Habeas & Prison Litigation Case Law Update

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Two statutes enacted in April 1996 will have major effects on how federal courts deal with prisoner petitions. Title I of the Antiterrorism and Effective Death Penalty Act concerns habeas petitions, and the Prison Litigation Reform Act concerns conditions of confinement suits. Because these statutes are complex and likely to spawn a great deal of litigation, the Center will attempt to assist the courts by several means.

1. We will produce this newsletter to summarize relevant appellate and district court decisions under the statutes. We see it as a quick-response, short-term effort to help judges during the most intense period of judicial interpretation. It is patterned after our *Guideline Sentencing Update* publication, but will have a shorter life span. This first issue includes decisions reported as of May 27, 1996.

2. We are planning a nationally broadcast videoseminar late this summer to analyze the new habeas provisions and how the courts have been interpreting them, with some attention also to the Prison Litigation Reform Act.

3. We will adapt our already scheduled regular educational programs to take account of these legislative changes. For example, the June conference of chief probation and pretrial services officers, the August Capital Case Management Workshop for appellate clerks, this summer's programs for magistrate judges, and September's seminar on pro se litigation are all undergoing curriculum revision in light of these statutes. We are also helping circuit conference planners arrange programs on these topics.

4. We will focus on these statutes in several of our regular reporting services. The *Chambers to Chambers* serial periodical, currently running a series on federal capital prosecutions, will share court and case management innovations that judges and courts have developed in response to the new statutes. Our *Resource Guide for Managing Prisoner Civil Rights Litigation*, which has been in draft status pending the new legislation, will now move to final publication.

We welcome your comments about our responses to the new legislation and any suggestions you have. We will try to be as flexible as possible in our assistance to the courts.

HABEAS CORPUS

Courts of Appeals

Eleventh Circuit denies authorization to file second habeas petition under amended habeas statute; Supreme Court grants certiorari. After the appellate court affirmed the denial of defendant's first federal petition for habeas corpus relief and the Supreme Court denied his petition for certiorari, the state set his execution for between May 2 and May 9, 1996. The state courts denied defendant's second state habeas petition, and on May 2 he filed in the federal appellate court a request for a stay of execution and an application, pursuant to section 106 of the Antiterrorism and Effective Death Penalty Act of 1996 (to be codified at 28 U.S.C. § 2244(b)), for permission to file a second federal habeas petition in the district court. He claimed that he satisfied the requirements for a second habeas filing under the Act, and he argued alternatively that the new Act unconstitutionally restricted his right to bring habeas claims. The appellate court did not reach this second claim because it determined that defendant would not have been entitled to relief under either the new law or pre-Act law.

Under new section 2244(b)(3)(C), "[t]he 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." The court held that neither of defendant's claims satisfied the provisions of section 2244(b)(2)(A) or (B): he did not "rel[y] on a new rule of constitutional law . . . that was previously unavailable"; the "factual predicate for the claim" was already known; and "the facts underlying the claim" would not be sufficient to establish, even under the preponderance standard, that "no reasonable factfinder would have found the applicant guilty of the underlying offense." The court concluded that "Felker has failed to show substantial grounds upon which relief might be granted under the new Act. Likewise, he has failed to show substantial grounds upon which relief might be granted insofar as any constitutional issues involving the Act are concerned, because he would not be entitled to any relief even under pre-Act law."

Felker v. Turpin, No. 96-1077 (11th Cir. May 2, 1996) (per curiam).

The Supreme Court has granted certiorari in *Felker*, limited to the following issues: "(1) Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E), 28 U.S.C. § 2244(b)(3)(E), is an unconstitutional restriction of the

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jurisdiction of this Court. (2) Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. § 2241. (3) Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution." New 28 U.S.C. § 2244(b)(3)(E) states: "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."

Felker v. Turpin, 116 S. Ct. 1588 (U.S. May 3, 1996) (oral argument set for June 3, 1996).

Ninth Circuit uses prior law to deny habeas petition and request for stay of execution that were pending when new law took effect. Defendant was scheduled for execution May 3, 1996. He filed a second habeas petition April 22, 1996, and amended the petition with new claims on April 26. The district court held that it lacked jurisdiction to hear the petition without an order from the appellate court authorizing it under new 28 U.S.C. § 2244(b)(3)(A). *See* section 107(c) of the Antiterrorism and Effective Death Penalty Act of 1996 (special habeas procedures in capital cases "shall apply to cases pending on or after the date of enactment of this Act"). Alternatively, even if the Act did not apply retroactively, the district court concluded that the petition should be dismissed because defendant "failed to show cause and prejudice for bringing his successive and abusive claims" and there were no other grounds to justify granting the petition.

The appellate court affirmed on the alternative ground. "The standard for obtaining a certificate of appealability under the Act is more demanding than the standard for obtaining a certificate of probable cause under the law as it existed prior to enactment of the Act. We need not decide whether to apply the Act's more demanding standard retroactively to Williams's case. Rather, we assume, without deciding, that section 2253(c)(2) of the Act does not apply retroactively to Williams's case. We, therefore, grant a certificate of probable cause to permit Williams to appeal the district court's denial of his writ of habeas corpus." The court then concluded that "Williams's second petition raises both successive and abusive claims, and Williams has failed to demonstrate cause and prejudice for raising these claims at this late date, nor has he shown that a miscarriage of justice would result from our refusal to review these claims. We, therefore, affirm the district court's denial of Williams's petition for a writ of habeas corpus, and we deny his application for a stay of execution."

Williams v. Calderon, No. 96-99009 (9th Cir. May 1, 1996) (Thompson, J.).

District Courts

District court concludes that it may grant "certificate of appealability" under new law after denial of habeas petition. The district court denied petitioner's habeas claims on March 28, 1996. On April 26, petitioner applied for a Certificate of Probable Cause to appeal the denial. Although the habeas petition had been denied before the new habeas reform act was signed into law, the court reasoned that "in the absence of expressed contrary provisions, statutes become effective when they are signed into law," and the new act should be applied to the appeal. Under the new act, amended 28 U.S.C. § 2253(c)(1) states that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals." (Previously, section 2253 also allowed "the justice or judge who rendered the order" to certify the appeal.) However, the new act also amended Fed. R. App. P. 22 to state that "an appeal by the applicant for the writ may not proceed unless *a district or* a circuit judge issues a certificate of appealability pursuant to section 2253(c)" (emphasis added).

The court held that it would "apply the Rule of Appellate Procedure because it authorizes me, a district judge, to issue a certificate of appealability. The statute, 28 U.S.C. § 2253, applies by its wording only to circuit justices and judges and authorizes them to issue certificates of appealability. The statute does not say, however, that only circuit justices or judges may issue such certificates. I conclude the statute as amended does not prohibit district judges from exercising the authority vested in us by the Rule of Appellate Procedure." The court issued the certificate.

Houchin v. Zavaras, No. CIV.A. 93-K-2651 (D. Colo. May 1, 1996) (Kane, J.).

Unpublished opinions

[Although we recognize that the precedential value of unpublished decisions and the rules and practices for citing thereto may vary among the courts, we are reporting unpublished opinions and orders in order to provide the most complete picture possible of the issues being litigated under the new legislation.]

District court holds new habeas law should not be applied retroactively to pending petitions in non-capital cases. The court granted defendant's second 28 U.S.C. § 2255 motion to vacate his conviction and sentence under 18 U.S.C. § 924(c)(1) in light of a recent Supreme Court case. The court used the habeas law in effect when defendant filed his motion rather than retroactively applying the new law that became effective while defendant's motion was pending. "While the recently enacted 'Antiterrorism and Effective Death Penalty Act of 1996' amends § 2255 to require that second or successive motions be based on newly discovered evidence of the defendant's innocence, or on new rules of constitutional law, we do not believe that these provisions apply to motions filed before passage of the Act. In the same title of the Act that amends § 2255 and § 2254, Congress specifically mandated that the new procedures for habeas corpus petitions involving capital punishment are to apply to all pending and subsequently filed cases. Pub. L. No. 104-132, § 107(c) . . . (April

24, 1996). Congress declined to include such language in the portion of the Act amending § 2255, and therefore we can infer that retroactivity was not intended."

U.S. v. Trevino, No. 96 C 828 (N.D. Ill. May 10, 1996) (Aspen, C.J.). *Cf. U.S. ex rel. Centanni v. Washington,* No. 95 C 7393 (N.D. Ill. May 8, 1996) (Shadur, J.) (memorandum opinion ordering parties to brief the issue of whether the Antiterrorism and Effective Death Penalty Act of 1996 applies to non-capital cases that were pending before the date of enactment).

PRISON LITIGATION

No cases reported as of May 27, 1996.

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Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
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HABEAS CORPUS

Supreme Court

Supreme Court rules that Antiterrorism and Effective Death Penalty Act does not repeal Court's authority to entertain original habeas petitions or violate Constitution's Exceptions or Suspension Clauses, but does affect standards governing granting of relief. Petitioner's execution was scheduled for the period May 2-9, 1996. On May 2, 1996, he filed motions with the Eleventh Circuit for stay of execution and for leave to file a second or successive federal habeas corpus petition under 28 U.S.C. § 2254. The court of appeals denied both motions, concluding that petitioner's claims had not been presented in his first habeas petition and that they did not meet the standards of § 106(b)(2) (amending 28 U.S.C. § 2244(b)) of the Antiterrorism and Effective Death Penalty Act (effective April 24, 1996).

Petitioner then filed with the Supreme Court a petition for writ of habeas corpus, for appellate or certiorari review of the Eleventh Circuit's decision, and for stay of execution. On May 3, the Court granted the stay application and petition for certiorari and ordered briefing on "the extent to which the provisions of Title I of the Act apply to a petition for habeas corpus filed in this Court, whether application of the Act suspended the writ of habeas corpus in this case, and whether Title I of the Act, especially § 106(b)(3)(E), constitutes an unconstitutional restriction on the jurisdiction of this Court."

A unanimous Court held that the Act does not deprive it of jurisdiction to entertain original habeas petitions, pursuant to 28 U.S.C. §§ 2241 and 2254, but does impose new conditions on its authority to grant relief. Since it retained jurisdiction over original petitions, the Court said the petitioner did not have a "plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2" of the U.S. Constitution (granting the Court appellate jurisdiction "with such Exceptions . . . as the Congress shall make"). The Court also ruled that its consideration of original habeas petitions must be informed by the Act's new restrictions on the granting of relief to state prisoners under § 2254. It further held that the added restrictions which the Act places on second habeas petitions do not amount to a "suspension" of the writ contrary to Article I, § 9 of the Constitution.

The Court first considered the "gatekeeping" mechanism established by § 106(b)(3) of the Act (§ 2244(b)(3)(A-E)), which requires application to the court of appeals for leave to file in the district court a second or successive habeas application. Section 106(b)(3)(E) states that 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." The Court noted that while § 106(b)(3)(E) "precludes us from reviewing . . . a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court." Therefore, because repeal by implication of the Court's habeas power is not favored, "we conclude that Title I of the Act has not repealed our authority to entertain original habeas petitions." This conclusion "obviates one of the constitutional challenges raised," that the Act violates the Exceptions Clause, Article III, § 2, because it deprives the Supreme Court of appellate jurisdiction in cases falling under § 106(b)(3)(E).

With reference to the new requirements imposed by the Act for granting relief under § 2254, the Court observed that § 106(b)(3)'s "gatekeeping" system for second petitions applies only to applications "filed in the district court" and consequently does not apply to the Supreme Court's consideration of habeas petitions. However, § 106(b)(1) and (2) "apply without qualification to any 'second or successive habeas corpus application under section 2254. . . . Whether or not we are bound by these restrictions, they certainly inform our consideration of original habeas petitions."

The Court then determined that the Act does not violate Article I, § 9, Clause 2 (providing that the writ of habeas corpus "shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"). The Act's requirement that a habeas petitioner obtain leave from the court of appeals to file a second petition in the district court "simply transfers from the district court to the court of appeals a screening function which would previously have been performed by the district court." The Act's codification of some preexisting limits on successive petitions and further restrictions on the availability of relief were within Congress's purview in prescribing "the proper scope of the writ." The new restrictions "constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ'."

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Quoting *McCleskey v. Zant*, 499 U.S. 467 (1991), the Court explained that "'the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.' . . . The added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process, and we hold that they do not amount to a 'suspension' of the writ contrary to Article I, § 9."

The Court therefore dismissed for want of jurisdiction the petition for writ of certiorari. It denied the petition for an original writ of habeas corpus, finding that petitioner's claims did not satisfy "the requirements of the relevant provisions of the Act, let alone the requirement [of the Court's Rule 20.4(a)] that there be 'exceptional circumstances' justifying the issuance of the writ."

Felker v. Turpin, No. 95-8836 (U.S. June 28, 1996) (Rehnquist, C.J.).

Courts of Appeals

Tenth Circuit holds that habeas reform act's certificate of appealability is required in pending noncapital case because the standard for issuance is the same as for certificate of probable cause under former law. Petitioner moved for a certificate of probable cause pursuant to 28 U.S.C. § 2253 on Feb. 9, 1996, to appeal the Feb. 1 denial of his § 2254 petition. Section 102 (amending § 2253) of the Antiterrorism and Effective Death Penalty Act (effective April 24, 1996), requires a state prisoner appealing denial of a § 2254 petition to obtain a "certificate of appealability" instead of a certificate of probable cause. In deciding whether § 102 should be applied to the case before it, the court cited *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), which it concluded "mandates that if Congress does not prescribe the scope of a statute, we apply intervening civil legislation to pending cases unless it would operate retroactively."

Since § 102 does not contain an effective date provision or clear language stating that it applies retroactively, the court said it must apply the new amendments to petitioner's application unless to do so would have retroactive effect. The court examined the law before and after April 24, 1996, and found that the required "substantial showing of the denial of a federal right" to obtain a certificate of probable cause was the same as § 102's required "substantial showing of the denial of a constitutional right" to obtain a certificate of appealability. Because the court has "always read the [earlier] standard to require a habeas petitioner to make a substantial showing of the denial of a federal constitutional right," it concluded that § 102 simply codifies the earlier standard. Therefore, application of § 102 to petitioner's request for a certificate of probable cause "would not constitute retroactive operation of a statute under *Landgraf*." (The court stressed in a footnote that it "express[ed] no opinion regarding the retroactivity concerns, if any, raised by the Act's requirement that an appeal may not be taken from the final order in a proceeding under 28 U.S.C. § 2255 unless a circuit judge issues a certificate of appealability.") Considering petitioner's application as a motion for a certificate of appealability, the court concluded that he had "failed to make a 'substantial showing of the denial of a constitutional right' as required under 28 U.S.C. § 2253 as amended by § 102."

Note: The court disagreed with the Ninth Circuit's ruling in *Williams v. Calderon*, 83 F.3d 281 (9th Cir. 1996) (*see Habeas & Prison Litigation Case Law Update*, June 1996, No. 1), that the standard for obtaining a certificate of appealability "is more demanding than the standard for obtaining a certificate of probable cause."

Lennox v. Evans, No. 96-6041 (10th Cir. June 24, 1996) (Baldock, J.).

In two other pending noncapital appeals, the Tenth Circuit concluded that the new law should not be applied under the circumstances of each case. *See Edens v. Hannigan*, No. 94-3352 (10th Cir. June 20, 1996) (Ebel, J.) (defendant filed his § 2254 petition on Nov. 16, 1992, and his notice of appeal on Oct. 12, 1994, and a certificate of probable cause was issued on Oct. 17, 1994, "all well before the new habeas corpus amendments were enacted. Under these facts we conclude that the new law does not apply to this case."); *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996) ("even if §102 applies to pending cases, we conclude no certificate of appealability is required here because the instant appeal is from a final order denying a § 2241 petition, which is neither a 'final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court' nor a 'final order in a proceeding under section 2255,'" *see* 28 U.S.C. § 2253(c)(1)(A) and (B)).

District Courts

District court finds that amended habeas statutes do not have retroactive effect and should be applied to all petitions pending on date of enactment. A state prisoner's petition seeking habeas corpus relief from his first-degree murder conviction and sentence of death had been pending in the district court since 1993. After the signing of the Antiterrorism and Effective Death Penalty Act of 1996 on April 24, 1996, the court had to determine whether to apply the habeas statutes as amended by the Act. The special procedures for capital cases in section 107 of the Act (codified at new Chapter 154, 28 U.S.C. §§ 2261–2266), could not be applied because the state procedures in this case did not meet the requirements of § 2261. However, the provision of the Act specifying that Chapter 154 "shall apply to cases pending on or after the date of enactment of this Act," would be considered by the court in deciding whether the existing habeas statutes as amended by the Act should be applied to this petition.

The court found that the purpose and structure of the Act, as well as the legislative history, indicated that "Congress intended that the amendments take effect at the same time

chapter 154 became operative: on the date of enactment." In particular, the court noted several instances in which "chapter 154's provisions are dependent upon the application of the amended versions" of the existing habeas statutes and found it "unlikely that Congress intended for the amended versions of §§ 2244, 2253, and 2254 to affect only cases falling under chapter 154." In all probability, the court said, Congress found it necessary to state expressly the effective date of the provisions of chapter 154 because the chapter relied on a state's willingness to conform to the law's newly announced standards regarding appointment and funding of counsel. "The specific language stating the scope of the chapter's application was necessary to negate the inference, created by the statutory language, that the new chapter only affected future state cases." By contrast, the amended statutes were not dependent upon a state's adoption of any standards; "therefore, Congress could safely presume that the amendments also would 'apply to pending cases,' because . . . that is the norm for 'remedial statutes.'"

With reference to whether the amendments would have retroactive effect and, therefore, should not be applied to pending cases, the court held that under the test of *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), "vested rights and past transactions" were not affected by the changes to the habeas law. It observed that "statutes delineating the scope of a state prisoner's habeas corpus action are of the 'prospective-relief' type" and said there could "be no doubt that a petitioner's requested relief is prospective in nature." The court found no common law doctrine that would lead to a different conclusion. Quoting *Landgraf*, the court emphasized that "[w]ithout a statutory or common law right at stake, a newly enacted statute is not deemed to 'operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law.'" Thus, the court held that it would apply the amended statutes and ordered reinstated the briefing schedule it had previously specified with modifications in filing deadlines.

Leavitt v. Arave, No. CIV. 93-0024-S-BLW (D. Idaho May 31, 1996)(Winmill, J.). *But cf. Warner v. U.S.*, LR-C-96-220 (E.D. Ark. May 10, 1996) (Eisele, J.) (citing *Landgraf, supra*, concluding that because defendant's second § 2255 motion was filed before April 24, 1996, and § 105 of the Act did not state that amendments to 28 U.S.C. § 2255 were to be applied either retroactively or to cases pending at time of enactment, it was not necessary to consider what effect, if any, the Act might have on this case).

District court declares unconstitutional as applied the Act's requirement that § 2254 petition must be filed within 180 days after final state court affirmance of conviction and sentence. The district court found that under new 28 U.S.C. § 2263, petitioner was barred from filing a federal habeas petition because he did not file within "180 days after final State court affirmance of [his] conviction and sentence on direct review," which occurred in 1994. The court further found that the additional thirty-day extension of time provided by § 2263(b)(3) did not help petitioner because that period could not be added after the 180-day period had completely expired.

Citing the Suspension Clause of the Constitution and *Swain v. Pressley*, 430 U.S. 372 (1977), which interpreted that clause, the court declared § 2263 an unconstitutional suspension of the writ as applied. "The Court finds that § 2263 infringes on the privilege of habeas corpus in this case because prior to its passage, the petitioner would not have been time barred, yet upon its passage he was immediately time barred; the statute provides for no safe harbor or special exception. The law would require the petitioner, prior to the passage of § 2263, to have anticipated this effect. Section 2263 in the instant case is inadequate to test the legality of the petitioner's conviction and completely prevents any consideration of the equities of the case; therefore, § 2263 violates the suspension clause and is unconstitutional as applied. The Court thus interprets the Act's 180-day limitations period as commencing for purposes of this case on April 24, 1996." The July 1, 1996, deadline previously set for the filing of petitioner's § 2254 motion would remain in effect.

Breard v. Angelone, 926 F. Supp. 546, 547–48 (E.D. Va. 1996).

District court rules that Act's capital case provisions do not apply to pending case where state plan did not meet Act's requirements for post-conviction counsel and judicial economy would be thwarted. Petitioner had been sentenced to death in Tennessee and had filed a habeas petition before enactment of the Antiterrorism and Effective Death Penalty Act of 1996. The court concluded that the Act should not be applied here for two reasons. First, "[a]lthough Tennessee law provides for the appointment of counsel for indigent prisoners seeking habeas relief, this law insufficiently ensures the competency of such counsel. Based on the language of [28 U.S.C.] § 2261(b) of the Act, the Court concludes that this portion of the Act will not apply to Tennessee capital cases until the state satisfies the prerequisite set forth in § 2261(b)."

Second, the court decided that § 2262 "should not be construed to apply to cases that are currently the subject of evidentiary hearings in federal district court." The language of § 2262(a) and (b) "suggests that once the Act is implemented, a prisoner at any stage of the habeas review process may recommence the review process by filing a new habeas corpus application. Such an application would then be reviewed in accordance with the Act." If this provision were interpreted to apply to cases such as this, in which the court "has conducted an evidentiary hearing and has completed review of thirty distinct claims for habeas relief, then the very judicial system that had almost completed an arduous review of the petitioner's claims would be forced to start over from the beginning and reanalyze each of the petitioner's claims under the revised Act. Such a reading of the Act would conflict with

the very goal of judicial economy that the Act seeks to promote." Thus, the court read "the language of Section 107(c), pertaining to the statute's effective date, to define 'pending' cases as those in which no federal district court has commenced habeas review as of the enactment of the Act."

Austin v. Bell, No. 3:86-0293 (M.D. Tenn. May 8, 1996) (Nixon, C.J.).

District court holds that Rule 22(b) does not provide it with authority to rule on petitioner's motion for a certificate of appealability. The court dismissed petitioner's habeas petition on June 6, 1996. Petitioner then filed a Motion for Issuance of Certificate of Appealability, pursuant to 28 U.S.C. § 2253(c)(1), as amended by § 102 of the Antiterrorism and Effective Death Penalty Act of 1996. The recently amended text of § 2253(c)(1)(A) provides that an appeal from a final order "in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court" may not be taken "[u]nless a circuit justice or judge issues a certificate of appealability." Looking at the plain language of the statute, the court said "it seems clear that the Court lacks the ability to rule on petitioner's present motion."

However, the Act also amended Fed. R. App. P. 22(b) to provide that "an appeal by the applicant for the writ may not proceed unless a district or circuit judge issues a certificate of appealability pursuant to section 2253(c)." After finding that "the legislative history shines absolutely no light on this patently apparent conflict in the Act," the court concluded that "[s]ince Rule 22(b) requires that applications for certificates of appealability be processed in accordance with § 2253(c), and as a district judge has no authority to rule on such applications under § 2253(c), . . . Rule 22(b) does not provide [the court] with the authority to rule on petitioner's motion for a certificate of appealability." The court noted its disagreement with *Houchin v. Zavaras*, 924 F. Supp. 115 (D. Colo. 1996) (district court has authority under Rule 22(b) to issue certificate) (see summary in *Habeas & Prison Litigation Case Law Update*, No. 1, June 1996). Admitting that its conclusion "is not free from doubt," the court denied the motion and ordered it forwarded to the court of appeals.

Parker v. Norris, Civil No. PB-C-96-143 (E.D. Ark. June 14, 1996) (Eisele, J.).

District court finds that second petition for writ of habeas corpus constitutes an abuse of the writ under both former and amended law. Because petitioner's second habeas petition was pending on April 24, 1996, and the district court was uncertain whether amendments to 28 U.S.C. § 2244 were to be applied retroactively, it analyzed the issue of whether petitioner had abused the writ under both pre- and post-Act standards. The court first concluded that the petition must be dismissed pursuant to pre-Act law and then considered the amended standards. It noted that the petitioner raised issues in his second application that were not presented in his first petition and, under the amended version of § 2244, had to satisfy one of two alternatives to prevent dismissal for abuse. The court held that petitioner could not satisfy the first alternative because he failed to make "any allegation that a new rule of constitutional law entitles him to habeas relief." § 2244(b)(2)(A). Petitioner also failed to meet either prong of the second alternative set out in § 2244(b)(2)(B)(i) and (ii). Thus, § 2244 as amended mandated dismissal of the petition as a second and successive petition that abuses the writ.

Armstead v. Parke, No. 3:95-CV-0776 AS. (N.D. Ind. June 10, 1996).

PRISON LITIGATION

Courts of Appeals

Fifth Circuit holds that Prison Litigation Reform Act (PLRA) is not yet triggered in litigation over 1983 consent decree governing Louisiana prisons. The Louisiana Department of Public Safety and Corrections challenged the district court's jurisdiction to issue an order in 1995 modifying a 1983 consent decree by reinstating nine state prisons that had previously been released from compliance with the decree. The department contended that a sunset clause in the decree was activated on November 1, 1989, terminating the court's jurisdiction as a matter of law. Therefore, it argued, the court lacked authority to enter the 1995 reinstatement order.

The Fifth Circuit affirmed the reinstatement order and returned the case to the district court for further proceedings. In doing so, the court noted that it had reviewed the PLRA and briefs on the applicability of the Act submitted by the parties and concluded that the Act had not yet been triggered in the case. Citing 18 U.S.C. § 3626(a)(1) as amended by the PLRA, which sets out criteria for the granting of prospective relief in prison reform litigation, the appellate court found that the district court had not fashioned such relief. "Instead, we understand the 1995 Order to have brought the nine previously released institutions back within the court's continuing jurisdiction so that it may examine whether prospective relief is necessary to avoid constitutional violations from occurring in those institutions." The Fifth Circuit emphasized, however, that in the future if the district court "should find a violation of a 'Federal right,' then any remedy it might fashion must conform to the standards set forth in the Act."

Williams v. Edwards, No. 95-30835 (5th Cir. June 19, 1996) (Wiener, J.).

Tenth Circuit rules that PLRA amendments to in forma pauperis statute do not apply to appeals filed before April 26, 1996. After reviewing the Act, the court of appeals concluded that the amendments to 28 U.S.C. § 1915 do not apply "when, as in this case, the prisoner/appellant filed his notice of appeal before April 26, 1996, the date President Clinton signed the Act into law." The court said it did not consider under what circumstances, if any, the amendments to § 1915 would apply if a prisoner initiated action in district court before April 26, 1996, but filed notice of appeal after that date.

White v. Gregory, No. 95-1215 (10th Cir. June 21, 1996) (Brorby, J.).

District Courts

District court grants preliminary injunction and, in accordance with the PLRA, appoints special master to ensure city's compliance. Based on unrefuted affidavits of plaintiffs—current and former prisoners at the District of Columbia's Lorton Correctional Complex—the district court found that they are likely to succeed in their claim, instituted on March 31, 1994, that the city's failure to enforce its own nonsmoking policy in the correctional facility violated the plaintiffs' Eighth Amendment rights. The court "determined that the most efficient way to ensure that the City complies with this Court's [preliminary injunction] Order is to appoint a disinterested and neutral Special Master . . . in accordance with the Prison Litigation Reform Act." It directed both parties to submit a list of not more than five persons to serve as special master. The court found "that the action it has taken is consistent with" the PLRA.

Crowder v. Kelly, No. CIV. A. 94-702 (D. D. C. May 21, 1996) (Sporkin, J.).

District court defers ruling on petition for leave to proceed in forma pauperis and grants plaintiff time to submit amended complaint and properly completed IFP petition. The district court found that plaintiff's original 42 U.S.C. § 1983 complaint failed to state a claim upon which relief could be granted. The court granted him two months to submit an amended complaint. It cautioned that the amended complaint would be dismissed with prejudice pursuant to 28 U.S.C. § 1915, as amended by the PLRA, if it failed to state a colorable claim. The court observed as well that the plaintiff's petition to proceed in forma pauperis was not supported by a properly completed copy of the court's new application, which conforms to the requirements of the PLRA regarding certification of the plaintiff's prisoner account. It deferred ruling on the IFP petition and directed the clerk to provide the plaintiff with the court's new form.

Brown v. McBride, No. 3:96-CV-297 RM (N.D. Ind. May 20, 1996) (Miller, J.).

Unpublished opinions

[Although we recognize that the precedential value of unpublished decisions and the rules and practices for citing thereto may vary among the courts, we are reporting unpublished opinions and orders in order to provide the most complete picture possible of the issues being litigated under the new legislation.]

District courts dismiss in forma pauperis petitions without prejudice because of failure to comply with PLRA filing fee requirements. On March 27, 1996, plaintiff filed a motion for leave to proceed in forma pauperis without prepay-

ment of fees and costs. On April 15, 1996, the district court directed plaintiff to pay the $120 filing fee or submit a new IFP petition showing plaintiff's inmate account statement for the preceding six-month period, properly certified by the appropriate prison official. Plaintiff complied with the court's order on May 31, 1996. Noting that the plaintiff had submitted "all of the information required under the law in effect before April 26, 1996," but had failed to comply with the PLRA, which was effective on and after that date, the court denied the plaintiff's motion without prejudice. "In the event plaintiff decides to proceed in the case, he must comply with all the provisions of the Act."

Kahn v. Malinov, No. CIV.A. 96-2501 (E.D. Pa. June 6, 1996) (DuBois, J.).

In the other case, although the district court "cannot see how the plaintiff can prevail on his due process claim" in his civil rights suit, it dismissed the action without prejudice "so that plaintiff may refile it after deciding whether his claim is so meritorious as to support his expenditure of $120 on the filing fee." Emphasizing that pursuant to the PLRA, "henceforth even in forma pauperis plaintiffs must pre-pay a portion of the fee and are obligated to pay off the balance as soon as they are able," the court warned that "should plaintiff decide to refile this action, he must pay $120 even if his complaint is dismissed as frivolous or if he otherwise loses on the merits." The court noted that under amended 28 U.S.C. § 1915(b)(1), plaintiff would have to pay "an initial partial filing fee of $6.32" (20% of the average monthly balance in his prison account for the last six months), and then "his prison account [would] be docked until he has paid the entire $120 filing fee."

Spencer v. Winbush, No. CIV.A. 96-3729 (E.D. Pa. May 29, 1996) (Vanartsdalen, J.).

District court dismisses complaint and IFP petition without prejudice because of plaintiff's failure to exhaust administrative remedies. Observing that the PLRA requires a plaintiff to exhaust "such administrative remedies as are available" before filing an action concerning prison conditions (42 U.S.C. § 1997e(a) as amended), the court said the plaintiff failed to comply with this provision. The complaint stated that the plaintiff did not "use the prisoner grievance procedure to seek relief" because he "was in fear of [the] grievance falling in the wrong hands." The court dismissed the action and the motion to proceed in forma pauperis without prejudice.

Brooks v. Superintendent Lunk of Div. 10, No. 96C3221 (N.D. Ill. June 5, 1996) (Shadur, J.).

Videoseminar on Habeas Developments

The Federal Judicial Center, in conjunction with ALI–ABA, will conduct a national videoseminar on "New Developments in the Federal Law of Habeas Corpus" on September 12, 1996, from noon to four p.m., e.d.t. The program will originate from the Center's studio in the Thurgood Marshall Federal Judiciary Building and will be offered at forty sites across the country.

Title I of the Antiterrorism and Effective Death Penalty Act, enacted in April of this year, is having far-reaching effects on how federal courts handle habeas corpus petitions, particularly where the death penalty has been imposed. The conference will begin with an overview of the new law, followed by sessions dealing specifically with retroactivity issues, constitutionality concerns, the federalism impact of the new law, and what remains of preexisting judicial standards. The videoseminar will bring judges, practitioners, staff attorneys, and law clerks up to date on the issues raised by the new law and the court cases interpreting it.

We have assembled a faculty of national experts on federal habeas corpus to analyze the new provisions and how the courts are interpreting them. The program will be moderated by Robb Jones, director of the Center's Judicial Education Division. The faculty will include James Coleman of Duke University, Barry Friedman and Nancy King of Vanderbilt University, Leon Friedman of Hofstra University, Joseph Hoffmann of Indiana University, James Liebman of Columbia University, Ira Robbins of American University, and Larry Yackle of Boston University. Federal judges on the faculty will include District Judge Rya Zobel (the Center's director) and Eleventh Circuit Judge Edward Carnes.

The program will be available on videotape by early October to anyone unable to attend the program on September 12. Courts that have their own satellite downlink equipment and wish to receive the program should contact Robb Jones or Denise Neary at the Center at (202) 273-4059.

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HABEAS CORPUS

Retroactivity

Second Circuit holds that Antiterrorism and Effective Death Penalty Act of 1996 should not be applied retroactively to noncapital habeas appeal. Petitioner's appeal of the district court's denial of his habeas petition was argued in the appellate court on March 29, 1996. On May 3 the appellate court vacated the district court's order and remanded with instructions to grant the petition and discharge petitioner from prison. *See Boria v. Keane,* 83 F.3d 48, 55 (2d Cir. 1996). The state petitioned for rehearing, arguing that the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter AEDPA), signed into law April 24, 1996, applies to this case and would change the result.

The court rejected the state's arguments and reaffirmed its earlier holding. "[A]pplication of the new statute to these circumstances would be retroactive" because it would attach new legal consequences to events completed before its enactment. "Because application of the new statute to this case would be retroactive, the next step is to discern whether Congress intended the new statute to apply retroactively. . . . While Congress has spoken clearly in some portions of the new statute with respect to the application of the statute to pending cases, . . . in the context of non-capital habeas cases the statute's silence is striking. This silence, coupled with the presumption against retroactivity, leads us to hold that the new statute does not apply to this case."

Boria v. Keane, 90 F.3d 36, 37–38 (2d Cir. 1996) (per curiam). *Cf. Burkett v. Love,* 89 F.3d 135, 138 (3d Cir. 1996) (where habeas petition was filed and rejected in district court and appealed before April 24, 1996, "we need not digress to determine the effect of [§ 106 of the AEDPA] on this pending action, filed, as it was, before the amendments were enacted").

Second Circuit holds that one-year time limit provision of the AEDPA does not apply to petition filed before Act's effective date, but that the certificate of appealability provision does. "Section 101 of the AEDPA amends 28 U.S.C. § 2244 to require that habeas petitions brought under 28 U.S.C. § 2254 be filed no later than one year after the completion of state court direct review, with certain exceptions not pertinent to the pending case. . . . Reyes filed his habeas petition in the Southern District on July 13, 1994, more than one year after leave to appeal to the New York Court of Appeals from the affirmance of his state court conviction was denied in 1989. . . . In this case, it would be entirely unfair and a severe instance of retroactivity to apply to Reyes the new requirement of the AEDPA that a habeas petition be filed within one year after completion of state court direct review where that period ended before the effective date of the Act."

The court also had to determine whether to apply the Act's new provisions for a "certificate of appealability," which replaced the requirement for a "certificate of probable cause" and will be codified at 28 U.S.C. § 2253(c). "The new requirement of a certificate of appealability ('COA') appears to make no significant change in the standard applicable to the former requirement of a certificate of probable cause ('CPC'). . . . In agreement with the Tenth Circuit, *see Lennox v. Evans,* 87 F.3d 431, 433–34 (10th Cir. 1996), we hold that the substantive standard for a COA is the same as the standard for the prior CPC. *But see Williams v. Calderon,* 83 F.3d [281,] 286 [(9th Cir. 1996)] (stating, without discussion, that COA standard is 'more demanding' than CPC standard)." The court also concluded that the new requirement in § 2253(c)(3), that the COA "indicate which specific issue or issues satisfy the showing required" of the denial of a constitutional right, should apply to a habeas petition filed before the effective date of the AEDPA. "This is well within the category of procedural changes that pose no issue of retroactivity."

If a petitioner makes a motion for a certificate of probable cause, the court held that it should be treated as a motion for a certificate of appealability "[a]s long as a prisoner's request for a CPC meets the substantive and procedural requirements of the new COA." Treating petitioner's request for a CPC here as a request for a COA, the court concluded that one of his claims presented a substantial issue warranting a COA and granted the COA as to that issue.

Reyes v. Keane, 90 F.3d 676, 678–81 (2d Cir. 1996).

Tenth Circuit applies "gatekeeper" mechanism for second or successive habeas petitions to petition filed after the AEDPA became effective. A death row prisoner's habeas petition was denied in the district court and the denial was affirmed by the appellate court in 1995. After his petition for writ of certiorari was denied by the Supreme Court on June 3, 1996, he filed in the appellate court an application for an order authorizing the district court to consider his second petition,

Habeas & Prison Litigation Case Law Update is distributed periodically by the Federal Judicial Center to inform judges and other judicial branch personnel of selected federal court decisions interpreting the 1996 federal legislation on habeas petitions and prison litigation. Any analyses or interpretations of the case law are those of the Center staff who prepare the summaries.

pursuant to the new "gatekeeper" provision in 28 U.S.C. § 2244(b)(3), as amended by the AEDPA. Petitioner also challenged whether the AEDPA should even apply to his case.

The court held that the Act did apply and that the application would be denied because petitioner had not made the required showing. "Because the 1996 Act was already in place at the time of Hatch's filing with this Court, the application of the 1996 Act to his case is not retroactive, and thus does not implicate the Ex Post Facto Clause." As to the substance of the petition, the court held that "Hatch has not made a 'prima facie showing that [his] application satisfies the requirements of' [amended § 2244(b)(3)(C)]. . . . Accordingly, the Application for Order Authorizing Consideration of Successive Petition for Writ of Habeas Corpus is DENIED." The court added that "[n]o petition for rehearing nor suggestion for rehearing en banc will be entertained. . . . § 106(b)(3)(E) (noting that the grant or denial of an authorization by a court of appeals to file a successive application cannot be the subject of a petition for rehearing in the court of appeals) (to be codified at 28 U.S.C. § 2244(b)(3)(E))."

Hatch v. Oklahoma, No. 96-727 (10th Cir. Aug. 6, 1996) (per curiam).

District court holds that noncapital provisions of the AEDPA should not be applied retroactively, but analyzes petition under old and new law in light of the "uncertain state of the law." After defendant exhausted his state court appeals he applied for a writ of habeas corpus in the district court in 1993. His application "proceeded along a tortuous path" and a hearing on the merits was not held until February 1996. Before a decision was reached the AEDPA was signed into law and the district court had to decide whether to apply the relevant new provisions, which in this case were the amendments to 28 U.S.C. § 2254 in the Act's § 104. (Note: Although defendant had been sentenced to death, § 107 of the AEDPA was found not to apply.)

Applying the test from *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the court concluded that "Congress did not intend § 104 of the AEDPA to apply to actions pending on the date of its enactment." Following the maxim that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion," the court concluded "that because § 107 [of the Act] contains an explicitly retroactive provision, and because § 104 contains no retroactive provision, Congress intended the latter to have only prospective effect. Accordingly, because Cockrum's application was pending on the date that the AEDPA was signed into law, it is found that § 104 does not apply to this action." However, the court noted that several courts have reached different conclusions regarding whether all or part of the AEDPA should be applied retroactively and that the Fifth Circuit had not decided this issue. "In light of this uncertainty, it would be imprudent to fail to consider the AEDPA altogether in this opinion. Thus, Cockrum's claims will be analyzed first under pre-AEDPA law, and second, in the alternative, his claims will be evaluated under the AEDPA."

The court determined that petitioner was entitled to relief under either law because of ineffective assistance of counsel at the penalty phase of his trial. New 28 U.S.C. § 2254(e)(1) states that "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." The court concluded that, at the evidentiary hearing in February, petitioner showed by clear and convincing evidence that the factual findings underlying the state court's rejection of his ineffective assistance of counsel claim were incorrect, thus rebutting the presumption of correctness of the state court findings under new or old law.

The state argued that the evidence from the February hearing should not be used in this decision because petitioner would not have been entitled to an evidentiary hearing under amended § 2254(e)(2). The court disagreed, finding that "the AEDPA does not undo the previous ruling that an evidentiary hearing should be held, nor require evidence already received in such a hearing to be disregarded." The evidence showed that the state court proceedings "resulted in a decision that . . . involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States," *see* § 2254(d)(2) (as amended), and the court issued a writ of habeas corpus ordering the release of petitioner unless the sentence of death is vacated and a new punishment hearing is initiated within 90 days.

Cockrum v. Johnson, No. 6:93 CV 230 (E.D. Tex. July 25, 1996) (Justice, J.).

District court holds that habeas amendments do not apply to § 2254 action that was submitted and argued well before date of enactment. "This petition was filed October 12, 1994, and the matter was fully submitted following oral argument in July 1995. Consequently, neither party complied with or relied upon any provision of the recently enacted amendments to 28 U.S.C. § 2254 contained in the Antiterrorism and Effective Death Penalty Act of 1996 . . . (Apr. 24, 1996). The 1996 amendments were enacted long after this petition was filed, briefed and argued, and the new provisions do not apply explicitly to a petition such as this one which was filed before enactment. Furthermore, the 1996 amendments do not provide an effective date for the new provisions governing § 2254 petitions which might apply in this case. This Court agrees with Chief Judge Aspen who decided, in a petition brought under § 2255, that the new amendment is not retroactive apart from certain provisions involving capital cases where retroactivity is explicitly provided. *See United States v. Trevino*, No. 96 C 828, 1996 WL 252570, at n. 1 (N.D. Ill. May 10, 1996)."

Grady v. Artuz, No. 94 CIV. 7362 at n.1 (S.D.N.Y. June 24, 1996) (Koeltl, J.). *See also Wilkins v. Bowersox*, No. 91-0861-CV-W-5 (W.D. Mo. May 15, 1996) (Wright, J.) (where arguments were heard in Jan. 1996 and some issues were resolved

before Apr. 24, 1996, amendments to § 2254 would not be applied); *U.S. ex rel. Jones v. Barnett*, No. 96 C 1274, slip op. at 2 (N.D. Ill. July 15, 1996) (Anderson, J.) (for state prisoner's habeas petition filed Feb. 13, 1996, "the amendment to section 2254 does not merely change the manner in which a federal court analyzes the habeas petition. The amendment narrows the standard of review habeas courts can give to questions of law and fact decided by state courts. . . . Since the amended section 2254(d) affects the quantum of protection the courts afford the rights of the defendant, this court declines to apply it retroactively.").

Special Procedures in Capital Cases

District courts hold that California and Florida do not qualify for the AEDPA's special habeas procedures for capital cases. California death row inmates filed a class action suit against the state of California, seeking to stop the state from claiming that it qualifies for the benefits of new Chapter 154 in Title 28 (§§ 2261–2266) because it satisfies the requirements for a "unitary review procedure" under § 2265. As the court noted, "defendants have threatened to invoke chapter 154 in all federal court proceedings involving members of the proposed class. Absent judicial relief from this Court, defendants' threats to invoke Chapter 154's expedited review provisions will effectively cause plaintiffs to forfeit rights to which they are entitled under Chapter 153. . . . As a practical matter, defendants' assertions would thus secure for the State the benefits of the Act, regardless of whether California actually provides the competent counsel that states are required by Congress to give plaintiffs as a quid pro quo for receiving such benefits."

The court allowed the suit to proceed as a class action, and then found that the state did not qualify for Chapter 154's procedures. "California has a unitary review procedure, as that term is defined in the Act. As explained below, however, the Court also concludes that California's alleged comprehensive scheme fails to satisfy the remaining requirements of section 2265," namely, a "rule of its court of last resort or by statute" that provides a qualifying mechanism for the appointment and compensation of competent counsel and "standards of competency for the appointment of such counsel."

The court granted a preliminary injunction ordering that "defendants, their agents, servants, employees and attorneys, and all those in active concert with them ARE HEREBY RESTRAINED AND ENJOINED from trying or seeking to obtain for the State of California the benefits of the provisions of Chapter 154 of Title 28, U.S. Code, in any state or federal proceeding involving any class member." However, the court also granted a temporary stay of the order to allow plaintiffs time to apply for a stay pending appeal.

Ashmus v. Calderon, No. C 96-1533 TEH (N.D. Cal. June 14, 1996) (Henderson, C.J.).

In Florida, a death row prisoner filed a motion to enjoin the state "from invoking or asserting, in any state or federal proceeding, that the State of Florida has complied with the so-called 'opt-in' provisions of Chapter 154," and sought "a judicial determination pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, and 42 U.S.C. § 1983, that the system of expedited habeas review may not be applied to either himself or other similarly situated Florida death-row inmates." However, because plaintiff had not yet moved for class certification, the court considered the motion only as to the individual plaintiff.

Because "Florida does not provide for a 'unitary review' process," *see* 28 U.S.C. § 2265, the court examined whether the state met the requirements of § 2261 "to provide competent counsel and reasonable litigation funding to indigent capital prisoners in its state post-conviction proceedings." Although the court found that Florida has a "comprehensive statutory framework for appointment of counsel in post-conviction proceedings brought by all capital prisoners," it held that the state "does not have a statute or rule with a mechanism for ensuring 'competent counsel in State post-conviction proceedings' is appointed for indigent capital defendants, [and thus] cannot qualify as an 'opt-in' state under Chapter 154 of the Act. See 28 U.S.C. § 2261(b)." The court also held that "any offer of counsel pursuant to Section 2261 must be a meaningful offer. That is, counsel must be immediately appointed after a capital defendant accepts the state's offer of post-conviction counsel. The present backlog of unrepresented capital defendants who are in a position to seek post-conviction review, demonstrates that Florida has not made the requisite meaningful offer of counsel."

