreasonable'' that the lower court had used: ''a state court decision involves an 'unreasonable application of . . . clearly established Federal law' only if the state court has applied federal law 'in a matter that reasonable jurists would all agree is unreasonable.' '' O'Connor stated that this definition inappropriately added a subjective element to the analysis. Rather, the question must be whether a state court decision is ''objectively unreasonable.'' She refused to give a specific definition to the term ''unreasonable'' but instead indicated that ''federal judges are familiar with its meaning.'' She emphasized that the most important point was that an ''unreasonable'' decision was an increment above an ''incorrect'' decision.

In *Richter*, Kennedy ignored nearly all of this. Rather, he specifically defined what it takes to make a state court decision unreasonable. He held, ''As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'' This is an exceedingly demanding standard that will be nearly impossible to meet. In fact, this new definition is so strict that it would appear to allow habeas relief only when the state courts are guilty of near judicial incompetence. While Kennedy may be right that Congress intended Section 2254(d) to be a difficult standard to meet, this new definition interprets the language of that standard so strictly as to make it as difficult as it could possibly be.

Moreover, Kennedy's new definition of ''unreasonable'' silently overrules *Williams*. There is no qualitative difference between the ''fairminded jurist'' test set forth in Kennedy's new definition and the ''reasonable jurist'' test rejected in *Williams*. They both utilize the

[4] 394 U.S. 286 (1969).
[5] 529 U.S. 362, 67 CrL 59 (2000).

same subjective element that O'Connor rejected. And on a more basic level, Kennedy provided an explicit definition for a term that O'Connor specifically refused to define. In fact, she went so far as to say it was ''no doubt difficult to define.'' Kennedy did not acknowledge such a concern.

Preclusive Effect of State Court's Decision

A fundamental aspect of the new standard of review is that it requires federal courts to give deference to the state court decision on a constitutional claim. Kennedy's belief that the Ninth Circuit did not give the appropriate deference under the standard was the impetus for this section of the opinion. But deference is one thing; preclusion is another. And Kennedy's discussion of the standard of review incorporated, for the first time, res judicata concepts that had previously been unknown to first-time habeas petitions raising constitutional claims that were decided on the merits in state court.

Generally speaking, the concept of res judicata (also known as ''claim preclusion'' or often just ''preclusion'') is that a party is barred from relitigating a claim against another party where a court has previously decided the claim. Res judicata promotes finality, comity, efficiency, and consistency over accuracy. Habeas corpus relief for state prisoners in federal court has always been explicitly viewed as an exception to res judicata principles. Even if the state court has specifically addressed the constitutional claim and denied it on the merits, federal courts have never been precluded from exercising their authority to consider the merits of the claim and grant relief.

Nonetheless, res judicata notions are not completely foreign to habeas law. Out of a concern for comity, federalism, and the finality of state court convictions—the same policy concerns that lie at the heart of res judicata and that later motivated Congress to pass the AEDPA—the Supreme Court began in the late 20th century to limit state prisoners' access to the writ with various procedural obstacles that precluded a state prisoner from litigating constitutional claims in federal court that were procedurally defaulted in state court.

But habeas corpus has always been, and remains, an equitable remedy. And in determining the appropriate scope of a federal court's powers in a habeas proceeding, the court has always viewed habeas as a balance between comity, federalism, and finality, on the one hand, and a petitioner's interest in liberty from unlawful custody on the other. So even where procedural hurdles had been erected, there always remained a window through which a petitioner could pass to get review of the claim in federal court. But that window in those situations was very, very small. As mentioned before, to overcome a procedural default, a petitioner must meet the exceedingly demanding cause/prejudice/miscarriage of justice standard.

And that is the impact of a shift toward giving state court decisions near-preclusive effect. It alters the balance of equities. The policy goals of finality, comity, and federalism overtake the goal of getting it right on the constitutional issue. And, of course, reducing the interest in accuracy directly affects the petitioner's liberty interest. It drastically reduces the federal court's interest in ensuring that the state court reached the correct result on whether the petitioner's constitutional rights were violated.

This shift from deference toward preclusion is overtly present in *Richter*. Throughout his discussion of the Section 2254(d) standard, Kennedy relied heavily on res judicata principles. He repeatedly stated that the ''relitigation'' of a federal claim raised in state court is ''barred'' in federal court unless the Section 2254(d) standard is met. In fact, Kennedy's general description of ''the basic structure'' of habeas corpus was rooted entirely in res judicata notions. He emphasized that the standard of review was designed to confirm that state courts are the ''principal forum'' for asserting constitutional challenges. He stated that the exhaustion doctrine requires petitioners to first present their claims to state court. If the state court rejects the claim on procedural grounds, he added, the claim is ''barred'' in federal court unless the cause-and-prejudice standard is met. He stated, ''If the state court denies the claim on the merits, the claim is barred in federal court unless one of the exceptions to § 2254(d) set out in §§ 2254(d)(1) and (2) applies.'' He then concluded that the standard of review ''complements the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding.''