The court granted plaintiff's motion to the extent that it enjoined defendants "from asserting against Plaintiff, in any state or federal proceeding, that Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 . . . (codified as 28 U.S.C. §§ 2261–2266), applies to Plaintiff."

Hill v. Butterworth, No. 4:96-CV-288-MMP (N.D. Fla. Aug. 7, 1996) (Paul, J.).

Prison Litigation

Proceedings In Forma Pauperis

Second Circuit holds that the obligation to pay filing fees "will be imposed prior to any assessment of the frivolousness of the appeal." The Second Circuit addressed a basic issue arising under the Prison Litigation Reform Act of 1995 ("PLRA"): "whether a prisoner filing an appeal becomes liable for appellate filing fees before or after his motion for leave to appeal *in forma pauperis* has been adjudicated." The court considered the language of two subsections of 28 U.S.C. § 1915 as amended by the Act: § 1915(a)(2), relating to the prisoner's trust fund account statement, "plainly applies to a prisoner approaching a court and 'seeking' to proceed i.f.p." On the other hand, § 1915(b)(1), which requires full payment of any filing fee, "[a]rguably . . . applies only to a prisoner who already has i.f.p. status, *i.e.*, a prisoner who has been granted such status in the district court with respect to his complaint and has been continued in such status for purposes of his appeal, or who has been granted such status by this Court." Such a construction "would produce a bizarre result" in courts where "the decision to grant a motion to appeal i.f.p. is usually made only after determining that the appeal surmounts the standard of 'frivolousness.' . . . [O]nly the prisoners who surmount the frivolousness standard would become obligated for filing fees."

The court decided that the phrase "brings a civil action or files an appeal in forma pauperis" in § 1915(b)(1) "can be read to include both prisoners who have been granted i.f.p. status and those who seek such status." The Second Circuit also considered § 1915A, which requires a court to review a prisoner complaint "before docketing, if feasible or, in any event, as soon as practicable after docketing," and to dismiss the complaint if it is frivolous or otherwise lacks merit. It noted that this screening procedure appears to be designed for district courts since it refers to the review of a complaint, and said that even in courts that delay docketing until frivolousness has been determined, "Congress likely did not intend the section 1915A screening to insulate prisoners from liability for filing fees for complaints determined to be frivolous."

As to the requirements of § 1915(b)(1) that a prisoner plaintiff pay "any court fees required by law," and of § 1915(b)(3) that the filing fee collected not exceed "the amount of fees permitted by statute for the commencement of a civil action or an appeal," the court found that these obligations apply to both the $5 filing fee required by 28 U.S.C. § 1917 and the $100 docketing fee mandated by the Judicial Conference.

Finally, the Second Circuit established a procedure to satisfy the requirements of § 1915(a)(2) that the prisoner submit to the court a certified copy of his or her trust fund account statement and § 1915(b)(1) that the court collect the initial filing fee payment. It required the prisoner to submit to the court an authorization for both tasks to be performed by the prison, which the clerk's office can then send to the prison. After such authorization, the prison has the responsibility of sending to the court a certified copy of the prisoner's trust fund account statement and the initial partial filing fee payment, as well as the subsequent payments from the prisoner's account required by § 1915(b)(2), and "the failure of the [prison] to send the statement or to remit any required payment shall not adversely affect the prisoner's appeal." An appeal filed without the required authorization and prepayment of fees will be dismissed in thirty days unless within that time the prisoner files the required authorization.

Leonard v. Lacy, 88 F.3d 181, 184–87 (2d Cir. 1996).

Second Circuit holds that PLRA fee requirements may be applied to prisoners who filed notices of appeal before the Act's effective date. The Second Circuit considered the effect of the PLRA's filing fee requirements in four unrelated cases involving notices of appeal and IFP motions filed by state and federal prisoners. All four appellants filed their notices of appeal before April 26, 1996. One filed a motion to proceed in forma pauperis before that date; two filed IFP motions after the effective date; and one acquired IFP status in the court of appeals before the effective date because the status was granted in the district court and not revoked.

Because the PLRA contains no effective date provision or other indication that the filing fee requirements should be applied to pending appeals, the court followed *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), to decide whether the requirements should be applied retroactively. "The rationales outlined in *Landgraf* strongly indicate that the fee payment obligations of the PLRA should be applied to appeals in which the notice of appeal was filed before the Act's effective date. The fee payment obligations are essentially procedural . . . . More significantly, the slight burden arising from application of the PLRA requirements to pending appeals is entirely avoidable. Even though a prisoner has filed a notice of appeal, he has no obligation to pursue it, and once confronted with the prospect of liability for filing fees, he may choose either to accept that liability or withdraw his appeal."

The court found that "the relevant event for purposes of retroactivity is, at the earliest, the granting of leave to proceed on appeal *in forma pauperis*. Neither the filing of the notice of appeal nor the making of the i.f.p motion implicates settled expectations or burdens prior conduct in ways that counsel against application of the PLRA to pending appeals." The court noted that its decision conflicted with the Tenth Circuit's ruling in *White v. Gregory*, 87 F.3d 429 (10th Cir. 1996), that the PLRA's filing fee requirements did not apply where a notice of appeal was filed before the Act's effective date. The *White* decision "contains no discussion of the issue, and we respectfully disagree with its conclusion."

Finally, the court held that the appellant who had acquired IFP status in the court of appeals through the continuation of his IFP status granted in the district court could be subjected to the PLRA's requirements. It reasoned, first, that "the burdens of the PLRA are slight and entirely avoidable." Second, since no judicial time had been invested in reviewing the merits of the appeal, the congressional purpose to deter frivolous appeals "is significantly advanced by applying the PLRA's requirements to his appeal at this stage." (The court observed that "we might deem it inappropriate to apply the Act" if judicial resources had already been expended, if the appellant had expended "significant time and effort" in preparing an appellate brief, or "if this Court had granted a motion to proceed on appeal i.f.p., a step that would normally require judicial assessment of whether the appeal had sufficient merit to surmount the standard of frivolousness.") Third, requiring the appellant to choose between becoming obligated for filing fees or withdrawing his appeal now "creates at most disappointment, not impairment of protectable interests."

The court ruled that it would dismiss the four appeals unless within thirty days each appellant filed the authorization required by *Leonard v. Lacy*, *supra*. It cautioned appellants that if they avoided dismissal by filing the authorization, they would be obligated to pay the filing fees from their prison accounts even if their appeals were subsequently dismissed.

Covino v. Reopel, 89 F.3d 105, 106–09 (2d Cir. 1996).

Second Circuit concludes that PLRA filing fee provisions do not apply to petition for extraordinary writ directed at judge conducting criminal trial. A defendant in a pending criminal prosecution filed a motion seeking to have the trial judge withdraw from the case, and later filed a petition for a writ of mandamus in the court of appeals, seeking to compel the district judge to rule on the recusal motion and to have the Second Circuit order reassignment of the case. The petition was accompanied by an IFP motion, presenting the court with "the issue of whether the new filing fee payment requirements of the PLRA apply to a petition for an extraordinary writ."

"Neither the text nor the legislative history of the PLRA indicates whether a petition for a writ of mandamus is to be considered a 'civil action'" under amended 28 U.S.C. § 1915(a)(2). "Congress enacted the PLRA to curb the increasing number of civil lawsuits filed by prisoners . . . . It is reasonable to assume that Congress wished to apply the PLRA's deterrent effect to prisoners' complaints, regardless of the type of pleading filed by the prisoner to obtain relief." Therefore, the PLRA "should normally apply" to a petition for a writ that sought relief comparable to that which could be obtained by filing a complaint against prison officials under 42 U.S.C. § 1983. However, "a petitioner for a writ of mandamus directed to a judge conducting a criminal trial . . . is not analogous to the lawsuits to which the PLRA applies. We will therefore not apply our PLRA procedure to Nagy's motion."

In re Nagy, 89 F.3d 115, 116–17 (2d Cir. 1996).

Tenth Circuit holds that mandamus petition is covered by amended § 1915 and that bar to IFP filings after three previous dismissals of meritless claims applies retroactively. The prisoner filed a habeas corpus petition in district court on April 2, 1996. On May 7, 1996, he filed in the court of appeals a petition for a writ of mandamus under 28 U.S.C. § 1651(a), accompanied by an IFP motion, seeking prompt resolution of his habeas petition. Analyzing the PLRA amendments to 28 U.S.C. § 1915, the Tenth Circuit decided that a mandamus proceeding falls within the scope of the amended IFP statute: "Allowing prisoners to continue filing actions as they had before enactment of the amendments, merely by framing pleadings as petitions for mandamus, would allow a loophole Congress surely did not intend in its stated goal of 'discourag[ing] frivolous and abusive prison lawsuits.'" Based on the history and purpose of the PLRA, the court concluded that a mandamus petition is a "civil action" under § 1915 and that "complaint" in amended § 1915(a)(2) includes petitions for extraordinary writs. This conclusion, the court said, would cause it to dismiss the mandamus petition without prejudice because the petitioner had not complied with the amended statute. However, petitioner "faces a more serious barrier to proceeding IFP: § 1915(g)."

Section 1915(g) bars a prisoner from bringing a civil action or appeal IFP "if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal . . . that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." The appellate court observed that "[a]s of 1981, [the petitioner] had filed between 600 and 700 complaints in state and federal courts, many of which had been dismissed as malicious or frivolous." Taking judicial notice that he "has had three actions or appeals in courts of the United States dismissed as frivolous or malicious," the court stated that the petitioner "cannot proceed in forma pauperis if § 1915(g) applies to suits dismissed prior to its enactment." Applying the *Landgraf* analysis, the court determined that § 1915(g) can be applied retroactively because it "does not change the legal consequences of [earlier] prisoner actions" but rather "imposes stricter requirements for proceeding in forma pauperis in future actions." *Accord Abdul-Wadood v. Nathan*, No. 96-1074 (7th Cir. Aug. 2, 1996) (Easterbrook, J.) (petitioner who had two previous complaints dismissed as frivolous before the PLRA took effect and three more after "now has at least five strikes against him" and § 1915(g) applies).

Therefore, petitioner cannot proceed in forma pauperis and may resubmit his petition only by paying the filing fee. The court directed the clerk of court "not to accept from [the petitioner] any further extraordinary writs in noncriminal matters, or appeals of judgments in civil actions or proceedings, unless he pays the filing fees established by our rules."

Green v. Nottingham, 90 F.3d 415, 417–20 (10th Cir. 1996).

Second Circuit finds that PLRA does not apply to habeas corpuspetitions. Following *In re Nagy, supra,* the appellate court analyzed whether a habeas petition or an appeal from the denial of such a petition constitutes a "civil action" under 28 U.S.C. § 1915(a)(2). It listed three reasons supporting its conclusion that Congress did not intend the PLRA to apply to habeas petitions: (1) Nothing in the text of the PLRA or its legislative history indicates such an intention; (2) it is unlikely that Congress intended the PLRA's elaborate procedures for collection of filing fees to apply to payment of the $5 filing fee required in habeas actions; and (3) Title I of the Antiterrorism and Effective Death Penalty Act makes no change in filing fees or in a prisoner's obligation to pay the fees in habeas cases.

Reyes v. Keane, 90 F.3d 676, 678 (2d Cir. 1996).

District court rules that sua sponte "screening" provisions of PLRA apply to IFP prisoner complaints filed before April 26, 1996. Plaintiff's 42 U.S.C. § 1983 complaint was received by the district court's pro se office on April 10, 1996. Since the PLRA amendments to 28 U.S.C. § 1915 do not indicate an effective date, the court reviewed the requirement of § 1915(e)(2) that the court dismiss a case at any time it determines the action is frivolous, malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. In addition, the court pointed to new section 1915A, "entitled 'Screening,' requiring the Court to review prisoner complaints before docketing, or as soon as practicable after docketing," and to dismiss complaints for the same reasons specified in § 1915(e)(2).

Although the district "has determined not to apply the Act's amendment to 28 U.S.C. § 1915(a)–(b), requiring prisoners to pay the filing fee, to complaints filed before April 26, 1996," the court saw "no reason why the provisions providing for sua sponte dismissal of claims that clearly fail to state a claim should not apply to pre-April 26, 1996 complaints." Applying the screening provision to all complaints, regardless of when they were filed, does not involve retroactivity, the court found. "It is no different than applying amendments to the Federal Rules of Civil Procedure to pending cases, whenever filed." The court dismissed the complaint without prejudice.

McCray v. Kralik, No. 96CIV.3891 (PKL) (AJP) (S.D.N.Y. July 1, 1996) (Leisure, J.) (unpublished).

Appropriate Remedies for Prison Conditions

District courts rule that PLRA's automatic stay provision violates separation of powers and due process clause. Under 18 U.S.C. § 3626(b), as amended, defendants filed motions in both the Western and Eastern Districts of Michigan seeking immediate termination of a 1985 consent decree entered by the Eastern District of Michigan. Portions of the case had been transferred to the Western District of Michigan in 1992 and 1993. Section 3626(b) entitles a defendant or intervener in an action involving prison conditions to immediate termination of any prospective relief under certain conditions, unless the district court makes written findings that the relief remains necessary and is as limited as possible to correct the violation. In addition, § 3626(e)(2) provides for an automatic stay of any prospective relief that has already been approved or granted, beginning on the thirtieth day after a motion for termination has been filed.

To determine whether the relief granted under the decree at issue conforms to the requirements of § 3626(b), the Western District said it would have "to reconsider each provision of the Decree and the associated plans and orders" that had been issued since 1985. This would require time to review extensive records and schedule hearings so that the parties would be "given every opportunity to present their arguments to the Court." Consequently, the court said it could not decide the motion to terminate within thirty days. Because of the scope of the impact the stay would have on prior rulings and the status of the case, and because of the automatic imposition, the court ordered the parties to address its constitutionality.

The court first disposed of a nonconstitutional argument, that pursuant to the supersession clause of the Rules Enabling Act, 28 U.S.C. §§ 2071–2077, the automatic stay provision does not take effect until and unless the Supreme Court amends Fed. R. Civ. P 60(b) and 62(b). The court concluded that "enforcement of the stay provision would not affect a court's authority to grant a relief from judgment or a stay in its discretion. Thus, it can not be said that the stay provision 'conflicts irreconcilably' with" the rules.

The Western District then turned to the question of the automatic stay's impact upon separation of powers. Citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), which listed several factors to consider when evaluating acts of Congress under an Article III standard, the court found that Congress usurped an exclusively judicial role in enacting the stay provision. "The power to decide substantive issues of law, such as a motion to terminate the case, is a most basic attribute of the Judiciary's power under Article III." The automatic grant of the stay, even though temporary, with no provision for a case-by-case determination, is "akin to the issuance of a preliminary injunction, which even a court cannot do without making a finding on the facts."

The district court further found that the stay provision violates separation of powers by altering a final judgment. "[W]here appeals have been exhausted or the time for appeal has elapsed or been waived, consent decrees become final judgments." The PLRA stay provision renders existing judgments inoperative, the court said, and the fact that the stay is temporary relates only "to the extent to which the Act impermissibly modifies existing judgments." The automatic stay also contravenes the due process clause because it violates the "vested rights doctrine." The stay "takes from plaintiffs their vested right in the judgment, which they have had since 1985, without any process at all." The court ordered that the stay would not take effect pending its decision on defendants' motion to terminate the consent decree.

The district court for the Eastern District of Michigan concurred with the Western District that § 3626(e)(2) is unconstitutional. It found that the automatic stay provision "is not an attempt by Congress to limit the jurisdiction of Article III courts. It is an encroachment by Congress into a court's final order, overturning it until a later date." It held that the prospective relief previously awarded under the consent decree would not be stayed pending a determination of the defendants' motion to terminate.

Hadix v. Johnson, No. 4:92:CV:110 (W.D. Mich. July 3, 1996) (Enslen, J.); *Hadix v. Johnson*, No. 80-CV-73581-DT (E.D. Mich. July 5, 1996) (Feikens, J.). *Cf. U.S. v. Engler*, 91 F.3d 144 (6th Cir. 1996) (table) (remanding consent decree appeals for reconsideration in light of amended § 3626); *U.S. v. Michigan*, 91 F.3d 145 (6th Cir. 1996) (table) (same).

District court holds PLRA's immediate termination provision is constitutional and vacates consent decrees. The district court granted defendants' motion for immediate termination of consent decrees from 1978–1979 that governed conditions for detainees awaiting plea, trial, sentencing, or transfer in certain New York City-area jails. The court limited its ruling to the application of 18 U.S.C. § 3626(a)(1), (b)(2), and (b)(3) to the decrees.

The court first held that § 3626(b)(2) does not violate the Rules Enabling Act. There is no direct conflict between § 3626(b)(2) and Fed. R. Civ. P. 60(b) because a district court may still grant relief on a discretionary basis under the rule.

As to the constitutional claims, the court concluded that the statute does not violate the separation of powers principle regarding the reopening of final judgments. "Injunctions, such as the Consent Decrees here, entail continuing, supervisory jurisdiction and therefore are not final judgments. . . . Congress may legislate retroactively so as to modify the prospective effects of a judgment that is final for appeal purposes because this does not reopen the merits of the judgment." *See also Plyler v. Moore*, Civ. A. No. 3:82-876-2 (D.S.C. June 4, 1996) (bench ruling granting motion to terminate eleven-year-old consent decree). Nor does the statute violate the separation of powers principle established in *U.S. v. Klein*, 80 U.S. (13 Wall.) 128 (1872), by prescribing a rule of decision without changing the underlying law. "[W]hile Congress did not amend the substantive law with respect to permissible prison conditions, it did change the law governing the district court's remedial powers. Under the new law, courts must apply the same limitations on relief to consent judgments as to litigated judgments." Finally, the statute does not violate separation of powers by divesting courts of remedial jurisdiction. While "seemingly cramped" by the new legal standards and time constraints imposed, the courts nevertheless retain the ability under § 3626(b) "to enforce constitutional rights. Under § 3626(b)(3), a court may not vacate prospective relief if it finds on the record that constitutional violations exist and that the relief is appropriately tailored to remedy the violation."

Section 3626(b)(2) also does not violate equal protection principles. Using a rational basis test because the PLRA provisions granting immediate termination do not implicate a prisoner's right "to bring to court a grievance that the inmate wished to present," *Lewis v. Casey*, 116 S. Ct. 2174 (1996), the court determined that although Congress could have modified the standards for consent decrees in all types of cases, nothing required it to do so. "Therefore, Congress' determination to single out prison reform litigation was within its power."

Due process arguments were equally unavailing. Because the consent decrees "are not final judgments within the scope of the vested rights doctrine," the plaintiffs "do not have any vested rights in the prospective effects" of the decrees. Nor do the plaintiffs have a due process claim that the statute impairs their contracts with the defendants. Since the federal government was not a party to the consent decrees, the "sovereign acts" doctrine is not applicable. Therefore, rational basis review is appropriate and under that standard, the PLRA provisions are not "arbitrary and irrational."

Acknowledging that the findings now required by § 3626(b)(2) were not made when the consent decrees were entered into, the court observed that § 3626(b)(3) would allow continuation of the relief provided by the decrees "if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right." But the court did not have a record before it on which it could make such findings, and it denied an oral request by the plaintiffs, "seemingly joined by the United States," to postpone a decision on the motion to terminate until a factual record of current conditions in New York City jails could be created. "The statute provides for 'immediate termination' and based on the current record before the Court, the defendants are entitled to vacatur of the Consent Decrees." The court shared some of the concerns expressed by the Michigan district courts that declared the automatic stay provision unconstitutional, but emphasized that it did not need to decide the issue because it disposed of the motion to terminate within the thirty-day time period specified in § 3626(e). (*See Hadix v. Johnson*, *supra*.)

Benjamin v. Jacobson, No. 75 CIV 3073 (HB) (S.D.N.Y. July 23, 1996) (Baer, J.).

District court finds that compensation of a previously appointed special master is not governed by the PLRA. On December 11, 1995, the district court appointed a special master pursuant to Fed. R. Civ. P. 53(b) to monitor compliance with injunctive relief ordered to remedy violations of the prisoner-plaintiffs' constitutional rights. Defendants were ordered to pay the special master's compensation and expenses as a cost of suit. Following enactment of the PLRA, the special master and his staff ceased work pending further direction from the district court. The PLRA, at 18 U.S.C. § 3626(f)(4), limits compensation of a special master to "an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master," and specifies that "[s]uch

compensation and costs shall be paid with funds appropriated to the Judiciary."

The court observed that § 3626 applies "with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of enactment of this title." Section 3626(g)(7) defines prospective relief as "all relief other than compensatory monetary damages," and § 3626(g)(9) states that relief is "all relief in any form that may be granted or approved by the court." Thus, the first question to be answered was whether appointment of the special master constituted "relief." Since the statutory definition of relief shed no light on the issue, the court turned to the definition in Black's Law Dictionary, which focused on "the ultimate legal form of remedy rather than the means of achieving the remedy." This distinction, the court said, was supported by the court's order, which distinguished between the remedies required to cure the constitutional deficiencies and the appointment of a special master. Therefore, the court held that the term "relief" does not apply to the compensation of a previously appointed special master.

Coleman v. Wilson, No. CIV. S-90-520-LKK (E.D. Cal. July 12, 1996) (Karlton, J.).

Suits by Prisoners

District court holds that the PLRA does not apply retroactively to an award of attorneys' fees earned before its enactment; alternatively, plaintiff satisfied Act's requirements. In 1993, plaintiff, a nonsmoking inmate, sued under 42 U.S.C. § 1983, alleging that correctional authorities had been deliberately indifferent to the serious health risks nonsmokers face from ongoing exposure to environmental tobacco smoke. In February 1996, one month after a magistrate judge concluded that plaintiff had demonstrated a likelihood of success on the merits of his claim for permanent injunctive relief, the defendant director of the Department of Correctional Services imposed a smoking ban in all buildings owned and/or operated by the department, stating that "pending inmate litigation, both locally and nationally on the issue of second hand smoke are concerns that must be addressed." Thereafter, the district court concluded that defendants were entitled to summary judgment on the merits of plaintiff's claim because they had rectified any Eighth Amendment violations, but left open the issue of whether the plaintiff was a prevailing party for purposes of an attorneys' fee award.

Defendants argued that the PLRA "narrows the definition of a prevailing party so that a prisoner's attorney will be compensated only for those fees reasonably and directly incurred in proving an actual violation of a federal right," and that amended 42 U.S.C. § 1997e(d)(A) "abolishes the catalyst theory upon which attorney's fees may be awarded." The court noted that all of the action that triggered entitlement to attorneys' fees occurred before the Act was in effect and, further, that the portion of the Act defendants relied on had no stated effective date. Therefore, retroactive imposition would cause "'manifest injustice' to lawyers like Plaintiff's counsel who have performed their ethical obligations to the courts upon settled expectation premised upon precedent that if they 'prevailed' they would be compensated."

Nevertheless, the district court went on to determine that, if the PLRA did apply, plaintiff had made a sufficient showing at the preliminary injunction hearing to satisfy the requirement of § 1997e(d)(A) that no attorneys' fees be awarded unless "directly and reasonably incurred in proving an actual violation of the plaintiff's rights." Implementation of the smoking ban resulted from the magistrate judge's order "which put Defendants on notice that continuance of their past practice was obdurate. Consequently, I find that the requested attorney's fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights."

Weaver v. Clarke, No. 4:CV93-3356 (D. Neb. June 18, 1996) (Kopf, J.).

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HABEAS CORPUS

Retroactivity

En banc Seventh Circuit holds that amended § 2254 applies to habeas appeal filed and argued before AEDPA; discusses review of state court decisions. Petitioner was convicted of murder by a jury in Wisconsin in a bifurcated trial. In the second phase of the proceeding, the jury had to determine whether petitioner was insane at the time of the murders, which would alter his place of confinement and allow the possibility of future release. The jury found that petitioner was not insane, and the judge sentenced him to life. After the state courts rejected petitioner's Sixth Amendment claim that he had been improperly limited in cross-examining a psychiatrist who testified for the state in the second phase, he filed a habeas petition in federal court. The district court denied the petition, and an appellate court panel heard oral argument on petitioner's appeal. Fifteen days later the Antiterrorism and Effective Death Penalty Act of 1996 was signed into law. The appellate panel set the case for reargument before the full court on the issue of whether to apply to pending cases new 28 U.S.C. § 2254(d), which specifies the scope of federal review of state court legal and factual determinations.

A majority of the en banc court held that new § 2254(d) does apply. Because the AEDPA is silent as to the effective date of § 2254(d), the court followed the retroactivity analysis in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), under which "'the court must ask whether the new provision attaches new legal consequences to events completed before its enactment.' . . . Section 2254(d) does not attach new legal consequences to the filing of petitions for habeas corpus, although some other parts of the 1996 Act may do this." The court reasoned that, by limiting the scope of federal review of state court decisions, § 2254(d) "affects the relation between federal and state courts, rather than regulating the details of litigation." It is "the historical practice" that "legal changes that reduce the willingness of federal courts to set aside judgments presumptively apply to existing judgments. . . . Current law normally governs when statutes 'speak to the power of the court rather than to the rights or obligations of the parties,' . . . [and] the amended § 2254(d) is designed to curtail collateral review and augment the finality of judgments, which strongly implies application to existing judgments. . . . We respectfully disagree with the contrary conclusions of *Edens v. Hannigan*, 87 F.3d 1109, 1111 n.1 (10th Cir. 1996), and *Boria v. Keane*, 90 F.3d 36 (2d Cir. 1996). . . . The 1996 Act does not 'impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.' . . . The new law therefore governs our consideration of Lindh's contentions."

The court also rejected claims that altering the scope of collateral review after a prisoner filed a § 2254 petition violates the Suspension Clause of the Constitution; that § 2254(d)(1) violates Article III by improperly limiting federal court review of questions of federal law; and that changing the scope of review under § 2254 violates the Due Process Clause because the previous standard of review had become a protected "fundamental right."

Addressing the merits of petitioner's claim, the court first had to determine when, under § 2254(d)(1), a state court decision would be "contrary to, or involve[] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The phrase "contrary to . . . clearly established Federal law" requires that a state court decision conflict with a decision of the Supreme Court of the United States. "A conflict between decisions of the Seventh Circuit and the Supreme Court of Wisconsin would not authorize issuance of a writ under § 2254(d)(1)." As for the "unreasonable application" language, it "tells federal courts: Hands off, unless the judgment in place is based on an error grave enough to be called 'unreasonable.'" The court did not define "unreasonable," but stated that "when the constitutional question is a matter of degree, rather than of concrete entitlements, a 'reasonable' decision by the state court must be honored. . . . The Supreme Court of the United States sets the bounds of what is 'reasonable'; a state decision within those limits must be respected—not because it is right, or because federal courts must abandon their independent decisionmaking, but because the grave remedy of upsetting a judgment entered by another judicial system after full litigation is reserved for grave occasions. That is the principal change effected by § 2254(d)(1)."

Following those guidelines, the court held that the state courts' interpretation of the Confrontation Clause was correct and upheld the denial of the petition. Three judges dissented from this conclusion, and two of these judges also dissented on the Article III issue.

Lindh v. Murphy, 96 F.3d 856, 861–77 (7th Cir. 1996) (en banc).

Habeas & Prison Litigation Case Law Update is distributed periodically by the Federal Judicial Center to inform judges and other judicial branch personnel of selected federal court decisions interpreting the 1996 federal legislation on habeas petitions and prison litigation. Any analyses or interpretations of the case law are those of the Center staff who prepare the summaries.

Second Circuit holds that AEDPA would not be applied to § 2255 appeal that was fully briefed before April 24, 1996. Petitioner's "notice of appeal was filed in January 1996, and there is some question as to whether the April 24, 1996, requirement [to obtain a certificate of appealability] is to be applied retroactively to appeals pending on that date. In *Reyes v. Keane*, 90 F.3d 676, 680 (2d Cir. 1996), this Court held that the 'substantial showing' requirement imposed by § 2253 as amended is retroactively applicable to appeals from denials of habeas corpus petitions brought under 28 U.S.C. § 2254. The decision in *Reyes* does not answer the retroactivity question with regard to a § 2255 petitioner, however, for the *Reyes* opinion noted that the amendment requiring a certificate of appealability was essentially a procedural amendment, given that prior to the April 1996 amendments a § 2254 petitioner was required to obtain a substantively similar 'certificate of probable cause' in order to appeal; in contrast, no such requirement for a certificate had been imposed on a § 2255 petitioner prior to the amendments."

"In the present case, we note that not only was Thye's appeal pending on the effective date of the amendments, but that both sides had already filed their briefs addressing the merits. Even assuming that § 2253's new requirement were to be held applicable to some § 2255 appeals filed before the effective date of the amendments, we doubt that Congress meant the amendment to apply to appeals that were fully briefed prior to that date. . . . We conclude that the amendments should not be applied retroactively to appeals that were already fully briefed."

Thye v. United States, 96 F.3d 635, 636–37 (2d Cir. 1996) (per curiam).

Magistrate judge rules that AEDPA's noncapital provisions may be applied retroactively. Petitioner sought habeas relief from his state court conviction and sentence of death. The Antiterrorism and Effective Death Penalty Act of 1996 was signed into law "between sessions of his evidentiary hearing in this case." The court interrupted the proceedings to determine whether the Act should be applied to the case. The court first concluded that the Act's special habeas procedures for capital cases could not be applied because "Ohio's procedure for providing counsel in post-conviction proceedings plainly does not comply with 28 U.S.C. § 2261(b) and (c)." However, following the test for retroactive application of statutes in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the court held that the noncapital amendments to 28 U.S.C. §2254 could be applied.

"The Court acknowledges that applying the Act to pending cases will disturb some 'settled expectations,' particularly in the capital habeas corpus bar, but those are not settled expectations of the sort *Landgraf* intended should be protected. . . . Because those portions of the Act amending [§ 2254] change habeas corpus procedure and standards for review of state court decisions, this Court concludes they are not retroactive in the sense forbidden by the presumption against statutory retroactivity adumbrated in *Landgraf*. Therefore it is appropriate to apply them to this and other habeas corpus cases pending on the Act's effective date."

"New § 2254(e) modifies the standards for granting an evidentiary hearing and for evaluating state court fact determinations. It modifies old § 2254(d) by eliminating the exceptions to the presumption of correctness of state court fact finding . . . . Operating on the principle of applying the law in effect at the time of the decision, this Court will leave standing its prior decision to grant an evidentiary hearing in this case. However, applying the same principle, the Court will apply the new statute in evaluating the state court determinations of fact. That is, they will be presumed to be correct unless clearly erroneous, that is, unless Petitioner establishes they are incorrect by clear and convincing evidence."

Zuern v. Tate, No. C-1-92-771 (S.D. Ohio Aug. 7, 1996) (Merz, Mag. J.).

Special Procedures in Capital Cases

Fourth Circuit holds that AEDPA's special habeas procedures for capital cases cannot be applied to Virginia defendant whose final state habeas petition was denied before July 1, 1992. The court had to determine whether it would analyze a capital defendant's habeas petition under § 107(a) of the AEDPA (*see* 28 U.S.C. §§ 2261–2266). Although the petition "was filed well before the Act took effect" on April 24, 1996, § 107(a) is to be applied retroactively, *see* AEDPA § 107(c), if the state meets the Act's requirements for "the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners" in capital cases.

The court concluded that § 107 could not be applied here. "Since July 1, 1992, Virginia has required appointment of competent counsel to represent indigent petitioners in its post-conviction proceedings. . . . Although the parties dispute whether Virginia's system satisfies § 107's requirements, this dispute is irrelevant because, whatever the merits of the Virginia system, it was not set up until after Bennett's Virginia habeas petition had been finally denied by the Virginia Supreme Court. Accordingly, we conclude that Virginia's disposition of Bennett's petition should not receive the added deference afforded by the Act, because, by the time it denied his petition, Virginia had not yet set up the appointment procedures the Act requires as the price of deference." Because the court denied the petition under pre-Act habeas law, it did not determine whether to apply other sections of the Act.

Bennett v. Angelone, 92 F.3d 1336, 1341–43 (4th Cir. 1996). *See also Banks v. Horn*, No. 4:CV-96-0294 (M.D. Pa. Aug. 30, 1996) (McClure, J.) (holding that § 107 could not be applied to capital petitioner "since Pennsylvania has not established a 'unitary review procedure' as defined in [28 U.S.C. § 2265]. . . . Pennsylvania's procedure for unitary review in capital cases . . . does not apply for present purposes as it was made applicable to cases in which the death penalty was imposed after January 1, 1996, . . . well after Banks' sentence was

imposed."); *Zuern v. Tate*, No. C-1-92-771 (S.D. Ohio Aug. 7, 1996) (Merz, Mag. J.) (concluding that "Ohio's procedure for providing counsel in post-conviction proceedings plainly does not comply with 28 U.S.C. § 2261(b) and (c)").

Second or Successive Petitions

Second Circuit sets forth procedure to follow when second or successive petition is filed in district court instead of appellate court. Petitioner attempted to file a second motion for relief under 28 U.S.C. § 2255 in the district court on June 17, 1996. The court concluded that the motion should have been filed in the appellate court because § 2255, as amended, now provides that a "second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals." The court used 28 U.S.C. § 1631 to "transfer this matter to the United States Court of Appeals for the Second Circuit in the interest of justice." The appellate court held that the transfer was valid and then denied the motion, finding that it did "not even arguably satisfy the criteria for relief specified in §§ 2255 and 2244(b)(2)."

The court used the occasion to "establish the procedure to be followed when, as occurred in this case, a second or successive petition for habeas corpus by a state prisoner, or § 2255 motion by a federal prisoner, is filed in a district court in this circuit unaccompanied by the required § 2244(b)(3) motion." Because of the delays and confusion that improper filings could cause, "[i]t is important that this situation be addressed by a clear and comprehensive procedure throughout the Second Circuit. We accordingly rule that when a second or successive petition for habeas corpus relief or § 2255 motion is filed in a district court without the authorization by this Court that is mandated by § 2244(b)(3), the district court should transfer the petition or motion to this Court in the interest of justice pursuant to § 1631, as was done in this case."

"The Clerk of this Court will then send a notice to the petitioner or movant that a motion must be filed pursuant to § 2244(b)(3). The notice will explain the substantive requirements that such a motion must satisfy, and advise the petitioner or movant that: (1) the motion pursuant to § 2244(b)(3) must be filed in this Court within forty-five days of the date of the Clerk's notice; and (2) if the motion is not so filed, an order will be entered denying authorization for the underlying petition for habeas corpus or § 2255 motion to be filed in district court."

"In accordance with § 1631, the petition for habeas corpus or § 2255 motion will be deemed filed, for purposes of the one-year limitation periods established by §§ 2244(d) and 2255, on the date of its initial filing in the district court. The thirty-day period specified by § 2244(b)(3)(D) for this Court to grant or deny authorization for a district court filing will commence upon 'the filing of the motion,' § 2244(b)(3)(D), in response to the previously described notice by the Clerk of this Court."

The court added that "no filing fee will be required in connection with § 2244(b)(3) motions. . . . Section 2244(b)(3) motions are analogous to such 'gatekeeping' motions as motions for permission to appeal under 28 U.S.C. § 1292(b) or *id.* § 636(c)(5), or motions for leave to appeal filed by sanctioned litigants, for which no filing fee is required. Because the permission sought is to maintain an action in the district court, in the event that a § 2244(b)(3) motion is granted, the filing fee should be assessed by the district court. In the case of a petition for habeas corpus, the fee is $5.00. *See* 28 U.S.C. § 1914(a). No fee is charged for a § 2255 motion."

Liriano v. United States, 95 F.3d 119, 120–23 (2d Cir. 1996) (per curiam) (as amended Oct. 7, 1996).

Certificate of Appealability

District court holds that it does not have authority to issue certificate of appealability for § 2255 appeal. Petitioner filed a motion for post-conviction relief under 28 U.S.C. § 2255 on April 8, 1996, and the court denied the motion on July 16. Defendant filed a notice of appeal on July 26, and the court construed the notice of appeal as a request for a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1)(B) and Fed. R. App. P. 22(b), as amended by the AEDPA.

The court first determined that, although defendant's original § 2255 motion was filed before the effective date of the AEDPA, it could apply amended § 2253(c) and Rule 22 to the appeal. Defendant may "receive a certificate of appealability allowing him to raise any issues for which there has been a 'substantial showing of the denial of a constitutional right.' 28 U.S.C. § 2253(c)(2). The only right affected would be Mr. Cota-Loaiza's ability to appeal the denial of his § 2255 motion on grounds that would not justify the issuance of a certificate of appealability, namely, grounds for which there has not been a 'substantial showing of the denial of a constitutional right,' or, in other words, grounds that have no merit. Accordingly, the rights Mr. Cota-Loaiza would lose if 28 U.S.C. § 2253(c)(1)(B) were applied are of little or no value. Second, before Mr. Cota-Loaiza filed his notice of appeal, any right he may have had to appeal the denial of his § 2255 motion was at best inchoate and contingent. Furthermore, because Mr. Cota-Loaiza did not initiate his appeal until after the effective date of the Act, any vested, concrete appellate rights he acquired by initiating his appeal should be governed by the law as it existed on July 26, 1996, the date he filed his notice of appeal, including the certificate of appealability requirement in 28 U.S.C. § 2253(c)(1)(B)."

The court then concluded that it had to dismiss the appeal because, despite contrary indications in Rule 22(b), it had no authority under the AEDPA to issue a certificate of appealability for a § 2255 appeal. "[I]t is quite clear that district courts lack the authority under 28 U.S.C. § 2253(c)(1), added by § 102 of the Act, to grant or deny certificates of appealability . . . . However, the very next section of the very same Act, § 103, which amends Fed. R. App. P. 22(b), clearly contemplates that the district courts may issue certificates of appealability, at least in some cases." The court resolved the conflict by holding that Rule 22 "applies only to proceedings by state prisoners under 28 U.S.C. § 2254, and that it does not give

the district courts authority to grant or deny certificates of appealability in proceedings under 28 U.S.C. § 2255. Only the title of the rule speaks of proceedings under § 2255; there is no mention of such proceedings in the text. To the contrary, Fed. R. App. P. 22(b) begins by stating the remainder of the rule applies '[i]n a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . . .'" Therefore, the court "den[ied] Mr. Cota-Loaiza's request for a certificate of appealability as moot, on the ground this court lacks authority to grant his request. Should Mr. Cota-Loaiza wish to proceed further with his appeal, he should file a request for a certificate of appealability with the Tenth Circuit."

U.S. v. Cota-Loaiza, 936 F. Supp. 756, 759–61 (D. Colo. 1996). *Cf. U.S. v. Campos*, 932 F. Supp. 1034, 1038 (W.D. Tenn. 1996) (in appeal of denial of § 2255 motion, resolving conflict between statute and rule by holding that defendant's claim "is clearly devoid of merit" and "to the extent that a district court has the authority to rule on the issuance of a certificate of appealability under amended 28 U.S.C. § 2253, that certificate is DENIED"); *Parker v. Norris*, 929 F. Supp. 1190, 1192–93 (E.D. Ark. 1996) (court held that it was precluded by § 2253(c)(1)(A) from issuing certificate of appealability for § 2254 petition despite Rule 22(b)). *But see Houchin v. Zavares*, 924 F. Supp. 115, 117 (D. Colo. 1996) (district court has authority under Rule 22(b) to issue certificate); *Harkins v. Roberts*, 935 F. Supp. 871, 872–73 (S.D. 1996) (court denied request for certificate after "proceed[ing] under the assumption that it has the ability to grant a certificate of appealability").

PRISON LITIGATION

Proceedings In Forma Pauperis

Second Circuit rules that PLRA fee requirements do not apply to released prisoners. The Second Circuit considered whether the filing fee requirements of the Prison Litigation Reform Act continue to apply after a prisoner has been released. The court construed two provisions of the Act [28 U.S.C. § 1915(b)(1) & (2)] that it found to be facially inconsistent. "On the one hand, the statute broadly states that a prisoner who files an appeal 'shall be required' to pay filing fees, and McGann was a prisoner when he filed his appeal. On the other hand, the amounts required to be paid are to be calculated as percentages of the balances of, or deposits into, the prisoner's prison account and are to be debited from that account, and now that McGann is no longer a prisoner, there is no prison account from which to calculate and debit the required payments." The court decided that "the detailed mechanism [Congress] created for implementing this obligation by debiting prison accounts demonstrates that Congress expected the new payment requirement to apply to a prisoner who remains incarcerated." The Second Circuit pointed out that if the payment obligation continued after release, a released prisoner would have to pay the entire balance of the fee in a single payment because he or she would not have a prison account that could be debited. It is not likely, the court said, that Congress intended to impose a more onerous requirement on released prisoners than on those who remain incarcerated.

McGann v. Commissioner, 96 F.3d 28, 29–30 (2d Cir. 1996).

Second Circuit holds that the PLRA is not applicable to appeals submitted for decision before the Act's effective date. Before the PLRA became law, the plaintiff's appeal had been fully briefed, considered by the Second Circuit, and deemed submitted for decision. In light of its recent ruling in *Covino v. Reopel*, 89 F.3d 105 (2d Cir. 1996), that the PLRA's fee provisions apply to prisoners who filed notices of appeal before the Act's effective date, the court addressed whether the appellant "must comply with the provisions of the PLRA, which, if applicable, require dismissal of this appeal unless Ramsey submits an appropriate authorization form to this court. *Leonard v. Lacy*, 88 F.3d 181 (2d Cir. 1996)." It held that the appellant did not have to comply. "[W]e suggested in *Covino* that the fee provisions might not apply in cases in which the 'appeal reached the stage where judicial resources had already been expended, or perhaps even if the appellant himself could demonstrate that he had expended significant time and effort by preparing an appellate brief.'" The congressional purpose of deterring or reducing the burden of frivolous prisoner litigation would not be furthered by imposing the PLRA fee requirements on appellant in this case.

Ramsey v. Coughlin, 94 F.3d 71, 73 (2d Cir. 1996). *See also Duamutef v. O'Keefe*, No. 96-2238 (2d Cir. Oct. 18, 1996) (PLRA filing fee requirement does not apply to appeal fully briefed before the court decided *Covino v. Reopel*, *supra*).

Ninth Circuit holds that PLRA dismissal requirement applies to appeals pending on the date of enactment. Before the PLRA was enacted, the district court sua sponte dismissed plaintiff's § 1983 complaint as frivolous. One day before the Act took effect, the plaintiff filed a notice of appeal, and the district court granted him leave to proceed on appeal in forma pauperis. As amended by the PLRA, 28 U.S.C. § 1915(e)(2) requires a court to dismiss a case sua sponte at any time it determines the case is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief from a defendant immune from such relief. The Ninth Circuit determined that this provision "is a procedural rule which

raises no retroactivity concerns under *Landgraf*." Consequently, it "applies to all appeals pending on or after April 26, 1996, regardless of when the complaint or notice of appeal was filed." Under § 1915(e)(2), it dismissed the appeal for failure to state a claim upon which relief may be granted.

Marks v. Solcum, D.C. No. CV-96-00023-RMB (9th Cir. Oct. 18, 1996) (per curiam).

Seventh Circuit rules that neither mandamus petitions in criminal proceedings nor habeas corpus petitions are subject to PLRA fee provisions; also holds that initial partial fee must be paid before the court will consider appeal's merits. In several cases that were consolidated for appeal, the Seventh Circuit considered various questions of interpretation under the PLRA. It held:

(1) Whether a petition for mandamus falls within the scope of the PLRA cannot be answered "in gross." A mandamus action against a judge presiding in a petitioner's civil case would fall under the Act, but a mandamus petition in a criminal proceeding would not because it is not a civil action within the meaning of 28 U.S.C. § 1915(b)(1). "It is a procedural step in the criminal litigation, like an interlocutory or final appeal or a civil contempt proceeding against a witness. . . . [I]t is apparent that the word 'appeal' [in the statute] means the appeal in a civil action. A different conclusion would create the anomaly that a prisoner who had brought three or more groundless civil suits while incarcerated could not seek mandamus in a criminal action against him without prepaying the docket fee." The court cited both *In re Nagy*, 89 F.3d 115 (2d Cir. 1996), and *Green v. Nottingham*, 90 F.3d 415 (10th Cir. 1996), in support of its conclusion.

(2) Although habeas corpus actions and § 2255 proceedings "are technically civil proceedings and so come within the literal scope of the Act," the PLRA does not apply to them, as the Second Circuit held in *Reyes v. Keane*, 90 F.3d 676 (2d Cir. 1996). The simultaneously enacted Antiterrorism and Effective Death Penalty Act deals comprehensively with habeas corpus. Moreover, habeas corpus "is more accurately regarded as being sui generis . . . than as being either civil or criminal," and prisoner civil rights relief, which the PLRA addresses, is analytically very different from postconviction relief. "By virtue of the new 28 U.S.C. § 1915(g), the application of the [Act] to habeas corpus would block access to any prisoner who had filed three groundless civil suits and was unable to pay the full appellate filing fee. . . . This result would be contrary to a long tradition of ready access of prisoners to federal habeas corpus, as distinct from their access to tort remedies."

(3) As the Second Circuit held in *Leonard v. Lacy*, 88 F.3d 181 (2d Cir. 1996), before the court will consider the merits of even a frivolous case, prisoner-appellants must pay the initial partial fee required by the PLRA. "To reach the merits of frivolous appeals without insisting on the initial payment would produce the paradox that frivolous appellants would get a decision on the merits without charge while appellants who had colorable but losing cases would get (the same) decision on the merits only after paying (assuming they have a means of paying, 28 U.S.C. § 1915(b)(4))."

Martin v. United States, 96 F.3d 853, 854–56 (7th Cir. 1996).

Seventh Circuit resolves several issues regarding PLRA fee provisions. In ruling on five cases consolidated for decision, the Seventh Circuit said that this opinion, together with *Martin v. United States*, *supra*, and *Abdul-Wadood v. Nathan*, 91 F.3d 1023 (7th Cir. 1996), resolved "most of the pressing questions this court has encountered in beginning to implement the Act." The court ruled that a federal prisoner's petition under 28 U.S.C. § 2241 challenging his sentence is not a "civil action" subject to the PLRA "[f]or the reasons *Martin* gave in holding that petitions under §§ 2254 and 2255 are not. . . . It is functionally a stage in the criminal proceeding; indeed, this petition is simply a § 2255 action in the wrong venue." However, a "proper § 2241 action, concerning conditions of confinement . . . or other matters that occur at the prison" would fall under the Act. The appellate court also cited its decision in *Martin* in holding that a jurisdictionally untimely appeal in the second case should be handled in the same way as a frivolous appeal; that is, appellate fees must be assessed and paid even if the appeal is dismissed for want of jurisdiction.

In the third case, the Seventh Circuit agreed with *Covino v. Reopel*, 89 F.3d 105 (2d Cir. 1996), that the plaintiff's "carryover IFP status does not affect the obligation to pay appellate fees." The court said "'bringing' a civil action and 'filing' an appeal" are the dispositive events, and since the plaintiff filed his appeal after April 26, he is required to pay the filing fees. It further emphasized that "[n]ow that payment of the filing fees is obligatory, we will take nonpayment (for any reason other than destitution) as a voluntary relinquishment of the right to file future suits in forma pauperis—just as if the prisoner had a history of frivolous litigation, and § 1915(g) required prepayment." It directed the district court clerk to "keep tabs of the payment history . . . and pass information about nonpayment to the clerk of this court so that judges throughout the circuit may be informed and respond appropriately."

The plaintiff in the fourth case filed a motion with the Seventh Circuit on March 4, 1996, asking it to certify that his appeal was not frivolous so that he could proceed IFP. Because the motion was pending when the PLRA took effect, the court of appeals considered whether appellate fees had to be assessed against the plaintiff before the motion could be addressed. "Without pretending that this is the only possible reading of the Act, we think that the best understanding is that an appeal lodged before April 26, but ineffective because the appellant lacks IFP status, does not become 'filed' until the motion has been acted on, one way or the other. *Martin* held that for appeals filed after April 25, payment (at least assessment) must precede any determination of frivolousness; for appeals lodged before April 26, however, the sequence is the reverse. And to prevent the assessment of a fee against a litigant who may not have anticipated this possibility, we will

give Thurman (and any similarly situated litigants) notice and an opportunity to dismiss the appeal before taking the step that locks in the obligation to pay." The fifth case was remanded to the district court for a determination of when the appeal was filed.

Thurman v. Gramley, 97 F.3d 185, 186–89 (7th Cir. 1996).

Third Circuit agrees with Second and Seventh Circuits that habeas proceedings are not covered by the PLRA's filing fee requirements. Acknowledging that habeas petitions "fit within the literal scope of the PLRA," the Third Circuit nevertheless joined the Seventh Circuit in *Martin v. United States*, *supra*, and the Second Circuit in *Reyes v. Keane*, 90 F.3d 676 (2d Cir. 1996), in holding that "Congress did not intend to include habeas proceedings in the category of 'civil action' for the purposes of §1915(b)." Habeas corpus cases are hybrid in nature. Also, Congress could have reformed "the in forma pauperis status of habeas petitioners" in the Antiterrorism and Effective Death Penalty Act, which it passed two days before the PLRA, but it did not do so. Neither is it conclusive that Congress expressly excluded habeas proceedings from the section of the PLRA that applies to "civil action[s] with respect to prison conditions," 18 U.S.C. § 3626. Section 3626 "limits the power of the federal courts to issue orders of relief from prison conditions by requiring that a 'prison release order' be issued by a panel of three judges," relief that is "akin to that provided by a writ of habeas corpus. . . . [I]n order to distinguish between prison release orders and habeas proceedings, Congress felt compelled to exclude expressly such proceedings from the scope" of that section.

The Third Circuit agreed with the Second Circuit in *Reyes*, *supra*, that "where a claim is not analogous to [a §1983 suit complaining about prison conditions], the PLRA should be applied with caution." It is telling, the court found, that Congress established an elaborate installment payment plan in the PLRA, "yet did not increase the $5 filing fee for a habeas corpus petition. . . . Congress surely did not intend for the installment plan . . . to apply to habeas corpus actions merely to assure deferred monthly payments of a $5.00 fee." Finally, the court of appeals noted that, like the Seventh Circuit in *Martin*, *supra*, it could not countenance prohibiting prisoners "who had filed three groundless civil suits from seeking habeas relief from unlawful imprisonment," as a literal reading of the PLRA would require.

Santana v. United States, No. 96-5276 (3d Cir. Oct. 18, 1996) (Becker, J.).

District court declares unconstitutional the PLRA's ban on IFP filings after three dismissals. On May 8, 1996, the court dismissed the plaintiff's complaint alleging that he had been denied his First Amendment right to participate in Jewish services and other practices of the Jewish faith. It found that he had filed at least three actions that were dismissed as frivolous before the PLRA took effect and that his complaint did not "meet the 'imminent danger of serious physical injury' standard" required by 28 U.S.C. §1915(g). At the same time, the court granted preliminary injunctive relief to other inmates who had filed similar claims before enactment of the PLRA. In a motion to alter or amend the court's judgment, the plaintiff challenged the constitutionality of §1915(g). The court rejected the plaintiff's argument that the statute has an impermissible retroactive effect, agreeing with the analysis in *Green v. Nottingham*, 90 F.3d 415 (10th Cir. 1996), that the statute is a procedural rule that "does not alter the merits of a prisoner's action or the legal consequences of the previously dismissed actions." In addition, "§1915(g) does not impair any rights a prisoner had before the law's enactment because IFP status under the former version of the law was available at a judge's discretion." Also, the statute "does not require a prisoner to perform 'new duties with respect to transactions already completed.'"

However, the district court found the plaintiff's contention that "§1915(g) violates the equal protection guarantee of the Fifth Amendment" more persuasive. "This section of the PLRA treats this class of indigent inmates differently from the similarly situated class of prisoners with three frivolous dismissals who do not seek to proceed IFP." Section 1915(g) burdens the affected inmates' fundamental constitutional right of access to the courts by restricting their ability "to file in federal court constitutional claims other than those involving imminent serious physical injury." The court declared meritless the defendants' (and intervenor United States') contentions that the inmates' access to the courts was not substantially burdened because the three-dismissal provision only denies access to a narrow class of inmates and does not deny access in criminal cases or habeas proceedings; that inmates with three dismissals can still file actions if they pay the fee like other litigants; that the inmates can use the prisoner grievance system; and that the inmates do not have an unconditional right to proceed IFP and the three-dismissal provision is similar to the federal courts' inherent power to limit inmates' abuse of the courts.

Because the case involved "a challenge to a federal statute affecting prisoner litigation in federal courts and addressing other related federal court administration and legal issues" rather than issues concerning prison administration and security, the court ruled that "the usual strict scrutiny rule for fundamental rights should apply." The statute did not meet that standard. "Even assuming the interest in deterring inmates from filing frivolous lawsuits is compelling, §1915(g) would stop only indigent inmates with three previous frivolous dismissals from filing new civil actions. Those inmates who also have filed three or more frivolous actions in the past, but have enough money to pay filing fees, can file as many new lawsuits as they can afford. . . . Stopping all further lawsuits under §1915(g), frivolous or not, by indigent inmates with three dismissals unless imminent serious physical injury is involved would bar many other important and arguably meritorious constitutional claims by only those inmates." The court held that "the indigency classification in 28 U.S.C. §1915(g) is not necessary or narrowly tailored to achieve a compelling government interest, and therefore is unconstitu-

tional under the equal protection component of the Fifth Amendment." It granted the plaintiff's motion to alter or amend the judgment.

Lyon v. Del Vande Krol, No. 4-96-CV-10356 (S.D. Iowa Sept. 9, 1986) (Longstaff, J.).

District court concludes that fee requirements of PLRA do not apply to a § 2255 motion. The petitioner moved for leave to proceed in forma pauperis on his 28 U.S.C. § 2255 motion. The district court noted that no filing fee is required for such motions and that the PLRA did not impose such a filing fee. "In contrast to a § 2254 proceeding, a § 2255 motion is just that: a *motion* in a pre-existing criminal case, not a new, civil action." The petitioner's IFP request was denied as moot.

U. S. v. Bazemore, 929 F. Supp. 1567, 1568–69 (S.D. Ga. 1996). *Accord U. S. v. Rios*, CRIM. 92-153-04 (E.D. Pa. Sept. 3, 1996) (Kelly, J.) (unpublished).

District court holds that bar to IFP filings after three previous dismissals applies retroactively. The district court cited *Green v. Nottingham*, 90 F.3d 415 (10th Cir. 1996), in holding that 28 U.S.C. § 1915(g) "requires that this court consider prisoner actions dismissed prior to, as well as after, the PLRA's enactment." Because the plaintiff had had three or more prior dismissals and was not in imminent danger of serious physical injury, his IFP request was denied and his civil rights complaint dismissed "without prejudice to bringing it in a paid complaint."

Harris v. Guichard, No. C96-3031-VRM (N.D. Cal. Sept. 5, 1996) (Walker, J.) (unpublished).

Remedies for Prison Conditions

District court concludes that pre-PLRA order setting special master's compensation does not constitute "prospective relief" under the Act, and any ambiguity in the term "relief" should be resolved against retrospective application. The district court considered whether, pursuant to 18 U.S.C. § 3626(f)(4), it must modify its January 23, 1995, order of reference setting the special master's compensation at $125 per hour and requiring defendants to bear the expense. It noted that in a separate section of the statute, Congress expressly directed that § 3626 apply retrospectively, "but only with respect to 'all prospective relief' that had been previously granted." Therefore, the court had to determine whether its previous order granted prospective relief. The court agreed with the decision in *Coleman v. Wilson*, 933 F. Supp. 954 (E.D. Cal. 1996), that the term "relief" should be construed "in light of its traditional legal meaning." It found that its previous order did not provide relief "as that term is traditionally understood in a legal context." Even the appointment of a special master itself did not constitute relief because a special master "is simply a device utilized by the Court to assist in the formulation of appropriate relief or to monitor relief that is ordered." The district court found further support for its conclusion in the structure of the Act, which has a separate section dealing with special masters.

Even assuming *arguendo* that the term "relief" is ambiguous, the court said "it is appropriate to adopt that interpretation which avoids retroactive effects." It concluded that if § 3626(f)(4) were applied to the order setting special master compensation, it would operate retroactively. The basic inquiry, as established in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), is "whether the statute in question . . . 'attaches new legal consequence to [prior] events' . . . or results in unfair new burdens." The special master had accepted the assignment in January 1995 on the representation that he would be paid $125 per hour, and he had devoted 18 months to the case. "The gross unfairness of depriving the Special Master—ex post facto—of the benefit of the Court's representation and order, and slashing his compensation 40 percent many months into the remedial process is self-evident." Moreover, shifting the cost of paying the special master from the defendants to the judiciary, as § 3626(f)(4) requires, would have retroactive effect. "[T]he provision fundamentally alters the legal consequences—for the judiciary—of this Court's prior finding of liability." The court rejected the defendants' argument that judicial interests are not cognizable for the purposes of determining a statute's retroactivity, noting that "this appears to be the first time that Congress has imposed what is normally considered a responsibility of the losing party upon the judiciary."

Madrid v. Gomez, No. C90-3094-TEH (N.D. Cal. Aug. 23, 1996) (Henderson, J.).

District court holds that proposed consent decree complies with requirements of the PLRA. A class action brought on behalf of all past, present, and future prisoners in the St. Joseph County Jail was filed on February 15, 1994, challenging conditions of confinement, including alleged overcrowding, at the jail. After extensive settlement negotiations, the parties reached a comprehensive settlement agreement, including a proposed consent decree, which they filed with the court on June 21, 1996. On July 12, 1996, the court conducted a fairness hearing regarding the proposed settlement. On July 23, 1996, the St. Joseph County Council approved the consent decree. Before approving and confirming the report and recommendation of the magistrate judge in the case, the district judge found that the proposed consent decree was enforceable under the PLRA. The court reviewed the proposed decree in light of 18 U.S.C. § 3626(a)(1), which prohibits a court from approving prospective relief unless it finds "that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." The law further requires the court to determine that the relief will not have an "adverse impact on public safety or the operation of a criminal justice system." The proposed decree met all of these standards, the court said, and it "will not place this court in the position of an architect, accountant, or

appropriating body for the Jail. Instead, the proposed decree limits the court's role in enforcing its terms."

Winston v. Speybroeck, No. 3:94CV0150AS (N.D. Ind. Aug. 2, 1996) (Sharp, J.) (unpublished).

Suits by Prisoners

Eighth Circuit rules that the PLRA's attorneys' fees provision should not be applied retroactively. A class of inmates in the Nebraska State Penitentiary challenged the conditions of their confinement under 42 U.S.C. § 1983 and won an injunction in 1992. Under 42 U.S.C. § 1988, the district court awarded attorneys' fees to the plaintiffs as prevailing parties. The defendants challenged the attorneys' fees award on three grounds, including restrictions enacted by the PLRA [42 U.S.C. § 1997e(d)] on awarding fees pursuant to § 1988 in prisoner suits. Since the PLRA was enacted well after both the liability and attorneys' fees determinations were made, the Eighth Circuit had to decide whether the attorneys' fees restrictions should be applied retroactively.

Relying on *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the court concluded that "the plaintiffs and their attorneys have proceeded from the outset under the assumption that Section 1988 would apply to this case. They have litigated for literally years under that assumption. . . . It would be 'manifestly unjust' to upset those reasonable expectations and impose new guidelines at this late date." Moreover, the appellate court found evidence that Congress did not intend for this provision of the Act to be applied retroactively. The section of the PLRA dealing with prospective relief [18 U.S.C. § 3626] specifically states that it will apply to relief "granted or approved before, on, or after the date of enactment of this title." By contrast, the section of the Act dealing with suits by prisoners [42 U.S.C. § 1997e], "is silent on retroactive application. Congress saw fit to tell us which part of the Act was to be retroactively applied."

Jensen v. Clarke, 94 F.3d 1191, 1202–03 (8th Cir. 1996). *Accord Cooper v. Casey*, 97 F.3d 914, 921 (7th Cir. 1996) (To give the PLRA attorneys' fees provision retroactive effect "would attach (without clear indication of congressional intent to do so) new legal consequences to completed conduct").

District court holds that the PLRA bars recovery of damages for mental or emotional injury in the absence of physical injury. Plaintiff filed a complaint claiming that the conditions of his confinement violated his constitutional rights in various ways. The district court found that even assuming the plaintiff had suffered mental or emotional injuries for which the defendants had personal liability, he could not recover damages for those injuries without demonstrating that he had also suffered physical injury [42 U.S.C. § 1997e(e)]. The plaintiff had not presented any legally sufficient evidence at trial to establish physical injury.

Markley v. DeBruyn, No. 3:94-CV-701RM (N.D. Ind. Aug. 19, 1996) (Miller, J.) (unpublished).

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HABEAS CORPUS

Certificate of Appealability

En banc Eleventh Circuit holds that certificate of appealability requirements apply to cases pending on, but appealed after, April 24, 1996, and that district courts have authority to issue the certificate. In two cases originally filed before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, one involving a 28 U.S.C. § 2254 petition and the other a § 2255 petition, the district courts denied relief on or after April 24, 1996. Both petitioners appealed and, despite expressing doubts about their authority to do so, each district court issued a certificate of appealability (COA) under amended § 2253(c). The Eleventh Circuit granted hearing en banc to resolve whether district courts are authorized to issue a COA under amended § 2253(c) and Fed. R. Crim. P. 22(b) in § 2254 and § 2255 cases.

The court first concluded that "the AEDPA's certificate of appealability provisions, §§ 102 and 103 of the Act, apply to pending § 2254 cases . . . where no application for a certificate of probable cause to appeal was filed before the effective date of the Act, and to pending § 2255 cases . . . where no notice of appeal was filed before that effective date." Following the analysis set forth in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), for deciding whether to apply a new law to an ongoing case, the court concluded that the changes to § 2253 and Rule 22 "may be accurately characterized as rules of procedure. They might also be characterized as changes in the law affecting access to and the propriety of prospective relief. Applying such changes to pending cases is not giving them retroactive effect under the *Landgraf* judicial default rules." See also the summary of *Herrera* below.

In deciding whether § 2253(c)(1) authorizes district judges to issue a COA, the court stated that "[t]he crucial phrase is 'circuit justice or judge.' Unfortunately, that phrase is ambiguous, because the adjective 'circuit' can be read in either of two ways. . . . If all we had to consider was the language of § 2253(c), as amended, we might be hard put to choose between the two plausible interpretations." However, "[t]he same subject is also addressed in § 103 of the AEDPA, which amended Rule 22(b)" and provides in part that in a § 2254 case "an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c)." "Plainly, the language of that provision authorizes district judges to issue certificates of appealability in § 2254 cases," and the court rejected the state's argument that the reference back to § 2253(c) diminished "the plain language of the rule."

The court was thus left with "a choice. On the one hand, we could interpret the ambiguous phrase 'circuit justice or judge' in § 2253(c) to mean 'circuit justice or circuit judge,' which will conflict with and render meaningless much of the plain language of Rule 22(b). . . . On the other hand, we could interpret the ambiguous phrase in § 2253(c) to mean a 'circuit justice' or a 'judge,' which would include district judges as well as circuit judges. That interpretation would reconcile the statutory provision with the rule and give effect to each word of both provisions. . . . We . . . hold that under 28 U.S.C. § 2253(c), as amended, and Federal Rule of Appellate Procedure 22(b), as amended, district court judges are authorized to issue certificates of appealability."

Hunter v. United States, 101 F.3d 1565, 1569–76 (11th Cir. 1996) (en banc). *But see United States v. Johnson*, 940 F. Supp. 167, 171–72 (W.D. Tenn. 1996) (concluding that "the statute is clear" and does not authorize district court to issue COA in a § 2255 case—"It would require a strained interpretation to avoid application of the word 'circuit' to both justice and judge in section 2253. District courts accordingly lack the authority to issue certificates of appealability in section 2255 cases.").

Seventh Circuit holds that certificate of appealability may be required for § 2254, but not § 2255, motions filed before April 24, 1996. In two cases consolidated for appeal, the court had to determine whether the new requirement in § 2253(c) for a certificate of appealability (COA) should be applied when the appeal from the district court opinion came before April 24, 1996, when the AEDPA took effect. One petitioner challenged his federal sentence under 28 U.S.C. § 2255, had the petition dismissed in district court, and filed his appeal March 29, 1996. On its own initiative, the district court declined on July 5 to issue a COA. The second petitioner challenged his state conviction under § 2254, which was decided against him and appealed before April 24, 1996. That district court declined to issue a certificate of probable cause (CPC), which was required for § 2254 appeals before AEDPA.

In the first case, the appellate court held "that a certificate of appealability is unnecessary for § 2255 cases in which the

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notice of appeal preceded April 24. . . . [A]lthough the [AEDPA] presumptively applies to pending cases, it does not alter the effect of procedural steps completed before its enactment. . . . Until April 24, the procedural step necessary to place a § 2255 case before the court of appeals for decision was the filing of the notice of appeal. We do not read the new statute to call for the dismissal of appeals that were properly filed before its enactment, and we therefore conclude that Herrera's appeal must be resolved on the merits. . . . No § 2255 case appealed before April 24 requires a certificate of appealability, and orders by district courts declining to issue such certificates will be disregarded as irrelevant." The court ordered that a schedule be set for the appeal. *Accord United States v. Lopez*, 100 F.3d 113, 117 (10th Cir. 1996) ("amended §2253(c) should not be applied to a § 2255 appeal filed before the Act's effective date").

The § 2254 appeal, "by contrast, requires a certificate of some kind. Unlike the notice of appeal in a § 2255 case, the notice of appeal in a § 2254 case does not (and, before April 24, did not) complete the steps necessary to place the case on the calendar for decision. The petitioner needed a certificate of probable cause, and when April 24 arrived Green did not have one in hand. A § 2254 case in which a certificate of probable cause was issued before April 24 is just like a § 2255 case in which the appeal was filed before April 24: nothing further is required by the Act. But Green was certificate-less on April 24. Which kind of certificate does he need today? Given . . . that the statutory changes generally regulate future steps in existing cases, we conclude that Green needs a certificate of appealability rather than a certificate of probable cause. . . . The two certificates differ only in scope: a certificate of probable cause places the *case* before the court of appeals, but a certificate of appealability must identify each *issue* meeting the 'substantial showing' standard, see the amended § 2253(c)(3). It is therefore unnecessary to remand Green's case to the district court, which by denying a certificate of probable cause has foreclosed a certificate of appealability as well." *See also Drinkard v. Johnson*, 97 F.3d 751, 756 (5th Cir. 1996) (agreeing that standards for CPC are same as for COA, and treating application for CPC filed but not acted upon before April 24, 1996, as application for COA).

Herrera v. United States, 96 F.3d 1010, 1011–12 (7th Cir. 1996).

Standard of Review

Fifth Circuit applies new standard of review in § 2254(d) to habeas appeal filed before April 24, 1996. In September 1994, petitioner filed an application for a certificate of probable cause (CPC) to appeal his state death sentence after the district court granted summary judgment for the state on his § 2254 motion. The appellate court granted a stay of execution in December 1995, but the appeal was still pending when the AEDPA was enacted. The court concluded that the new standard of review in § 2254(d) should be applied and that petitioner failed to meet that standard.

Following the *Landgraf* analysis, the court stated that "the question is 'whether [the statute] would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.' . . . If we conclude that the statute does not have a retroactive effect, we should apply the new statute in rendering a decision in the case before us." The court first concluded that the change to § 2254(d) "has no plausible connection" to petitioner's crime, and he "cannot argue that the new standards of review attach new legal consequences to that conduct by increasing his liability for that conduct or by imposing new duties on him based on that conduct. . . . This provision instead speaks to the power of the federal courts to grant habeas relief to state prisoners," and as such "is easily classified as procedural in nature." Because petitioner "cannot argue credibly that he would have proceeded any differently during his state post-conviction proceedings had he known at the time of those proceedings that the federal courts would not review claims adjudicated on the merits in the state court proceedings *de novo*, . . . the new standards of review do not have a retroactive effect" and should be applied.

In applying § 2254(d)(1), the court stated that "use of the word 'unreasonable' in formulating this restrictive standard of review implicitly denotes that federal courts must respect all *reasonable* decisions of state courts. Thus, given the statutory language, and in the light of legislative history that unequivocally establishes that Congress meant to enact deferential standards, we hold that an application of law to facts is *unreasonable* only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In other words, we can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists." The court concluded that the state court's decision was not contrary to or an unreasonable application of federal law. (Judge Garza dissented on the standard of review and the conclusion.)

Drinkard v. Johnson, 97 F.3d 751, 764–69 (5th Cir. 1996).

Third Circuit holds that counsel's assistance was ineffective under old and amended standard of review. The federal district court granted a writ of habeas corpus after concluding that petitioner had been denied effective assistance of counsel at his state trial. Previously, the state courts had denied petitioner's claim in post-conviction proceedings, upholding the lower court's findings that counsel had a reasonable trial strategy or, even if the performance had been deficient, it had not deprived petitioner of a fair trial.

After the district court had granted the writ and after the state's appeal was argued in the court of appeals, 28 U.S.C. § 2254 was amended by the AEDPA. Before determining whether to apply the amended statute, the appellate court looked at the standard in effect when the petition was originally filed and held that the state court's conclusions were not reasonable and the writ was properly granted by the district court. Then, without holding whether amended § 2254

should be applied, the court concluded that the same result was warranted under the new standard.

"[W]e are convinced that the record clearly and convincingly shows that [petitioner's] trial counsel was ineffective even if the AEDPA establishes a more deferential standard [of review of state court factual findings]." Under amended § 2254(d)(1), a petition may be granted if the state court's adjudication of the claim "involved an unreasonable application of clearly established Federal law." The appellate court found that petitioner's counsel's performance "was severely deficient and his errors were 'so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment.' . . . As a result of his errors Berryman was deprived of a fair trial. . . . Given that woefully inadequate and deficient performance and the prejudice that performance caused Berryman, we cannot uphold the state court's determination that trial counsel had a reasonable trial strategy. That determination was clearly an unreasonable application of [Supreme Court precedent] to the facts of this case."

Under § 2254(d)(2), the writ may also be granted if the state court decision "was based on an unreasonable determination of the facts" presented in the state court. Section 2254(e)(1) requires that "a determination of a factual issue made by a State court shall be presumed to be correct." The appellate court assumed arguendo that § 2254(e)(1) established a more deferential standard of review. "However, even applying the most conceivably deferential standard to the factual determination of the state court that trial counsel had a strategy, we conclude that that determination was unreasonable in light of the evidence presented in the state court. . . . Counsel's own testimony, and the record of his actions at the trial, plainly demonstrate that the state court's factual determination that trial counsel had a strategy was an unreasonable determination in light of the evidence presented in the state court proceedings." The court affirmed the order granting the writ of habeas corpus.

Berryman v. Morton, 100 F.3d 1089, 1102–05 (3d Cir. 1996). *See also Fern v. Gramley*, 99 F.3d 255, 260 (7th Cir. 1996) (in appeal initially filed in 1994, state court decision was error under old or new § 2254 standard and district court should not have denied petition); *Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996) (where AEDPA was enacted after district court had granted § 2254 petition and after opening briefs were filed in appeal by state, appellate court affirmed under old law and concluded that "whether or not the Act applies to pending appeals, our decision would be the same" because "the state court decision was contrary to clearly established federal law as determined by the [Supreme] Court").

Retroactivity

En banc Seventh Circuit holds that AEDPA would not be applied to rehearing en banc where original habeas petitions and appeal from denial of writ were filed and heard before Act took effect. Petitioner filed his first federal habeas petition, challenging only his conviction, in 1992 while his appeal from his death sentence was pending in the state supreme court. Over the next three years the district court denied the habeas petition, the state court affirmed the death sentence, and the Seventh Circuit affirmed the habeas denial. In November 1995, two weeks before his scheduled execution, petitioner filed a habeas petition in the district court challenging his death sentence. The district court dismissed the petition as an abuse of the writ. An appellate panel affirmed the dismissal, but shortly before the scheduled execution the court granted a stay and decided to hear the case en banc. The case was heard in December 1995, but before a decision was reached the Antiterrorism and Effective Death Penalty Act of 1996 was passed. The court ordered that the case be reheard, in order to consider the bearing of the new Act on the petition.

Before deciding the effect of the AEDPA on the petition, the en banc court decided the preliminary issue of whether the current petition was a second petition or, as petitioner argued, a first petition attacking his sentence as distinct from the petition attacking his conviction. The court concluded that it was a second petition, and that petitioners cannot bifurcate their petitions in this way so as to avoid the AEDPA'S one-year statute of limitations on habeas petitions in capital cases or its requirements for second or successive petitions. "With immaterial qualifications the year runs from 'the date on which the judgment became final by the conclusion of direct review,' and we take 'judgment' to refer to the sentence rather than to the conviction." The present petition did not satisfy the new law's criteria for filing a second or successive petition, but the court then held that the new law should not be applied here.

Citing *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), and its decision in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), the court noted that a new law "takes effect on the date of enactment unless the effect in a case or class of cases would be retroactive in the sense of 'attach[ing] new legal consequences to events completed before its enactment.' . . . That is an exact description of what would happen if the new section 2244(b)(2) were applied to Burris's second petition. The completed event to which the new statute attaches new legal consequences is the filing of his first petition, which was limited to issues arising at the guilt phase of the criminal proceeding." Assuming that the second petition was not an abuse of the writ, as the court went on to hold, "then the new law, if applied retroactively, would indeed attach a new legal consequence to that completed event, the filing of the first petition: the consequence would be that he could not file a second petition." The petition was remanded to the district court for a hearing on the merits.

Burris v. Parke, 95 F.3d 465, 467–69 (7th Cir. 1996) (en banc). *See also Roldan v. United States*, 96 F.3d 1013, 1014 (7th Cir. 1996) (holding that new provision of § 2255 setting standards for filing second or successive petitions could be applied to reject petitioner's third appeal, still pending on April 24, 1996, distinguishing *Burris* because "there is little likelihood that the change of law has bushwacked or mousetrapped" petitioner). *Cf. Johnston v. Love*, 940 F. Supp. 738, 744 n.2 (E.D. Pa. 1996) (declining to apply § 2254

retroactively to petition filed June 14, 1995); *Kowalczyk v. United States*, 936 F. Supp. 1127, 1132 n.1 (E.D.N.Y. 1996) (1996 amendments should not be applied retroactively to § 2255 habeas petition filed on Dec. 7, 1994).

Note: On Jan. 10, 1997, the Supreme Court granted certiorari in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc). Question presented: "Did the court of appeals correctly conclude that Congress, despite explicit provision in Section 107(c) of Antiterrorism and Effective Death Penalty Act, failed to specify extent to which statute's habeas corpus revisions are to apply retroactively to pending habeas cases and, if so, did court correctly interpret U.S. Supreme Court's retroactivity jurisprudence to depend upon proof of actual reliance interests and to create presumption that habeas-curtailing statutes apply retroactively?"

Tenth Circuit holds that the one-year period of limitation in § 2244(d) should not be applied to § 2255 appeal when the one-year period expired before April 24, 1996. "Section 2255, as revised by the Act, precludes the filing of a § 2255 motion more than one year after conviction, as is the case here. . . . Lopez filed a notice of appeal with this court on February 8, 1996, before the effective date of the Act, but no briefs were filed until May 7, after the Act became effective. . . . [T]he act of filing a § 2255 motion more than one year after conviction now has an entirely new legal consequence. . . . [R]etroactive application of the one-year requirement would therefore be inconsistent with *Landgraf*." However, defendant failed to state a valid claim and the court affirmed the district court's denial of his § 2255 motion.

United States v. Lopez, 100 F.3d 113, 116–17 (10th Cir. 1996). *Accord Flowers v. Hanks*, 941 F. Supp. 765, 769–71 (N.D. Ind. 1996) (allowing petition to be filed June 26, 1996, although conviction would be time-barred under amended § 2444(d)(1), concluding that "for all § 2254 actions which accrued before the effective date of the AEDPA—April 24, 1996—petitioners would be entitled to a grace period in the amount of the limitations period to file a timely suit. Therefore, the court finds that a one-year grace period is a reasonable time frame in which to apprise future petitioners that their pre-accrued claims must be filed within one year of the enactment of the AEDPA or be barred by § 2244(d)(1)."). *See also Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc) (reaching a similar conclusion in dicta). *Contra Curtis v. Class*, 939 F. Supp. 703, 706–08 (D.S.D. 1996) (concluding petitioner's second federal habeas petition is time-barred by § 2244(d) and would fail under § 2254(d)(2) anyway—"The statute delineating the scope of habeas proceedings provides prospective relief given its remedial nature. . . . Thus, amended versions of 28 U.S.C. §§ 2244, 2253, and 2254 would apply to petitioner's case since their application would not be considered to be retroactive." Furthermore, § 2244(d) is "procedural in nature, [and] its application in petitioner's case would not be retroactive."); *Griffin v. Endicott*, 932 F. Supp. 231, 232 (E.D. Wis. 1996) (rejecting claim that applying §2244(d) to petition filed June 7, 1996, violated Ex Post Facto Clause).

PRISON LITIGATION

Proceedings In Forma Pauperis

Fifth Circuit holds that the PLRA repeals Fed. R. App. P. 24(a) to the extent the rule actually conflicts with it, and decides other issues of first impression regarding IFP provisions. Before enactment of the Prison Litigation Reform Act, the district court certified plaintiff to proceed in forma pauperis in his 42 U.S.C. § 1983 action. After the PLRA took effect, the district court dismissed the suit as frivolous under the old provisions of 28 U.S.C. § 1915(d). It did not decertify plaintiff's IFP status and he filed a timely appeal. Since the PLRA amended § 1915 to require new filing procedures and fees in prisoner IFP cases, the Fifth Circuit had to decide several issues of first impression: whether the Act amended Fed. R. App. P. 24(a); whether to require the plaintiff to replead his pauper status; and whether to assess him a fee for the appeal.

The court noted that the Act would require the plaintiff "to reapply to this court with a new affidavit," but Rule 24(a) "would carry forward his i.f.p. certification from the district court. Faced with competing mandates, we must decide whether Congress's procedural litigation reforms in the PLRA take precedence over the rules of appellate procedure." It analyzed two limits to Congress's power to amend the Federal Rules of Appellate Procedure—the so-called 'abrogation clause' in the Rules Enabling Act that "seems to invalidate all federal statutes 'in conflict' with court rules," and "the general disfavor with which we view implicit amendment or repeal of statutes." The abrogation clause did not invalidate the recently enacted PLRA because the clause applies only to statutes passed before the effective date of the rule in question. As to the disfavored implicit repeal of Rule 24, the court relied upon a long-established exception that provides that when "two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one." Therefore, the PLRA repeals Rule 24(a) to the extent they actually conflict, and the Act governs the plaintiff's appeal.

Even though the plaintiff's IFP request in the district court did not meet the § 1915(a)(2) requirement of a trust fund account statement, the Fifth Circuit declined to dismiss his appeal altogether, citing several equitable considerations. The court said it would hear the appeal without requiring the plaintiff to file a new notice of appeal or new briefs if within thirty days he filed a new petition to proceed IFP consistent with § 1915(a). Although the PLRA's fee requirements also take precedence over conflicting provisions in Rule 24, the court said it would not assess fees against the plaintiff "unless and until he decides to reapply for i.f.p. status." The court chose not to assess the plaintiff "a filing fee today so that the fee might have its intended deterrent effect when [he] later decides whether to proceed. . . . [W]e will consider his resubmission for i.f.p. status to be the filing of an appeal in forma pauperis under the Act."

Jackson v. Stinnett, 102 F.3d 132, 134–37 (5th Cir. 1996).

Fifth Circuit rules that § 1915(g) applies to appeals pending on the PLRA's effective date and finds that appellant has three or more strikes that bar IFP status. The Fifth Circuit considered whether new 28 U.S.C. § 1915(g), effective April 26, 1996, applies to an appeal filed December 14, 1995. The provision bars a prisoner from bringing a civil action or appeal in forma pauperis if he or she "has, on 3 or more prior occasions . . . brought an action or appeal . . . that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." The court concluded that § 1915(g) "does not affect a prisoner's substantive rights, and it does not block his or her access to the courts. We therefore find that application of this procedural rule to pending appeals does not raise the retroactivity concerns discussed in *Landgraf* [*v. USI Film Prods.*, 511 U.S. 244 (1994)]." The court of appeals further held that the provision "does not raise retroactivity concerns [because] it does not impose new or additional liabilities [under *Landgraf*], but instead requires collection of a fee that was always due." It stressed that "[b]efore the PLRA, courts routinely revoked a prisoner's ability to proceed i.f.p. after numerous dismissals." Thus, § 1915(g) "merely codifies an existing practice . . . designed to prevent prisoners from abusing the i.f.p. privilege."

Noting that Congress had not provided any instructions to aid the court in determining what counts as a dismissal under the section, the Fifth Circuit analyzed in detail the "different and creative dismissal combinations" reflected in the appellant's record. It held that "by using the phrase 'dismissed on the grounds that it is frivolous,' Congress did not mean to include dismissals later reversed." It also declined to count against the appellant "the district court's dismissal as frivolous in the instant case—at least for now," ruling that dismissals "include only those for which appeal has been exhausted or waived." Referring to another case brought by the defendant, the court concluded that "Congress would have us count both the dismissal in the district court and the separate dismissal of the appeal as frivolous." The court held that the appellant had three or more strikes under the statute and could only pursue another IFP action in federal court if he is in "imminent danger of serious physical injury."

Adepegba v. Hammons, No. 95-31249 (5th Cir. Dec. 31, 1996) (Garza, J.).

Fifth Circuit rules that the PLRA does not apply to § 2255 proceedings. In ruling that the Act is inapplicable to 28 U.S.C. § 2255 petitions, the Fifth Circuit expressly adopted the reasoning of *Santana v. United States*, 98 F.3d 752 (3d Cir. 1996); *Martin v. United States*, 96 F.3d 853 (7th Cir. 1996); and *Reyes v. Keane*, 90 F.3d 676 (2d Cir. 1996), which "all recognize habeas corpus proceedings are technically civil actions . . . but find several considerations that counsel against applying the Act to habeas petitions."

United States v. Cole, 101 F.3d 1076, 1077 (5th Cir. 1996).

Third Circuit holds that the PLRA's fee requirements do not apply to mandamus petitions, "regardless of the nature of the underlying actions." Plaintiff petitioned for a writ of mandamus requiring the district court to act promptly on his request for habeas corpus relief; he asked for leave to file in forma pauperis. Finding that a mandamus petition is neither a "civil action" nor an "appeal" within the plain meaning of the PLRA's text, the Third Circuit considered congressional intent. "The clear import of the PLRA is to curtail frivolous prison litigation, namely that brought under 42 U.S.C. § 1983 and the Federal Torts Claims Act. . . . As a result, we agree with the courts of appeals that have held that where the underlying litigation is criminal, or otherwise of the type that Congress did not intend to curtail, the petition for mandamus need not comply with the PLRA" (citing *Martin v. United States*, 96 F.3d 853 (7th Cir. 1996) and *In re Nagy*, 89 F.3d 115 (2d Cir. 1996)). The court added that, in light of the important role mandamus petitions have, it is unlikely Congress intended to subject to PLRA restrictions "bona fide mandamus petitions, regardless of the nature of the underlying actions." Since the court had previously ruled in *Santana v. United States*, 98 F.3d 752 (3d Cir. 1996), that habeas actions are not subject to the PLRA's fee provisions, it held that the plaintiff was not required to pay the $100 filing fee.

Considering the problem posed by litigants "masking as a mandamus petition" civil actions or appeals that would otherwise be subject to the Act, the court acknowledged the difficulty this could cause "in the processing of pro se litigation . . . particularly in the area of docketing." Clerks untrained in the law "will have to make a decision as to whether the PLRA applies in order to insure that the litigant has filed the proper documents." The Third Circuit decided "that it will be useful for the Clerk's office to posit that a paper styled as a mandamus petition will not be subject to the PLRA unless it appears clearly that the styling is an effort to avoid the requirements of that Act." It suggested that the clerk's office

follow procedures set out in a footnote and stressed that "treatment of questionable mandamus petitions must be subject to review by the Court."

Madden v. Myers, 102 F.3d 74, 76–78 (3d Cir. 1996).

District court directs clerk to remove first "strike" for frivolous dismissal under Fed. R. Civ. P. 60(b). On September 23, 1996, the district court dismissed the plaintiff's complaint as frivolous pursuant to 28 U.S.C. § 1915(e) and directed the clerk of court to "flag" plaintiff's first frivolous dismissal under the PLRA. The plaintiff filed a motion for reconsideration arguing that the dismissal should not count as his "first strike" because of "a convergence of problems" that caused him to file the action reluctantly "in order to obtain legal information with which to litigate an already-pending (and possibly meritorious) claim." While he was on punitive segregation in August 1996, the plaintiff requested from the prison librarian a copy of a district court standing order, but the librarian sent him instead copies of various federal civil rights and habeas corpus forms. The plaintiff then sought assistance from the warden, but received no response. During this period, the existing Prisoner Assistance Project was being dismantled and plaintiff failed to receive information on how to contact the new legal services provider.

Given these circumstances, the court said, it was understandable that he would turn to the federal court. Although he should have written a letter rather than filing a civil complaint, in light of the situation it would be "manifestly, unduly harsh and inappropriately punitive" to assign a strike to the plaintiff. "[W]here as here a prisoner's civil action, though legally misguided, was undertaken in evident good faith solely to remove a perceived barrier to access to the courts, remedial action is both warranted and just." The district court did not believe its action constituted "an improper 'amendment' of the statute. . . . [T]here is no reason to think that, even under the statute, an inmate may not seek relief under Fed. R. Civ. P. 60(b)(6)."

Dalvin v. Beshears, 943 F. Supp. 578, 578–79 (D. Md. 1996).

Remedies for Prison Conditions

Fourth Circuit upholds constitutionality of the PLRA's immediate termination provisions and construes the term "Federal right" in § 3626(b)(2). A class of inmates appealed a district court order terminating a 1986 consent decree pertaining to conditions in South Carolina prisons. The district court based its ruling on the lack of court findings, required by 18 U.S.C. § 3626(b)(2) as amended by the PLRA, that "the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."

On appeal, the inmates argued that § 3626(b)(2) violates the separation of powers doctrine in two ways: first, by requiring courts to reopen final judgments and, second, by prescribing a rule of decision without changing the underlying law. The court of appeals rejected both contentions. The consent decree was not like a judgment for money damages but was "akin to a final judgment granting injunctive relief, and thus is subject to subsequent changes in the law." Furthermore, the statute amends the applicable law pertaining to the district court's authority to award relief greater than that required by the Eighth Amendment, and it does not dictate a rule of decision because "it does not purport to state how much relief is more than necessary" to correct the violation of a federal right.

The inmates also contended that the statute must survive strict scrutiny because it "singles out a class of prison inmates and burdens their fundamental right of access to the courts" in violation of the Fifth Amendment's equal protection principles. The Fourth Circuit found that "by its terms § 3626(b)(2) neither prohibits prisoners from filing civil suits challenging the conditions of their confinement nor impedes their ability to do so." It found no merit, either, in the further assertion that, by prohibiting the inmates from enforcing the terms of the consent decree, the statute burdens their "fundamental right 'to enforce the successful result' of a civil suit." Although "the right of access to the courts necessarily includes the right to enforce a judgment once it is obtained," the court of appeals held that § 3626(b)(2) "does not burden this right; it merely limits the substantive relief to which the Inmates are entitled." The statute is "an eminently rational means of accomplishing" the congressional purpose of "preserving state sovereignty by protecting states from overzealous supervision by the federal courts in the area of prison conditions litigation."

The appellate court rejected the inmates' claim, based on the vested-rights doctrine, that § 3626(b)(2) deprived them of "a property interest—the rights afforded by the consent decree—without due process of law." The inmates' further "due process challenge to § 3626(b)(2) on the basis that it operates retroactively" was equally meritless. Relying on the rule stated in *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), that the retroactive application of legislation must be justified by a rational legislative purpose, the inmates argued that even if the prospective application of the statute is constitutional, "there is no rational legislative purpose justifying [its] retroactive application." This argument was answered by *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), "in which the Court noted the well-settled principle that '[w]hen the . . . statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.' . . . That is precisely the case here."

The court also refused to "construe the term 'Federal right' to include prospective relief contained in a consent decree. . . . Obviously, such a reading renders the provision nonsensical because under it, the district court would never be able to terminate a consent decree." It held that "the term 'Federal right' as used in § 3626(b)(2) does not include rights con-

ferred by consent decrees providing relief greater than that required by federal law."

Plyler v. Moore, 100 F.3d 365, 369–75 (4th Cir. 1996).

District court holds that the PLRA's termination provisions violate separation of powers principles. Defendants moved, under 18 U.S.C. § 3626(b)(2), to terminate relief ordered by a 1985 consent decree. They argued that the PLRA terminated the decree and orders stemming from it because the decree was not based on findings required by the statute that "the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." The United States as intervenor contended "that what saves the termination provisions of the Act from being unconstitutional is § 3626(b)(3), which prohibits termination if the court makes findings of constitutional violations and then uses the requisite tests to determine whether such relief shall continue." Plaintiffs argued that the termination provisions violate separation of powers principles, as well as due process and equal protection rights.

The district court emphasized that the "plaintiff class and the defendant . . . labored between 1981 and 1985 to reach an agreement which recognized the existence of constitutional violations in prison conditions and spelled out terms in intricate detail as to how these conditions would be remedied." By the decree's terms constitutional findings were not necessary. A consent decree "allows parties to save the exhausting time, money, and resources involved" in making a finding of past constitutional violations "in order to concentrate on present conditions." Thus, the PLRA's requirement that the judgment be terminated unless those constitutional findings are made "imperiously transforms a consent decree's strength into a nullity."

The court reviewed the standard for modification of a consent decree set out in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992), noting the Supreme Court's admonition that a proposed modification "should not strive to rewrite a consent decree so that it conforms to the constitutional floor" and its holding that "a consent decree is a final judgment that may be reopened only to the extent that equity requires." The district court found that "[t]he PLRA completely re-writes the standard for modification in prison litigation, making consent decrees subject to the constitutional floor—in direct contrast to *Rufo*." The requirement of § 3626(b)(3) that a court make new findings for an existing consent decree "represents an unjustifiable encroachment of the legislative and executive branches into the domain of the judiciary."