The Supreme Court simply had never before discussed the standard of review in these res judicata terms. It is a fundamental change in habeas corpus law.

However, Kennedy's analysis does have significant flaws. In the first instance, he mischaracterizes the intended role of exhaustion in habeas corpus. The exhaustion doctrine was created precisely because habeas corpus was an exception to res judicata principles. Exhaustion—the requirement that a petitioner fairly present a constitutional claim to the state court—was intended to provide state courts an opportunity to correct a constitutional error before the federal courts stepped in. As a result, contrary to what Kennedy stated in *Richter*, relitigation of a federal claim is not ''barred'' in federal court because it was properly exhausted and then decided upon the merits in state court. It is the opposite. A petitioner is only allowed to litigate the claim in federal court precisely because he gave the state courts the opportunity to rule on the claim.

But the more fundamental problem with Kennedy's analysis is that it shows a surprising lack of comprehension of the concept of a standard of review. The Section 2254(d) standard operates like any other standard of review in our legal system: It provides the lens through which a court must analyze a claim. In this way, it places a restriction only on when a litigant can obtain relief. It does not prevent a litigant from actually litigating a claim or a court from considering the merits of the claim.

Despite its logical flaws, Kennedy's analysis in *Richter* is now the law. The Supreme Court has now incorporated notions of preclusion into the standard of review. It is a dramatic shift in the equities in habeas law. It has demonstrably shrunk the window through which a petitioner can seek review of the merits of a constitutional claim in federal court.

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On the merits, Kennedy concluded (unsurprisingly) that, under the highly deferential standard of review, the state court had reasonably rejected the ineffective-

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ness claim. Justice Ruth Bader Ginsburg concurred in the judgment. She believed that Richter's attorney had provided deficient performance but that the error did not prejudice him. She did not express any disagreement with Kennedy's opinion on the procedural issues.

Preclusion's Immediate Impact

This shift toward granting preclusive effect to state court decisions can be seen in full force in the subsequent decision in *Cullen v. Pinholster*. Although the Supreme Court did not explicitly rely upon res judicata principles, the court's rationale is pure preclusion.

Scott Lynn Pinholster was convicted of first-degree murder based on the brutal murder of two men. At the penalty phase of his capital trial, defense counsel presented only one mitigating witness—Pinholster's mother. Counsel did not call a psychiatrist to discuss whether Pinholster had any mitigating mental disorders. The jury sentenced him to death.

After his conviction became final, Pinholster filed two separate habeas corpus petitions in state court arguing that his attorney was ineffective at the penalty stage of the capital trial based on counsel's failure to adequately investigate and present mitigating evidence. Both times, the state courts summarily denied the claim without holding an evidentiary hearing.

Pinholster then raised the ineffectiveness claim in a federal habeas petition. After holding an evidentiary hearing on the ineffectiveness claim, the district judge granted relief, concluding that counsel had been constitutionally ineffective based on evidence admitted at the hearing. After a three-judge panel of the Ninth Circuit reversed the grant, an en banc panel vacated the reversal, affirmed the district court, and granted the petition. The en banc court determined that new evidence from the hearing could be considered in assessing whether the state court's decision was unreasonable under Section 2254(d)(1).

The Supreme Court agreed to review the case on the merits but also to consider the procedural issue of ''whether review under § 2254(d)(1) permits consideration of evidence introduced in an evidentiary hearing before the federal court.''

Writing for seven justices on this procedural question, Justice Clarence Thomas held that ''review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.'' Thomas reasoned that the standard of review is ''in the past tense.'' The standard's ''backward-looking language requires an examination of the state-court decision at the time it was made,'' Thomas said. He added that this understanding of the standard is compelled by the broader context of the statute as a whole, ''which demonstrates Congress' intent to channel prisoners' claims first to the state courts.'' Thomas further reasoned that this holding was consistent with the court's prior precedents, which ''emphasize that review under § 2254(d)(1) focuses on what a state court knew and did.''

Even though the reliance on res judicata notions is not as overt as in *Richter*, the reasoning that Thomas used in *Pinholster* certainly has strong undercurrents of preclusion. It shifts the focus of habeas entirely to the state court's actions, granting greater authority to that court's decision. But, more important, regardless of whether Thomas said it openly, preclusion is the clear result of *Pinholster*. The holding in *Pinholster* now gives preclusive effect to a state court decision that no further evidentiary exploration of an issue is necessary, even if the petitioner diligently pursued the claim in state court.