According to the court, the real issue was "can injunctive relief based on past negotiations, cost assessments, and compromises between parties be overturned by an act of Congress?" Under *Rufo*, the court could modify such relief if required to meet a substantial change in fact or law. "Extending modification of a decree by a court to the virtual termination of an entire group of decrees by Congress exceeds the limits of congressional authority."

The court further concluded that two possible exceptions to the separation of powers doctrine alluded to in *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1461-62 (1995)—legislative action dealing with prospective relief and a court's power to make equitable exceptions to an otherwise applicable rule of finality—did not apply to this case.

To terminate the consent decree altogether "would unjustifiably deny" plaintiffs the relief for which "they traded a potential finding of unconstitutionality" and "to which they are entitled by the power of this court—a power that cannot be taken away by Congress."

Hadix v. Johnson, No. 80-73581 (E.D. Mich. Nov. 1, 1996) (Feikens, J.). *See also Gavin v. Ray*, No. 4-78-CV-70062 (S.D. Iowa Sept. 18, 1996) (unpublished) ("the consent decree in this case, including the prospective relief ordered, is a final judgment affecting private rights, and . . . the PLRA's termination provisions violate separation of powers principles").

District court rules that, with no showing of a "current or ongoing violation" of a federal right and in the absence of constitutional challenge, the PLRA mandates termination of consent judgment. Under 18 U.S.C. § 3626(b)(2), defendants moved to terminate a consent judgment entered on May 28, 1982, directing them to adopt and implement a procedure regarding the practice of religion by Muslim inmates. Because the judgment was granted without the findings now required by the statute, they contended it should be terminated immediately. Plaintiffs countered that under § 3626(b)(3) the consent decree did not have to be terminated if the court made the written findings specified in that provision. They argued that "the relief provided in the judgment remains necessary to protect the plaintiffs' rights under the Religious Freedom Restoration Act (RFRA)."

The question, the court said, "is whether the relief provided by the consent judgment remains necessary. The language of § 3626(b)(3) seems to clearly and unambiguously require a finding of a current or ongoing violation of a federal right." The district court found nothing in the record to support such a finding, and "an unsupported assertion that the defendants might alter the status quo to the extent a violation occurs appears to be too speculative to satisfy § 3626(b)(3) . . . [and] would also be inconsistent with the goal of the PLRA, and Supreme Court holdings, to limit judicial intervention in the administration of a state's prison system." Even if the decree is terminated, the court said, Muslim prisoners' rights would still be protected under the First Amendment and the RFRA. In granting the defendants' motion to terminate the consent decree, the court noted that, unlike other cases that have dealt with similar motions, plaintiffs in this case did not raise any constitutional issues.

James v. Lash, Nos. S 73-5 AS, 3687 (N.D. Ind. Dec. 13, 1996) (Sharp, J.).

Suits by Prisoners

District court holds that the PLRA-mandated cap on attorneys' fees applies to work done after effective date of the Act. Plaintiffs' counsel requested fees for work performed between Jan. 1, 1996, and June 30, 1996, based on the established rate of pay of $150 per hour. Defendants argued that the hours billed for work performed after April 26, 1996, were subject to the limitation on fees set out in the PLRA. As amended by the Act, 42 U.S.C. § 1997e provides that no award of attorneys' fees in a case covered by the PLRA "shall be based on an hourly rate greater than 150 percent of the hourly rate established . . . for payment of court-appointed counsel" under 18 U.S.C. § 3006A. The district court calculated that plaintiffs' counsel would thus be entitled to a maximum of $112.50 per hour rather than $150.

The court pointed out that only one section of the PLRA—dealing with appropriate remedies for prison conditions—"specifies that it is to be applied to pending cases," and the section contains no attorneys' fees limitation. It noted the plaintiffs' argument that because Congress had specifically removed a limitation on attorneys' fees from that section, "[a]pplication of the PLRA to this case . . . would specifically read into the statute the very fee limitation Congress eliminated." But the district court found this "negative inference . . . too attenuated to support a finding of congressional intent," and turned to the question of retroactive effect. Based on *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the court rejected the plaintiffs' argument that implementing such a drastic reduction in their counsel's fees eleven years after the consent judgment was entered "would occur without providing 'ample notice'" and would disrupt the plaintiffs' "'settled expectations' in having their counsel paid comparably to the prevailing market rate." Since court-appointed counsel "are paid the maximum amount allowed by statute, and . . . the PLRA's cap is 150% of that amount," the court could not say "that Congress's intent to limit plaintiffs' counsel to $112.50 per hour is so fundamentally unfair as to result in manifest injustice. Nor can I say that this legislation unreasonably disrupts settled expectations." The court held that the PLRA's limit on attorneys' fees applies to work performed after April 26, 1996.

Hadix v. Johnson, No. CIV. A. 80-73581 (E.D. Mich. Dec. 4, 1996) (Feikens, J.).

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HABEAS CORPUS

Retroactivity

Ninth Circuit holds that AEDPA will not be applied to cases filed before April 24, 1996. "On August 29, 1996, the Court directed the parties to submit briefs on the question of whether the Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA] . . . applied to cases filed prior to the Act's effective date. . . . We hold that the amendments to Chapter 153 of Title 28 of the United States Code contained in Title I of the Act do not apply to cases filed in the federal courts of this Circuit prior to the Act's effective date of April 24, 1996. A full opinion detailing the rationale for our decision, along with a decision on the merits, will be forthcoming, together with any separate concurring or dissenting opinions which members of the en banc panel may wish to file." (Editor's Note: As of March 27, 1997, no further opinions had been published.)

Jeffries v. Wood, 103 F.3d 827, 827 (9th Cir. 1996) (en banc) (per curiam) (three judges dissented from this order).

Certificate of Appealability

Four circuits hold that district courts can issue certificates of appealability. In *Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996) (en banc), the Eleventh Circuit held that district courts have the authority to issue certificates of appealability (COA) under amended 28 U.S.C. § 2253(c)(1). Four other circuits have now reached the same conclusion.

Three of the circuits found that § 2253(c)(1), which allows a COA to be issued only by "a circuit justice or judge," seems to conflict with Fed. R. App. P. 22(b), which expressly allows district judges to issue COA's. Agreeing with *Hunter*, these courts determined that "judge" in § 2253(c)(1) should be read to include circuit or district judges to harmonize it with the clear language of Rule 22(b). *See United States v. Asrar,* No. 96-56805 (9th Cir. Mar. 3, 1997) (Tashima, J.) ("We agree with the Eleventh Circuit that under the AEDPA district courts possess the authority to issue certificates of appealability in section 2255 as well as section 2254 proceedings."); *Houchin v. Zavaras*, No. 96-1187 (10th Cir. Feb. 27, 1997) (Henry, J.) (reconciling apparent conflict by holding district judges have authority to issue certificates in § 2254 cases; declining, however, to rule on whether authority extends to § 2255 cases); *Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063, 1066–73 (6th Cir. 1997) ("Because neither the legislative history nor any overwhelming policy considerations support a contrary reading, we hold that district judges may issue certificates of appealability under the AEDPA.").

Without concluding that § 2253 could be read to allow district judges to issue COA's, the Fifth Circuit held that "[i]f there is any inconsistency, we would construe the express grant of authority to district courts [in Rule 22(b)] as compelling, and we hold that district courts retain the authority to issue certificates of appealability for § 2254 petitions under the AEDPA." *Else v. Johnson,* 104 F.3d 82, 83 (5th Cir. 1997) (as amended Feb. 20, 1997).

Sixth Circuit holds that certificate of appealability requirements apply to application for certificate of probable cause pending on April 24, 1996. Petitioner's § 2254 habeas claim was denied by the district court on March 25, 1996, and he filed a notice of appeal and request for certificate of probable cause (CPC) on April 21, 1996. The district court issued a CPC on May 1. However, the appellate court remanded, concluding that the new standards for a certificate of appealability should have been applied once the AEDPA took effect on April 24. Because petitioner raised only constitutional claims, the change from having to show the denial of a "federal right" for a CPC to having to show denial of a "constitutional right" for a COA did not place an extra burden on petitioner: "*at least so far as this case is concerned*, the AEDPA merely codifies the [earlier] standard."

The court also concluded that the requirement in § 2253(c)(3), that the COA "shall indicate which specific issue or issues satisfy the showing required" for the issuance of a COA, could be applied. Although this specificity requirement could limit the issues on appeal, unlike the prior law which allowed the entire appeal to go forward with a CPC, petitioner "retains the right to request appellate consideration of his entire petition, and the change to the law does not impair his rights." In addition, the change was procedural in nature and "applie[d] more to the district court's conduct than to [petitioner's], so under the *Landgraf* analysis it could be applied retroactively.

Lyons v. Ohio Adult Parole Auth., 105 F.3d 1063, 1073–76 (6th Cir. 1997). *See also In re Certificates of Appealability,* 106 F.3d 1306, 1307–08 (6th Cir. 1997) (order "set[ting] forth the

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administrative procedures that are to be used to implement" the decision in *Lyons* regarding the handling of COA's in district and appellate courts). *Cf. Brown v. Cain*, 104 F.3d 744, 749 (5th Cir. 1997) ("the COA requirement of the AEDPA will not apply to habeas appellants who have *already obtained* CPC's"; distinguishing holding in *Drinkard v. Johnson*, 97 F.3d 751, 756 (5th Cir. 1996) (apply new standards to pending petitions)).

Second or Successive Petitions

Second Circuit holds that leave to file second petition under § 2244(b) is not required if first petition was dismissed without prejudice; Seventh Circuit holds same if first petition was dismissed as insufficient. In 1990, the Second Circuit petitioner's first federal habeas petition was dismissed for failure to exhaust state remedies without prejudice to refiling. On Sept. 6, 1996, after exhausting available state remedies, petitioner filed a motion in the Second Circuit for authorization to file a second habeas petition in the district court pursuant to 28 U.S.C. § 2244(b)(3)(A), as amended by the AEDPA. The Act "does not define what is meant by a 'second or successive' application. The issue presented by this motion is whether a habeas petition qualifies as a 'second or successive' application within the meaning of § 2244, where it is filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies."

The court found that § 2244 should not be applied in this situation. It first noted that, in upholding the new "gatekeeping" provisions in § 2244, the Supreme Court, in *Felker v. Turpin*, 116 S. Ct. 2333 (1996), concluded that the new restrictions are not an unconstitutional suspension of the writ of habeas corpus because they are "well within" the "evolutionary process" putting restraints on "abuse of the writ." Before the AEDPA, the court noted that "a petition filed after a previously submitted petition was dismissed without prejudice was not considered an abuse of the writ. The abuse of the writ doctrine is rooted in the need for finality and concerns of comity . . . ; however, neither concern is implicated when a petition is filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies."

"When a petition is dismissed without prejudice for failure to exhaust, there is no federal adjudication on the merits. To foreclose further habeas review in such cases would not curb abuses of the writ, but rather would bar federal habeas review altogether. Although Congress plainly intended the AEDPA amendments to work significant procedural changes in habeas corpus review, nothing in the legislative history or *Felker* suggests that Congress wished to depart from the long-standing and widely accepted rule . . . that no barrier to habeas review arises from the dismissal of a petition on procedural grounds without prejudice to refiling. . . . We, therefore, hold that a petition filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies is not a 'second or successive' petition within the meaning of § 2244."

Camarano v. Irvin, 98 F.3d 44, 45–46 (2d Cir. 1996) (per curiam). *Accord In re Turner*, 101 F.3d 1323, 1323–24 (9th Cir. 1996) (amended § 2244(b)(3) "does not apply to second or subsequent habeas petitions where the first petition was dismissed without prejudice for failure to exhaust state remedies") (as amended Jan. 21, 1997). *See also Chambers v. United States*, 106 F.3d 472, 474–75 (2d Cir. 1997) (previous § 2255 petitions filed by prisoner that were, in actuality, § 2241 petitions, should have been construed as such and thus current § 2255 petition will be treated as prisoner's first: "a petition asserting a claim to relief available under 28 U.S.C. § 2255 is not a 'second or successive' application where the prior petition(s) sought relief available only under 28 U.S.C. § 2241").

In the Seventh Circuit case, petitioner's first § 2254 petition was dismissed in 1992 because he declined to pay a $5 filing fee. He filed another § 2254 petition in July 1996 in the district court, which dismissed it for want of jurisdiction in light of § 2244(b)(3)(A). On appeal, petitioner argued that this was actually his first petition, reasoning that because his 1992 petition was dismissed on procedural grounds it was not filed at all.

Finding, as did the Second Circuit, that § 2244(b) "uses, but does not define, the phrase 'second or successive habeas corpus application,'" the court looked to the applicable pre-AEDPA law, Rules Governing Section 2254 cases in the United States District Courts. Rule 9(b) covered dismissal of second or successive petitions, and the court found that "some deficient petitions were not treated as initial applications for purposes of Rule 9(b). When, for example, a petition was dismissed for failure to exhaust state remedies, no court treated the renewal of the claim after exhaustion as a second petition. . . . For the same reasons, the filing and rejection of a petition as unintelligible or poorly developed does not make the filing of an enlarged specification a 'second or successive' petition; it is better to think of the process as one of filing, rejection, and amendment."

In addition, "Rule 2(e) says that a petition will be returned to the petitioner if it 'does not substantially comply with the requirements of rule 2 or rule 3.' Payment of the filing fee, or a grant of leave to proceed *in forma pauperis*, is one of the requirements in Rule 3(a)." Because petitioner was required to pay the fee in 1992 and did not, his petition "should have been 'returned' under Rule 2(e). Although the district court entered in 1992 a document purporting to be a Rule 58 judgment, reciting 'this case is dismissed,' an order of this form was inapt. The petition had not been filed, and it therefore could not be dismissed." Therefore, petitioner's 1996 filing "is his first for purposes of § 2244(b). Any petition returned under Rule 2(e) should be disregarded for purposes of § 2244(b), as should any petition dismissed to permit exhaustion; but any other outcome is presumptively sufficient to bring § 2244(b) into play."

Benton v. Washington, 106 F.3d 162, 163–65 (7th Cir. 1996).

Seventh and Eleventh Circuits conclude that motion based on new rule of *statutory* law does not authorize second or successive petition; other circuits agree. The defendant in each circuit filed a second or successive petition under 28 U.S.C. § 2255 for review of his conviction or sentence for violating 18 U.S.C. § 924(c). Under amended § 2255, "[a] second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain— . . . (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

The Eleventh Circuit petitioner properly filed his request with the appellate court under § 2244(b)(3)(A), seeking resentencing after *Bailey v. United States,* 116 S. Ct. 501 (1995), interpreted the "use" prong of § 924(c) to require active employment of the weapon. However, the court rejected the request, holding that "*Bailey* did not express a new rule of constitutional law; rather, it merely interpreted a substantive criminal statute using rules of statutory construction."

In re Blackshire, 98 F.3d 1293, 1294 (11th Cir. 1996) (per curiam). *Accord United States v. Lorentsen,* 106 F.3d 278, 279 (9th Cir. 1997) (certification denied: "*Bailey* announced only a new statutory interpretation, not a new rule of constitutional law"); *Coleman v. United States,* 106 F.3d 339, 341 (10th Cir. 1997) (per curiam) ("*Bailey* is not a new rule of constitutional law" and authorization to file second § 2255 petition is denied).

The Seventh Circuit petitioner did not follow the procedure under § 2244(b)(3), filing a second and, after that was dismissed, a third § 2255 petition in the district court. He appealed the dismissal of his third petition, and the Seventh Circuit had to decide whether to dismiss the appeal or treat it as a motion under § 2244. "A district court *must* dismiss a second or successive petition . . . unless the court of appeals has given approval for its filing. . . . So Nuñez needs our approval to begin his collateral attack, and the district court properly dismissed his petition. What remains is the possibility that the notice of appeal serves as a request for authorization. Treating an appeal in these circumstances as a request for authorization will speed cases to decision with a minimum of paperwork, and we therefore think that the appeal should be so treated when it is practical to make a decision on the basis of the short appellate record." *Cf. Liriano v. United States,* 95 F.3d 119, 122–123 (2d Cir. 1996) (second or successive habeas petition or § 2255 motion improperly filed in district court should be transferred to appellate court, which will notify petitioner or movant of proper procedure under § 2244); *Coleman v. United States,* 106 F.3d 339, 341 (10th Cir. 1997) (per curiam) (agreeing with reasoning of *Liriano* and adopting similar procedure); *Williams v. Stegall,* 945 F. Supp. 145, 147–48 (E.D. Mich. 1996) (holding that amended § 2244(b)(3) would be applied to second § 2254 petition that was pending on April 24, 1996, and dismissing petition for lack of jurisdiction without prejudice to refiling if authorized by appellate court under § 2244(b)(3)). *But cf. Hill v. Straub,* 950 F. Supp. 807, 809–10 (E.D. Mich. 1997) (disagreeing with *Williams* and holding that § 2244(b)(3) would not be applied to successive petition filed July 17, 1995).

The court then rejected the petition, concluding that "*Bailey* is not 'a new rule of *constitutional* law' (emphasis added); it is simply an interpretation of 18 U.S.C. § 924(c)(1). . . . What is more, *Bailey* has not been 'made retroactive to cases on collateral review by the Supreme Court.' . . . The implied application for leave to file a successive petition under 28 U.S.C. § 2255 is denied."

Nuñez v. United States, 96 F.3d 990, 991–92 (7th Cir. 1996). *Cf. Hohn v. United States,* 99 F.3d 892, 893 (8th Cir. 1996) (per curiam) (refusing to issue certificate of appealability after denial of § 2255 motion to have § 924(c)(1) sentence set aside after *Bailey*; certificate under § 2253(c)(2) requires "a substantial showing of the denial of a constitutional right," and *Bailey* claim involves statutory right).

Eleventh Circuit holds that § 1983 claims are subject to the rules governing second or successive habeas petitions; holds same for motion under Fed. R. Civ. P. 60(b) for relief from habeas denial. Two state prisoners under sentence of death filed petitions under 42 U.S.C. § 1983, claiming that the state's method of execution constitutes cruel and unusual punishment. They had previously filed unsuccessful habeas petitions under 28 U.S.C. § 2254. The district court denied their claims and they appealed.

"Guided by *Gomez v. United States District Court,* 503 U.S. 653 . . . (1992), as interpreted by *Lonchar v. Thomas,* . . . 116 S. Ct. 1293, 1301 . . . (1996), we conclude that Plaintiffs' § 1983 claim is subject to the procedural requirements for bringing a second or successive habeas claim. . . . *Gomez* held that a plaintiff cannot escape the rules regarding second or successive habeas petitions by simply filing a §1983 claim."

"We treat Plaintiffs' § 1983 cruel and unusual punishment claim as the functional equivalent of a second habeas petition, . . . and apply the rules regulating second or successive habeas petitions. Because Plaintiffs failed to apply for permission to file a second habeas petition as required by 28 U.S.C. § 2244(b)(3)(A), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 . . . , the district court was without authority to consider their request for relief." The court went on to hold that it would have denied any application to file a second petition because neither plaintiff could meet the requirements of § 2244.

Felker v. Turpin, 101 F.3d 95, 96–97 (11th Cir. 1996) (per curiam).

In the second case, one of the inmates from above filed a motion in the district court under Fed. R. Civ. P. 60(b) seeking relief from that court's 1994 denial of his § 2254 petition. The court denied the motion, holding that it was untimely and that it was tantamount to a second or successive habeas petition, which under § 2244(b)(3)(A) required authorization from the appellate court. The inmate filed a notice of appeal and

an application for a certificate of probable cause or appealability in the Eleventh Circuit.

The appellate court agreed with the district court and denied relief. "[T]he established law of this circuit, like the decisions . . . from other circuits, forecloses [the] position that Rule 60(b) motions are not constrained by successive petition rules. . . . Rule 60(b) cannot be used to circumvent restraints on successive habeas petitions. That was true before the Antiterrorism and Effective Death Penalty Act was enacted, and it is equally true, if not more so, under the new act."

The inmate also argued that the AEDPA should not be applied "because the underlying ruling that he seeks to amend, the denial of his first habeas petition, became final with the denial of rehearing on certiorari on April 15, 1996. . . . However, in *Felker* [*v. Turpin*], 116 S. Ct. 2333 . . . (1996), the Supreme Court applied the successive petition restrictions of the new act . . . to Felker's attempt to file a second habeas proceeding after the effective date of the act, even though his first habeas petition had been filed and decided before. Likewise, we hold that the successive petition restrictions contained in the amendments to § 2244(b) apply to Rule 60(b) proceedings, even where those proceedings seek to amend a judgment that became final before the effective date of the amendments."

The court then held that "even if we treat Felker's application for a certificate of appealability as a request that we authorize him to file a second or successive habeas application, such a request is due to be denied, because the claims do not fall within the § 2244(b)(2)(A) or (B) exception."

Felker v. Turpin, 101 F.3d 657, 660–61 (11th Cir. 1996) (per curiam).

Special Procedures in Capital Cases

Fifth Circuit holds that Texas does not meet requirements for the AEDPA's special habeas procedures in capital cases. A Texas death row inmate's federal habeas petition was denied by the district court in March 1996. His appeal and application for a certificate of probable cause (CPC) were pending when the AEDPA became effective. Following *Drinkard v. Johnson,* 97 F.3d 751 (5th Cir. 1996), the appellate court concluded that amended § 2254 applied to the appeal. It then had to determine whether to apply § 107 of the Act, "Special Habeas Corpus Procedures in Capital Cases" (28 U.S.C. §§ 2261–2266).

The court held that Texas did not meet § 2265's requirements regarding "standards of competency for the appointment of" counsel for death sentence appeals. Although the state claimed it "has implemented a flexible mechanism for evaluating the qualifications of prospective counsel . . . on a case-by-case basis to ensure competence," the court "interpret[ed] § 2261(b) to require explicit standards of competency," and found that the state "has not 'establishe[d] by statute, rule of court of last resort, or by another agency authorized by State law' specific, mandatory standards for capital habeas counsel."

Mata v. Johnson, 99 F.3d 1261, 1266–67 (5th Cir. 1996). *See also Death Row Prisoners of Pennsylvania v. Ridge,* 106 F.3d 35, 36 (3d Cir. 1997) (state admitted that it "does not meet the requirements of § 2261 as of January 31, 1997, and that it has not met them previously"); *Satcher v. Netherland,* 944 F. Supp. 1222, 1241–45 (E.D. Va. 1996) (at least before July 1, 1995, Virginia did not satisfy § 2261 requirements); *Ryan v. Hopkins,* No. 4:CV95-3391 (D. Neb. July 31, 1996) (Piester, J.) (unpublished) ("Nebraska's framework for appointing counsel in postconviction capital cases is not currently in compliance with subsections (b) and (c) of section 2261").

PRISON LITIGATION

Proceedings In Forma Pauperis

Sixth Circuit rules that PLRA filing fee provisions are constitutional. Addressing several constitutional issues related to the filing fee provisions of the Prison Litigation Reform Act (PLRA), the Sixth Circuit held that the fee requirements placed on prisoners "do not deprive them of adequate, effective, and meaningful access to the courts." Under 28 U.S.C. § 1915(b)(1), a prisoner without funds would not be denied access based on poverty; and § 1915(b)(4) explicitly states that a prisoner cannot be prohibited from bringing a civil action or appealing a civil or criminal judgment "for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee." "Moreover, once the initial filing fee is paid, the payments are slight," and if the prisoner's suit is successful, judgment may be rendered for costs [§ 1915(f)(1)]. Also, the burdens imposed are similar to ones imposed and upheld in previous cases involving indigent prisoners. Thus, the Act does not violate a prisoner's First Amendment rights.

Neither do the fee requirements deprive prisoners of their equal protection rights. Prisoners and indigents are not a suspect class, the classification does not affect a fundamental right, and the provisions meet the rational basis test. "Deterring frivolous prisoner filings in the federal courts falls within the realm of Congress's legitimate interests, and the specific provisions . . . are rationally related to the achievement of that interest."

The Act satisfies the constitutional requirements of procedural and due process. Prisoners' ability to petition for redress

of grievances has not been deprived or limited. In addition, although they have an interest in the funds in their trust accounts, "inmates are not granted full control over their money while in prison, and debit procedures similar to those in question have been applied in the prisoner context. . . . Furthermore, the Act charges a prisoner no more than anyone else who is adjudged able to pay—and under much more generous payment terms." The test for substantive due process violations has not been met. Finally, the PLRA provisions do not violate the Double Jeopardy Clause because "the Act cannot be said to have a punitive intent or purpose, and the effect on prisoners is not so onerous that it renders the Act punitive."

Hampton v. Hobbs, 106 F.3d 1281, 1284–88 (6th Cir. 1997). *See also Roller v. Gunn*, No. 96-6992 (4th Cir. Feb. 19, 1997) (Wilkinson, C.J.) (The Act represents a legitimate exercise of Congress's power to reduce frivolous lawsuits in the federal courts. The Act is rational, does not violate fundamental rights, and does not single out a suspect class for disparate treatment.)

Seventh Circuit holds that prisoner's release does not eliminate obligation to pay filing fees incurred during incarceration. While in prison the appellant filed several lawsuits under 42 U.S.C. § 1983 which were dismissed for a variety of reasons. He appealed five of them but was released from prison before paying the full fees for all of the appeals. Four of the original suits and two of the appeals were filed before April 26, 1996, the effective date of the PLRA. The Seventh Circuit considered how several provisions of the PLRA apply in these circumstances. The court noted the distinctions between nonprisoners and prisoners specified in §§ 1915(a)(1) and 1915(b)(1). Under (a)(1) nonprisoners may proceed in forma pauperis without prepayment of filing fees; under (b)(1) prisoners seeking to proceed in forma pauperis are required to pay the filing fees. Also, under § 1915(a)(2), prisoners must submit with their complaints not only the statement of assets required by (a)(1) but also certified copies of their trust fund account statements. Despite these restrictions on prisoner-plaintiffs, the court pointed to another "potentially relevant" provision, § 1915(b)(4), which states that "[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment" because the prisoner "has no assets and no means by which to pay the initial partial filing fee."

The court of appeals then analyzed the status of appellant's various appeals with regard to the PLRA's applicability. Citing its decision in *Thurman v. Gramley*, 97 F.3d 185, 188-89 (7th Cir. 1996), which held that "an appeal lodged before April 26 . . . does not become 'filed' until the motion [to certify the appeal as nonfrivolous] has been acted upon," the court concluded that the Act did not apply to two appeals at all. The appellant did not have to prepay the fees "[b]ecause [he] is now out of prison, and neither appeal was filed for statutory purposes before his release." Nevertheless, the court affirmed the district court judgment that the appeals were frivolous and stressed that "[b]oth of these suits and appeals count as 'strikes' for the purpose of 28 U.S.C. § 1915(g) should Robbins return to prison and initiate new litigation."

The PLRA applied fully to the other three appeals commenced on or after April 26 while the appellant was still a prisoner, obliging him to pay the filing fees. "His current status does not alter the fact that he was a prisoner when he filed the appeals." Appellant did not comply with § 1915(b)(1) by providing a copy of his prison trust account and making partial payment at the time he filed those appeals. In response to a court order requiring him to comply, the appellant simply stated "that he had been released and is penniless." The Seventh Circuit stressed that "[h]is current poverty would not authorize continuation of the appeals, if he had the resources to comply with the statute at the time the Act called for payment. Nor does his current poverty excuse his noncompliance with our orders." Appellant had to provide a copy of his prison trust account statement showing the balances and income through the day of his release. The court gave him 21 days to supply the information. "If these appeals are to continue, Robbins must pay the amounts that according to the trust account statements he could have paid at the time he filed the appeal (and before his release). . . . Under the Act, release does not eliminate an obligation that could and should have been met from the trust account while imprisonment continued."

The Seventh Circuit contrasted its decision with that of *McGann v. Commissioner*, 96 F.3d 28, 30 (2d Cir. 1996), which concluded that a prisoner's obligation to pay fees after his release "is to be determined, like any non-prisoner, solely by whether he qualifies for i.f.p. status." The decisions are congruent, the Seventh Circuit said, because the Second Circuit based its conclusion in *McGann* on its belief that "there is a conflict between § 1915(b)(1) and § 1915(b)(2): the former calls for full payment, yet the latter specifies a mechanism that won't work for ex-prisoners." The Seventh Circuit did not see this inconsistency. In its view, "[w]hat excuses further prepayment after release, if the former prisoner is destitute, is not a conflict between § 1915(b)(1) and § 1915(b)(2) . . . but § 1915(b)(4) . . . [T]he majority in *McGann* did not consider the approach we adopt here, requiring prepayment of the sum that should have been remitted before release. We have no reason to suppose that the second circuit would reject this option, so we do not think that this opinion creates a conflict in outcomes."

Robbins v. Switzer, 104 F.3d 895 897–99 (7th Cir. 1997).

Sixth Circuit concludes that § 1915 permits nonprisoners to continue to litigate cases without payment of filing fees, but they must file an affidavit of assets. Section 1915(a)(1) as amended by the PLRA, provides: "Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such

prisoner possesses that the person is unable to pay such fees or give security therefor." According to the court, the "quandary posed by the statute is what Congress intended by the phrase 'prisoner possesses.'" It decided "that Congress actually intended the phrase to be 'person possesses,'" citing several factors, including the purpose of the Act itself to curtail inmate litigation, not pauper litigation. The legislative history did not reveal "a modicum of evidence that Congress intended to prevent indigent non-prisoners from proceeding in forma pauperis in the federal courts." A "plethora of legislative history" established that the PLRA was applicable only to prisoners. The rules of statutory interpretation also supported its conclusion, the court said. To require only prisoners to file an affidavit of assets, as the United States argued, "would create a needless conflict with Fed. R. App. P. 24 . . . [and] non-prisoners who were not truly paupers could avoid payment of the required costs and fees. Requiring all individuals to file an affidavit of assets assures the integrity of the indigency request."

The court held that all individuals seeking pauper status must file Form 4 in the Appendix of Forms of the Federal Rules of Appellate Procedure, "or an affidavit which contains the same information contained in this form. . . . Only prisoners . . . have the additional requirement of filing a prison trust account." Finally, the court of appeals held that to the extent that Fed. R. App. P. 24(a) conflicts with § 1915(a)(3), which prohibits an appeal in forma pauperis if the trial court certifies that "the appeal is not taken in good faith," the statute repeals the rule. Since the district court had made such a certification in this case, the Sixth Circuit ruled that the appellant did not have pauper status and must pay the required filing fee.

Floyd v. United States Postal Serv., 105 F.3d 274, 275–79 (6th Cir. 1997). *See also In re Prison Litigation Reform Act*, 105 F.3d 1131, 1131–39 (6th Cir. 1997) (chief judge of the circuit issued detailed administrative order to assure uniformity throughout circuit in implementing PLRA's IFP provisions "until such time as panels of this court have the opportunity to address the numerous issues raised by the Act"; order applies to all complaints and notices of appeal filed on or after March 1, 1997).

Fifth Circuit holds that filing fee provisions apply to pending appeals, and fees assessed after appellant decides to continue appeal do not have retroactive effect. One week before the effective date of the PLRA, the appellant filed an appeal of the dismissal of her claims in district court. The Fifth Circuit considered whether the appellant had to submit a new IFP certification to the court of appeals and pay the filing fee for the appeal, as required by the Act, 28 U.S.C. § 1915(a)(2). In reviewing the governing principles regarding retroactivity set out in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the court noted that "[t]he requirement that the plaintiff certify her indigent status using new forms certainly affects her rights no more than the three strikes provision of section 1915(g)" that the court upheld in *Adepegba v. Hammons*, 103 F.3d 383 (5th Cir. 1996). Thus, the filing requirements do not impose new liabilities under *Landgraf*. The plaintiff was given 30 days to refile for IFP certification in accordance with the PLRA.

The Fifth Circuit further found that, unlike the certification requirements of § 1915(a) which apply "any time a prisoner is 'seeking to bring or appeal a judgment in a civil action,'" the requirement of § 1915(b)(1) that the prisoner pay the full filing fee attaches only "to specific 'triggering events'" of bringing an action and filing an appeal, both of which the plaintiff had completed before the PLRA became effective. Following the rationale of *Thurman v. Gramley*, 97 F.3d 185 (7th Cir. 1996), the Fifth Circuit said it would deem the plaintiff's appeal "to be 'filed' under the PLRA if and when she refiles under the new certification requirements of the Act. Should she decide to refile, she 'shall be required to pay the full amount of a filing fee.'" Assessing fees if the plaintiff decides to refile for certification would be consistent with *Landgraf* "[b]ecause imposing fees after her decision to pursue her appeal does not attach new liabilities to completed conduct." The court noted that its decision disagrees with *White v. Gregory*, 87 F.3d 429 (10th Cir. 1996), which held that the PLRA does not apply to cases pending on its enactment.

Strickland v. Rankin County Correctional Facility, 105 F.3d 972, 974–76 (5th Cir. 1997). *See also Ayo v. Bathey*, 106 F.3d 98, 100–01 (5th Cir. 1997) (per curiam) (PLRA's IFP certification requirements apply "to all cases pending on its effective date, whether fully briefed or not, and . . . application of the PLRA revokes a prisoner's previously obtained IFP status, whether granted in a motion to proceed IFP on appeal prior to the effective date of the PLRA or granted in the district court and carried over to the appeal before the effective date of the PLRA"). *But see Rodgers v. Deboe*, 950 F. Supp. 1024, 1026– (S.D. Cal. 1997) (declining to apply § 1915(b) to plaintiff who was granted IFP status more than two months before Act, finding that "application of section 1915(b)'s newly created obligation to pay the 'full amount of a filing fee' to a plaintiff whose filing fees have already been 'waived' under pre-PLRA standards would have an impermissible retroactive effect" under *Landgraf*; court declined to follow *Marks v. Solcum*, 98 F.3d 494, 496 (9th Cir. 1996), which held that the sua sponte dismissal provisions of § 1915(e)(2) may be applied to civil actions filed prior to enactment of the PLRA).

Ninth Circuit rules that IFP provisions do not apply to habeas proceedings. Appellant filed a petition for a writ of habeas corpus in the district court on Jan. 8, 1995. On April 29, 1996, the court denied the petition as to three of four claims. On May 13, 1996, appellant filed a notice of appeal. The Ninth Circuit agreed with the decisions in *Santana v. United States*, 98 F.3d 752 (3d Cir. 1996), *Martin v. United States*, 96 F.3d 853 (7th Cir. 1996), and *Reyes v. Keane*, 90 F.3d 676 (2d Cir. 1996) that the PLRA's IFP provisions do not apply to habeas actions. "Congress was clearly not concerned with habeas corpus proceedings when they enacted the PLRA, as is

further evidenced by the absence of any reference to the PLRA or the forma pauperis revisions in the AEDPA enacted only two days earlier."

Naddi v. Hill, 106 F.3d 275, 277 (9th Cir. 1997).

District court rules that IFP status does not automatically continue on appeal and plaintiff must comply with PLRA filing fee requirements. Upon receiving the plaintiff's notice of appeal, the Eighth Circuit advised him by letter dated Oct. 1, 1996, that his appeal could not be docketed and processed because he had not paid the filing fees or complied with 28 U.S.C. § 1915(b). The plaintiff filed an objection to the district court's request that he submit a new IFP form in order to appeal. He argued that he did not have to comply with the recent statutory amendments because he was granted IFP status in the district court prior to April 26, 1996. The court noted that, unlike previous law, "[t]he amendments to the statute do not provide for such an automatic continuation of IFP status when a prisoner has filed an appeal in forma pauperis." Since the plaintiff filed his notice of appeal after April 26, 1996, he must comply with the amended statute, citing *Thurman v. Gramley*, 97 F.3d 185 (7th Cir. 1996), and *Covino v. Reopel*, 89 F.3d 105 (2d Cir. 1996).

Hale v. Wood, 943 F. Supp. 1135, 1136 (D. Minn. 1996).

Remedies for Prison Conditions

District court terminates specific performance of obligations in consent decree but denies motion to vacate decree; in the alternative, court rules that § 3626 unconstitutionally reopens final judgments. Plaintiff class—pretrial detainees being held in the Suffolk County Jail—brought suit against the defendants in 1971, challenging as unconstitutional the conditions of their confinement. The parties entered into a consent decree in May 1979. The decree was subsequently modified in 1985, 1990, and 1994.

After enactment of the PLRA, defendants brought motions to terminate prospective relief under 18 U.S.C. § 3626(b)(2) and to vacate the consent decree. Defendants (the sheriff of Suffolk County and the commissioner of corrections) argued that under § 3626(b)(2)(iii), the court should immediately terminate all prospective relief entered in the case because the court's previous decisions did not make the findings required under § 3626(a) and there was no showing that would support a finding that prospective relief is still warranted under the terms of the PLRA. The sheriff asked for termination of provisions in the consent decree granting prospective relief for alleged conditions of overcrowding. The commissioner contended that the entire consent decree constituted prospective relief under the PLRA and should be vacated. The United States, as intervenor, proposed "a less stringent and restrictive interpretation of what satisfies the requirement that the district court find a 'current and ongoing violation of the Federal right,' as . . . used in § 3626(b)(2) . . . [T]his finding would be permissible where the 'proximate effects' of a past constitutional violation have not yet been remedied, as well as where an imminent threat of recurrence of a violation of federal rights exists."

Plaintiffs "informed the court . . . that, in their view, because terminating all prospective relief would be interpreted by defendants as ending the defendants' obligation to maintain single-cell occupancy, a court order terminating all prospective relief will as a practical matter cause plaintiffs to lose 'rights secured to them by the decree.' Therefore . . . the court must either make the findings required by the statute and order that narrowly tailored prospective relief remains in effect or confront the constitutional issues posed by the PLRA."

After reviewing precedent in tort and contract cases and examining the definitions contained in § 3626(g) as well as standard legal definitions, the court concluded that based on precedent and "ordinary usage" there is "a distinction between, on the one hand, 'relief' and 'prospective relief' and, on the other hand, the judgment or consent decree itself." In its view, determinations made by the court in the initial consent decree and subsequent modifications "represent judicial determinations regarding the rights and duties of the parties that are distinct from the relief ordered as remedies."

In the event its nonconstitutional interpretation of the statute is rejected by an appellate court, the district court offered an alternative constitutional ground of decision based on *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995). "The effect of the PLRA, unless construed to preserve [the ongoing obligations undertaken by the sheriff in an agreement modifying the consent decree and approved by the court in its Final Order of June 14, 1994] . . . would be to set aside by statutory directive a final judgment of a court. This would be the most serious intrusion on the separation of powers of any of the various alleged intrusions plaintiffs have challenged." This holding is a narrow and limited one, the court stressed, declaring that the challenged section of the statute "offends the principle of separation of powers to the extent that it is interpreted as having retroactive effect to reopen consent decrees entered before its enactment."

The district court granted the motion to terminate prospect relief "to the extent that the obligations placed on defendants under the Consent Decree . . . will no longer be enforced by an order of specific performance," but denied the motion "to the extent that it requests that the court terminate the obligations stated in the Consent Decree . . . as the consensual undertakings of the defendants with court approval." It denied the motion to vacate the consent decree in its entirety.

Inmates of the Suffolk County Jail v. Sheriff of Suffolk County, No. CIV. A. 71-162-REK (D. Mass. Jan. 2, 1997) (Keeton, J.).

District court makes findings required by § 3626(b)(3) and holds defendants in civil contempt of both settlement agreement and court orders enforcing its terms. The parties entered into a settlement agreement on Oct. 12, 1994, which obligated the defendants to remedy conditions at the Criminal Justice Complex (CJC) in St. Thomas, U.S. Virgin Islands, and

established specific requirements and deadlines to effect this remedy. On Nov. 7 and 8, 1996, a hearing was held on a motion brought by plaintiffs to show cause why the defendants should not be held in civil contempt for continued noncompliance with the agreement and the district court's orders enforcing it. Defendants moved to terminate the consent decree under the PLRA. Based on the evidence and testimony presented at the hearing, the court found that "conditions at the CJC presently do not meet minimal, constitutional standards." It examined the agreement and made the findings required by 18 U.S.C. § 3626(b)(3): "[I]ts terms are narrowly tailored to address the constitutional violations suffered by the plaintiffs. Further . . . the Agreement extends no further than necessary to correct the clear violations of plaintiffs' federal rights under the Constitution." It held the defendants in civil contempt of both the agreement and the court's enforcement orders. The district court noted that it did not have to decide to whether the PLRA's provision authorizing termination of a consent decree is constitutional because the defendants no longer sought to terminate the agreement but instead moved to modify it pursuant to Fed. R. Civ. P. 60(b).

Carty v. Farrelly, C.A. No. 94-78 (D.V.I. Jan. 29, 1997) (Brotman, J.).

Ninth Circuit denies mandamus challenges to district court rulings on nonretroactivity of special master provision. In three cases, petitioners sought writs of mandamus commanding district courts to vacate orders holding that 18 U.S.C. § 3626(f)(4), which limits compensation for special masters and requires payment from Judiciary funds, does not apply retroactively to special masters appointed before the PLRA's effective date. Observing that "there is no published precedent from any court other than respondent courts on the retroactive application of the special master provision," the Ninth Circuit denied the petitions after reviewing the statute and its legislative history under the retroactivity analysis of *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). "[W]e are not convinced that the error petitioners contend the respondent courts have committed cannot be corrected on appeal if, indeed, error has been committed."

Wilson v. United States Dist. Court, 103 F.3d 828, 830 (9th Cir. 1996).

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HABEAS CORPUS

Second or Successive Petitions

Ninth Circuit holds that prima facie showing on one claim is sufficient to grant entire application for second petition under §2244(b)**.** "The relevant provision of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §2244(b)(3)(C), states that this court 'may authorize the filing of a second or successive application . . . if it determines that the application makes a prima facie showing that the application satisfies the requirements of this [section].' Although the provision arguably is subject to the interpretation that this court is to authorize only those claims meeting the requirements of §2244, we conclude that the proper procedure under the statute is for this court to authorize the filing of the entire successive application.

"Section 2244(b)(3) refers only to our granting or denying 'an application.' This provision is to be contrasted with section 2244(b)(4), which provides that '[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.' (Emphasis supplied.) Thus, the district court is directed to address, claim by claim, the entire application authorized by this court.

"Our authority to authorize 'an application' under section 2244(b) is also to be contrasted with our authority to issue a certificate of appealability under section 2253. In the latter case, '[t]he certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).' 28 U.S.C. §2253(c)(3). There is no comparable restriction governing our authorization of successive applications for habeas corpus under section 2244(b).

"We conclude, therefore, that our authorization permits Nevius to file his entire application in the district court. Indeed, it is likely in many cases that this court's authorization of a successive petition, which must be issued within 30 days after filing of the applicant's motion, *see* §2244(b)(3)(D), will be issued without explanation."

Nevius v. McDaniel, 104 F.3d 1120, 1121–22 (9th Cir. 1996). *See also Bennett v. United States*, No. 97-9003 (7th Cir. Mar. 3, 1997) (Posner, C.J.) (holding that §2244's requirement for a "prima facie showing" applies to §2255 applications to file second or successive petitions and that, "[b]y 'prima facie showing' we understand (without guidance in the statutory language or history or case law) simply a sufficient showing of possible merit to warrant a fuller exploration by the district court").

Eighth Circuit holds that §2244(b) applies to motion to recall mandate and that new rule of state law does not allow second petition. In 1995 the Eighth Circuit upheld petitioners' state death sentences and the district court's denial of their habeas petitions. "The petitioners have now moved to recall our mandate in order to permit them to contend that a decision of the Supreme Court of Arkansas, handed down after our decision, so changes the state-law basis of their convictions as to render their death sentences invalid under the Eighth Amendment."

"When the decision in question is, as here, a denial of a petition for habeas corpus, a motion to recall the mandate to allow consideration of a new ground or contention is the functional equivalent of a second or successive petition for habeas corpus. Such a motion can be granted, and the new ground or contention decided on the merits, only if the case meets the exacting standards for second or successive petitions." Because the motion was filed Dec. 24, 1996, the court applied §2244(b), as amended by the AEDPA. The relevant portion of the statute in this case is §2244(b)(2)(A), which requires dismissal of a second or successive habeas petition unless "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."

The court held that petitioners' claim did not meet the requirements of §2244(b)(2)(A). "It is apparent that this claim does not 'rel[y] on a new rule of constitutional law' . . . . The 'new rule' asserted . . . is a rule of state law, having to do with the elements of capital felony murder. Moreover, even if [the new state court decision] had established 'a new rule of constitutional law,' not merely of state statutory law, petitioners would still not prevail, because this asserted new rule has not been 'made retroactive to cases on collateral review by the Supreme Court. . . .' 'Supreme Court' in this sentence means the Supreme Court of the United States, and that Court has said nothing about the opinion of the Supreme Court of Arkansas." The court added that, "[i]f we were free to reach

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the merits of petitioners' argument . . . , we would still deny the motion."

Ruiz v. Norris, 104 F.3d 163, 164–65 (8th Cir. 1997). *See also Denton v. Norris,* 104 F.3d 166, 167 (8th Cir. 1997) (rejecting petitioners' claim that amended §2244(b)(1)—which precludes second or successive petitions for any claim presented in prior application—is an unconstitutional suspension of the writ of habeas corpus).

Standard of Review

Fourth Circuit holds that it will not apply AEDPA standard of review to pre-Act denial of habeas relief. A state prisoner, convicted of capital and other crimes, had his habeas petitions denied by the state courts, and the Supreme Court denied certiorari in 1994. He filed a federal habeas petition, which the district court denied in 1995. He then filed a notice of appeal and request for a certificate of probable cause. Shortly after he filed his opening brief in the Fourth Circuit, the AEDPA was enacted.

The appellate court remanded for an evidentiary hearing on some of petitioner's claims, after first determining that the new standards of appellate review in Chapter 153 of the AEDPA should not be applied to this §2254 petition. "[T]he AEDPA was not enacted until April 24, 1996, nearly six months after the district court disposed of Mackall's case and two days after he filed his opening brief in the Fourth Circuit. And, unlike Chapter 154, the amendments to Chapter 153 are not subject to a retroactivity clause. . . . Absent some indication that Congress intended the revisions to apply retroactively, *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 255–57, 114 S. Ct. 1483, 1492 . . . (1994), we will not review the district court's disposition under standards that did not exist until after this appeal had divested the court of jurisdiction."

Mackall v. Murray, 109 F.3d 957, 960–61 (4th Cir. 1997). *See also Brewster v. Kirby,* 954 F. Supp. 1155, 1158–59 (N.D.W. Va. 1997) (declining to retroactively apply AEDPA to §2254 petition where filings were completed one year before statute enacted); *Hamblin v. Anderson,* 947 F. Supp. 1179, 1183 (N.D. Ohio 1996) (do not apply AEDPA amendments to §2254 petitions pending on date of enactment); *Satcher v. Netherland,* 944 F. Supp. 1222, 1247–49 (E.D. Va. 1996) (same). *Cf. Jeffries v. Wood,* No. 95-99003 (9th Cir. May 12, 1997) (en banc) (Thomas, J.) (opinion of court giving rationale for earlier order, at 103 F.3d 827, holding that AEDPA would not be applied retroactively; five judges dissented from opinion).

Fifth Circuit uses AEDPA standard of review to reverse pre-AEDPA habeas grant. Defendant's second federal habeas petition, filed in October 1993, was granted as to petitioner's sentence after the district court held that he had received ineffective assistance of counsel at the punishment phase of his murder trial. While the state's appeal was pending, the AEDPA was enacted. Following the *Landgraf* retroactivity analysis and the recent holding in *Drinkard v. Johnson,* 97 F.3d 751 (5th Cir. 1996) (*see Habeas & Prison Litigation Case Law Update* #5), the appellate court held that "the amended standards of review found within [§2254(d)] apply retroactively to [t]his petition."

The court then concluded that "the new standards of review set forth in the AEDPA require reversal of the district court's order granting habeas corpus relief. . . . The state trial court conducted an evidentiary hearing, heard testimony and received evidence from both parties, and issued detailed findings of fact and conclusions of law in support of its judgment" that defendant did not receive ineffective assistance of counsel. The court held that "we cannot say that reasonable jurists considering the question would be of one view that the state court determination . . . was incorrect. We certainly cannot say that the state court decision was so clearly incorrect as not to be debatable among reasonable jurists. Accordingly, we conclude, as we must, that 28 U.S.C. §2254, as amended . . . , bars habeas corpus relief."

Moore v. Johnson, 101 F.3d 1069, 1072–76 (5th Cir. 1996). *See also Ford v. Ahitow,* 104 F.3d 926, 936 (7th Cir. 1997) (using AEDPA standard of review to reverse pre-AEDPA issuance of habeas writ, but also noting that it would have reversed even under pre-AEDPA standard); *Scott v. Anderson,* 958 F. Supp. 330, 334 (N.D. Ohio 1997) (holding that amended §2254 would be applied to petition filed Feb. 2, 1996).

Certificate of Appealability

Fifth Circuit stays response brief by state until certificate of appealability is issued. Petitioner applied for a certificate of probable cause to authorize an appeal of the district court's denial of his habeas petition. Because the application was still pending when the AEDPA became effective, the appellate court treated it like an application for a certificate of appealability (COA). Petitioner filed a brief raising fourteen points of error, providing "the basis to determine whether a COA should issue and, if so, on what issues." The state then moved to stay briefing until the court ruled on the application and the court granted the motion.

"Under [18 U.S.C. §]2253(c)(3), as amended, an appeal may not proceed until a COA issues. The COA must specify which points of appeal satisfy the new federal habeas relief standard set forth in section 2253(c)(2). We have not yet ruled on Lucas' application. Thus, the State should not be required to respond until such certification issues. The effect of requiring the State to respond at this point would be to nullify this newly amended section by transforming an application for a COA into an appeal on the merits. This result is inconsistent with the rule that statutes should be interpreted so as to give meaning to all terms. . . . Therefore, we conclude that we must issue a COA specifying the issues meriting review before requiring the State to respond to the petitioner's brief on the merits."

Lucas v. Johnson, 101 F.3d 1045, 1046 (5th Cir. 1996) (per curiam). *Accord United States v. Simmonds,* 111 F.3d 737, 741 (10th Cir. 1997) ("we hold the circuit court should rule on whether it will issue a certificate of appealability before

requiring the government's merit brief"; however, "the circuit court may still request the government's merit brief before ruling on a certificate of appealability, especially in those cases the court finds particularly difficult or complex such that a merit brief from the government would significantly aid its decision").

Second Circuit holds that COA is required for appeal of §2255 motion where motion was originally filed before the AEDPA; also holds that district courts have authority to issue COA. Two federal prisoners filed §2255 motions in 1992. The district court denied their motions on Sept. 27, 1996, and also denied their applications for certificates of appealability. Movants then filed notices of appeal, and further moved to dispense with the COA requirement, arguing that amended §2255 should not be applied to motions originally filed before enactment of the AEDPA.

Applying the *Landgraf* retroactivity analysis, the appellate court "agree[d] with the Eleventh Circuit that application of whatever limiting effect the AEDPA may have on the scope of appeals of denials of section 2255 motions results in the sort of procedural change that does not encounter retroactivity objections. *See Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996) (in banc). . . . Accordingly, the motion to dispense with a COA must be denied." *See also United States v. Riddick*, 104 F.3d 1239, 1241 (10th Cir. 1997) (COA required for appeal from denial of §2255 motion filed May 3, 1996, even though denial occurred on April 19, 1996); *United States v. Orozco*, 103 F.3d 389, 391–92 (5th Cir. 1996) (requirements for COA apply to pending §2255 appeal where notice of appeal was filed after AEDPA's effective date; defendant's notice of appeal would be construed as request for COA); *United States v. Coyle*, 944 F. Supp. 418, 420 (E.D. Pa. 1996) (COA is required for §2255 appeal filed after AEDPA's enactment although original §2255 motion was filed in 1995).

The court also agreed with the "careful analysis" in *Hunter*, 101 F.3d at 1573–83, that the seemingly conflicting language of §2253(c)(1) (COA can be issued only by "circuit justice or judge") and Fed. R. App. P. 22(b) (expressly allowing district judge to issue COA) should be harmonized by reading "judge" in §2253(c)(1) to include both circuit and district judges. The court additionally reasoned that district judges could issue pre-AEDPA certificates of probable cause for §2254 appeals, and "[i]f Congress wished to transfer the 'gate-keeping' function for appeals of section 2254 denials exclusively to the courts of appeals, it could be expected to make absolutely clear its intention as to such a significant restructuring of appellate procedure." Finding further that Congress intended to make §2255 appeals "at least as restricted as" §2254 appeals, but lacking evidence that Congress intended to make them "*more* restrictive than" §2254 appeals, the court concluded "that district judges have authority to issue COAs in section 2255 cases" as well as in §2254 cases.

The court added that a request for a COA in §2254 and §2255 appeals must first be made to the district court. "Amended Rule 22(b) specifies that the district judge who rendered the judgment 'shall' either issue a COA or give reasons for denying one, implying that the district judge is required to be the initial COA decision-maker. If the district judge denies a COA, a request may then be made to a court of appeals." If an appellant files a notice of appeal (which does not normally set forth the issues to be appealed), rather than a request for a COA (which should make "a substantial showing of the denial of a constitutional right"), the court will grant or deny a COA if it can determine from the filing whether appellant did or did not make the required showing. "In cases where the matter is unclear, we will treat the notice of appeal as a 'request' for a COA, as contemplated by Rule 22, but will afford the appellant an opportunity to make the 'substantial showing of the denial of a constitutional right,' as contemplated by section 2253."

Lozada v. United States, 107 F.3d 1011, 1015–17 (2d Cir. 1997).

Third Circuit holds that district court may issue COA. After the district court denied a federal prisoner's §2255 claim, it issued a certificate of appealability. The government argued that the district court had no authority to do so, but the appellate court disagreed. "Certainly the term 'circuit justice or judge' is ambiguous as 'circuit' might modify only the word 'justice' or might modify both 'justice' and 'judge.' Obviously, if 'circuit' applies to 'judge' then only a court of appeals judge or circuit justice can issue a certificate of appealability. . . . Yet we know that, unless we are willing to hold that Congress made an extraordinary mistake in drafting, a district judge must be able to issue a certificate of appealability in" §2254 cases because Fed. R. App. P. 22(b) specifically allows it. "Thus, at the very time that Congress amended section 2253 to remove the language providing that the 'judge who rendered the order' could issue a certificate of probable cause, now a certificate of appealability, it provided in Rule 22(b) that a district judge in general, and the judge who rendered the judgment in particular, ordinarily, of course, a district judge, could issue a certificate of appealability. Furthermore, the AEDPA amendment to Rule 22(b) referred to section 2253(c) even though prior to the amendment Rule 22(b) did not mention section 2253. . . . In these circumstances, we must conclude that Congress deliberately amended Rule 22(b); we consequently hold that section 2253(c)(1) authorizes a district judge to issue a certificate of appealability in cases under subparagraph A and thus necessarily under subparagraph B as well. Our conclusion harmonizes Rule 22(b) and section 2253(c)(1), and thus we reject any suggestion that these provisions are inconsistent."

United States v. Eyer, No. 96-7310 (3d Cir. May 14, 1997) (Greenberg, J.).

One-Year Period of Limitation

Second Circuit holds that §2244(d)(1) should not have been used to bar §2254 claim. Petitioner was convicted in 1974 and the state's highest court refused to hear his appeal in 1978. He filed a federal habeas petition on July 5, 1996. The district

court dismissed the petition as time-barred under new 28 U.S.C. §2244(d)(1), which imposes a one-year period of limitation on habeas petitions by state prisoners. The one-year period runs, for this case, from "the date on which the judgment became final by the conclusion of direct review." The appellate court reversed and remanded.

Noting that *Lindh v. Murphy,* 96 F.3d 856, 867 (7th Cir. 1996) (en banc), indicated that petitioners should have a full year after the effective date of §2244(d)(1) to file, the court stated that "where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition, we see no need to accord a full year after the effective date of the AEDPA. At the same time, we do not think that the alternative of a 'reasonable time' should be applied with undue rigor. In this case, the petition was filed 72 days after the effective date of the Act, and may well have been handed to prison authorities for mailing a slightly shorter interval after that effective date. . . . We conclude that the filing was timely."

The state contended that the petition should be dismissed under Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts, which states that a petition may be dismissed if the state has been prejudiced by a delay in filing, and that prejudice is presumed if the delay is more than five years. The court declined to consider that issue, reasoning that because dismissal under Rule 9(a) "normally requires consideration of factual circumstances, [it] is appropriately left for the District Court, in the first instance. Alternatively, if the petition fails on its merits, the District Court may prefer to adjudicate the petition on that basis."

Peterson v. Demskie, 107 F.3d 92, 93–94 (2d Cir. 1997). *See also Duarte v. Hershberger,* 947 F. Supp. 146, 148–49 (D.N.J. 1996) (after first concluding that "the new one-year statute of limitations applies only prospectively to pending non-capital habeas cases," holding that petitioner whose one-year period would have expired before April 24, 1996, should "receive a grace period equal to the new limitations period"; thus, even though petitioner's final state appeal was rejected in 1986, he had until April 24, 1997, to file).

Tenth Circuit holds that one-year time limit should not be applied retroactively. A federal prisoner's conviction became final in 1991. He filed a §2255 motion in 1996, after the effective date of the AEDPA. The appellate court held that the "1-year period of limitation" in §2255 could not be applied to bar the claim. "[L]iteral application of the amended statute would bar Mr. Simmonds' §2255 motion as of October 7, 1992, more than three years prior to the amended statute's effective date. . . . However, a new time limitation cannot be so unfairly applied to bar a suit before the claimant has had a reasonable opportunity to bring it. . . . [A]dditionally, there is no indication Congress intended to foreclose prisoners who had no prior notice of the new limitations period from bringing their §2255 motions."

"Therefore, we hold application of the new time period to Mr. Simmonds' §2255 motion without first affording him a reasonable time to bring his claim impermissibly retroactive. Furthermore, we hold the one-year limitations period reflected in the amended 28 U.S.C. §2255 is also a reasonable time for prisoners to bring §2255 motions whose convictions became final before the Antiterrorism and Effective Death Penalty Act took effect. Accordingly, prisoners whose convictions became final on or before April 24, 1996 must file their §2255 motions before April 24, 1997."

United States v. Simmonds, 111 F.3d 737, 744–46 (10th Cir. 1997). *But cf. Clarke v. United States,* 955 F. Supp. 593, 597 (E.D. Va. 1997) (holding that one-year limitation period in §2255 may be applied to deny motion filed Oct. 21, 1996, over six years after conviction became final).

PRISON LITIGATION

Proceedings In Forma Pauperis

Fifth Circuit rules that the PLRA's filing fee provisions do not apply to deportees. After construing the plaintiff's collateral attack on the conviction underlying his deportation order as a 28 U.S.C. §2241 habeas petition, the district court dismissed it for frivolousness and failure to exhaust administrative remedies. The plaintiff appealed and sought to proceed in forma pauperis (IFP). The Fifth Circuit had to determine whether he was a "prisoner" as defined in 28 U.S.C. §1915(h): "[T]he term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program."

The court found it "a fairly close question" because "[i]n some sense, it is his violations of criminal law that have caused his current detention." However, he was currently being detained for a violation of immigration law rather than criminal law, and the court saw no language in §1915(h) indicating that Congress intended it to apply to INS detainees. In fact, the absence of immigration regulations in the list of offenses covered by the statute "very plausibly could be read to indicate the contrary." The court of appeals also found it persuasive that Congress addressed immigration reform in two other recent enactments: the Anti-Terrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. It therefore held that the plaintiff was not a "prisoner" under the PLRA and therefore did not have to comply with the Act's filing fee provisions.

Ojo v. Immigration & Naturalization Serv., 106 F.3d 680, 682–83 (5th Cir. 1997).

Eighth Circuit holds that the PLRA covers mandamus petitions arising from civil rights lawsuits and finds petitioner ineligible for installment payment of fees. The petitioner sought a writ of mandamus against the district judge conducting his 42 U.S.C. §1983 civil rights action and asked to proceed IFP. Noting that the PLRA does not mention mandamus proceedings in its IFP provisions, the Eighth Circuit held that "a mandamus petition arising from an ongoing civil rights lawsuit falls within the scope of the PLRA." It cited similar decisions in *Martin v. United States*, 96 F.3d 853, 854 (7th Cir. 1996), and *Green v. Nottingham*, 90 F.3d 415, 417–18 (10th Cir. 1996). The court left open "the issue of whether the PLRA applies to mandamus petitions when the underlying litigation is a civil habeas corpus proceeding." Because the petitioner had three or more previous cases dismissed for frivolousness or failure to state a claim, he was "ineligible for the §1915(b) installment plan," the court said. Before the court would consider the merits of his petition, he must pay the full filing fee within fifteen days.

In re Tyler, 110 F.3d 528, 529 (8th Cir. 1997). *Cf. Sikora v. Hopkins*, 108 F.3d 978, 978 (8th Cir. 1997) (per curiam) (writ of mandamus denied because appellate court found no error in district court's application of PLRA's fee provisions to petitioner even though he submitted his complaint and IFP motion prior to Act's effective date).

Tenth Circuit holds that §2254 habeas corpus actions and §2255 proceedings are not "civil actions" under the PLRA. "Because neither habeas nor §2255 proceedings can be uniformly characterized and because the context of the issue before us is narrow and well defined—the scope of the Prison Litigation Reform Act fee provisions—we find it analytically useful to consider habeas and §2255 proceedings together."

The court agreed with five other circuits that "the legislative history and purpose of the newly amended 28 U.S.C. §1915 show the filing fee requirements of that statute were not intended to extend to habeas or §2255 proceedings." It cited the following reasons: the PLRA's main purpose is to curtail abusive prison-condition litigation; the "economic disincentive" of §1915 does not have the same impact relative to a $5 filing fee for a habeas action as it does to a $120 fee for a civil suit; Congress could have reformed the fee provisions for habeas and §2255 actions in the Antiterrorism and Effective Death Penalty Act passed two days before the PLRA, but it did not do so; and, §1915(g) limits a prisoner proceeding IFP to three frivolous civil actions or appeals—"If 'civil action' includes habeas and §2255 proceedings in the context of 28 U.S.C. §1915, conceivably, a prisoner who had brought three frivolous prisoner-condition lawsuits would be prohibited from bringing a first habeas or §2255 action." This result "'would be contrary to a long tradition of ready access of prisoners to federal habeas corpus'" (quoting *Martin v. United States*, 96 F.3d 853, 855–56 (7th Cir. 1996)).

The court distinguished *Green v. Nottingham*, 90 F.3d 415 (10th Cir. 1996), which held that a petition for writ of mandamus, filed in the course of a habeas proceeding, was a "civil action" under §1915. "[I]n *Green*, we were specifically concerned with prisoners using writs of mandamus to subvert §1915's intent to curtail abusive litigation. . . . Here, we are not faced with the same concern. . . . [W]e are not, contrary to Congress' intent, creating a back door through which prison-condition litigation is admitted without first requiring a prisoner to satisfy 28 U.S.C. §1915's fee provisions." The court also agreed with the decisions in *Martin*, *supra*, at 854, and *Reyes v. Keane*, 90 F.3d 676, 678 (2d Cir. 1996), that the word "appeal" in §1915(b)(1) means an appeal of a civil action.

United States v. Simmonds, 111 F.3d 737, 741–44 (10th Cir. 1997). See also the Tenth Circuit decision in *Pigg v. F.B.I.*, 106 F.3d 1497, 1498 (10th Cir. 1997) (per curiam), holding that the district court erred in counting the dismissed *current* civil suit as one of three *prior* actions under §1915(g).

Eleventh Circuit decides that the PLRA does not cover habeas corpus proceedings. In May 1996, the district court denied petitioner's request for a writ of habeas corpus under 28 U.S.C. §2254, and thereafter also denied his application for a certificate of probable cause. The petitioner then sought a certificate of appealability from the Eleventh Circuit. On August 14, 1996, the clerk of the court of appeals advised the petitioner that he would have to pay the full appellate docketing and filing fee "or move, in accordance with the terms of the PLRA, for relief from the obligation to pay that entire fee in advance." The petitioner responded by filing a Motion to Determine Applicability of Docket and Filing Fees, contending that the PLRA does not cover habeas corpus cases and therefore the court "should find the 'docket and filing fees inapplicable to him.'"

The court saw "some force to the argument that the PLRA applies to habeas corpus cases," because of the "multitude of case law" that refers to them as civil in nature. But this language is "illusive, as habeas corpus actions are not purely (and thus not plainly) 'civil actions.'" The court also noted that under §1915(g), prisoners who had filed three groundless civil lawsuits would be denied access to the writ if the PLRA were applicable. It did not find it significant that Congress expressly excluded habeas corpus proceedings in defining the term "civil action with respect to prison conditions" in 18 U.S.C. §3626(g)(2)—Congress felt compelled to make such an exclusion from the scope of that section "in order to distinguish between prison release orders and habeas proceedings." Moreover, the Antiterrorism and Effective Death Penalty Act was passed two days earlier than the PLRA and Congress could have dealt with the IFP status of habeas petitioners in that act had it wanted to. It is also not likely that Congress meant for the PLRA's elaborate payment provisions, applicable to the $150 filing fee for a civil action, to cover the $5 fee in §2254 actions. For these reasons, the court held that the filing fee requirements of 28 U.S.C. §§1915(a)(2) and 1915(b) do not apply in §§2254 or 2255 proceedings.

Anderson v. Singletary, 111 F.3d 801, 802–06 (11th Cir. 1997). *Accord Smith v. Angelone*, 111 F.3d 1126, 1129–30 (4th Cir. 1997).

District court rules that filing fee requirements do not apply to lawsuit filed before the PLRA. Plaintiff filed his action on July 21, 1995, and the district court granted his request for IFP status. Defendant contended that the decision in *Covino v. Reopel*, 89 F.3d 105 (2d Cir. 1996), required that the PLRA's filing fee provisions be applied retroactively. The district court found this contention "manifestly wrong." The holding in *Covino*, which dealt with the retroactive application of the fee provisions to filing notices of appeal, rested on Congress's desire to reduce frivolous prisoner litigation. In that decision, the court of appeals said it might have made a different decision if the district court had granted a motion to proceed IFP on appeal. In this case, the district judge had done just that. For this reason, and because requiring plaintiff to comply retroactively with the fee provisions would not serve the congressional purpose, the provisions would not apply.

Walls v. Angrum, No. 95 Civ. 5498 (BSJ) (S.D.N.Y. Mar. 3, 1997) (Jones, J.) (unpublished).

Remedies for Prison Conditions

District court again holds automatic stay provision unconstitutional, refuses to adopt "tortured interpretation" of §3626(e)(2) advocated by Department of Justice. Defendants moved for the immediate termination of remedial plans and court orders under 18 U.S.C. §3626(b)(1), (2), and (3). They argued that the automatic stay provision of the PLRA, §3626(e)(2), mandated automatic suspension of prospective relief thirty days after the filing of their motion for termination of relief. In accord with its previous decision in the companion case of *Hadix v. Johnson*, 933 F.3d 1360 (E.D. Mich. 1996), the district court held the automatic stay provision an unconstitutional violation of separation of powers and refused to give it effect pending a full hearing on the issues; "Because the automatic stay provision of the PLRA would have the effect of overturning a judgment of court established under Article III of the United States Constitution, that provision clearly violates constitutional separation of powers principles."

In making its ruling, the court rejected "a tortured interpretation of §3626(e)(2)" that the Department of Justice advocated "in order to save its constitutionality." The Department argued that "the provision should be seen as permitting the courts to exercise discretion to suspend, alter, or terminate relief. In other words, 'the relief remains in effect until the court either grants a stay under subsection (e)(2)(A) or terminates the relief.'" This interpretation, the court declared, "clearly contradicts the plain language of the statute."

Glover v. Johnson, 957 F. Supp. 110, 112–13 (E.D. Mich. 1997).

District court holds immediate termination provision constitutional, but takes motion to terminate under advisement pending hearing on ongoing constitutional violations. Pursuant to 18 U.S.C. §3626(b), defendants asked the court to terminate a consent decree and judgment order entered in 1980 and 1982. Plaintiffs contended that §3626(b) unconstitutionally violates separation of powers and equal protection principles and interferes with private contractual rights. The district court found that through the PLRA, Congress had changed the law governing the court's remedial power, ensuring that "courts cannot award relief greater than what is necessary to protect federal rights, even if the parties agree to it." This does not violate the separation-of-powers doctrine, the court said. "[C]ase law supports the conclusion that judgments imposing prospective relief, such as the orders in the case at hand, are subject to modification in equity by the courts in light of new circumstances. Section 3626 just provides an alternative mechanism to Rule 60(b) under which a defendant can ask for revision of a judgment in prison reform cases." The court can continue narrowly tailored prospective relief under §3626(b)(3).

In response to plaintiffs' argument that the statute violates equal protection because it does not serve any legitimate purpose, the court held that §3626(b) is rationally related to Congress's "legitimate interest in preserving state sovereignty from overzealous supervision by the federal courts in the area of prison conditions litigation." The court also rejected plaintiffs' contention that the statute retroactively deprived them of the benefit of the agreement they entered into. "What the Act restricts is an agreement that imposes obligations on the Defendant that go beyond what the Constitution requires, and thereby beyond what the court can enforce."

Although defendants "appear[ed] to be entitled to termination of the prospective obligations imposed by the consent decree and judgment order," the court found that the "lack of safety and dangerous conditions caused by overcrowding," which plaintiffs complained of, "are within the scope of the suit and if such conditions do not meet the constitutional minimum, the Court is not in a position to terminate all relief in this case." Consequently, the court took the motion to terminate under advisement pending a hearing on the issue of ongoing constitutional violations pursuant to §3626(b)(3).

Jensen v. County of Lake, 958 F. Supp. 397, 400–07 (N.D. Ind. 1997).

District court issues narrowly tailored permanent injunction under §3626(a)(1)(A) requiring enforcement of nonsmoking policy. On May 21, 1996, the district court entered a preliminary injunction ordering the District of Columbia to take actions to enforce its nonsmoking policy in facilities operated by the D.C. Department of Corrections. After a trial, the court found that "prior to this Court's preliminary injunction there existed a 'deliberate indifference' to the concerns of nonsmoking inmates despite the District's smoking policy. Without a continuation of the injunction, this 'indifference' will continue." In conformance with the requirement of 18 U.S.C. §3626(a)(1)(A) that prospective relief "extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs," the court entered a permanent injunction in favor of the designated plaintiffs. "[T]he District will be required to take all steps necessary to assure that the named Plaintiffs will be assigned sleeping

quarters with other non-smokers and to otherwise enforce its non-smoking policy in those areas where the plaintiffs are compelled to be. . . . The Court finds that these are the narrowest and least intrusive means to vindicate Plaintiffs' rights under the Eighth Amendment."

Crowder v. District of Columbia, 959 F. Supp. 6, 9–11 (D.D.C. 1997).

Suits by Prisoners

Sixth Circuit declares that the PLRA's administrative exhaustion requirement does not apply to pending appeals. The Sixth Circuit considered whether 42 U.S.C. §1997e, as amended by the PLRA, applied to four appeals that were pending when the Act became law. The section requires that prisoners first exhaust any available administrative remedies before bringing challenges to the conditions of their confinement. None of the inmates alleged that he had fulfilled that requirement. The court of appeals noted that under the pre-PLRA statute, prisoners "were not, as a rule, required to exhaust administrative remedies before filing suit." It found that the amended statute's language—"[n]o action shall be brought. . . until such administrative remedies as are available are exhausted"—applies expressly to "the bringing of new actions, not the disposition of pending cases. Actions brought before the statute was enacted are not affected by the new administrative exhaustion requirement."

The court rejected the argument made by the states opposing the four appeals that the entire Act must apply to pending cases because Congress specified that one part of it (18 U.S.C. §3626) does. If Congress had so intended, "it would have employed the same language as it used in [§3626] to make that intent clear." The Sixth Circuit also explained that even if the "prospective statutory language" of the statute were not dispositive, footnote 29 of *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994)—which states that the applicability of procedural rules "ordinarily depends on the posture of the particular case"—would require "that the new administrative exhaustion provision not apply to pending cases." This result would not be altered by the holdings in *Cort v. Ash*, 422 U.S. 66 (1975), or *Weinberger v. Salfi*, 422 U.S. 749 (1975). Finally, the appellate court disposed of several policy arguments advanced by the states, stressing that "where the language of the statute and *Landgraf* both require that we apply this new requirement only with respect to cases filed after the PLRA's passage, it would be improper to hold, on policy grounds, that the provision applies to the cases before us."

Wright v. Morris, 111 F.3d 414, 417–23 (6th Cir. 1997) (Merritt, J., dissenting). *Accord Mitchell v. Shomig,* No. 95 C 7595 (N.D. Ill. Mar. 31, 1997) (Gettleman, J.) (unpublished).

District court rules that bar to suit with no showing of physical injury does not apply retroactively. Plaintiff brought an action under 42 U.S.C. §1983 for violation of her constitutional rights. She alleged that on August 9, 1995, she had been prevented from attending religious services by a guard who shouted obscenities at her and caused her mental and emotional distress. Defendants moved to dismiss her claims as barred by 42 U.S.C. §1997e(e) because she made no showing of physical injury. The district court noted the Second Circuit's holding in *Covino v. Reopel,* 89 F.3d 105, 107 (2d Cir. 1996), that the PLRA's fee application provision is procedural in nature and applies retroactively. The core inquiry, it said, is "'whether the new provision attaches new legal consequences to events completed before [the PLRA's] enactment'" (quoting *Landgraf v. USI Film Productions,* 511 U.S. 244, 270 (1994)). The district court found that §1997e(e) does have such an effect "because it denies plaintiff a cause of action where she once had 'a legally cognizable claim.' Unlike the provision at issue in *Covino*, the provision here is neither procedural nor will plaintiff be allowed to continue with her cause of action if it were applied retroactively; rather her cause of action would be barred. Therefore, because this section 'would impair rights [plaintiff] possessed when [she] acted,' *Landgraf* (citation omitted), this section of the PLRA does not apply retroactively, and consequently plaintiff's claims will not be dismissed on this ground."

Harris v. Lord, 957 F. Supp. 471, 474 (S.D.N.Y. 1997). *Accord Thomas v. Hill,* No. 3:96-CV-0306 AS (N.D. Ind. Apr. 4, 1997) (Sharp, J.) ("Application of §1997e(e) to pending cases would eliminate claims that were legally cognizable when brought, and extinguish liability for conduct giving rise to liability at the time it occurred. This, the court concludes, attaches new legal consequences to events completed before the provision's enactment."); *Ramirez v. County of San Francisco,* No. C 89-4528 FMS (N.D. Cal. Jan. 23, 1997) (Smith, J.) (unpublished).

District court holds constitutional the PLRA's requirement of a showing of physical injury; court also holds that exposure to asbestos is not "physical injury" and that §1997e applies to claims of former prisoners. Plaintiffs (prisoners and former prisoners at the Indiana Youth Center) filed a class action under 42 U.S.C. §1983 seeking damages for "'untold future physical injury and present mental pain and suffering,' as well as 'mental anguish and the fear of developing cancer, asbestosis or related asbestos exposure diseases and conditions.'" Defendants moved for judgment on the pleadings based on the plaintiffs' failure to allege a physical injury within the meaning of 42 U.S.C. §1997e(e), as amended by the PLRA. Plaintiffs contended that: (1) inhaling or ingesting asbestos particles is a physical "impact" that meets the "physical injury" requirement of §1997e(e); (2) at least some class members were not subject to §1997e(e) because they were no longer prisoners when the complaint was filed; and, (3) §1997e(e) is unconstitutional. As to the first, the district court found that "mere inhalation or ingestion of asbestos particles without proof of resulting disease or other adverse physical effects" was not a physical injury within the meaning of §1997e(e).

Next, finding the language of §1997e(e) ambiguous with regard to whether it applies to civil actions brought by former prisoners, the court concluded that "[a]pplying §1997e(e) to

claims arising during custody, regardless of the plaintiff's status at the time the action is filed, is the more sensible and logical interpretation. It is more consistent with the purposes of §1997e and the PLRA as a whole." The plaintiffs' interpretation of §1997e(e) would have the "perverse result" of encouraging delay in filing by prisoners who could wait until they are released from custody to file suit for mental or emotional injury. This would also tend to multiply litigation because "a plaintiff who successfully obtained injunctive relief while in prison would be able to bring a separate action after release (but *only* after release) to obtain damages for mental or emotional injury." Neither was it likely that Congress wanted to create two classes of prisoners based solely on whether their release date occurs before or after the statute of limitations runs on an action for mental or emotional injury. This "would raise serious equal protection problems." (The court distinguished *Robbins v. Switzer*, 104 F.3d 895 (7th Cir. 1997), which held that the provisions of §1915(a)(2) & (b) do not apply to prisoners released before their appeals are filed. The provisions involving a prisoner's "'trust fund account statement (or institutional equivalent)' would make no sense as applied to former prisoners.")

Addressing the plaintiffs' argument that §1997e(e) strips the federal courts of effective remedial authority to vindicate prisoners' constitutional rights, the court declared that "[t]here is a point beyond which Congress may not restrict the availability of judicial remedies for the violations of constitutional rights without . . . rendering [those rights] utterly hollow promises. That point has not been reached by enactment of §1997e(e) as applied here." The district court also ruled that the statute does not substantially burden plaintiffs' right of access to the courts and held that Congress's distinction between suits arising in prison and other suits is rationally related to several legitimate government interests and therefore does not violate equal protection. Other equal protection questions raised by plaintiffs "merely show that the statute might have been more narrowly tailored." Neither does §1997e(e) violate equal protection because it does not apply to *Bivens* claims against federal officers and employees. "[T]he Constitution does not require that claims asserted under *Bivens* and those asserted under §1983 be treated identically."

The court dismissed plaintiffs' claims without prejudice, noting that if a member of the plaintiff class develops a disease caused by exposure to asbestos at a later time, that person "would then appear to be able to satisfy the physical injury requirement of §1997e(e)."

Zehner v. Trigg, 952 F. Supp. 1318, 1322–35 (S.D. Ind. 1997). *But cf. Hollimon v. Detella*, No. 96 C 3452 (N.D. Ill. Jan. 30, 1997) (Pallmeyer, Mag. J.) (unpublished) (Plaintiff stated a claim for violation of Eighth Amendment rights, but §1997e(e) bars suit because it prohibits actions for mental or emotional injury with no showing of physical injury. Without benefit of briefing, the court is unwilling to dismiss the complaint "because this provision presents a substantial constitutional problem that the courts have not yet addressed.").

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HABEAS CORPUS

Retroactivity

Supreme Court holds that AEDPA provisions covering noncapital habeas cases are not applied retroactively. The U.S. Supreme Court determined that chapter 153 of the Antiterrorism and Effective Death Penalty Act of 1996, which applies to noncapital habeas corpus actions, should not be applied to petitions that were pending on the effective date of the Act, Apr. 24, 1996. The ruling reversed *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc) (summarized in Habeas & Prison Litigation Case Law Update #4 (Nov. 1996)), and resolved a circuit split.

The court first made clear that the retroactivity analysis of *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), is used as a default rule only when normal rules of statutory construction fail to indicate whether a statute should be applied retroactively. Resort to *Landgraf* is unnecessary here because "[t]he statute reveals Congress's intent to apply the amendments to chapter 153 only to such cases as were filed after the statute's enactment (except where chapter 154 otherwise makes select provisions of chapter 153 applicable to pending [capital habeas] cases)."

"In §107(c), the Act provides that 'Chapter 154 . . . shall apply to cases pending on or after the date of enactment of this Act.' . . . We read this provision of §107(c), expressly applying chapter 154 to all cases pending at enactment, as indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act. . . . While the terms of §107(c) may not amount to the clear statement required for a mandate to apply a statute in the disfavored retroactive way, they do serve to make it clear as a general matter that chapter 154 applies to pending cases when its terms fit those cases at the particular procedural points they have reached."

"[E]verything we have just observed about chapter 154 is true of changes made to chapter 153. . . . If, then, Congress was reasonably concerned to ensure that chapter 154 be applied to pending cases, it should have been just as concerned about chapter 153, unless it had the different intent that the latter chapter not be applied to the general run of pending cases."

"Nothing, indeed, but a different intent explains the different treatment. This might not be so if, for example, the two chapters had evolved separately in the congressional process, only to be passed together at the last minute, after chapter 154 had already acquired the mandate to apply it to pending cases. Under those circumstances, there might have been a real possibility that Congress would have intended the same rule of application for each chapter . . . . But those are not the circumstances here. Although chapters 153 and 154 may have begun life independently and in different Houses of Congress, it was only after they had been joined together and introduced as a single bill in the Senate (S.735) that what is now §107(c) was added. Both chapters, therefore, had to have been in mind when §107(c) was added. Nor was there anything in chapter 154 prior to the addition that made the intent to apply it to pending cases less likely than a similar intent to apply chapter 153. If anything, the contrary is true . . . ."

"The insertion of §107(c) with its different treatments of the two chapters thus illustrates the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted."

The court also found support in new 28 U.S.C. §2264(b), which tells district courts to review capital habeas petitions "subject to subsections (a), (d), and (e) of section 2254." "While §2264(b) does not speak to the present issue with flawless clarity, . . . the function of providing that §§2254(d) and (e) be applicable in chapter 154 cases is, in fact, supportive of the negative implication apparent in §107(c). There would have been no need to provide expressly that (d) and (e) would apply with the same temporal reach as the entirely new provisions of chapter 154 if all the new provisions in both chapters 153 and 154 were potentially applicable to cases pending when the Act took effect . . . . The provision thus confirms that Congress assumed that in the absence of such a provision, §§2254(d) and (e) (as new parts of chapter 153) would not apply to pending federal habeas cases."

"We hold that the negative implication of §107(c) is that the new provisions of chapter 153 generally apply only to cases filed after the Act became effective."

Lindh v. Murphy, 117 S. Ct. 2059, 2062–67 (1997) (four justices dissenting). *See also United States v. Rocha*, 109 F.3d 225, 228–29 (5th Cir. 1997) ("the AEDPA's COA requirement does not retroactively apply to §2255 appeals in which the final judgment and notice of appeal were entered before the AEDPA's effective date").

Habeas & Prison Litigation Case Law Update is distributed periodically by the Federal Judicial Center to inform judges and other judicial branch personnel of selected federal court decisions interpreting the 1996 federal legislation on habeas petitions and prison litigation. Any analyses or interpretations of the case law are those of the Center staff who prepare the summaries.

One-Year Period of Limitation

Ninth Circuit holds that one-year period is subject to equitable tolling. Petitioner's unsuccessful state appeals of his conviction and death sentence ended with a denial of certiorari by the U.S. Supreme Court on Jan. 8, 1996. By that date the state supreme court had denied his habeas petition. He then requested and was granted appointment of counsel and a stay of execution in federal district court, which also entered an order that he file his habeas petition by Mar. 25, 1997. An unexpected change in counsel led the new lead attorney to ask the court to extend that filing date and equitably toll the AEDPA's one-year filing deadline, 28 U.S.C. §2244(d); AEDPA Sec. 101. The district court granted the motion and extended the deadline to Oct. 13, 1997, concluding that the one-year time limit was not a jurisdictional bar but a statute of limitations subject to tolling. The warden at petitioner's prison then filed a petition for writ of mandamus in the appellate court.

The court first determined what the applicable one-year period was for petitioner and agreed with two other circuit's that "AEDPA's one-year time limit did not begin to run against any state prisoner prior to the statute's date of enactment. . . . No petition filed on or before April 23, 1997—one year from the date of AEDPA's enactment—may be dismissed for failure to comply with section 101's time limit." *See Lindh v. Murphy,* 96 F.3d 856, 866 (7th Cir. 1996) (en banc); *Reyes v. Keane,* 90 F.3d 676, 679 (2d Cir. 1996). *See also United States v. Lopez,* 100 F.3d 113, 116–17 (10th Cir. 1996) (same for §2255 actions).

The court then held that "[t]he district court's interpretation of AEDPA's limitation period was . . . clearly correct. Unlike other parts of AEDPA, section 101 is remarkably lucid. It is phrased only as a 'period of limitation,' and 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.' . . . Nor does the jurisdictional provision of the habeas statute, 28 U.S.C. §2241, 'limit jurisdiction to those cases in which there has been a timely filing' in the district court. . . . Indeed, both the Supreme Court and this court have repeatedly held that timing provisions even more unyieldingly phrased than AEDPA's are statutes of limitations subject to tolling. . . . Every relevant signal—from the Act's plain language, to its legislative history, to its structure—points in the same direction: Section 101's one-year timing provision is a statute of limitations subject to equitable tolling, not a jurisdictional bar."

The court added that "[e]quitable tolling will not be available in most cases, as extensions of time will only be granted if 'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time. . . . We have no doubt that district judges will take seriously Congress's desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted." Here, the court concluded, tolling the statute of limitations was justified.

Calderon v. United States Dist. Court for Central Dist. of Cal., 112 F.3d 386, 388–92 (9th Cir. 1997).

Successive Petitions

Seventh and Ninth Circuits conclude that successive habeas petition based on claim of newly discovered evidence may not be filed if motion only challenges sentence. A second or successive petition under 28 U.S.C. §2255 may be filed on the basis of newly discovered evidence only if the evidence would establish "that no reasonable factfinder would have found the movant guilty of the *offense*" (emphasis added). Section 2254, pursuant to §2244(b)(2)(B)(ii), contains similar language. The petitioner in each circuit was challenging only his sentence when seeking permission to file a successive petition.

The Seventh Circuit, in ruling against the §2255 petitioner, noted a motion challenging a *sentence* "does not fit within the narrow confines of the amended statute, at least if it is interpreted literally." Although in pre-AEDPA law courts had allowed some "actual innocence" claims to extend to sentencing issues, "we do not think the exception survives the amendment. The 'actual innocence' exception of the prior law was judge-made, and so its contours were appropriately judge-fashioned and permissibly judge-expanded. The exception in the new law is graven in statutory language that could not be any clearer. . . . [In] the absence of any indication in the legislative history that 'offense' was being used in some special sense different from its ordinary meaning, we think it highly unlikely that Congress intended the word to bear a special meaning. . . . We conclude that a successive motion under 28 U.S.C. §2255 (and presumably a successive petition for habeas corpus under section 2254, . . . which has materially identical language) may not be filed on the basis of newly discovered evidence unless the motion challenges the conviction and not merely the sentence."

The Ninth Circuit also interpreted the statute strictly in rejecting a §2254 petitioner's application. Petitioner "fails under [§2244(b)(2)(B)] because the constitutional error alleged . . . is ineffective assistance of counsel at *sentencing*, and he cannot demonstrate that 'no reasonable factfinder would have found [him] *guilty* of the underlying offense' (emphasis added)."

Hope v. United States, 108 F.3d 119, 120 (7th Cir. 1997); *Greenawalt v. Stewart,* 105 F.3d 1268, 1277 (9th Cir. 1997) (per curiam). *See also In re Medina,* 109 F.3d 1556, 1565 (11th Cir. 1997) (per curiam) (denying application for successive petition: "Medina's competency to be executed has nothing to do with his guilt or innocence of the underlying offense. . . . The §2244(b)(2)(B) exception to the bar against second habeas applications has no application to claims that relate only to the sentence."); *Greenawalt v. Stewart,* 105 F.3d 1287, 1287–88 (9th Cir. 1997) (per curiam) (rejecting petitioner's "attempt[] to avoid the [§2244] limitations imposed on successive petitions by styling his petition as one pursuant to §2241"; application to file successive petition denied, in part, because "his claim that execution by lethal injection violates his federal constitutional rights is not relevant to the question whether he is guilty of murder in the first degree").

Eleventh Circuit examines requirements for successive petition based on newly discovered evidence. Pursuant to §2244(b)(3)(A), petitioner filed an application for leave to file a second §2254 petition on two claims of newly discovered evidence. The appellate court held that petitioner failed to satisfy the requirements of §2244(b)(2)(B). "First, Boshears fails to demonstrate that the facts underlying these allegations 'could not have been discovered through due diligence,' as required by §2244(b)(2)(B)(i). This prong means that an applicant seeking permission to file a second or successive habeas motion must show some good reason why he or she was unable to discover the facts supporting the motion before filing the first habeas motion."

"An application that merely alleges that the applicant did not actually know the facts underlying his or her claim does not pass this test. Criminal defendants are presumed to have conducted a reasonable investigation of all facts surrounding their prosecution. . . . Thus, in evaluating an application under §2244(b)(2)(B)(i), we inquire whether a reasonable investigation undertaken before the initial habeas motion was litigated, would have uncovered the facts the applicant alleges are 'newly discovered.'" The court held that petitioner failed to adequately explain why reasonable investigation would not have previously uncovered the facts at issue.

Petitioner also failed to satisfy §2244(b)(2)(B)(ii), that "no reasonable factfinder would have found the applicant guilty of the underlying offense" because of the new evidence. "Our inquiry essentially has three steps. First, we must identify 'the facts underlying the [applicant's] claim' and accept them as true for purposes of evaluating the application. We next must decide whether these facts establish a constitutional error. Finally, we evaluate these facts in light of the evidence as a whole to determine whether, had the applicant known these facts at the time of his or her trial, the application clearly proves that the applicant could not have been convicted. . . . This is a very difficult standard to meet," and the court concluded that petitioner's evidence "is simply not enough to overcome the strict evidentiary standard."

In re Boshears, 110 F.3d 1538, 1540–43 (11th Cir. 1997) (per curiam).

Sixth Circuit holds that second or successive motions filed in district court should be transferred to appellate court. A federal prisoner "filed a second motion to vacate his sentence under 28 U.S.C. §2255. The district court, noting that Sims failed to obtain authorization to file his second §2255 motion as required by 28 U.S.C. §2244(b)(3), transferred the motion to th[e appellate] court pursuant to 28 U.S.C. §1631. After his §2255 motion was transferred, Sims filed a separate request under Sixth Circuit Rule 33 and §2244(b)(3) seeking permission to file his second §2255 motion in the district court."