There are many constitutional claims, such as ineffective assistance of counsel, where further factual exploration is often required. But now a federal court is barred from even considering that possible evidence where the state court has decided—even in an unreasonable fashion—that no evidentiary exploration of the issue should be done. A petitioner is not allowed to relitigate that question. That is preclusion in its purest form. Further, without the ability to establish the additional evidence, a petitioner will simply be unable to show that the state court's decision was unreasonable. In this way, the state court's decision on the merits will have a de facto preclusive effect on the federal courts.

As Justice Sonia M. Sotomayor stated bluntly in her dissent, there is a serious problem with this holding. She emphasized, ''Under the Court's novel interpretation of § 2254(d)(1) . . . , federal courts must turn a blind eye to new evidence in deciding whether a petitioner has satisfied § 2254(d)(1)'s threshold obstacle to federal habeas relief, *even when it is clear that the petitioner would be entitled to relief in light of that evidence*.'' That is the impact of preclusion. It cancels out the goal of getting it right. *Pinholster* has shifted the balance of equities to the extreme; the petitioner's liberty interest is no longer a factor for these types of claims.

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On a side note, a federal court's power to order a hearing has been greatly restricted after *Pinholster*. It appears there are only two real situations where a hearing could occur. First, as the court stated in *Pinholster*, a hearing can be ordered under the extremely restrictive standards set forth in Section 2254(e)(2). But Thomas made clear in *Pinholster* that a hearing under that subsection can happen only when the state court did not adjudicate the claim on the merits. That will cover only a very small set of cases.

As set forth in *House v. Bell*,[6] a federal judge could also potentially order a hearing to explore whether there has been a miscarriage of justice, to allow a petitioner to overcome a procedural default. But it would appear that *Pinholster* has created a logical conundrum in such a situation. The miscarriage-of-justice claim could easily rely on the same factual allegations that support the constitutional violation. (A claim under *Brady v. Maryland*, 373 U.S. 83 (1963), is a good example.) So what could happen is that a federal court would be allowed to rely upon facts established at a hearing to find that a petitioner had made a sufficient showing of innocence for the court to review the underlying constitutional claim, but it would then be restricted from relying upon those same facts when considering whether there had been a constitutional violation. It's a tad illogical.

Looking Forward

The Supreme Court's move toward preclusion will have an impact on at least one of the cases it has agreed

[6] 547 U.S. 518, 79 CrL 305 (2006).

to review in the October 2011 term. In *Greene v. Fisher*,[7] the question presented is: What is the temporal cutoff for determining whether a decision from the Supreme Court qualifies as ''clearly established Federal law'' under Section 2254(d)(1)?

The choice for the court in *Greene* will be between the date the conviction became final in state court versus the date of the state court decision that is the focus of Section 2254(d) review. These two are not often the same date. In most cases, the date that the conviction became final in state court will be later. The highest court in most states hears only a limited number of cases. This means that the intermediate state court's decision is often the one that gets reviewed under Section 2254(d). But a conviction does not become final in state court until either the time period for seeking discretionary review in the highest court has run or the highest state court has denied the application for review. This obviously adds time to the temporal cutoff for the clearly established federal law.

The habeas petitioner in *Greene* will have a strong logical argument, grounded in the history of the Writ, as to why the later date should control. As mentioned before, exhaustion was intended to give the state courts a meaningful opportunity to review the constitutional claim. The exhaustion rules require the petitioner to present the constitutional claim in any discretionary application to a state's highest court. If the petitioner pursued that remedy, then he gave the state, including the state's highest court, every opportunity to correct the error. That court's decision will have been based on the Supreme Court's decisions in existence at the time. Thus, as the petitioner can argue, the later date should control.

The state will rely upon the nearly preclusive effect of the state court decision. Relying upon *Richter* and *Pinholster*, the state will argue that review under Section 2254(d)(1) is restricted to what the state court knew at the time of its decision. The state court issuing the decision on the constitutional claim should be granted the power to set the date for what is considered ''clearly established Federal law'' because that court is the ''principal forum'' for adjudicating the claim. As with a state court's decision on the factual record to be considered, the petitioner's liberty interest in getting it right on the constitutional claim—even if the highest court had the opportunity to act—is not a relevant factor in the analysis. Thus, as the state will argue, the earlier date should control.

While the petitioner's argument has logic and history on its side, it probably won't be enough. The result of *Greene* may be preordained by what happened in the October 2010 term. *Richter* and *Pinholster* have irrevocably shifted the balance of equities. The overt move toward preclusion in habeas law would appear to dictate the outcome. A decision in *Greene* in the state's favor will further solidify the conclusion that a new era in habeas law has taken hold.

[7] No. 10-637 (to be argued Oct. 11, 2011).

  CRL ISSN 0011-1341