Noting that many prisoners are improperly filing second or successive motions in the district courts and that "district courts in this circuit are not handling the processing of these cases in the same way," the court adopted the procedure set forth in *Liriano v. United States*, 95 F.3d 119, 123 (2d Cir. 1996). Thus, "when a prisoner has sought §2244(b)(3) permission from the district court, or when a second or successive petition for habeas corpus relief or §2255 motion is filed in the district court without §2244(b)(3) authorization from this court, the district court shall transfer the document to this court pursuant to 28 U.S.C. §1631. The §2244(b)(3) motion to file the second or successive petition or §2255 motion will be deemed filed, for purposes of the one-year limitation periods established by §2244(d) and §2255, on the date that the §2244(b)(3) motion is given to prison authorities for mailing and the prisoner has satisfied the verification requirements of Fed. R. App. P. 25(a)(2)(C)."

In re Sims, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam).

Standard of Review

Tenth Circuit sets standard for denying habeas petition despite failure to exhaust remedies. On petitioner's appeal of the denial of his habeas petition, the state claimed that petitioner had failed to exhaust his state court remedies on one claim. The appellate court decided that it could deny the appeal on the merits despite the failure to exhaust. "[W]e conclude that it is appropriate to address the merits of a habeas petition notwithstanding the failure to exhaust available state remedies where, as here, 'the interests of comity and federalism will be better served by addressing the merits forthwith.' *Granberry v. Greer*, 481 U.S. 129, 134 . . . (1987) . . . . The [AEDPA] codifies the holding in *Granberry* by authorizing the denial of a petition on the merits despite failure to exhaust state remedies. *See* 28 U.S.C. §2254(b)(2). Because §2254(b)(2), standing alone, does not contain the standard for determining when a court should dismiss a petition on the merits instead of insisting on complete exhaustion, we read §2254(b)(2) in conjunction with *Granberry*."

Hoxsie v. Kerby, 108 F.3d 1239, 1242–43 (10th Cir. 1997).

Seventh Circuit holds that new §2254(d) mandates deferential review to sufficiency of evidence claims. In ruling on a state habeas petitioner's claim that the evidence was insufficient to convict him, the appellate court concluded that the standard of review for such claims set forth in *Jackson v. Virginia*, 99 S. Ct. 2781 (1979), was changed by the AEDPA. Although the test for sufficiency remains the same—habeas relief may be granted only if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt"—*Jackson*'s de novo review of the state courts' decisions is replaced by a more deferential review. Under 28 U.S.C. §2254(d)(1), habeas relief may only be granted when the state decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."

"Because *Jackson* claims are mixed questions of law and fact, we are compelled to hold that a writ of habeas corpus may be issued for evidence insufficiency only if the state courts have unreasonably applied the *Jackson* standard. Federal re-

view of these claims therefore now turns on whether the state court provided fair process and engaged in reasoned, good-faith decisionmaking when applying *Jackson*'s 'no rational trier of fact' test. As we stated in *Lindh* [*v. Murphy*], §2254(d)(1) 'requires federal courts to take into account the care with which the state court considered the subject. . . . [A] responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment.' 96 F.3d [856, 871 (7th Cir. 1996)]."

Following this standard, the court held that "we cannot say the state judges acted as unreasonable jurists in their application of the *Jackson* standard." (Note: The court reviewed this claim under the AEDPA even though petitioner filed it before Apr. 24, 1996. The Supreme Court's *Lindh* decision may require remand for review under the pre-AEDPA standards, but we believe the discussion of §2254(d)(1) merits reporting.)

Gomez v. Acevedo, 106 F.3d 192, 197–201 (7th Cir. 1997). *Cf. Hall v. Washington*, 106 F.3d 742, 748–49 (7th Cir. 1997) (in holding state court's findings were unreasonable under §2254(d), stating that the "'unreasonableness' standard allows the state court's conclusion to stand if it is one of several equally plausible outcomes. On the other hand, Congress would not have used the word 'unreasonable' if it really meant that federal courts were to defer in all cases to the state court's decision. Some decisions will be at such tension with governing U.S. Supreme Court precedents, or so inadequately supported by the record, or so arbitrary, that a writ must issue.").

Certificate of Appealability

Fifth Circuit holds that petitioner must exhaust state remedies to obtain COA. The district court dismissed petitioner's habeas claims for failure to exhaust state remedies on most of his claims, and denied his request for a certificate of probable cause (CPC). The appellate court construed petitioner's appeal as a request for a certificate of appealability (COA), and had to "decide what standards apply to a COA request when the district court denied habeas relief on a procedural ground, rather than on the merits."

Under pre-AEDPA law, the Fifth Circuit had held that "a habeas petitioner who 'has failed to exhaust all of the postconviction claims he now seeks to raise . . . has asserted no cognizable right to federal habeas relief under §2254'" and thus was not entitled to a CPC. More recently, the circuit held that "[t]he standard for obtaining a COA is the same as for a CPC. . . . Thus, in deciding whether to issue a COA to Murphy, we . . . engage in a two-step process. First, we will decide whether Murphy has made a credible showing of exhaustion. If he has, we will determine whether his underlying claim is debatable among reasonable jurists."

"We need proceed no further than the first step. When a habeas petition includes both exhausted claims and unexhausted claims, the district court must dismiss the entire 'mixed petition.' . . . Murphy has failed to exhaust most of his claims for relief. He has not alleged any 'absence of available State corrective process,' 28 U.S.C. §2254(b)(1)(B)(i), or that 'circumstances exist that render such process ineffective to protect [his] rights,' 28 U.S.C. §2254(b)(1)(B)(ii). Therefore, he has failed to satisfy the exhaustion requirement and, accordingly, is not entitled to a COA."

Murphy v. Johnson, 110 F.3d 10, 11–12 (5th Cir. 1997).

Fifth Circuit holds that COA is not required for §2241 appeal. "We must decide whether 28 U.S.C. §2253, as recently amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 . . . requires that Ojo receive a certificate of appealability ('COA') before we may hear his appeal. . . . Conspicuously absent from the statute is any mention of appeals in §2241 proceedings. As the plain language of §2253 unambiguously indicates that a COA is not required in such cases, we need look no further."

Ojo v. I.N.S., 106 F.3d 680, 681 (5th Cir. 1997). *Accord Forde v. U.S. Parole Comm'n*, 114 F.3d 878, 879 (9th Cir. 1997); *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996).

Special Procedures in Capital Cases

Fourth Circuit holds that Eleventh Amendment precludes suit to enjoin state from attempting to invoke new habeas procedures in capital cases. Five state inmates sought a declaratory judgment that Maryland does not qualify for the AEDPA's special habeas procedures in capital cases at chapter 154 (28 U.S.C. §§2261–2266) and an injunction forbidding the state from invoking chapter 154 until it complied with the statute. The district court concluded that the state did not comply with chapter 154's requirements and was not entitled to Eleventh Amendment immunity, and therefore held that the state was "not presently entitled to invoke the benefits of Chapter 154" and enjoined it from attempting to invoke the new standards in any future federal habeas actions brought by the five inmates. The state appealed, arguing that the Eleventh Amendment bars this action.

The appellate court vacated the judgment and remanded with instructions to dismiss. "[T]he Eleventh Amendment protects the sovereign rights of states from abridgement by the federal judiciary. Thus, the State of Maryland and the named officials are not subject to this suit unless the plaintiffs can demonstrate that this case falls within one of the exceptions to Eleventh Amendment immunity." The court ruled that none of the claimed exceptions applied here: the state has not engaged in "a continuing violation of federal law" by merely threatening to invoke the new procedures; this action does not fall within the habeas corpus exception to Eleventh Amendment immunity because it is not, in fact, a habeas action; and the state's "announced intention to invoke chapter 154 does not constitute a waiver of Eleventh Amendment immunity." The court also ruled that "considerations of judicial economy and convenience" in resolving this issue in one consolidated action rather than through individual habeas petitions cannot overrule the state's right to invoke the Eleventh Amendment.

Booth v. Maryland, 112 F.3d 139, 141–46 (4th Cir. 1997).

PRISON LITIGATION

Proceedings In Forma Pauperis

Eleventh Circuit holds that §1915(e)(2) applies to cases pending before PLRA's enactment; also holds that filing fee requirements do not violate equal protection and supersede conflicting provisions of Rule 24(a). The plaintiff filed his complaint on Jan. 29, 1996. On June 18, 1996, the district court dismissed it sua sponte for failure to state a claim, pursuant to 28 U.S.C. §1915(e)(2)(B)(ii). On July 31, 1996, the court granted plaintiff's motion to proceed IFP on appeal and ordered plaintiff to comply with §§1915(a) and (b). On appeal, plaintiff argued that the district court erred in applying §1915(e)(2) to his complaint because he filed the lawsuit before enactment of the Prison Litigation Reform Act (PLRA). He maintained that under pre-PLRA law, the first test of his complaint's sufficiency would probably have been in connection with a Rule 12(b)(6) motion and he could have amended it in light of the defendants' motion. By dismissing his complaint under §1915(e)(2), the court deprived him of this possibility. Based on *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the Eleventh Circuit held that §1915(e)(2) was wholly procedural and did not deprive plaintiff of any rights he possessed when he filed the lawsuit.

The court also considered arguments that the filing fee provisions failed equal protection rational basis review and were superseded by Fed. R. App. P. 24(a). Citing *Anderson v. Singletary,* 111 F.3d 801 (11th Cir. 1997), the court stressed that Congress had a rational basis to believe that the PLRA's fee requirements would curtail abusive prisoner litigation. As to the conflict between the PLRA's fee provisions and Rule 24(a), the Eleventh Circuit adopted the Fifth Circuit's analysis and holding in *Jackson v. Stinnett,* 102 F.3d 132, 136 (5th Cir. 1996): "To the extent that the Rules Enabling Act (as expressed in Rule 24(a)) actually conflicts with the PLRA, we hold that the statute repeals the Rule."

Mitchell v. Farcass, 112 F.3d 1483, 1486–89 (11th Cir. 1997). *See also Nicholas v. Tucker,* 114 F.3d 17, 19–21 (2d Cir. 1997) (PLRA's filing fee provisions do not violate equal protection or deny access to courts).

Fifth Circuit rules that district court has discretion under §1915(a)(3) to certify that prisoner appeals are not taken in good faith; also holds that statute does not conflict with Rule 24(a). The district court dismissed plaintiff's claims as frivolous and denied his motion for leave to appeal IFP. It also certified that the appeal was not taken in good faith pursuant to Fed. R. App. P. 24(a). After the plaintiff complied with a Fifth Circuit order that he fulfill the PLRA's filing-fee requirements, the court of appeals considered whether he was entitled to proceed IFP on appeal "and more specifically, the proper application of Fed. R. App. P. 24(a) . . . in light of the PLRA." It reviewed *Floyd v. United States Postal Serv.*, 105 F.3d 274 (6th Cir. 1997), which reached two conclusions on the same issues: "(1) conditional phrases in section 1915(a) and (b) create a prisoner/nonprisoner dichotomy between the various parts of subsection (a); and (2) subsection (a)(3), which . . . applies only to nonprisoners, poses an absolute bar to IFP appeals and hence impliedly repeals part of Rule 24(a)." The Fifth Circuit rejected both conclusions, emphasizing that the *Floyd* court's analysis "on the interplay between subsections (a) and (b) of section 1915" frustrates the PLRA's goals by distinguishing between prisoner and nonprisoner appeals. "We . . . hold that the district courts retain the discretion to certify under section 1915(a)(3) that IFP appeals, from prisoners and nonprisoners alike, are not taken in good faith."

The court distinguished two of its decisions—*Jackson v. Stinnett,* 102 F.3d 132 (5th Cir. 1996), and *Strickland v. Rankin County Correctional Facility,* 105 F.3d 972 (5th Cir. 1997)—which held that §1915 impliedly repealed portions of Rule 24. Here, the appeal did not involve provisions of §1915 that conflict with Rule 24, "The perceived conflict noted in *Floyd* is that section 1915(a)(3) does not permit an appeal to proceed IFP if the appeal is not taken in good faith, whereas Rule 24(a) allows an IFP appellant to apply to the courts of appeals for IFP status within 30 days of such a certification." The Rule 24(a) provisions that spelled out the district court's role in certifying IFP appeals pursuant to language contained in §1915(a) were adopted in 1967. The PLRA amendments to §1915 simply moved the language of subsection (a) to subsection (a)(3). This does not show "congressional intent to abrogate procedures in Rule 24 that have coexisted peacefully for three decades with the identical provision."

The court concluded that the PLRA did not overrule precedent providing for appellate review of a district court's certification that an IFP appeal is not taken in good faith. Consequently, it outlined the procedure that must be followed: "(1) a district court may certify that an IFP appeal is not taken in good faith under section 1915(a)(3) and Rule 24(a); (2) if the trial court does so, it is required under Rule 24(a) to set forth in writing the reasons for its certification; (3) within the time prescribed by Rule 4, the appellant either may pay the full filing fee and any relevant costs and proceed on appeal for plenary review, or contest the certification decision by filing a motion for leave to proceed IFP with the court of appeals. If the latter be done and the appellate IFP certification is secured, the motion therefor shall be deemed to be a timely notice of appeal. When the prisoner opts to challenge the certification decision, the motion must be directed solely to the trial court's reasons for the certification decision. The said motion and deemed notice of appeal shall be a filing for purposes of the PLRA and will trigger the financial screening and assessment procedures thereof." Because the lower court record lacked

findings on two substantive issues, the case was remanded to the district court to make the findings and conduct applicable financial screening and assessment procedures.

Baugh v. Taylor, 117 F.3d 197, 199–202 (5th Cir. 1997). *Accord Newlin v. Helman,* No. 96-4229 (7th Cir. July 23, 1997) (Easterbrook, J.).

Fifth Circuit holds that PLRA's three-strikes provision does not infringe prisoners' right of access to courts or to equal protection. The district court construed plaintiff's habeas corpus petition challenging his placement in administrative segregation as a 42 U.S.C. §1983 suit, dismissed it as frivolous under 28 U.S.C. §1915(e)(2)(B)(i), and barred him from further IFP filings under §1915(g). Plaintiff appealed.

The Fifth Circuit first concluded, in accord with its ruling regarding §2255 actions in *United States v. Cole,* 101 F.3d 1076 (5th Cir. 1996), that the new PLRA requirements do not apply to §2254 habeas petitions. It then decided that the district court had properly characterized the plaintiff's habeas action as a §1983 suit, which is a civil action within the meaning of the PLRA. According to the court's "bright-line rule," the proper vehicle for challenging a prison procedure that affects the timing of release from custody is a §1983 suit unless a favorable determination would automatically entitle the prisoner to accelerated release. Although plaintiff claimed that reassignment from administrative segregation would make him eligible for parole, a successful suit would have only an indirect impact on whether he eventually received parole. The PLRA therefore applied to his case.

The court disagreed with plaintiff's contention that the three-strikes provision unconstitutionally blocks prisoners' access to the courts and discriminates against them in violation of the Due Process Clause. A prisoner with three strikes "still has the right to file suits if he pays the full filing fees in advance, just like everyone else." Since no fundamental personal right or suspect class was involved, the only question was whether the provision makes a rational distinction between prisoners and other litigants. The court agreed with the Fourth and Sixth Circuits that it does. *See Roller v. Gunn,* 107 F.3d 227 (4th Cir. 1997); *Hampton v. Hobbs,* 106 F.3d 1281 (6th Cir. 1997). Because plaintiff had at least three strikes, "he may not proceed IFP in this or any other federal lawsuit which does not involve 'imminent danger of serious physical injury.'"

Carson v. Johnson, 112 F.3d 818, 820–23 (5th Cir. 1997). *See also Gibbs v. Roman,* 116 F.3d 83, 86 (3d Cir. 1997) (proper focus when examining complaint under §1915(g) "must be the imminent danger faced by the inmate at the time of the alleged incident, and not at the time the complaint was filed").

D.C. Circuit rules that fee requirements apply to petition for writ of prohibition, and petitioner must pay fees despite subsequent release from prison. Shortly before his release from prison, petitioner sought a writ of prohibition in the D.C. Circuit and filed a motion to proceed IFP. The court rejected his contention that because certain claims arose out of criminal proceedings, the petition should be treated like a habeas petition and, therefore, the PLRA's prepayment obligations should not apply. It held that the term "civil action" in §1915(b)(4) applies to a petition for a writ of prohibition that includes underlying civil claims, agreeing with other circuits "that it would defeat the purpose of the PLRA if a prisoner could evade its requirements simply by dressing up an ordinary civil action as a petition for mandamus or prohibition or by joining it with a petition for habeas corpus."

The court then considered how the filing fee procedures applied to petitioner. He had not submitted the required forms or made the required payments while he was incarcerated and argued that he was not bound by the PLRA after being released from prison. "That Smith currently lacks the means to pay the applicable filing fee does not . . . relieve him of his obligation to comply with past due procedural and payment obligations under the PLRA." Section 1915(b)(4), which provides that a prisoner shall not be prohibited from bringing an action or appeal because of lack of assets or means to pay the initial partial filing fee, does not override "the court's obligation to 'assess and, when funds exist, collect,' §1915(b)(1), applicable fees from petitioners who, though lacking assets at the time of filing, subsequently gain means, either in their prison account or after release." Petitioner must file an affidavit within thirty days showing the balances in his prison account as of the date he filed his petition and his income for six months prior to that date, as well as for the period from the filing date until the date of his release from prison.

In re Smith, 114 F.3d 1247, 1250–52 (D.C. Cir. 1997).

Sixth Circuit holds that "civil action" in §1915 does not encompass habeas corpus actions or §2255 motions to vacate sentence, but prisoners seeking such relief must comply with §1915(a)(1). The Sixth Circuit consolidated appeals from the denial of petitions for a writ of habeas corpus under 28 U.S.C. §2254 and a motion to vacate sentence under §2255 in order to determine the applicability of the PLRA's filing fee provisions to both types of cases. It decided that "[r]eading the term 'civil' to include habeas petitions and motions to vacate produces absurd results."

The court further considered how a prisoner who files a §2254 or §2255 action in district court can avoid payment of the required filing fees. "Unlike the appellate courts, which have Fed. R. App. P. 24 available to waive the fees, no equivalent rule exists for the district courts." It noted that under §1915(a)(1) a district court may allow any proceeding to go forward without prepayment of fees by a person who submits an affidavit containing specified information. The court held that a prisoner seeking §2254 or §2255 relief as a pauper must file the requisite affidavit but does not have to file the trust account statement required by §1915(a)(2).

Kincade v. Sparkman, No. 96-5842 (6th Cir. June 26, 1997) (Martin, C.J.). *See also Martin v. Bissonette,* No. 96-1856 (1st Cir. July 11, 1997) (Selya, J.) (PLRA does not apply to habeas petitions); *United States v. Levi,* 111 F.3d 955, 956 (D.C. Cir. 1997) (filing fee provisions do not apply to §§2254 and 2255 proceedings); *McIntosh v. United States Parole Comm'n,* 115

F.3d 809, 811–12 (10th Cir. 1997) (§ 2241 habeas proceedings and appeals are not "civil actions" under the PLRA). *Cf. Santee v. Quinlan*, 115 F.3d 355, 357 (5th Cir. 1997) (appeal of order dismissing application for writ of mandamus seeking review of underlying habeas corpus petition "is not an appeal of a civil action within the scope of PLRA").

Fifth Circuit holds that released prisoner must file affidavit required by § 1915(a)(1) but does not have to meet the filing fee requirements of §§ 1915(a)(2) and (b). While in prison, plaintiff filed a § 1983 lawsuit. By the time his suit was dismissed and he filed a notice of appeal, plaintiff had been released on parole. The Fifth Circuit considered the ambiguous wording of § 1915(a)(1), which "makes it unclear whether the affidavit requirement applies to all persons or only prisoners." In the court's view, "the most natural reading . . . is that Congress intended all petitioners to be more specific in their (a)(1) affidavits and that it intended prisoners to meet additional requirements under (a)(2)." The fee requirement of § 1915(b) also applies exclusively to prisoners. Because plaintiff was not a prisoner when he filed his notice of appeal, he did not have to meet the requirements of §§ 1915(a)(2) or (b). The court of appeals gave him thirty days to file an affidavit complying with § 1915(a)(1).

Haynes v. Scott, 116 F.3d 137, 139 (5th Cir. 1997). *Cf. Gay v. Texas Dep't of Corrections State Jail Div.*, 117 F.3d 240, 242 (5th Cir. 1997) (plaintiff required to pay filing fees because he filed notice of appeal before being released from prison).

Fifth Circuit rules that PLRA does not require prisoner to pay entire filing fee in prior civil case before filing second complaint. The plaintiff filed a § 1983 complaint in May 1996, along with a motion to proceed IFP. In August 1996, he filed a second § 1983 complaint and motion to proceed IFP. The district court sua sponte denied the second motion to proceed IFP and dismissed the complaint on the grounds that appellant could not file any other complaints until the full filing fee was paid in his previously filed case.

The Fifth Circuit reversed. "Nowhere does the PLRA require a prisoner to pay the entire filing fee in a prior civil case before filing a second complaint." The plaintiff had thus far complied with the PLRA's filing fee requirements with respect to both of his complaints. In these circumstances, dismissal of his second complaint contradicted the directive of § 1915(b)(4) that "[i]n no event shall a prisoner be prohibited from bringing a[n action] for the reason that the prisoner has no assets and no means by which to pay the initial filing fee." The district court also failed to follow the procedure established by the Fifth Circuit for screening frivolous IFP claims, which calls for an initial determination of IFP status based entirely on economic factors. Finally, dismissal of the second complaint "had the effect of impermissibly limiting the number of claims, frivolous or otherwise, that a pauper may bring."

Walp v. Scott, 115 F.3d 308, 309–10 (5th Cir. 1997).

Suits by Prisoners

Fourth Circuit holds that attorney fee provisions apply to juveniles incarcerated in juvenile detention facilities, and the PLRA governs all fee awards entered after its effective date. A group of juveniles successfully challenged the constitutionality of juvenile prison conditions. In several orders entered before and after enactment of the PLRA, the district court found that the juvenile plaintiffs were entitled to reasonable attorneys' fees pursuant to 42 U.S.C. § 1988. Attorney fee provisions in the PLRA state that no fees shall be awarded to a "prisoner who is confined to any jail, prison, or other correctional facility" in an action seeking redress for unconstitutional prison conditions unless certain requirements are met. *See* 42 U.S.C. § 1997e(d)(1)(A) and (B). No award made can be based on a rate "greater than 150 percent of the hourly rate established under section 3006A of title 18 . . . for payment of court-appointed counsel." Section 1997e(d)(3). In successive orders, the district court held that the PLRA did not apply to fee awards for work performed but not compensated before its enactment on Apr. 26, 1996. The court further held that fees for work performed subsequent to enactment were not limited by the PLRA because, while juveniles were considered "prisoners" under § 1997e(h) (and under 18 U.S.C. § 3626(g)(3)), they were not "confined to a prison, jail, or other correctional facility" as the phrase is defined in § 1997, a section not amended by the PLRA.

In reviewing the district court's orders, the Fourth Circuit considered three issues: "First, are the PLRA's limitations on attorneys' fees applicable to juveniles incarcerated in juvenile facilities? Second, if applicable to juveniles, are the limitations applicable to fee awards for work performed, but not compensated, prior to the enactment of the PLRA? And third, do the PLRA's limitations on attorneys' fees impose new standards for determining the appropriateness of a fee award in a prison conditions suit?" Resolution of the first question turned on "whether Congress intended the phrase 'jail, prison, or other correctional facility' to include juvenile detention facilities when it enacted the PLRA." The defendant contended that because the definition of "prison" in § 3626(g)(5) included juvenile facilities for the purpose of stating a cause of action, "prison" includes juvenile facilities for the purpose of awarding fees under § 1997e. Plaintiffs countered that (1) because Congress did not revise § 1997 to include juvenile facilities, it did not intend § 1997e to apply to them; (2) Congress intentionally defined "prison" to include juvenile facilities only in § 3626(g)(5); (3) Congress has historically treated adult and juvenile prisoners differently; and (4) it is not inconsistent to define a juvenile not incarcerated in a "prison" as a "prisoner" because juveniles transferred to adult facilities are subject to the same rules regardless of age. The appellate court recognized "the apparent conflict with the definition of 'institution'" in § 1997, but held "that a limitation of the phrase 'jail, prison, or other correctional facility' to adult prison facilities in [§ 1997e] would be inconsistent with other language within the section, other sections of the Act, and the

plain and usual meanings of the relevant terms." Thus, the fee provisions apply to juveniles in juvenile facilities.

With regard to fees awarded for services performed before enactment of the PLRA, §1997e(d)(3) "mandates that all attorney's fees awarded after April 26, 1996, in any prison conditions lawsuit comply with the restrictions imposed by the PLRA." All of the orders appealed were entered after that date. "Congress could have easily inserted language to restrict the application of these limitations to awards for work performed subsequent to the PLRA's enactment, but it did not do so." The same analysis applies to §§1997e(d)(1) and (d)(2). The court of appeals disagreed with other courts' decisions that application of the fee limitations to work done before the Act's effective date is impermissibly retroactive. It distinguished two of those cases because the fee awards were made before the PLRA's enactment. The court explained that in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the Court specifically cited attorney fee determinations as secondary conduct that "does not give rise to concerns about retroactivity." Nor are the limitations so fundamentally unfair as to result in manifest injustice. *Contra Hadix v. Johnson,* 965 F. Supp. 996, 999–1000 (W.D. Mich. 1997); *Blissett v. Casey,* No. 93-CV-218 (N.D.N.Y. June 20, 1997) (McCurn, J.).

The court also addressed the three-step analysis required by §1997e(d). The court must be satisfied that the plaintiff is eligible for fees under 42 U.S.C. §1988 and that the request is reasonable; the plaintiff must prove "the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights . . . and . . . is proportionately related to the court ordered relief . . . or . . . was directly and reasonably incurred in enforcing the relief ordered"; and plaintiff's counsel fees can be no more than 150% of the hourly rate available to court-appointed counsel. Plaintiffs had proven eligibility and reasonableness under §1988. However, on remand the district court still must consider whether plaintiffs proved the second criterion; and if it finds they have, the court must recompute its fee award to conform to the hourly cap.

Alexander S. v. Boyd, 113 F.3d 1373, 1380–88 (4th Cir. 1997) (Murhaghan, J., dissenting on retroactive application issue). *Cf. Clark v. C.O. Phillips,* 965 F. Supp. 331, 334, 338 (N.D.N.Y. 1997) (under §1997e(d), fee award of 79% of judgment awarded plaintiff is "proportionately related" to the relief obtained; also, under §1997e(d)(2), it is reasonable to apply 25% of judgment to attorney fee and cost award).

Fifth Circuit rules that "physical injury" required in §1997e(e) must comport with Eighth Amendment standards. The Fifth Circuit found no abuse of discretion in the district court's dismissal of plaintiff's civil rights complaint as frivolous under §1915(e)(2). A prisoner cannot bring a civil action for mental or emotional injury "without a prior showing of physical injury" under 42 U.S.C. §1997(e)e. Since there is no definition of "physical injury" in the statute, "the well established Eighth Amendment standards guide our analysis. . . . That is, the injury must be more than *de minimus*, but need not be significant." The plaintiff's "alleged injury—a sore, bruised ear lasting for three days—was *de minimus*."

Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997).

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HABEAS CORPUS

Second or Successive Petition

Four more circuits conclude that amended §2255 precludes second or successive petition based on *Bailey* claim; however, Second and Third Circuits hold that claim may be pursued under §2241, and Sixth Circuit holds that limits on second or successive petitions should not apply retroactively. Each circuit's petitioner had been convicted of or pled guilty to using or carrying a firearm during and in relation to a drug trafficking offense, 18 U.S.C. §924(c)(1). Each petitioner had filed an unsuccessful 28 U.S.C. §2255 motion before the decision in *Bailey v. United States*, 116 S. Ct. 501 (1995), which tightened the definition of "using" a firearm under §924(c)(1). Claiming that *Bailey* invalidated their §924(c)(1) convictions, all four petitioners sought to file another §2255 motion, but not until after passage of the Antiterrorism and Effective Death Penalty Act on April 24, 1996. The AEDPA amended §2255 to require that a second or successive §2255 motion be certified by the appellate court to contain either newly discovered evidence proving that defendant was not guilty or, for these cases, "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

The four circuits concluded that, under amended §2255, the petitioners could not file another motion. As the Fourth Circuit, sitting en banc, stated, "the *Bailey* Court neither referred to, nor relied upon, any provision of the Constitution as support for its holding. . . . We hold that the decision of the Supreme Court in *Bailey* did not announce a new rule of constitutional law and accordingly may not form the basis for a second or successive motion to vacate sentence pursuant to 28 U.S.C.A. §2255. In reaching this conclusion, we join the other circuit courts of appeals that have considered this question. *See Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997) (per curiam); *United States v. Lorentsen*, 106 F.3d 278, 279 (9th Cir. 1997); *In re Blackshire*, 98 F.3d 1293, 1294 (11th Cir. 1996) (per curiam); *Nunez v. United States*, 96 F.3d 990, 992 (7th Cir. 1996)."

The Fourth Circuit also found that *Bailey* has not been given retroactive application, holding that the Supreme Court must "declare[ ] the collateral availability of the rule in question, either by explicitly so stating or by applying the rule in a collateral proceeding. Because the Supreme Court has done neither with respect to the rule announced in *Bailey*, Vial would not be entitled to file a successive §2255 motion based on *Bailey* even if it contained a rule of constitutional law."

Finally, the court rejected petitioner's claim that, by barring his second motion, amended §2255 is an unconstitutional suspension of the writ of habeas corpus. In *Felker v. Turpin*, 116 S. Ct. 2333, 2339–40 (1996), "the Supreme Court determined that the provision of the AEDPA limiting second and successive habeas corpus petitions by persons convicted in state courts does not constitute a suspension of the writ. . . . We conclude that the reasoning of the Court with respect to limitations on second and successive habeas petitions pursuant to §2254 applies with equal force to the identical language in §2255."

In re Vial, 115 F.3d 1192, 1195–98 (4th Cir. 1997) (en banc) (three judges dissented).

The Second and Third Circuits agreed with *Vial*, but also considered whether petitioners had alternative means to raise their *Bailey* claims. Both held that, under the narrow circumstances here, petitioners could move in the district court for a writ of habeas corpus under 28 U.S.C. §2241. Section 2255, before and after the AEDPA amendments, provides a "safety valve": "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, *unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.*" (Emphasis added.) After reviewing the relevant legislative and case histories, the circuits reached similar conclusions.

The Third Circuit found that petitioner "does not have and, because of the circumstance that he was convicted for a violation of §924(c)(1) before the *Bailey* decision, never had an opportunity to challenge his conviction as inconsistent with the Supreme Court's interpretation of §924(c)(1). If, as the Supreme Court [has stated], it is a 'complete miscarriage of justice' to punish a defendant for an act that the law does not make criminal, thereby warranting resort to the collateral remedy afforded by §2255, it must follow that it is the same 'complete miscarriage of justice' when the AEDPA amendment to §2255 makes that collateral remedy unavailable. In that unusual circumstance, the remedy afforded by §2255 is 'inadequate or ineffective to test the legality of [Dorsainvil's] detention,'" and there is "no reason why §2241 would not be available under these circumstances, provided of course that Dorsainvil could make the showing necessary to invoke habeas relief, an issue for the district court."

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The court cautioned that its decision should "not suggest that §2255 would be 'inadequate or ineffective' so as to enable a second petitioner to invoke §2241 merely because that petitioner is unable to meet the stringent gatekeeping requirements of the amended §2255." Petitioner "is in an unusual situation because *Bailey* was not yet decided at the time of his first §2255 motion. Our holding that in this circumstance §2255 is inadequate or ineffective is therefore a narrow one."

In re Dorsainvil, 119 F.3d 245, 247–52 (3d Cir. 1997).

The Second Circuit, citing *Dorsainvil* with approval and following similar reasoning, agreed that resort to §2255's "safety valve" should be limited, and it tried to outline when §2241 could be used. "We have already stated that 'inadequate or ineffective' is not limited merely to the practical considerations suggested by the government, but refers to something that is still less than the full set of cases in which §2255 is either unavailable or unsuccessful. We now hold that that 'something' is, at the least, the set of cases in which the petitioner cannot, for whatever reason, utilize §2255, and in which the failure to allow for collateral review would raise serious constitutional questions."

"Because the cases in which serious questions as to §2255's constitutional validity are presented will be relatively few, our interpretation does not permit the ordinary disgruntled federal prisoner to petition for habeas corpus. Nor, however, does it keep the courts closed in cases where justice would seem to demand a forum for the prisoner's claim in so pressing a fashion as to cast doubt on the constitutionality of the law that would bar the §2255 petition."

"Since Triestman cannot bring his claim under the newly-amended §2255, and since any attempt by Congress to preclude all collateral review in a situation like this would raise serious questions as to the constitutional validity of the AEDPA's amendments to §2255, we find that §2255 is inadequate and ineffective to test the legality of Triestman's detention. We therefore hold that Triestman is entitled to bring a petition for a writ of habeas corpus in the district court pursuant to §2241(c)(3)."

The Second Circuit also addressed a procedural question: whether it could rule on an application to file a second motion within the thirty-day period required by §2244(b)(3)(D), but then stay the order and reconsider its decision later, as it did here. "[T]he parties agree that we have complied with [§2244(b)(3)(D)] by denying the motion within thirty days, even though we then stayed our mandate and ordered briefing on the question of whether or not it was appropriate to reconsider that decision. The parties also agree that, notwithstanding the restrictions on appealability in §2244(b)(3)(E), this court has the authority to order a rehearing sua sponte. It is well-established that a court of appeals is entitled both to reconsider a prior decision . . . and to order a rehearing sua sponte . . . . By mandating that the initial decision of the court of appeals 'shall not be the subject of a *petition* for rehearing' (emphasis added), §2244(b)(3)(E) provides only that a disappointed litigant may not ask the court to reconsider its certification decision. By its plain terms, it does not purport to limit the court's own power to review its decisions or to undertake a rehearing. As such, the government concedes, and we agree, that under the AEDPA, a court of appeals retains the authority to order a rehearing sua sponte."

Triestman v. United States, 124 F.3d 361, — (2d Cir. 1997).

The Sixth Circuit took a different approach. Petitioner's first §2255 motion was denied in July 1995 and affirmed on appeal in June 1996. Between those dates, *Bailey* was decided and the AEDPA enacted. Petitioner sought permission to file another §2255 motion, based on *Bailey*, in November 1996. Under those circumstances, "[t]his case presents us primarily with the question of whether AEDPA's new restriction on filing multiple §2255 motions 'is the type of provision that should govern cases arising before its enactment.' *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)."

The court determined that before the AEDPA, petitioner could have filed a second §2255 motion based on *Bailey*. It also noted the "safety valve" language in §2255. "If 'the remedy by [§2255] motion is inadequate or ineffective to test the legality of his detention,' then a federal prisoner may apply for a writ of habeas corpus under 28 U.S.C. §§2241, 2244. 28 U.S.C. §2255. If AEDPA bars Hanserd from raising his *Bailey* issue in a §2255 motion, he could file a habeas petition pursuant to this provision."

"A §2244 motion would not be barred by the new restrictions on successive motions and petitions. Section 2244(a) allows a district judge to refuse to entertain a repeat application for the writ by a federal prisoner only 'if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.'. . . Hanserd's previous §2255 motion was not an application for a writ of habeas corpus; and, in any case, the exception just quoted, which was inserted by AEDPA §106(a), explicitly states that §2244(a) should not be read to supersede the provisions of §2255. Similarly, §2244(b), which contains new limits similar to those in §2255 on successive petitions, applies by its terms only to a second or successive application under §2244 or §2254. 28 U.S.C. §2244(b)(2), (b)(3). Hanserd's §2255 motion was, axiomatically, a motion rather than an application and was filed in district court under §2255 rather than §2244 or §2254. We therefore conclude that if Hanserd is now barred from filing a §2255 motion, he may raise his *Bailey* claim under §2244."

"With this discussion in mind we now turn to *Landgraf*'s retroactivity analysis. We analyze the case first under the assumption that §2244 relief is available, and then under a contrary assumption. . . . [B]ecause §2244 would provide an equivalent remedy as a §2255 motion, requiring Hanserd to use the former instead of the latter would not have impermissible retroactive effect under *Landgraf*" and "AEDPA's new restrictions on second §2255 motions apply to this case."

"Conversely, if Hanserd may not file a habeas petition under §2244, then applying AEDPA's new restrictions to this

case to prohibit his second § 2255 motion would . . . have impermissible retroactive effect. . . . When Hanserd filed his initial § 2255 motion, the law would have allowed him to raise a *Bailey* claim in a second motion, as discussed above. Under AEDPA, however, he may not. Applying the new statute would thus attach a severe new legal consequence to his filing a first motion: he would have lost his right to challenge his sentence. . . . Because Congress has not expressed an intent that the new Act have such a retroactive effect, we could not apply AEDPA in this way."

"This analysis leads us to an odd conundrum. Section 2255 explicitly states that federal prisoners may resort to habeas corpus if, and only if, § 2255 relief is inadequate. Our analysis of the AEDPA under *Landgraf* leads us to the contrapositive conclusion: Hanserd may file a new § 2255 motion under the old abuse-of-the-writ standard if, and only if, § 2255 bars him from obtaining relief in district court under § 2244. Hanserd may apply for relief under one, but not both, of these provisions; the question is which one."

"Fortunately, Congress has provided our answer. In enacting § 2255, Congress expressed a clear preference that federal prisoners use that provision, rather than habeas corpus, to challenge their confinement, if possible. Hanserd's single post-AEDPA attack should therefore be pursued under § 2255 unless the new Act requires a different result. As discussed above, AEDPA's text, seen through the lens of *Landgraf*, does not require a different result. . . . Our holding means that federal inmates will have one post-AEDPA bite at the apple, limited further, for prisoners who filed a § 2255 motion before AEDPA's enactment, by the old abuse-of-the-writ standard. . . . [A] federal prisoner must satisfy the new requirements of 28 U.S.C. § 2255 only if he has filed a previous § 2255 motion on or after April 24, 1996, the date AEDPA was signed into law. As Hanserd's previous § 2255 motion was filed before that date, he does not need to meet this new standard."

"Inmates who wish to file a second or successive motion to vacate sentence should first file a motion in this court requesting permission under 28 U.S.C. §§ 2244, 2255, regardless of when the first motion to vacate sentence was filed. If the successive motion is proper under AEDPA's gatekeeping provisions, permission to file a motion in the district court will be granted, with the statute of limitations tolled while the motion for permission is before this court. See 28 U.S.C. § 2255. If under the holding of this case permission is not needed because AEDPA's gatekeeping provision cannot be applied pursuant to *Landgraf*, this court will so indicate and will transfer the motion to the proper district court pursuant to 28 U.S.C. § 1631. *Cf.* Fed. R. App. P. 22(a). Motions for permission that fall in neither of these categories—i.e., those that would be barred both under the old and the new law and those that are barred by a previous motion filed after April 24, 1996—will be denied by order of this court."

In re Hanserd, 123 F.3d 922, 924–34 (6th Cir. 1997).

Eleventh Circuit applies "pragmatic" test for whether "new rule of constitutional law" under § 2244(b)(2)(A) "was previously unavailable." On April 24, 1997, petitioner sought permission from the appellate court to file a second or successive habeas corpus petition pursuant to 28 U.S.C. § 2244(b)(2). He contended that, under *Cage v. Louisiana*, 498 U.S. 39 (1990), which was decided after his capital trial, the state court's jury instruction with regard to reasonable doubt was improper. Under § 2244(b)(2)(A), petitioner had to show 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."

The appellate court held that petitioner did not satisfy that requirement and it denied the application. "The central issue in the present case concerns whether the *Cage* claim Hill seeks to raise before the district court was 'previously unavailable' within the meaning of the AEDPA. In general, we have interpreted the term 'previously unavailable' with reference to the availability of the claim at the time the first federal habeas application was filed." Petitioner filed his first federal habeas petition seven months before the *Cage* decision.

"As our prior decisions illustrate, however, we have eschewed reliance upon any mechanistic test when assessing availability. Rather, our precedent establishes that a petitioner intent upon establishing the 'unavailability' of a claim based upon a new rule of constitutional law may also be required to demonstrate the infeasibility of amending a habeas petition that was pending when the new rule was announced. . . . The pragmatic approach we have adopted properly recognizes that the liberal amendment policy applicable to habeas petitions may make claims based upon new rules of constitutional law 'available' to the petitioner during a prior habeas action, even when the claim would not have been available at the inception of that prior action."

"Although the Supreme Court had not decided *Cage* when Hill instituted his first federal habeas proceeding on April 12, 1990, the decision issued just seven months later. In fact, from the time the Supreme Court decided *Cage*, Hill's habeas petition remained in the district court for another three and one-half years. Although the district court continued to invite further amendment during that time period, Hill never displayed the slightest interest in advancing new claims, whether pursuant to Cage or any other authority. . . .[D]espite ample opportunity during the pendency of this first federal habeas petition, Hill declined to raise his *Cage* claim until now, the eve of his scheduled execution. Accordingly, we find that the circumstances of this case conclusively refute Hill's contention that his *Cage* claim was 'previously unavailable' within the meaning 28 U.S.C. § 2244(b)(2)(A)."

The court also concluded that petitioner did not satisfy the requirement that the new rule of constitutional law was made retroactive "by the Supreme Court." Although the Eleventh Circuit ruled in 1994 that *Cage* should be applied retroactively to cases on collateral review, "more is required. Specifically, the applicant must establish that the Supreme Court has made the new rule of constitutional law retroactively applicable to cases on collateral review. The application filed by Hill does not satisfy this requirement." *Accord Bennett v. United States*, 119

F.3d 470, 471 (7th Cir. 1997); *In re Vial*, 115 F.3d 1192, 1197 (4th Cir. 1997) (en banc).

In re Hill, 113 F.3d 181, 182–84 (11th Cir. 1997) (per curiam). For a discussion and application of the "factual predicate" prong of the statute, §2244(b)(2)(B), see *In re Magwood*, 113 F.3d 1544 (11th Cir. 1997).

Seventh Circuit holds that voluntarily dismissed petition may count as prior habeas petition. Assisted by counsel, petitioner had previously filed a habeas claim that was identical to the current petition "but had voluntarily dismissed it before the judge determined its merits, though after the judge had ruled that the petition had enough merit to entitle Felder to an evidentiary hearing. . . . We must decide whether leave to file a second petition must be denied by virtue of 28 U.S.C. §2244(b)(1) . . . , which provides that 'a claim presented in a second or successive habeas corpus application under section 2254 . . . that was presented in a prior application shall be dismissed.' The claim of ineffective assistance that is the core of the present petition was presented in the first petition; the question, one of first impression, is whether the first petition should be disregarded because there was no decision denying it, merely a voluntary dismissal by the petitioner."

In *Benton v. Washington*, 106 F.3d 162, 164–65 (7th Cir. 1996), the court held that if a first petition was not accepted (for failure to exhaust state remedies or nonpayment of the filing fee, for example), then it does not count as a prior habeas petition for purposes of §2244(b). (See Habeas & Prison Litigation Case Law Update #6.) "But *Benton* is equally clear that dismissal of the first petition need not be on the merits to make the first petition count; and it gives the example of—a voluntary dismissal, *id.* at 164, as in this case. *Benton* does not, however, state that *any* voluntary dismissal of the first petition makes a subsequent petition second or successive; and the present case may seem one in which the circumstances of the voluntary dismissal make it like the cases instanced in *Benton* in which the first petition is to be ignored and the second treated as the first."

Here, however, "[t]he ground on which Felder moved to withdraw his petition was that he was unable to submit affidavits from the eyewitnesses . . . . The motion says that his lawyer . . . interviewed the two eyewitnesses and on the basis of the interviews determined that she would be unable to obtain affidavits from them and 'furthermore . . . will be unable to sustain [the petitioner's] burden of proof at an evidentiary hearing.' This is an admission of defeat; and a petitioner for habeas corpus cannot be permitted to thwart the limitations on the filing of second or successive motions by withdrawing his first petition as soon as it becomes evident that the district court is going to dismiss it on the merits. . . . So Felder's first petition, though not dismissed by court action either on the merits or otherwise, cannot be disregarded. It was a first petition within the meaning of the rule" and the motion to file a second petition must be denied.

Felder v. McVicar, 113 F.3d 696, 697–98 (7th Cir. 1997). *Cf. In re Turner*, 101 F.3d 1323, 1323–24 (9th Cir. 1996) (petition that was dismissed without prejudice for failure to exhaust state remedies does not count as first petition for §2244(b)); *Camarano v. Irvin*, 98 F.3d 44, 45–46 (2d Cir. 1996) (same).

Certificate of Appealability

Fifth Circuit holds that district court should determine which issues satisfy the showing required for a COA. In June 1996, the district court granted petitioner a certificate of probable cause (CPC) to appeal the denial of his habeas claims. Thereafter, the Fifth Circuit held that the AEDPA'S requirement for a certificate of appealability (COA) applied to petitioners who had not received a CPC before April 24, 1996. It also concluded that the standards for both motions were essentially the same, although a COA must "indicate which specific issue or issues satisfy the showing required." 28 U.S.C. §2253(c)(3). Because the district court did not specify which of petitioner's claims warranted appellate review, the CPC did not meet the standards required for a COA and the appellate court had to "determine whether we should decide ourselves whether a COA should issue or, instead, should remand to the district court."

The court first examined Fed. R. App. P. 22(b), which states in part that "the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. . . . If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge." The court read this to mean that "[a] district court must deny the COA before a petitioner can request one from this court. The rule contemplates that the district court will make the first judgment whether a COA should issue and on which issues, and that the circuit court will be informed by the district court's determination in its own decisionmaking. . . . [W]e conclude that when a district court issues a CPC or COA that does not specify the issue or issues warranting review, as required by 28 U.S.C. §2253(c)(3), the proper course of action is to remand to allow the district court to issue a proper COA, if one is warranted."

Muniz v. Johnson, 114 F.3d 43, 45–46 (5th Cir. 1997). *Accord Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063, 1076 & n.18 (6th Cir. 1997) (remanded: "Because the certificate issued by the district court does not comply with th[e specificity] requirement, we believe it would be improper for us to examine the merits of Lyon's petition. . . . If the district court had denied the certificate, Rule 22 would permit this court to issue one. The Rule does not, however, give us the authority to correct a faulty certificate sua sponte."). *See also United States v. Eyer*, 113 F.3d 470, 474 (3d Cir. 1997) (district court's failure to specify issues that warranted COA "could lead us to remand the case for the district court to specify the issues. But . . . , because there was only one issue before the district court, the issue it determined warranted the issuance of the certificate is obvious."). *Cf. Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997) (although district court failed to specify issues warranting COA, appellate court would decide whether COA should issue because the case "has been fully briefed, and

we have heard oral argument on all issues . . . . Thus, we are fully informed about the merits, and it would make no sense to go through the unnecessary step of remanding . . . .").

Eleventh Circuit sets forth procedures for handling certificates of appealability and holds that district courts must rule on COA requests before appellate court. In two §2255 cases before the appellate court, the government moved "'[F]or a Limited Remand with Instructions that the District Court Issue a Certificate of Appealability or State the Reasons Why Such a Certificate Should Not Issue and For a Stay of this Appeal.' The motions are granted."

"In granting the motions, we decide today that the federal courts and litigants in this circuit must treat requests for certificates of appealability (COAs) involving 28 U.S.C. §2254 or 28 U.S.C. §2255 in the same way. To be more specific, we also prescribe these courses of action to be followed:

(1) District courts must treat notices of appeal filed by petitioners following a denial of either a section 2254 or a section 2255 petition as applications for COAs.

(2) District courts must consider and rule upon the propriety of issuing the COA first, that is, before a request for a COA will be received or acted on by this court or a judge of this court."

"Even if today's procedural instructions are not commanded by [Fed. R. App. P. 22(b)] or [the] statutes, they do not contradict the Rule and statutes; and we conclude that these uniform procedures are necessary from the viewpoint of sound, orderly judicial practice in the circuit. So, we give the prescriptions pursuant to our supervisory powers."

Edwards v. United States, 114 F.3d 1083, 1084 (11th Cir. 1997) (per curiam).

PRISON LITIGATION

Proceedings In Forma Pauperis

Seventh Circuit resolves issues regarding three-strikes provision; assessment and collection of filing fees; and application of PLRA to complaints about denial or revocation of parole. The district court dismissed the plaintiff's complaint under 28 U.S.C. §1915(e)(2) for failure to state a claim on which relief may be granted. The Seventh Circuit found his appeal to be frivolous and ruled that the complaint and appeal constituted two strikes under §1915(g). The court of appeals directed that the district clerk assess and collect filing fees for both the complaint and appeal. "Our court will docket an appeal after receiving the notice of appeal . . . but put things into stasis until receiving notice from the district court that any necessary fee has been assessed and, if assessed, paid. (By 'paid' we mean the initial payment under §1915(b)(1), not the further progress payments under §1915(b)(2)."

The court disapproved of the conclusion in *McGore v. Wrigglesworth*, 114 F.3d 601, 606 (6th Cir. 1997), that, where a prisoner has the "means" but lacks the "assets" at the time of filing, the court may assess the partial fee and proceed before anything has been paid. The court determined that under §1915(b), the plaintiff owed $8.60 from his prison trust account as an initial partial filing fee for his complaint and an additional $8.60 from the account for the appellate fee. "The statute does not tell us whether the 20 percent-of-income payment is per case or per prisoner. . . . [W]e hold that the fees for filing the complaint and appeal cumulate. Otherwise a prisoner could file multiple suits for the price of one, postponing payment of the fees for later-filed suits until after the end of imprisonment (and likely avoiding them altogether)."

The court further decided that a district court's finding of three strikes may be contested in the appellate court without partial prepayment under §1915(b). Finally, it held that complaints about denial or revocation of parole are not "a functional continuation of the criminal prosecution" and therefore are civil actions governed by §1915(a)(2).

Newlin v. Helman, 123 F.3d 429, 432–38 (7th Cir. 1997). *Cf. Duvall v. Miller*, 122 F.3d 489, 490 (7th Cir. 1997) (a dismissed action or appeal that was paid for, rather than filed in forma pauperis, may qualify as a strike).

Fifth Circuit rules that motion for return of seized property is a civil action under the PLRA. Plaintiff filed a motion under Fed. R. Crim. P. 41(e) for return of seized property. Based on the government's response that the property had been destroyed, the district court dismissed the suit as moot. On appeal, the Fifth Circuit held that the motion—whether construed as being brought under rule 41(e) or as an independent civil suit under 28 U.S.C. §1331—was a civil action governed by the PLRA. "A motion for the return of seized property is a suit against the United States for property or money. As a common sense matter, this is a civil proceeding. Even when we have applied rule 41(e) to such an action, we have held that the proceeding is civil in nature."

Pena v. United States, 122 F.3d 3, 4–5 (5th Cir. 1997). *But cf. In re Stone*, 118 F.3d 1032, 1034 (5th Cir. 1997) (mandamus petition that arose out of a §2255 petition for post-conviction relief is not subject to PLRA's fee payment requirements).

Fifth Circuit holds that dismissals as frivolous or malicious under §1915(e)(2) should be deemed with prejudice. The district court dismissed plaintiff's 42 U.S.C. §1983 claims without prejudice. An appellate panel modified the dismissals, except for one claim, to be with prejudice. Sitting en banc to resolve conflicting circuit precedents, the Fifth Circuit sought "to implement procedures which will aid in the sepa-

ration of the wheat from the chaff in [prisoner pro se] filings as early in the judicial process as is possible." It held that, unless the district court assigns reasons for dismissing a case without prejudice, all dismissals as frivolous or malicious pursuant to §1915(e)(2) will be deemed to be with prejudice. It further held that in cases "in which the defendant has not been served and was, therefore, not before the trial court and is not before the appellate court, the appellate court, notwithstanding, has the authority to change a district court judgment dismissing the claims without prejudice to one dismissing with prejudice, even though there is no cross-appeal by the obviously non-present 'appellee.'"

Marts v. Hines, 117 F.3d 1504, 1505–06 (5th Cir. 1997) (en banc) (eight judges dissented from the opinion).

Fourth Circuit declares that filing fee requirement has impermissible retroactive effect. The district court dismissed plaintiff's §1983 complaint as frivolous; his appeal was pending when the PLRA went into effect. The Fourth Circuit concluded that under *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the filing fee requirement of §1915(b)(1) would have an impermissible retroactive effect on the appeal. Requiring plaintiff to pay a filing fee he did not have to pay when he filed the appeal would "'impair [a] right [he] possessed when he acted.'" It also "would 'impose new duties with respect to transactions already completed,' namely filing his appeal. *Landgraf*, 511 U.S. at 280." Even if the provision were considered procedural, *Landgraf* noted that "some purely procedural laws and rules may not be appropriately applied retroactively," and this is such a case.

Church v. Attorney General of Va., No. 95-7722 (4th Cir. Sept. 10, 1997) (Ervin, J.).

Remedies for Prison Conditions

Second Circuit holds that termination provision is constitutional if it is interpreted as restricting federal court jurisdiction rather than annulling consent decrees. Following enactment of the PLRA in April 1996, defendants brought suit under 18 U.S.C. §3626(b) to terminate consent decrees entered into during the period 1978–1979 by New York City and pretrial detainees in city jails. The district court held the termination provision constitutional and vacated the consent decrees. *Benjamin v. Jacobson,* 935 F. Supp. 332 (S.D.N.Y. 1996).

The Second Circuit issued a stay of the district court's order pending resolution of the appeal. Its inquiry was complicated by the fact that the language of the termination provision could be read in either of two ways. First, it might limit the jurisdiction of federal courts so that they "could not in the future enforce past consent decrees, except insofar as the decrees were found to be tailored to a federal right." Second, it might render null and void all past federally approved prison consent decrees that do not meet the narrowly tailored requirement, "despite the fact that the parties had originally—and freely—consented to them, presumably in exchange for some adequate consideration . . . that might even have amounted to a waiver of some constitutional rights."

The correct reading of the section lies in the meaning of the words "termination of prospective relief." Given the statutory definition of "prospective relief" as "all relief other than compensatory monetary damages," §3626(g)(7), the term could be interpreted to include the decrees. But such a reading "would imply that the word 'relief,' without more, includes within it 'private settlement agreements.'" To describe a contract or agreement as a form of relief would require a "remarkable twisting of language." The statutory definition of relief "should preferably be read to mean that it includes remedies arising out of or issued pursuant to consent decrees." In construing the statutory language, the court must "choose the interpretation that more readily permits [it] to hold the termination provision constitutional."

Although the PLRA takes away federal courts' discretionary power to afford more relief through a consent decree than would be permitted after a litigated judgment, this "does not infringe upon the power that courts must retain in order to meet their obligation of forging adequate remedies." If a court finds on the record that federal constitutional violations exist and that the relief is narrowly tailored to remedy those violations, it can provide such relief pursuant to §3626(b)(3). Therefore, the termination provision does not unconstitutionally restrict the remedial power of the federal courts, so long as it is interpreted solely as limiting federal jurisdiction over the nonfederal aspects of consent decrees. Neither does the provision unconstitutionally reopen final judgments in violation of *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). *Plaut* recognized *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), as an exception to its rule that Congress cannot alter any aspect of a final judgment. The consent decrees in this case "appear to fall within the possible *Wheeling Bridge* exception." The court did not accept plaintiff-detainees' argument that the *Wheeling Bridge* exception did not apply because of the additional distinction in that case which allows the legislature to alter executory judgments involving public rights but not private ones.

The court rejected plaintiffs' contention that the provision violates separation of powers by prescribing a rule of decision in contravention of *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). Unlike the *Klein* statute, the termination provision does not prevent courts from exercising jurisdiction over cases involving violation of federal rights. Moreover, it does not alter preexisting judgments. "It only ensures that federal claims under those judgments are heard in federal court and state claims are heard in state court." The Second Circuit stressed that, as with the other separation of powers issues, a serious constitutional problem is avoided only by interpreting the provision as not annulling the underlying decrees but just changing the forum in which they can be enforced.

The court applied the rational basis test to plaintiffs' equal protection claim. At least one legitimate objective was to avoid federal court entanglement in prison litigation beyond that necessary to protect federal rights. The termination provision, "insofar as it limits the jurisdiction of the federal courts to

claims founded on an actual violation of a federal right," is a rational means to achieve that end. And plaintiffs in this case, unlike those in *Romer v. Evans*, 116 S. Ct. 1620 (1996), "cannot assert that they are entirely shut out of the political process, or even from judicial protection in state courts."

The plaintiffs' due process claims are also without merit, even assuming that the consent decrees are contracts for due process purposes. If the PLRA only requires plaintiffs to enforce their contracts in a different forum, the termination provision easily survives the heightened scrutiny required by the "sovereign acts" doctrine. Neither have the consent decrees given plaintiffs "vested rights" in prospective federal court enforcement of the decrees.

Although the Second Circuit affirmed the district court's holding that the termination provision survives plaintiffs' constitutional challenges, it did not agree with the lower court—or other courts' decisions—that such a holding requires vacaturs of the consent decrees. In rejecting plaintiffs' constitutional arguments, the court invoked its saving interpretation that "termination of prospective relief" refers to the federal remedies arising out of the decrees, not to the decrees themselves. "Accordingly, the vacatur of the Consent Decrees is precluded not in spite of, but because of, the constitutionality of the termination provision." The consent decrees remain binding on the parties. Section 3626(d) explicitly states that "[t]he limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law." Thus, state courts may enter relief arising out of any contract or consent decree, including federal consent decrees, because the decrees are not only federal court judgments but also contracts arising under state law. To the extent that states do not enforce the contractual rights embodied in the decrees, they might unconstitutionally impair the parties' federal rights, enforceable in federal court.

The court of appeals further observed that the district court entered its order vacating the decrees on the basis of the existing record, which was silent regarding whether there are current or ongoing violations of federal rights. Pursuant to §3626(b)(3), a court may include supplemental information in the record when it determines that additional evidence is necessary for it to make a decision regarding termination of federal relief. Although plaintiffs might prefer to seek enforcement of the decrees in their entirety in state court, the choice is theirs, "and should they choose to remain in federal court, we hold that they are entitled to an evidentiary hearing on their allegations of current and ongoing violations of federal rights." The court declined to lift the stay until the Supreme Court has acted on any possible certiorari petition. It modified the stay to permit the parties to invoke state jurisdiction over the agreements now, "to take immediate effect at such time as the time for filing a petition for certiorari has lapsed, or such a petition has been denied, or this Court, or the Supreme Court, has lifted the above mentioned stay."

Benjamin v. Jacobson, 124 F.3d 162, 166–69, 171, 174–80 (2d Cir. 1997).

Eighth Circuit rules that termination provision does not violate separation of powers, equal protection, or due process rights. Three weeks after the PLRA was enacted, the state filed a motion pursuant to §3626(b) to terminate a consent decree entered into in the 1980s. The district court denied the motion to terminate, holding that the termination provision violated separation of powers by requiring federal courts to reopen final judgments. It certified its order for interlocutory appeal. The prisoner–plaintiffs asked the Eighth Circuit to strike down the termination provision as an unconstitutional violation of principles of separation of powers, equal protection, and due process.

The court of appeals distinguished the case from *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856). This case does not involve an attempt by Congress to tinker with results in damage suits that have become final, nor to amend the law on which the prisoners' cause of action is based. "The question we must resolve . . . is whether Congress may alter the remedial powers of the federal courts so that the courts may not enforce equitable relief previously awarded in pending cases." According to the court, *Plaut* does not always protect final judgments from congressional tinkering; instead, it protects "'the last word of the judicial department with regard to a particular case or controversy.' *Plaut*, 514 U.S. at 227. In a continuing case, a consent decree is not the 'last word' of the courts in the case, even after the decree itself has become final for purposes of appeal." The existence of Rule 60(b), as construed in *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992), "makes it unlikely that a court's approval of a consent decree constitutes the court's 'last word' on the issue of what relief is appropriate in perpetuity." A court's opinion on the appropriateness of the remedy set forth in a consent decree is "a temporal one," and the appellate court could not conclude that the Constitution forbids Congress to legislate on the issue.

The court of appeals refused to apply a strict scrutiny review to plaintiffs' equal protection arguments. Their fundamental right of access to the court was not impaired by the termination provision. "The right to enforce a consent decree that goes beyond the bounds of constitutional necessity is not equivalent to the right to bring constitutional grievances to the attention of the courts." Because a suspect classification was not at issue either, rational basis review was appropriate, and the court found that legitimate government interests were addressed by the PLRA. Identification of these interests disposed of the plaintiffs' further argument, based on *Romer v. Evans*, 116 S. Ct. 1620, 1627–29 (1996), that the only purpose of §3626(b) "is to disempower a politically unpopular group."

The court also found plaintiffs' due process claims of no merit. The doctrine of vested rights was not applicable, since a judgment that is not final for purposes of separation of powers also is not final for due process purposes. And, assuming that §3626(b) substantially impairs prisoners' con-

tractual rights, it still does not violate due process because the court found that Congress had legitimate governmental interests in enacting it.

The Eighth Circuit reversed the district court order holding the termination provision unconstitutional but concluded it was premature to grant the state's motion to terminate. It remanded the case so that the lower court could reach the question of whether relief remains necessary to correct ongoing violations of federal rights and is narrowly drawn in accordance with §3626(b)(3).

Gavin v. Branstad, 122 F.3d 1081, 1086–92 (8th Cir. 1997). *But see Taylor v. State,* 972 F. Supp. 1239, 1249 (D. Ariz. 1997) (termination provision is unconstitutional because it reopens final judgments and does not fall within *Wheeling* exception).

Suits by Prisoners

Eighth Circuit distinguishes *Jensen v. Clarke* in ruling that PLRA applies to attorneys' fees incurred after passage of the PLRA. In granting a motion for the award of attorneys' fees, the Eighth Circuit held that the PLRA applies to all hours worked after the date of passage of the Act. "This is not a 'retroactive' application of the new law. The situation in *Jensen v. Clarke,* 94 F.3d 1191, 1202–03 (8th Cir. 1996), was different. There, all of the hours involved had already been expended. Indeed, the order of the District Court . . . was entered before the enactment of the PLRA."

Williams v. Brimeyer, 122 F.3d 1093, 1094 (8th Cir. 1997).

District court rules that it lacks subject matter jurisdiction because of plaintiff's failure to exhaust administrative remedies. Plaintiff admitted in his complaint that he did not continue his action requesting protective segregation through the prison grievance procedure. He contended that the procedure could provide no "resolution" to the assault he had suffered and claimed that the assault could not be qualified as a "prison condition" under 42 U.S.C. §1997e(a). Defendants moved to dismiss the action because the plaintiff's failure to exhaust administrative remedies, as required by §1997e(a), deprived the court of subject matter jurisdiction.

The court found that the PLRA amended §1997e(a) to make the exhaustion provisions mandatory. Even if, as the plaintiff claimed, the department of corrections' response to his requests was untimely, the plaintiff had to pursue all levels of administrative procedure before bringing suit. His argument that he did not have to exhaust remedies because the action did not involve a prison condition was not sustainable. The definition of a "civil action with respect to prison conditions" in 18 U.S.C. §3626g(2), which was part of the PLRA, encompasses the assault he complained of. Plaintiff's failure to file an initial grievance deprived the district court of subject matter jurisdiction.

Morgan v. Arizona Dep't of Corrections, 967 F. Supp. 1184, 1186–87 (D. Ariz. 1997).

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Habeas Corpus

Second or Successive Petition

Ninth Circuit finds that the AEDPA does not allow a first habeas petition challenging mental competency to be executed, but holds that such a claim is not prevented by §2244 in a second or successive petition; Supreme Court grants certiorari; Fifth Circuit bars second competency claim, distinguishes Ninth Circuit case. The Ninth Circuit petitioner had been convicted on two murder counts and sentenced to death. He filed his first federal habeas petition in 1993, making several claims including that he was not competent to be executed. The district court dismissed the competency claim as premature (the state had not actually issued a warrant of execution), but granted the writ on other grounds. The appellate court reversed and ordered the district court to dismiss the petition, but stated that its decision should not affect later litigation on the competency issue.

On remand, petitioner tried to reopen the competency issue. The district court denied the motion, then dismissed the claim after ruling it could not entertain a competency to be executed claim under the Antiterrorism and Effective Death Penalty Act (AEDPA). The appellate court stayed petitioner's execution to determine if this is true and, if so, whether this is an unconstitutional suspension of the writ of habeas corpus.

The court concluded that, because of the nature of competency to be executed claims, such claims are indeed precluded from being heard under the AEDPA. "[T]he determination of whether an inmate is competent to be executed cannot be made before the execution is imminent, i.e., before the warrant of execution is issued by the state. . . . Even if the State had issued its warrant of execution prior to our consideration of Martinez-Villareal's first habeas petition, his competency claim still would have been premature. In *Lonchar v. Thomas*, [116 S. Ct. 1293, 1297 (1996)], the Supreme Court instructed that 'if the district court cannot dismiss the [first habeas] petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot.' Once this stay has been issued, the execution is not imminent, and the competency claim becomes premature. Accordingly, a competency claim cannot be asserted in a first habeas petition."

The court concluded that under the AEDPA, "such a claim cannot be asserted in a second petition either. . . . A claim that was presented in a prior petition must be dismissed. 28 U.S.C. §2244(b)(1). This sanction applies to a competency claim raised in a first petition even though that claim can never be adjudicated because it will always be premature. Accordingly, a petitioner must reserve his colorable competency claim and present it as a new claim in a second petition. But a claim that was not presented in a prior petition must be dismissed unless '(A) the applicant shows that the claim relies on a new rule of constitutional law . . . 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.' 28 U.S.C. §2244(b)(2)."

"The gateway described in subsection (A) does not apply to a competency claim because the constitutional right upon which such a claim is based was announced in 1986. The gateway described in subsection (B) does not apply because competency to be executed is not an issue of guilt or innocence. . . . It thus appears that the automatic stay accompanying a first habeas petition and the inapplicable gateways provided by the AEDPA foreclose any federal review of a death row inmate's competency to be executed."

While the court had been "asked to decide whether this predicament constitutes an unconstitutional suspension of the writ of habeas corpus," it ultimately found that it "need not decide this difficult constitutional question because we conclude that Martinez-Villareal's competency claim does not fall within the rubric of §2244." The court examined cases that have held that refiling a prior petition that was dismissed in its entirety without prejudice for failure to exhaust does not trigger §2244 (see case summaries below for examples). Although this is "a situation in which there has been a federal decision on all but one of Martinez-Villareal's constitutional claims . . . , the rationale underlying [the other decisions] applies with equal force to Martinez-Villareal's competency claim. Just as we must dismiss petitions containing unexhausted claims, we must dismiss a competency claim raised in a first petition because it will always be premature. Just as we dismiss unexhausted claims to permit state courts to pass first judgment on those claims, we dismiss a competency claim so that the state court may have the first opportunity to consider that claim once a warrant of execution has issued. And just as we permit an exhausted petition to be heard in federal court even after it had been dismissed previously as

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unexhausted, so too should we permit a ripe competency claim to be heard in federal court even after it had been dismissed previously as premature."

"Under our holding, a competency claim must be raised in a first habeas petition, whereupon it also must be dismissed as premature due to the automatic stay that issues when a first petition is filed. Once the state issues a second warrant of execution and the state court considers the now-ripe competency claim, a federal court may hear that claim—and only that claim—because it was originally dismissed as premature and therefore falls outside of the rubric of 'second or successive' petitions." The court stressed that its holding "is a narrow one that is inherently limited by the unique nature of a competency claim." It remanded the case to the district court to hear petitioner's competency claim.

The Supreme Court granted certiorari in this case on Oct. 14, 1997. Questions presented: "(1) Did Congress intend limitations of AEDPA on second or successive petitions to apply to all claims and in every court, including competency-for-execution claims and applications for 'original' Supreme Court habeas corpus writs? (2) Would applying act to prevent consideration of claim of incompetency for execution, which is raised in second or successive habeas corpus petition, constitute violation of Suspension Clause? (3) By what means can this court review these issues?"

Martinez-Villareal v. Stewart, 118 F.3d 628, 630–34 (9th Cir. 1997) (per curiam), *cert. granted*, 118 S. Ct. 294 (1997).

In the Fifth Circuit, the death row inmate had originally filed for federal habeas relief in 1992, but did not raise a competency to be executed claim at that time. Although the district court granted relief, the appellate court reversed and the Supreme Court later denied certiorari. In June 1997, after an unsuccessful round in the state courts on the competency issue, the inmate moved under § 2244(b) for permission to file a successive habeas application, this time challenging his competency to be executed pursuant to *Ford v. Wainwright*, 477 U.S. 399 (1986). Because the competency claim was being presented for the first time in federal court, he had to meet the requirements of § 2244(b)(2) (applicable to claims not presented in a prior application).

The court first looked to the two circuit decisions that "appear to have considered the applicability of § 2244(b) to *Ford* claims. In *In re Medina*, 109 F.3d 1556 (11th Cir. 1997), the Eleventh Circuit denied leave to file a second habeas application, explaining that the movant could not satisfy § 2244(b)(2)(A), because *Ford* is *not a new rule* of constitutional law, and that he could not satisfy § 2244(b)(2)(B), because the factual predicate for the claim *had nothing to do with his guilt or innocence* of the underlying offense. *Id.* at 1564–65. The court decided that, 'although the provisions of § 2244(b), as amended, operate to foreclose review of competency to be executed claims in second habeas applications,' . . . the provisions of § 2244(b) do not restrict the Supreme Court's original habeas authority to consider competency claims, . . . and federal review may also be obtained through certiorari review of the state court competency proceedings. 109 F.3d at 1564."

As for the Ninth Circuit decision in *Martinez-Villareal*, the court emphasized that it was distinguishable because "the movant had presented a *Ford* claim in his *first* habeas application. . . . [T]he Ninth Circuit decided that § 2244 does not apply to a *Ford* claim that has been dismissed as premature in a *first* habeas application. . . . Were we to adopt the rule of *Martinez*, it would not help Davis. Unlike the movant there, whose *Ford* claim was presented in his *first* federal habeas application and dismissed as premature, Davis did not present a *Ford* claim in his first federal application. Instead, as discussed *supra*, he seeks to present his *Ford* claim for the first time in a second habeas application. Likewise, because this is a second application, Davis would not be helped even were we to extend *In re Gasery*, 116 F.3d 1051 (5th Cir. 1997) (habeas application refiled after dismissal without prejudice for failure to exhaust state remedies is neither second nor successive), to *Ford* claims sought to be reasserted after dismissal without prejudice as premature when presented in a *first*, not—as here—second, habeas application."

Thus, petitioner had to satisfy the gatekeeping provisions of § 2244(b)(2). He "concede[d] that he cannot satisfy § 2244(b)(2)(B) (concerning guilt)," and the court concluded that he could not satisfy subsection (A), either, because the "legal basis of Davis' claim," the decision in *Ford*, "has been available since at least 1986" and cannot be considered "previously unavailable." And, agreeing with *Medina*, the court rejected defendant's claim that § 2244(b) violates the Suspension Clause by precluding consideration by a federal court of a mature *Ford* claim presented for the first time. "[T]he relevant provisions of AEDPA do not foreclose such review. A federal court determination of the issue can be sought through Supreme Court review of the state court competency proceedings. . . . Alternatively, the claim can be raised in an original habeas application to the Supreme Court."

In re Davis, 121 F.3d 952, 953–56 (5th Cir. 1997).

Third and Fifth Circuits hold that refiling of petition that was previously dismissed for failure to exhaust state remedies is not a second or successive petition. In the Third Circuit, the district court granted petitioner a stay of execution and held his federal habeas petition in abeyance to allow petitioner to exhaust one particular issue in state court. The state appealed, arguing that the court had no authority to hold the petition in abeyance. The appellate court remanded with instructions to dismiss the petition, holding that, in the absence of urgent circumstances, the petition should not have been held in abeyance but dismissed for lack of exhaustion. The court then noted that the pending dismissal "raises a question of whether any subsequent habeas filings on Christy's behalf will be considered 'successive' and whether, pursuant to the dictates of the Antiterrorism and Effective Death Penalty Act of 1996, . . . Christy would be required to seek authorization from the court to file a petition for habeas corpus. We hold that when a prior petition has been dismissed

without prejudice for failure to exhaust state remedies, no such authorization is necessary and the petitioner may file his petition in the district court as if it were the first such filing."

As amended by the AEDPA, 28 U.S.C. § 2244(b)(3)(E) forbids a "second or successive" petition for collateral relief without the consent of the court of appeals, and § 2244(b)(3)(C) "instructs courts of appeals to grant this authorization only if the applicant makes a prima facie showing that the application satisfies the requirements for second or successive applications. . . . While the AEDPA requires this procedure for second or successive applications, it does not define what is meant by 'second' or 'successive.'" The court reasoned that, before the AEDPA, "a petition filed after a previously submitted petition was dismissed without prejudice was not considered an abuse of the writ. . . . The problems that the abuse of the writ doctrine seeks to avoid are not implicated when a petition is filed after a prior petition is dismissed for lack of exhaustion. . . . Such a dismissal serves the interests of finality by discouraging piecemeal litigation. . . . Additionally, encouraging exhaustion promotes harmony between the federal and state judicial systems by giving the state courts the first opportunity to review state convictions and to correct constitutional errors."

Christy v. Horn, 115 F.3d 201, 208 (3d Cir. 1997). See also summaries of *Camarano* in Habeas & Prison Litig. Update #6, *Felder* in Habeas & Prison Litig. Update #9. *Cf. Reeves v. Little,* 120 F.3d 1136, 1138–39 (10th Cir. 1997) (agreeing that pre-AEDPA abuse of the writ doctrine is appropriate standard for deciding whether petition is second or successive; holding that petitioner's situation, where his earlier petition had been dismissed without prejudice within context of larger class action claim, "is analogous to that where prior petitions were dismissed for failure to exhaust," and thus his current petition should be considered his first).

The Fifth Circuit petitioner's first habeas petition had been dismissed without prejudice for failure to exhaust all state remedies. The appellate court also looked to pre-AEDPA law, finding that "we consistently concluded that petitions that were refiled after dismissal for failure to exhaust state remedies were not 'second or successive' petitions" for purposes of Rule 9(b) of the Rules Governing Section 2254 Cases. Noting that other circuits have reached the same conclusion under AEDPA, the court agreed and held that petitioner's "refiled petition is merely a continuation of his first collateral attack, not a 'second or successive' petition within the meaning of § 2244(b)." Thus, petitioner's motion was denied as unnecessary and he may file his petition in the district court.

In re Gasery, 116 F.3d 1051, 1052 (5th Cir. 1997) (per curiam). *Accord McWilliams v. Colorado,* 121 F.3d 573, 575 (10th Cir. 1997) ("habeas petition filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies does not qualify as a 'second or successive' application within the meaning of § 2244(b)(1). . . . Rather, it is simply a continuation of the earlier petition."); *Dickinson v. Maine,* 101 F.3d 791, 791 (1st Cir. 1996) (per curiam); *Flores v. United States,* No. 97-8080 (8th Cir. Aug. 26, 1997) (per curiam) (unpublished) ("habeas petition which is filed after a prior petition has been dismissed without prejudice does not qualify as 'second or successive' habeas application within the meaning of §§ 2255 and 2244(b)").

Evidentiary Hearing

Third and Ninth Circuits conclude that a habeas applicant has not "failed to develop the factual basis of a claim" under § 2254(e)(2) if the applicant was not able to do so. In the Third Circuit case, petitioner's first state trial was interrupted by the sudden death of a family member of the judge. The judge declared a mistrial and, in the resulting haste and confusion, petitioner was not afforded an opportunity to develop a claim of double jeopardy. He was convicted at a second trial and appealed, but was also unable to develop the double jeopardy claim in post-conviction proceedings because of state procedural laws governing what issues may be argued on appeal. After he filed a federal petition for a writ of habeas corpus on double jeopardy grounds, the district court held an evidentiary hearing and granted the petition.

Because the habeas petition was filed in 1995, the appellate court concluded that AEDPA should not be applied to the present action. However, "if we were to give retroactive effect to the 1996 amendments to § 2254, we would not conclude that the district court erred in conducting an evidentiary hearing. Section 2254(e)(2) applies to applicants who 'failed to develop the factual basis of a claim in State court proceedings.' In this case, Love did not 'fail' to develop the basis of his claim . . . [because] factors other than the defendant's action prevented a factual record from being developed."

Love v. Morton, 112 F.3d 131, 136 (3d Cir. 1997). *Accord Burris v. Parke,* 116 F.3d 256, 258–59 (7th Cir. 1997) (§ 2254(e)(2) did not apply where state refused to hear petitioner's claim: "the word 'fail' cannot bear a strict-liability reading, under which a federal court would disregard the reason for the shortcomings of the record. If it did, then a state could insulate its decisions from collateral attack in federal court by refusing to grant evidentiary hearings in its own courts. Nothing in § 2254(e) or the rest of the AEDPA implies that states may manipulate things in this manner.").

The Ninth Circuit petitioner had been denied an evidentiary hearing in the state courts, and the district court denied petitioner's habeas application on respondent's motion for summary judgment without holding a hearing. Because the original habeas petition was filed before the effective date of the AEDPA, the appellate court used pre-AEDPA law to rule that the district court should have held an evidentiary hearing on one of petitioner's claims. However, because this decision was reached before *Lindh v. Murphy,* 117 S. Ct. 2059 (1997), the court also analyzed whether a hearing would still be required if the AEDPA applied.

"Application of the AEDPA in this case would neither affect the appropriateness of an evidentiary hearing before the

district court nor preclude habeas relief on the merits of Jones's claims. As amended . . . , 28 U.S.C. § 2254 provides that a district court shall not hold an evidentiary hearing '[i]f the applicant has failed to develop the factual basis of [the] claim in State court proceedings.' 28 U.S.C. § 2254(e)(2). It is clear that Jones did not 'fail[ ] to develop' the factual basis of either of his claims; rather, the state courts denied him the opportunity to develop the facts by failing to hold an evidentiary hearing. Where, as here, the state courts simply fail to conduct an evidentiary hearing, the AEDPA does not preclude a federal evidentiary hearing on otherwise exhausted habeas claims. The facts developed in the course of the evidentiary hearing, in turn, would enable the district court to determine whether Jones qualifies for habeas relief under the AEDPA on the ground that the state courts' denial of his petition was contrary to clearly established law as announced by the Supreme Court . . . . Finally, the district court's duty to ascertain the sufficiency of the evidence by engaging in a thorough review of the complete state court record is unaffected by the AEDPA. Without such a review of the record, it is impossible to determine whether the state court adjudication rested on an 'unreasonable application' of clearly established federal law or an 'unreasonable determination' of fact."

Jones v. Wood, 114 F.3d 1002, 1013 (9th Cir. 1997).

Certificate of Appealability

Fifth Circuit holds that appellate review of habeas denial is limited to issue(s) specified in the certificate of appealability (COA). "Under the AEDPA, a district court has the authority to issue a COA. . . . The district court in this case limited Lackey's COA to the issue of whether defense counsel provided Lackey ineffective assistance of counsel . . . . On appeal, Lackey raises eight other claims, some of which were rejected by the district court, others which are raised for the first time on appeal. We have yet to address the question of whether a three-judge panel like this one must reach the eight issues that were not specified in the COA."

"A plain reading of the AEDPA compels the conclusion that COAs are granted on an issue-by-issue basis, thereby limiting appellate review to those issues alone. Section 2253(c)(3) states: 'The certificate of appealability under paragraph (1) *shall indicate which specific issue or issues* satisfy the showing required by paragraph (2).' (Emphasis added.) . . . [I]f we were to conclude that § 2253(c)(3) of the AEDPA requires issue specification, yet hold that granting a COA brings up all issues raised before the district or circuit judge who issued the COA, we would render meaningless the specification language in § 2253(c)(3)."

"In this appeal, Lackey (in addition to the issue specified in the COA) raises issues that were either rejected by the district court or raised for the first time in this court. We decline to address those issues rejected by the district court because they are outside the ambit of the COA. A contrary conclusion would risk inconsistent adjudication . . . . And we decline to address those claims that Lackey has raised for the first time on appeal because those issues are deemed waived." Finding no error by the district court on the one appealable issue, the court affirmed the denial of habeas relief.

Lackey v. Johnson, 116 F.3d 149, 151–52 (5th Cir. 1997). *See also United States v. Youngblood*, 116 F.3d 1113, 1115 (5th Cir. 1997) (remanded: extending to § 2255 case the rule of *Muniz v. Johnson*, 114 F.3d 43, 45–46 (5th Cir. 1997) [Habeas & Prison Litig. Update #9], a § 2254 case that held district court must rule on motion for COA before petitioner can request one from appellate court, and "that when a district court issues a CPC or COA that does not specify the issue or issues warranting review, as required by 28 U.S.C. § 2253(c)(3), the proper course of action is to remand to allow the district court to issue a proper COA, if one is warranted"; here, district court only granted leave to appeal in forma pauperis, which is not equivalent to granting COA—"We therefore remand the case to the district court for the limited purpose of considering whether COA should issue.").

Eighth Circuit holds that claim "presented" in first petition but not ruled on cannot be raised in second petition. In petitioner's first habeas action he raised two issues. The district court granted relief on one claim, but did not rule on the second claim concerning due process. The state appealed, and the Eighth Circuit reversed the grant of habeas corpus; the due process claim was not argued on appeal. Petitioner then filed a second habeas petition that reasserted the due process claim. The district court dimissed for lack of jurisdiction, and petitioner moved under § 2244(b) for authorization from the appellate court to file a second petition. The appellate court denied the motion.

"Because Wainwright presented the same claim in his first habeas proceeding, § 2244(b)(1) prevents him from raising the claim again in a second habeas petition. . . . The amended statute provides, 'A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.' . . . Wainwright's due process claim falls within the plain language of § 2244(b)(1). The amended statute precludes any claim 'presented' in the first action, rather than 'adjudicated' 'on the merits' in the first action, as the pre-Act version of § 2244(b) provided. . . . Wainwright presented the due process claim to the district court in the first habeas proceeding. In addition, the petition [he] seeks to file is a second or successive petition within the meaning of the Act. It raises claims concerning the same conviction that his earlier petition addressed, . . . and Wainwright's first habeas petition was not dismissed without prejudice for failure to exhaust state remedies."

"Wainwright blames the district court and this court for overlooking the due process issue in his first habeas proceeding, and states our refusal to permit consideration of the issue now 'will send Wainwright to his death based on a judicial oversight that was not even of his own making or that of his lawyers.' Wainwright is pointing an accusatory finger in the wrong direction. Although Wainwright argued the issue in post-trial briefs, the district court did not decide the issue

because the court granted Wainwright the relief he sought on another ground. In this circumstance, a familiar rule of trial practice places on Wainwright's shoulders the responsibility to obtain a ruling on any issue left unaddressed by the district court. Wainwright should have pressed the district court for a ruling on the due process issue, paving the way for our review in his first habeas appeal. We thus reject the kind of piecemeal habeas litigation Wainwright advocates."

The court also noted that, in his first habeas appeal, petitioner could have raised the due process claim as an alternative ground for affirmance but failed to do so. Finally, the court stated that its decision has "not effectively den[ied] Wainwright federal habeas review of his due process claim. Wainwright had his opportunity to seek adjudication of the claim in the first habeas proceeding, but did not pursue a decision on the merits."

Wainwright v. Norris, 121 F.3d 339, 340–41 (8th Cir. 1997) (per curiam).

Prison Litigation

Proceedings In Forma Pauperis

Fifth Circuit holds that filing fee requirements do not deny prisoners constitutionally guaranteed access to courts. After assessing a partial filing fee as required by 28 U.S.C. § 1915(b), the district court dismissed plaintiff's 42 U.S.C. § 1983 complaint as frivolous. Plaintiff did not challenge the filing fee assessment and paid the fee imposed. The district court made no explicit findings regarding the constitutionality of the Prison Litigation Reform Act fee provisions. The Fifth Circuit granted appellant's in forma pauperis motion and assessed a partial filing fee pursuant to the PLRA. Appellant asserted that the fee provisions deny prisoners constitutionally guaranteed access to the courts.

Considering the question under both plain error and de novo standards, the court of appeals held that the Act's fee requirements "do not hinder prisoners' abilities to prepare or transmit their cases or appeals to court." The provisions change the terms of IFP litigation by "requiring indigent prisoners for the first time to make the same prudential decisions about the merits of their lawsuits that everyone else makes before filing," but this does not restrict their access any more than non-IFP litigants are restricted by the filing fee. Moreover, the savings provision of § 1915(b)(4), which states that no prisoner will be barred from court because he or she does not have the means to pay the initial partial filing fee, "sufficiently guarantees that all prisoners will have access to the courts, regardless of their income."

Norton v. Dimazana, 122 F.3d 286, 290–91 (5th Cir. 1997). *Accord Shabazz v. Parsons*, 127 F.3d 1246, 1248–49 (10th Cir. 1997).

Ninth Circuit holds that actions dismissed before the PLRA's effective date count as strikes under § 1915(g). Before the plaintiff filed two 42 U.S.C. § 1983 complaints in November 1996, he had brought six other actions that were dismissed as frivolous or for failure to state a claim. Four of those cases were dismissed before the effective date of 28 U.S.C. § 1915(g), which prohibits prisoners from bringing civil actions or appeals IFP "if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility," filed actions that were dismissed as frivolous, malicious, or for failure to state a claim, unless the prisoner is imminently threatened with serious physical injury. The district court dismissed both of the plaintiff's suits on the ground that § 1915(g) applies to cases dismissed before enactment of the statute and therefore barred him from proceeding IFP.

The Ninth Circuit affirmed the lower court decision. "To interpret the statute as only applying to actions commenced after April 26, 1996, the effective date of the PLRA, would give every prisoner, regardless of the number of prior frivolous suits, three *more* opportunities to pursue frivolous actions—without paying any filing fees. . . . [S]uch an interpretation would frustrate, rather than advance, the congressional goal of reducing frivolous prisoner litigation in federal court." There is no retroactivity problem because the statute "does not impair any substantive rights of prisoners, but merely affects their ability to proceed *in forma pauperis*."

Tierney v. Kupers, 128 F.3d 1310, 1311–12 (9th Cir. 1997). *Accord Keener v. Pennsylvania Bd. of Probation & Parole*, 128 F.3d 143, 144–45 (3d Cir. 1997) (per curiam) ("dismissals for frivolousness prior to the passage of the PLRA are included").

Eighth Circuit rules that prisoner-appellant may seek IFP status on appeal pursuant to Rule 24(a) even though district court certifies appeal "is not taken in good faith" under § 1915(a)(3). The district court summarily dismissed plaintiff's complaint as frivolous and certified under 28 U.S.C. § 1915(a)(3) that any appeal would not be in good faith. Plaintiff persisted in his appeal. The Eighth Circuit rejected the reasoning of *McGore v. Wrigglesworth*, 114 F.3d 601, 610–11 (6th Cir. 1997), which held that the introductory clauses of § 1915(a)(1) and (b)(1) excluded from the prisoner appeal process the good faith certification provision of § 1915(a)(3). Instead, the court cited approvingly the decision in *Baugh v. Taylor*, 117 F.3d 197, 199 (5th Cir. 1997), which used Fed. R. App. P. 24(a) to reconcile the coexistence of § 1915's three subsections. The court held that "civil action prisoner-appellants who have been denied the right to proceed on appeal in forma pauperis by the district court because the district court has certified under § 1915(a)(3) that the appeal would not be taken in good faith, may still, by separate motion filed with this court pursuant to . . . Rule 24(a), seek to proceed in this court under the provisions of § 1915."

The filing of such a motion in the court of appeals triggers appellant's responsibility to pay the full filing fee in installments under § 1915(b), "unless the appellant must pay the full amount up front in cash because he has acquired the requisite 'three strikes' under § 1915(g)." The Eighth Circuit also concluded that once the appellate filing fee is assessed by the district court, the court of appeals may consider the merits of the appeal, even though calculation and collection of the fee may occur long after the case is disposed of. The appellate court directed the district court to follow specific procedures in assessing and calculating the appellate filing fee, including setting an initial partial fee of $35 "or such other reasonable amount warranted by available information" whenever the lower court does not receive a certified copy of a prisoner's prison account within 30 days of notice of appeal. The court affirmed the district court's ruling that the appeal was frivolous and notified appellant that the dispositions of both his complaint and appeal counted as "strikes" under § 1915(g).

Henderson v. Norris, 129 F.3d 481, 484–85 (8th Cir. 1997) (per curiam) (Arnold, J., dissented from the portion of the opinion "regulating the district court's handling of cases under the PLRA"). *See also Wooten v. District of Columbia Metro. Police Dep't*, 129 F.3d 206, 207–08 (D.C. Cir. 1997).

Eighth Circuit rules that plaintiff must show that filing fee provision, § 1915(g), caused actual injury to have standing to challenge its constitutionality. The district court initially denied plaintiff's request for IFP status because he had at least three strikes under 28 U.S.C. § 1915(g) and was not in "imminent danger of serious physical injury," as required in order to be exempt from the statutory prohibition on IFP filings. Upon reconsideration, the district court ruled that § 1915(g) burdened the plaintiff's fundamental right to court access. Under strict scrutiny, the lower court found "that the provision was not narrowly tailored to prevent abusive prisoner litigation since it only curbs repeat litigation by prisoners who can not afford the filing fee and does not take into account the varying sentences and circumstances of different prisoners."

The defendants' request for interlocutory review by the court of appeals was granted. The Eighth Circuit emphasized that "it is not sufficient for standing to show that court access could be impeded [by § 1915(g)]. Rather, a prisoner must show that it actually has been." The plaintiff had not made such a showing. The record revealed that he had sufficient funds to pay the filing fee, and payment would not force him to go without basic necessities. The plaintiff "is thus free to pursue his action if he pays the required fees, and section 1915(g) has not caused an actual injury to him because he was not without the necessary resources to bring his claim to court." Since he had not shown an actual injury, plaintiff lacked standing to raise his constitutional claims in the district court; the interlocutory appeal was dismissed and the case was remanded to the district court.

Lyon v. Krol, 127 F.3d 763, 764–65 (8th Cir. 1997) (Heaney, J., dissented).

District court concludes that *Anderson v. Singletary* does not excuse all indigent habeas litigants from filing fees. A prisoner appealed the district court's denial of his § 2255 motion. While his appeal was pending, he sought a refund of the $105 appellate filing fee that he had paid, contending that *Anderson v. Singletary,* 111 F.3d 801 (11th Cir. 1997) [Habeas & Prison Litig. Update #7], held that such fees do not apply to habeas litigants. Noting that 28 U.S.C. § 1915 "is merely a fee-processing statute," the district court said the Eleventh Circuit did not acknowledge the logical inconsistency of the appellant's position in *Anderson* that "because the fee-*processing* statute did not apply to him, he somehow was excused from the application of the fee-*prescription* statutes like §§ 1913 and 1917." Moreover, the court of appeals never answered the question of whether appellate docket and filing fees in fact are inapplicable to habeas appellants.

The district court summed up what *Anderson*, and several opinions from circuits concurring in the *Anderson* approach, seemed to have concluded: (1) an indigent prisoner who files a habeas action or appeal may do so "without prepayment of fees or security therefor" under § 1915(a)(1); (2) habeas cases are not civil actions within the meaning of § 1915(b)(1); (3) therefore, district courts should apply § 1915(a)(1) to habeas litigants who are prisoners just as they would to nonprisoners, "with an eye toward waiving filing fees if the prisoner otherwise satisfies that section's indigency requirement and § 1915(a)(3)'s 'good faith' bar. Conversely, courts should not apply §§ 1915(a)(2) & (b) to such litigants."

On the surface, the court stated, its conclusion that § 1915(a)(1) applies to imprisoned habeas litigants conflicts with the *Anderson* holding "'that the filing fee requirements of section 804(a) of the PLRA do not apply in 28 U.S.C. § 2254 or 28 U.S.C. § 2255 proceedings.'" 111 F.3d at 806. But the appellate panel "painted with too broad a brush, and . . . must have intended [that] . . . § 1915(a)(1) applies to habeas cases, but not §§ 1915(a)(2) & (b)." Henceforth, the district court would assess and collect docket and filing fees from habeas appellants and evaluate their IFP motions only under § 1915(a)(1), "subject to the 'good faith' limitation imposed by § 1915(a)(3), as well as the dismissal criteria set forth in § 1915(e)(2), but not the 'three-strikes' limit contained in § 1915(g)." The appellant's financial wherewithal would be evaluated according to pre-PLRA practice on a case-by-case basis. In the case before the court, the appellant was not entitled to a refund of the filing fee.

United States v. Bazemore, 973 F. Supp. 1475, 1478–80 (S.D. Ga. 1997).

Remedies for Prison Conditions

First Circuit holds termination provisions constitutional and terminates, but refuses to vacate, consent decree. Pursuant to the termination provisions of the PLRA [18 U.S.C. § 3626], defendants moved to terminate all prospective relief provided by a 1979 consent decree and to vacate the decree outright. Plaintiff class—present and future pretrial detainees

held or to be held in the Suffolk County jail—challenged the Act on constitutional grounds. The district court upheld the constitutionality of the termination provisions and granted termination of prospective relief "to the extent that the consent decree would 'no longer be enforced by an order of specific performance.'" But the court declined to vacate the decree or to terminate obligations stated in the decree which "represented 'consensual undertakings of the defendants with court approval.'" *Inmates of Suffolk County Jail v. Sheriff of Suffolk County,* 952 F. Supp. 869, 883 (D. Mass. 1997). All parties appealed.

The First Circuit found that the PLRA conflates "relief" and "consent decree" by describing a consent decree "as a *form* of relief rather than as a judgment that *engenders* relief." This equation of the terms "contradicts conventional understandings and . . . requires that commonplace legal terms be used in curious ways." Because of the uncertainty caused by this usage, the court of appeals reviewed the legislative history of the Act and was persuaded that the statute should be interpreted as directing the termination of consent decrees outright. The history "strongly suggests that the PLRA's sponsors wanted to truncate the federal judiciary's involvement in prison administration." The congruence between the statute's text and Congress's "easily discerned intent" led the court to conclude that "Congress meant precisely what it said—however deviant from ordinary usage that may be . . . . We are therefore duty bound to interpret the PLRA as mandating the termination of extant consent decrees altogether unless the district court makes the specific findings that are necessary to keep a particular decree alive."

Turning to constitutional issues, the First Circuit held that the PLRA provisions do not violate separation of powers by reopening final judgments or prescribing a rule of decision upon the court. *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211 (1995), and *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), "read together, teach that equity requires, and the separation of powers principle permits, legislatures to direct that courts respond to changes in substantive law by revisiting forward-looking injunctions." Furthermore, the relevant underlying law in this case is not the Eighth Amendment, as plaintiffs contend, but the law relating to "the district court's authority to issue and maintain prospective relief absent a violation of a federal right . . . . Given this shift in the relevant underlying law, the termination of prospective relief pursuant to the PLRA does not amount to a legislative reopening of a final judgment." Plaintiffs' argument that the termination provisions violate *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), by imposing a rule of decision on the courts while the underlying law remains constant, is invalid. The underlying law is not the Eighth Amendment, as already noted. The PLRA affects only a federal court's power to grant prospective relief where there is no violation of a federal right. Courts retain their power to interpret and apply the law to the facts without legislative interference.

Due process rights are not violated by the PLRA, either. Plaintiffs are not deprived of vested rights because "frankly modifiable decrees" cannot create such rights. Plaintiffs' objection that the consent decree is a contract that the PLRA unconstitutionally impairs is equally unavailing. Where the contract is private and the impairing statute is federal, there is a presumption of constitutionality and the legislation must meet only a rational basis test. The PLRA is not subject to heightened scrutiny, as the plaintiffs argue, because the federal government is not a constructive party to the consent decree. The "practical, commonsense linkage" between the termination provisions and the changed circumstance of the district court's diminished authority to grant or enforce prospective relief survives rational basis review.

Regarding equal protection, the PLRA does not breach fundamental rights of pretrial detainees who enjoy both the presumption of innocence and the right not to be punished prematurely. The Act does not permit relief where no fundamental right (and therefore no federally secured right) is violated. In the absence of such a violation, the court's inability to provide prospective relief does not infringe pretrial detainees' right to be free from punishment. Neither does the Act abridge plaintiffs' fundamental right of access to the court. The court also rejected plaintiffs' contention based on *Romer v. Evans,* 116 S. Ct. 1620, 1628 (1996), that the PLRA violates equal protection by singling out "a certain class of citizens for disfavored legal status or general hardship[]." With no fundamental right or suspect class at issue—and despite the plaintiffs' assertion that an "anti-inmate animus" underlay passage of the Act—the law easily meets the rational basis test.

The court of appeals did not accept the plaintiffs' further argument that even if the PLRA is constitutional, the consent decree should remain operable because (1) the district court previously made findings that satisfy the criteria set out in § 3626(b)(2), or (2) if those findings are inadequate, the court "should have conducted an inquiry into whether a violation of a federal right exists currently (or probably will come into existence if the strictures of the consent decree are lifted) before implementing the PLRA's termination provision." The appellate court found no reason to declare clearly erroneous the district court's assessment of the existing factual findings. With regard to present conditions, the court of appeals deferred to the lower court's "intimate familiarity with this protracted litigation and to its informed evaluation of current prison conditions" and saw no obligation imposed on the trial court "to make a predictive inquiry into future conditions before terminating an existing consent decree."

Although the First Circuit concluded that the PLRA mandates termination of the decree, it agreed with the district court that an order actually vacating the decree is not required. Congress used the verb "terminate," rather than "vacate," and the distinction between the two words may have practical significance: "While terminating a consent decree strips it of future potency, the decree's past puissance is preserved and certain of its collateral effects may endure. Vacating a consent decree, however, wipes the slate clean, . . . indeed, casting a shadow on past actions taken under the decree's imprimatur." The PLRA does not require vacating a consent decree when

prospective relief is terminated. The court of appeals affirmed the district court judgment finding the PLRA to be constitutional, terminating all prospective relief under the decree, and refusing to vacate the decree. It directed that the judgment be revised to terminate the consent decree itself.

Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 652–63 (1st Cir. 1997). *See also Dougan v. Singletary*, 129 F.3d 1424, 1426–27 (11th Cir. 1997) (per curiam) (holding §3626(b)(2) constitutional, vacating district court's denial of motion to terminate consent decree, and remanding for further proceedings consistent with opinion and PLRA).

Suits by Prisoners

Tenth Circuit rules that PLRA does not require prisoner-plaintiff to exhaust administrative remedies before bringing *Bivens* action for monetary damages. The district court dismissed plaintiff's civil rights complaint brought pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), on the ground that he had failed to exhaust prison administrative remedies as required by 42 U.S.C. § 1997e(a). Considering his appeal, the Tenth Circuit said Congress made it clear by amending § 1997e(a) to include "any other Federal law" that it intended to expand the application of § 1997e beyond state prisoners filing 42 U.S.C. § 1983 actions. "[T]he exhaustion requirements now apply to *Bivens* suits brought by federal prisoners against federal officials as well." Also, Congress amended § 1997e to make exhaustion mandatory instead of directory.

Despite these conclusions, the court decided that the district court erred in dismissing plaintiff's claims because there were no administrative remedies he could have exhausted before filing the lawsuit. He sought purely monetary damages for violations of his constitutional rights under *Bivens*. The government conceded that prison staff will reject such a claim as constituting improper subject matter for administrative review and notify a claimant of the availability of a remedy under the Federal Tort Claims Act. Plaintiff could have brought a FTCA claim, the government argued, and should be required to exhaust the remedies required by that statute. The court of appeals disagreed.

The plaintiff did not seek damages against the government, as allowed by the FTCA, but against individual prison officials, as allowed by *Bivens*. Thus, his suit does not fall under the FTCA, and FTCA administrative procedures are not applicable to him. The court found "untenable" the government's further contention that the PLRA compels a prisoner to pursue FTCA administrative remedies even though he or she is seeking relief not cognizable by that Act. "Congress clearly intended to require prisoners to exhaust only 'such administrative remedies as are available' before bringing a *Bivens* suit in federal court." It concluded that until Congress provides an administrative remedy for prisoners seeking monetary damages against prison officials under *Bivens*, "no exhaustion of administrative remedies is required under PLRA in this case because no such remedies exist to be exhausted."

Garrett v. Hawk, 127 F.3d 1263, 1265–67 (10th Cir. 1997).

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Habeas Corpus

Special Procedures in Capital Cases

Ninth Circuit affirms order enjoining state from claiming it qualifies for special procedures; Supreme Court grants certiorari. Chapter 154 of the Antiterrorism and Effective Death Penalty Act (codified at 28 U.S.C. §§ 2261–2266) adds new procedures for habeas petitions by state prisoners who have been sentenced to death. Chapter 154 applies only if a state qualifies under either the "post-conviction" or "unitary review" procedures set forth in §§ 2261 and 2265. Plaintiff, on behalf of himself and other death row inmates in California, sought and received from the district court a ruling that California does not qualify for the Chapter 154 procedures. The court issued an injunction prohibiting California from attempting to invoke Chapter 154's benefits in any state or federal proceeding. *See Ashmus v. Calderon,* 935 F. Supp. 1048 (N.D. Cal. 1996) [Habeas & Prison Litig. Update #3]. The Appellate court upheld the ruling and injunction, although it clarified the terms of the injunction.

The court first held that the action was not barred by the Eleventh Amendment. One exception to a state's right to immunity occurs when plaintiffs "identify a continuing or impending violation of federal law" and seek only prospective relief. "The plaintiffs satisfy this requirement. They have demonstrated that California's announced intention to invoke Chapter 154 without having complied with that Chapter's opt-in requirements (as we discuss later in this opinion) threatens to violate their right to federal review of their habeas petitions, pursuant to Chapter 153 of Title 28, and their right to the assistance of counsel, pursuant to 21 U.S.C. § 848(q). . . . The State is not entitled to the[] 'benefits' of Chapter 154 unless it complies with the opt-in requirements of that Chapter. Until it does, it remains in noncompliance with the very federal law it seeks to use against the prisoners; and it seeks to use this law to deprive the prisoners of their rights to federal review under Chapter 153 of Title 28. The State's threat to use Chapter 154 in this way also forces the prisoners to file bare bones petitions within the 180-day time limit, before counsel will have been appointed to assist them, thereby depriving them of their right to the assistance of counsel at this critical stage of the habeas process, in violation of 21 U.S.C. § 848(q)." *Accord Hill v. Butterworth,* 133 F.3d 783, 785 n.7 (11th Cir. 1997). *Contra Booth v. State,* 112 F.3d 139, 141–46 (4th Cir. 1997) [Habeas & Prison Litig. Update #7].

The court then agreed with the district court "that California does not qualify at this time for the benefits of Chapter 154. . . . Nor did the district court err in determining that an injunction was necessary to effectuate its declaratory judgment. Had the district court not issued the injunction, California would have been free to assert in other federal and state proceedings the same position it asserts in this case." However, the court clarified the injunction "to provide that California is enjoined from asserting in any state or federal court that it qualifies for the benefits of Chapter 154 under the current state of California law in cases involving habeas corpus claims of state prisoners under sentence of death. Moreover, the district court may determine, depending upon future events, to modify its injunction as may be appropriate."

The court rejected the state's claim that the injunction violates the First Amendment. "The injunction does not interfere with the state officials' free speech rights. They are free to voice their opinion that the district court, and we, are wrong. The officials, however, may not seek to invoke the opt-in benefits of Chapter 154 in litigation arising under the current state of California law in cases similar to the present case after the district court and this court have determined that the State has not complied with Chapter 154's opt-in requirements."

The Supreme Court granted certiorari on the following questions: "(1) Does Eleventh Amendment bar coercive suits that seek to prevent state officials from advocating their views on disputed issues of law that will arise and be adjudicated in regular course of habeas litigation? (2) Does injunction barring one party from seeking favorable judicial rulings on disputed questions of law and procedure constitute impermissible viewpoint-specific prior restraint on lawful advocacy?"

Ashmus v. Calderon, 123 F.3d 1199, 1204–09 (9th Cir.) (Beezer, J., dissented), *cert. granted,* 118 S. Ct. 596 (1997).

Second or Successive Petitions

Seventh Circuit sanctions repetitive filer. "For the third time since Congress enacted the Antiterrorism and Effective Death Penalty Act, Anthony Alexander has sought to commence a successive collateral attack on his criminal conviction." The court had also rejected a pre-AEDPA collateral attack from petitioner. Each filing was on the same issue, which the court twice rejected on the merits. Because "the rejection of a motion for leave to file a second or successive collateral attack is 'on the merits,' . . . [r]ejected justifications may not be reiterated in a successive motion for leave to file." Yet that is

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what this inmate has done, and the court faced the question of "[w]hat should a court do with a prisoner who refuses to take no for an answer, and files over and over again?"

"Our last order informed Alexander that our patience had been exhausted" and that he could face sanctions. "But what sanction can be effective? . . . The problem with money sanctions is that prisoners don't pay, tapping the prisoner's trust account under the [Prison Litigation Reform Act] is not an option given the conclusion . . . that the PLRA is inapplicable, and the remedy we have devised for people who ignore sanctions—blocking the filing of new suits until the money has been paid . . . —has an exception for collateral attacks on convictions."

"Two options remain. First, we can enter a standard *Mack* order (blocking the filing of new suits), which will at least give Alexander some incentive to pay if he wants to engage in civil litigation *other* than a collateral attack. . . . Second, we can and do provide that any future applications for leave to file successive collateral attacks will be *deemed* rejected, without the need for judicial action, on the 30th day, unless the court orders otherwise. . . . We will read any future application Alexander files, even though we will not necessarily enter an order addressing it, so Alexander will not lose the benefit of any decision made retroactive by the Supreme Court."

The court also imposed a fine. "Courts have inherent powers to protect themselves from vexatious litigation, . . . [and] may use that authority when other sources do not govern the subject. The statutes and rules [governing sanctions] are limited in extent—to actions in the district court, to 'appeals,' and perhaps to acts by lawyers—but do not reflect a substantive decision that repetitious litigation by pro se litigants in original matters filed in the court of appeals ought not be penalized. Alexander is fined $500, and until he pays that sum in full to the clerk of this court, clerks of all courts within this circuit will return, unfiled, any papers he tenders in civil litigation, and this court will receive but not act on motions for leave to file successive collateral attacks. If Alexander persists in filing frivolous applications, the fine will go up."

Alexander v. United States, 121 F.3d 312, 313–16 (7th Cir. 1997).

Tenth Circuit holds that § 2255 motion that was, in effect, a reinstatement of the right to appeal, did not count as first habeas petition. Petitioner was originally convicted and sentenced in 1989. In 1991 he filed a 28 U.S.C. § 2255 motion, claiming that his attorney in 1989 failed to file an appeal. The district court granted the motion, appointed counsel, and scheduled a resentencing hearing, but resentenced petitioner to the same term. The appellate court then affirmed the conviction and sentence. After enactment of the AEDPA, petitioner filed another § 2255 motion, this time claiming ineffective assistance of appellate counsel. The district court concluded that this was a second or successive petition and transferred the matter to the appellate court, where petitioner filed a motion seeking permission to file a second or successive petition.

The appellate court concluded that, in this situation, the current § 2255 motion was not a second or successive petition because the first petition was, in effect, a direct appeal. "Here, when the district court resentenced Mr. Scott following the filing of his first § 2255 motion, the resentencing enabled Mr. Scott to perfect his direct appeal. . . . The purpose of the resentencing was to place the defendant 'back into the position he would have been had counsel perfected a timely notice of appeal.' . . . In fact, on appeal from the resentencing, this court treated the matter as a direct criminal appeal. . . . In addition, a § 2255 motion should not be considered before the disposition of the direct criminal appeal."

"Mr. Scott's ineffective assistance of appellate counsel claim did not even exist until the direct appeal process concluded. . . . It is also questionable whether Mr. Scott could have raised his ineffective assistance of trial counsel claim in the prior proceeding," because such claims should be brought in collateral proceedings, not on direct appeal. "Thus these issues would be precluded from review if the instant motion is construed as a second motion under AEDPA. . . . [B]ecause of the unique situation presented when the granting of the prior motion merely reinstated the right to a direct appeal, the first subsequent motion is not a second or successive motion under AEDPA," and the § 2255 motion was remanded to the district court.

United States v. Scott, 124 F.3d 1328, 1329–30 (10th Cir. 1997) (per curiam).

Second Circuit holds that, when first § 2255 motion successfully challenged part of sentence, later petition challenging conviction or unamended aspects of original sentence must meet test for second or successive petition. In 1992 defendant filed a § 2255 motion challenging several aspects of his 1989 sentence. His term of supervised release was reduced but all other claims failed; the district court's decision was affirmed on appeal. In 1997 defendant sought leave to file another § 2255 motion, attacking his conviction and sentence.

"Galtieri's first 2255 petition was successful and resulted in a modification of his sentence. His second 2255 petition, strictly speaking, seeks to vacate the amended sentence, and, still strictly speaking, could be considered a first 2255 petition to vacate the *amended* sentence. That approach, however, would permit every defendant who succeeds in having any component of his sentence modified to bring a renewed challenge to his conviction and to the unamended components of his original sentence, raising grounds that were either available for presentation on the first petition or even specifically rejected on that petition."

"We therefore conclude that whenever a first 2255 petition succeeds in having a sentence amended, a subsequent 2255 petition will be regarded as a 'first' petition only to the extent that it seeks to vacate the new, amended component of the sentence, and will be regarded as a 'second' petition to the extent that it challenges the underlying conviction or seeks to vacate any component of the original sentence that was not

amended. In the pending matter, . . . [a]ll of his claims concern either the conviction or the unamended components of his sentence. The current petition will therefore be treated in its entirety as a 'second' petition." The application to file a second petition was denied because none of the claims met the statutory standard. *Accord Pratt v. United States*, 129 F.3d 54, 62–63 (1st Cir. 1997) (dismissing petition that, after first § 2255 petition resulted in resentencing, raised claims about underlying conviction that could have been pursued in first petition—"Unpursued errors arising out of events that occurred before the filing of the initial habeas petition, and which could have been, but were not, challenged in that petition, . . . normally are not eligible for inclusion in a subsequent habeas petition.").

The court also addressed the 30-day time limit in which an appellate court must grant or deny an application to file a second or successive petition, 28 U.S.C. § 2244(b)(3)(D). "Though Congress understandably prefers that motions to file second habeas petitions be adjudicated expeditiously, some flexibility must be accepted to accommodate the variety of procedural contexts in which such motions are presented. . . . In nearly all cases, assessing the motion to file a second habeas petition against the strict statutory criteria will be a relatively straightforward task that can be accomplished within 30 days. In the few instances where that cannot be done, however, either because the necessary documents cannot be readily assembled, or, even with such documents, the issue posed is of such difficulty that it cannot be readily adjudicated, we do not think that Congress wanted courts to forgo reasoned adjudication."

In such cases, the appellate court might adjudicate the motion within 30 days, then stay the mandate and rehear the motion. Or, as in this case, it might deny the motion within 30 days and issue an opinion later. "Reflecting on our initial experience with the new statute, we now conclude that an additional approach, which might be preferable, is to (1) start the 30-day clock when the motion, and all papers required for a reasoned decision, including the transcript where necessary, have been filed with the Court of Appeals, (2) adjudicate the motion within 30 days in the general run of matters, and (3) exceed the 30-day limit only where an issue requires a published opinion that cannot reasonably be prepared within 30 days, consistent with the Court's other obligations." *Cf. In re Siggers*, 132 F.3d 333, 335–36 (6th Cir. 1997) (in "the absence of any enforcement provision, we hold that failure to comply with the thirty-day provision does not deprive this Court of the power to grant or deny a motion under § 2244(b)(3)(A)," and because "§ 2244(b)(3)(D)'s thirty-day restriction is advisory or hortatory rather than mandatory, we hold that it is not invalid as an invasion of the judiciary's autonomy and that it does not violate due process").

Galtieri v. United States, 128 F.3d 33, 36–38 (2d Cir. 1997). *Cf. Esposito v. United States*, 135 F.3d 111, 113–14 (2d Cir. 1997) (per curiam) (applying *Galtieri* and dismissing as unnecessary a motion to file a second § 2255 petition—because petitioner's challenge is limited to aspects of his sentence that were amended upon resentencing, it is treated as a first petition).

Certificate of Appealability

Tenth Circuit holds that AEDPA standards apply to COA application filed after the AEDPA took effect even if the original § 2254 habeas petition was filed before the Act. Petitioner requested a certificate of appealability (COA) on August 28, 1996, several months after the AEDPA took effect. He argued, however, that the new act's standards should not apply to his application because his § 2254 petition for habeas corpus was filed before the enactment of the AEDPA. The appellate court disagreed.

"Whatever changes AEDPA has made with respect to appeals by habeas corpus petitioners are procedural only. The notice of appeal in this case, together with Tiedeman's application for a certificate of appealability, was filed after the enactment of AEDPA. We recognize that the Supreme Court, in *Lindh v. Murphy*, . . . 117 S. Ct. 2059 . . . (1997), has held that the amendments made by AEDPA to Chapter 153 of Title 28 . . . , generally speaking, are prospective only. The particular provision of the law at issue in *Lindh*, however, had to do with the substantive standards for review of state-court judgments by habeas courts. In stating its holding at the end of its opinion, the Court said that 'the new provisions of Chapter 153 *generally* apply only to cases filed after the Act became effective.' . . . 117 S. Ct. at 2068 (emphasis ours). The parties to this case agree that the new provisions with respect to certificates of appealability made no substantive change in the standards by which applications for such certificates are governed. Moreover, we can think of no reason why a new provision exclusively 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. Accordingly, we hold that AEDPA does apply to the certificate-of-appealability issues presented in this case."

The court also held that "district courts possess the authority to issue certificates of appealability under Section 2253(c) and Fed. R. App. P. 22(b)." In this case, the district court had issued a certificate, but "failed to follow Section 2253(c)(3), which requires that the certificate 'shall indicate which specific issue or issues satisfy the showing required by paragraph (2).' Consequently, the certificate issued in this case is defective on its face. It does not specify any issue or issues with respect to which the applicant has made a substantial showing of the denial of a constitutional right." The court did not remand, however, because the case "has been fully briefed, and we have heard oral argument on all issues, including the merits. Thus, we are fully informed about the merits, and it would make no sense to go through the unnecessary step of remanding to the District Court with the request that an issue or issues be specified, when we already know, having fully considered the case, what we think the result ought to be. . . . We hold that Tiedeman has not made a substantial showing of

the denial of a constitutional right, and we therefore deny the certificate."

Tiedeman v. Benson, 122 F.3d 518, 520–22 (10th Cir. 1997). *Contra Hardwick v. Singletary*, 126 F.3d 1312, 1313 (11th Cir. 1997) (although "the standard governing certificates of probable cause and certificates of appealability is materially identical," district court should not have applied standards for COA to application for appeal filed post-AEDPA when habeas petition was filed pre-AEDPA); *United States v. Kunzman*, 125 F.3d 1363, 1364 n.2 (10th Cir. 1997) (citing other cases, "we join the majority of circuits and hold that §§ 2254 and 2255 petitioners who filed their petitions in district court prior to AEDPA's effective date, regardless of whether they filed their notice of appeal before or after AEDPA, do not need a certificate of appealability to proceed with their appeal"); *United States v. Carter*, 117 F.3d 262, 264 & n.1 (5th Cir. 1997) (same). *See also United States v. Perez*, 129 F.3d 255, 260 (2d Cir. 1997) (following *Lindh*, "an appellant need not obtain a COA to appeal the denial of his § 2255 motion so long as he filed the motion before April 24, 1996"); *United States v. Skandier*, 125 F.3d 178, 180 (3d Cir. 1997) (same); *Arredondo v. United States*, 120 F.3d 639, 640 (6th Cir. 1997) (same).

One-Year Period of Limitation

Ninth Circuit holds that actions short of actually filing habeas petition do not preclude expiration of one-year limitation period; court also denies "equitable tolling" of that period for mental incompetence. Over ten years ago, Horace Kelly murdered three people in California. He was convicted and sentenced to death for all three murders, and by 1992 the California Supreme Court had upheld the convictions and sentences in his direct appeals. Kelly never sought further relief in the state courts, and has never filed an application or petition for habeas corpus in federal court. However, beginning in 1992, Kelly "start[ed] a 'proceeding' for the purpose of obtaining federally appointed counsel before any application or petition for habeas corpus is filed" and obtained a stay of execution from the district court. The court then appointed counsel, a "next friend" to bring a habeas petition on his behalf, and a psychiatrist to evaluate his current mental condition. All of this occurred before April 24, 1996, the effective date of the AEDPA. Over a year after that date, Kelly still had not filed a habeas petition and the state filed a motion to dismiss the proceedings and vacate the stays of execution because AEDPA's one-year statute of limitations for filing habeas petitions, 28 U.S.C. § 2244(d)(1)(A), had passed. The district court concluded that the AEDPA's filing deadlines did not apply and denied the motion. The state then filed the instant petition for a writ of mandamus.

The appellate court agreed with the state's position and granted the writ of mandamus to lift the stays of execution and dismiss the proceedings. The statute "clearly requires that the 'application for a writ of habeas corpus' must be filed during the one-year statute of limitations period. 28 U.S.C. § 2244(d)(1)(A). The statute does not say that a request for counsel must be filed during that time; it requires the filing of the application itself. It is abundantly clear that no application for habeas corpus has ever been filed in these matters. No doubt some sort of proceedings, which might ultimately have led to applications, were on file. But a mere possibility that a habeas corpus application will be filed is far from being the habeas corpus application itself. . . . But, says Kelly, despite the clear language of § 2244(d)(1), the AEDPA does not apply at all because it only applies to *cases* filed after April 24, 1996, and his case was filed before that date. We disagree. As we have said, the AEDPA applies to defendants who 'did not have a federal habeas petition pending at the time AEDPA was signed into law.' . . . Kelly has never filed a petition or application."

The court stated that it's holding was also supported "by Congress's obvious intent to '"halt the unacceptable delay which has developed in the federal habeas process."' . . . Whether one believes that the delay is unacceptable, or not, the rule argued for by Kelly would seriously undercut Congress's purpose, as this matter itself illustrates. Over four years after he first obtained stays from the district court, Kelly has yet to present any application for habeas corpus to that court. If a mere appointment of counsel in what amounts to a proceeding ancillary to a true habeas corpus application can avoid the one-year statute of limitations, the Act will not have been very effective at all."

"Kelly argues that even if the AEDPA does apply, he is entitled to tolling of the one-year provision. We have held that equitable tolling will be available when '"extraordinary circumstances" beyond a prisoner's control make it impossible to file a petition on time.'" *See Calderon v. United States Dist. Ct. for Cent. Dist. of Cal.*, 128 F.3d 1283, 1288 (9th Cir. 1997) (superseding opinion published at 112 F.3d 386 and summarized in Habeas & Prison Litig. Update #8). "Kelly asserts that he is not mentally competent and cannot, therefore, aid his attorney. Thus, he argues, he not only is entitled to tolling but also is entitled to have the stays imposed by the district court continued indefinitely. He cites no authority for that interesting assertion, and on the facts of these proceedings we reject it as a matter of law."

"Kelly has had counsel to represent him for a long time, and even has a next friend. The Supreme Court could hardly have contemplated that all post-conviction proceedings would be stayed because a defendant was not competent, when it endorsed the concept which allows '"next friends" [to] appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves.' . . . While we do not foreclose the possibility that some particular difficulties could require tolling in some instances, this is not one of them. . . . Kelly is simply attempting to obtain from the federal courts, by indirection, the very relief he was denied on direct appeal in California. He seeks to put off any decision whatever on the merits of his claims, if any. That he cannot do under the guise of tolling or otherwise. As it is, he has injected a long, fruitless delay into the state proceedings. The AEDPA has, however, brought that delay to an end."

Calderon v. United States Dist. Ct. for Cent. Dist. of Cal., 127 F.3d 782, 784–87 (9th Cir. 1997) (Tashima, J., dissented on the tolling issue). *See also Calderon*, 128 F.3d at 1287 n.3 ("for purposes of determining cases to which AEDPA applies, a case is pending when the application for a writ of habeas corpus is filed"); *Holman v. Gilmore*, 126 F.3d 876, 879–80 (7th Cir. 1997) (AEDPA applies to habeas petition filed after April 24, 1996, even though a request for appointment of counsel was filed before that date: "A motion under [21 U.S.C. § 848(q)(4) for appointment of counsel is a prelude to a collateral attack . . . but is not itself a collateral attack. . . . A § 2254 case is commenced on the date the petition is filed."); *Williams v. Cain*, 125 F.3d 269, 274 (5th Cir. 1997) (same, for petitioner who filed motions for stay of execution, to proceed in forma pauperis, and for appointment of counsel before April 24, 1996, but did not file actual habeas application until after that date).

Prison Litigation

Proceedings In Forma Pauperis

Seventh Circuit holds that *Thurman* analysis applies to complaints and requires district court to give plaintiff notice and opportunity to withdraw complaint before incurring obligation to pay filing fee. The district court dismissed plaintiff's complaint as time-barred and ruled that he could not proceed in forma pauperis (IFP) in the future because he had three strikes under 28 U.S.C. § 1915(g), as amended by the Prison Litigation Reform Act. The Seventh Circuit reversed the dismissal and noted that plaintiff had lodged his complaint before the effective date of the PLRA but that it was filed after that date. It held that *Thurman v. Gramley*, 97 F.3d 185, 188–89 (7th Cir. 1996), applied. In *Thurman* the court ruled that an appeal lodged before the effective date but filed after it was subject to the PLRA's mandatory filing fee provisions. However, to avoid unfairness to a litigant who may not have anticipated this turn of events, it gave the plaintiff "notice and an opportunity to dismiss the appeal before taking the step that locks in the obligation to pay."

In this case, the court equated a complaint with an appeal and held that plaintiff must have notice and an opportunity to withdraw the complaint before he is obligated to pay the filing fee. Since plaintiff did not receive such notice alerting him "to the fact that his pursuit of even a non-frivolous suit will trigger his obligation to prepay the entire filing fee under the statute because he already has three strikes," § 1915(g) could not be applied to bar him from proceeding IFP "until the requirements of *Thurman* are met." The Seventh Circuit's opinion gave plaintiff sufficient notice of the applicability of § 1915(g); on remand the district court should set a deadline for withdrawal of the complaint. If plaintiff declines to withdraw the suit, he will not be able to proceed IFP under § 1915(g) and will have to prepay the full filing fee, assuming that he already has three strikes against him.

Lucien v. Jockisch, 133 F.3d 464, 468 (7th Cir. 1998).

Fifth Circuit holds that § 1983 cases that include unexhausted habeas claims fall within purview of three strikes provision. The district court concluded that plaintiff had filed at least five actions—two including habeas claims that were dismissed without prejudice for failure to exhaust state court remedies—that had been dismissed as frivolous and was therefore barred by § 1915(g) from proceeding IFP. It further denied his request for leave to appeal IFP. The Fifth Circuit had to decide whether plaintiff already had three strikes against him before filing his appeal.

The court found "no compelling reason to excuse [plaintiff's] frivolous § 1983 actions . . . from the reach of the PLRA's 'three strikes' proviso simply because the cases included unexhausted habeas claims. It is more faithful to the intent of the PLRA to classify these dispositions as strikes." If the court were to hold otherwise, litigious prisoners could circumvent the three strikes barrier by pleading such claims as part of § 1983 actions. The court rejected plaintiff's further contention that the district court's denial of his IFP petition violated § 1915(b)(4), which provides that a prisoner shall not be prohibited from bringing a civil action or a civil or criminal appeal because he has "no means by which to pay the initial partial filing fee." Section 1915(b)(4) is subject to the three strikes rule of § 1915(g). The Fifth Circuit held that plaintiff already had three strikes against him, denied his motion to proceed IFP, and dismissed his appeal.

Patton v. Jefferson Correctional Ctr., 136 F.3d 458, 461–65 (5th Cir. 1998).

District court rules that petitioner confined under sexual predator law is not a prisoner as defined by the PLRA. Petitioner, who was confined under Wisconsin's sexual predator law, sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and requested leave to proceed IFP. Both petitioner and the state contended that individuals detained under the Wisconsin law are not prisoners as defined in two identical provisions of the PLRA—28 U.S.C. § 1915(h) and 42 U.S.C. § 1997e(h). The Wisconsin Supreme Court had held that detention as a sexual predator is neither criminal punishment nor punitive in nature.

The district court found the Fifth Circuit's decision in *Ojo v. Immigration & Naturalization Serv.*, 106 F.3d 680, 682 (5th Cir. 1997), persuasive. In that case, the court of appeals "interpreted the statutory definition of prisoner as covering only individuals whose *current* detentions serve as punish-

ment for one of the legal violations specified in the statute." An immigrant who had been released from prison at the expiration of his criminal sentence and was in the custody of the INS while deportation proceedings were conducted was not a prisoner covered by the PLRA. The petitioner's status in the present case "is factually similar to the status of the INS detainee in *Ojo*," the district court said. Because his detention is a civil commitment imposed after a judicial determination that he is a sexually violent person according to the Wisconsin law, the petitioner could not be considered a prisoner subject to the fee provisions of the PLRA.

West v. Macht, 986 F. Supp. 1141, 1143 (W.D. Wis. 1997).

District court holds that sua sponte dismissal of complaint for failure to state a claim under § 1915 poses no retroactivity concerns, and such dismissal is proper when the complaint shows on its face that the action is time-barred. Section 1915(e)(2)(B) directs that a district court dismiss a case sua sponte at any time if it appears that the action fails to state a claim upon which relief may be granted. The court held that this provision, like the three strikes section (§ 1915(g)), "effectuates a change which has no deleterious substantive consequences" for the plaintiff, who filed his complaint in 1995, and therefore applies to pending litigation.

It then turned to the question of whether it is proper for the court to dismiss a complaint sua sponte and before service of process on statute of limitations grounds. A pre-PLRA case, *Pino v. Ryan,* 49 F.3d 51, 54 (2d Cir. 1995), held that sua sponte dismissal before service of the pro se complaint was appropriate because the claim, filed five years after the events in question, was "based on an indisputably meritless legal theory." Since the *Pino* decision was rendered "under the more plaintiff-protecting requirements of the old § 1915(d)," and "Congress in the PLRA has directed courts to dismiss at any time for failure to state a claim, nothing counsels against dismissal on limitations grounds in this case," which was also filed five years after the date at issue.

Johnstone v. United States, 980 F. Supp. 148, 154 (E.D. Pa. 1997).

Remedies for Prison Conditions

Sixth Circuit reverses district court and holds that termination provisions do not violate separation of powers. The district court held that 18 U.S.C. § 3626(b)(2)–(3), the PLRA's provisions entitling defendants in prison condition lawsuits to obtain immediate termination of prospective relief in existing consent decrees, unconstitutionally violated separation of powers. *Hadix v. Johnson,* 947 F. Supp. 1100 (E.D. Mich. 1996). The Sixth Circuit reversed. It agreed with several other circuits that the provisions do not require the reopening of a final judgment; "rather, they merely alter the prospective application of orders requiring injunctive relief." As the other courts had concluded, "the prospective equitable relief contained in the *Hadix* consent decree remains subject to subsequent changes in the law."

The court also concurred with several other circuits that the provisions do not prescribe a rule of decision, but only "the standard for authorizing a remedy in any given case." It stated in a footnote that if plaintiffs' challenges to the provisions on due process and equal protection grounds were before it, it would reject them, as a number of other circuits had, and find the statute "rationally-related to the legitimate state interest of curbing judicial involvement in prison administration."

Hadix v. Johnson, 133 F.3d 940, 942–43 (6th Cir. 1998).

Ninth Circuit holds that § 3626 applies to pending cases and that district court erred in granting summary judgment against defendants without making required findings. The district court granted summary judgment sua sponte, ordering defendants to provide plaintiff with a special diet. Defendants appealed, contending that the court erred in granting summary judgment for plaintiff without finding that the relief was narrowly drawn, extended no further than necessary to correct the violation of the right, and was the least intrusive means necessary, as required by § 3626(a)(1).

The court of appeals agreed that the lower court had to make such findings before it could render summary judgment because Congress had explicitly prescribed that § 3626 apply retroactively. It reversed and remanded the case so that the defendants could respond and the district court, if it found for the plaintiff again, could "consider the appropriate relief in light of the PLRA."

Oluwa v. Gomez, 133 F.3d 1237, 1240 (9th Cir. 1998).

Eighth Circuit holds that district court must make findings required by PLRA to support injunction and, if prospective relief sought includes a prisoner release order, it must be entered by three-judge court. Defendant sought to dissolve an injunction granted by the district court Sept. 16, 1996, without holding a hearing or considering the applicability of the PLRA. The injunction in an ongoing class action granted a motion brought by plaintiff inmates to establish a ceiling on technical probation violators held in the city jail.

The Eighth Circuit agreed with the defendant that the Sept. 16th order violated § 3626 by, among other things, granting prospective relief without making the findings specified in § 3626(b)(2) and (3). Moreover, the injunction constituted a "prisoner release order" as defined in § 3626(g)(4) and, as such, was subject to the requirements of § 3626(a)(3), which provides that prisoner release orders "shall be entered only by a three-judge court." The court of appeals observed that it had already rejected all but one of the plaintiffs' constitutional arguments against the PLRA's immediate termination provision in *Gavin v. Branstad,* 122 F.3d 1081 (8th Cir. 1997), and it likewise rejected their contention that § 3626(b) impaired the judiciary's power to remedy constitutional violations. Under § 3626(b)(3), courts may tailor prospective relief necessary to remedy a current violation of federal rights.

The appellate court found that any prospective relief granted "without the § 3626(b)(2) findings . . . must be terminated *unless* the court makes the findings specified in

§ 3626(b)(3)." But plaintiffs "are entitled to seek new or extended prospective relief under the standards set forth in § 3626(a)." If such relief includes a prisoner release order, the order must be entered by a three-judge court pursuant to § 3626(a)(3)(B). Finding the statute unclear regarding "whether the § 3626(b)(3) findings that will avoid termination of an existing injunction must in all cases be made by a three-judge court if the injunction includes a prisoner release order," the Eighth Circuit left "the question of the proper interplay between § 3626(a)(3) and § 3626(b)(3) for initial decision by the district court."

Tyler v. Murphy, 135 F.3d 594, 596–98 (8th Cir. 1998).

District court, citing *Benjamin v. Jacobson*, rules that termination of prospective relief does not allow defendants to ignore terms of consent decree. In an unpublished opinion, the district court reviewed its previous decision in an August 1, 1997, opinion and order terminating prospective relief granted in a March 6, 1996, consent decree. It held that in light of the Second Circuit's ruling in *Benjamin v. Jacobson*, 124 F.3d 162, 178 (1997), it had to reverse its earlier decision to the extent that the decision had allowed the defendants essentially to ignore the consent decree. Although the prospective relief granted in the decree remained terminated, "the parties are not free to ignore the terms of the consent decree. . . . If Defendants violate the terms of the March 6, 1996 consent decree, Plaintiff must seek enforcement of the decree in state court."

Giles v. Coughlin, No. 95 CIV. 3033 JFK (S.D.N.Y. Dec. 11, 1997) (Kennan, J.) (unpublished).

Suits by Prisoners

Seventh Circuit holds that § 1997e(e) is constitutional as applied in case in which no physical injuries are alleged. Plaintiffs, inmates at the Indiana Youth Center who were exposed to asbestos, claimed mental and emotional injuries as a result of the exposure. Defendants moved for judgment on the pleadings because plaintiffs did not allege "physical injury" as required by 42 U.S.C. § 1997e(e). The district court ruled that recovery was barred by § 1997e(e) and dismissed the case without prejudice. 952 F. Supp. 1318 (S.D. Ind. 1997).

The Seventh Circuit first ruled that plaintiffs had waived appellate review of the applicability of § 1997e(e) to their case, which was pending when the PLRA was enacted, by failing to present the argument in the district court. It then considered the constitutionality of the statute, which "does not permit recovery for custodial mental or emotional damages 'without a prior showing of physical injury.'" The court agreed with the district court that the prohibition on recovery of damages in §1997e(e) does not improperly strip federal courts of their power to remedy constitutional violations. They retain the power to enforce constitutional guarantees through other remedies. The court concluded that *Owen v. City of Independence*, 445 U.S. 622 (1980), which plaintiffs cited in support of their argument, actually "supports the view that § 1997e(e) is a permissible restriction on the availability of damages for constitutional violations" because Congress had clearly declared its intent to restrict the damages remedy in 42 U.S.C. § 1983 cases. The court recognized that injunctive relief did not offer any meaningful recourse for the plaintiffs, but emphasized that "the Constitution does not demand an individually effective remedy for every constitutional violation." Plaintiffs will be able to sue for damages if they develop asbestos-related illnesses in the future; therefore, the statute is constitutional as applied in this case.

The Seventh Circuit also rejected plaintiffs' argument that § 1997e(e) "impinges upon their fundamental right of access to the courts by effectively denying them a judicial forum for their claims of emotional injury." The statute "only limits the relief to which the plaintiffs are entitled." They still possess what the Supreme Court, in *Lewis v. Casey*, 116 S. Ct. 2174, 2180–81 (1996), said the Constitution requires—"a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." Consequently, §1997e(e) is not subject to strict scrutiny and it easily meets the rational basis test. The court of appeals noted that the recent Supreme Court decision of *Metro-North Commuter R.R. Co. v. Buckley*, 117 S. Ct. 2113 (1997), upheld similar restrictions upon a group of nonprisoners. Plaintiffs' further equal protection argument based on *Romer v. Evans*, 517 U.S. 620 (1996), was equally unavailing because the statute does not impose "across the board restriction on access to governmental assistance." The court declared meritless plaintiffs' contention that § 1997e(e) violates the separation of powers principles enunciated in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871) by prescribing a rule of decision. "If the argument were accepted, countless federal statutes would be called into question on constitutional grounds."

Zehner v. Trigg, 133 F.3d 459, 461–64 (7th Cir. 1997). *But cf. Kerr v. Puckett*, No. 97-2566 (7th Cir. March 10, 1998) (Easterbook, J.) (holding in *Robbins v. Switzer*, 104 F.3d 895 (7th Cir. 1997), that "prisoner" in § 1915(b) does not comprehend inmate who has been released, applies equally to § 1997e; thus, ex-prisoner on parole may bring suit for mental or emotional injury without a showing of physical injury).

Sixth Circuit holds that attorneys' fees provision does not apply to legal work completed before enactment of the PLRA. In 1985, the district court ordered that plaintiffs—attorneys representing all female inmates in Michigan—were entitled to attorneys' fees in the ongoing case. On March 11, 1996, plaintiffs filed a petition for attorneys' fees incurred between July and December 1995. On May 7, 1996, the defendants filed a brief calling the court's attention to the passage of the PLRA and contending that the Act's attorneys' fees provision should apply retroactively to plaintiffs' petition for fees. The district court rejected the defendants' argument.

On appeal, defendants renewed their contentions that under 42 U.S.C. § 1997e(d)(1)(A) & (B), the plaintiffs must establish "how each hour they charged was directly and reasonably incurred in proving an actual violation of constitu-

tionally protected rights" and, further, that the plaintiffs' hourly rate should be limited to $112.50, as provided in § 1997e(d)(3). The Sixth Circuit concluded that under *Landgraf v. U.S.I. Film Prods.*, 511 U.S. 244 (1994), the statute has an impermissible retroactive effect by attaching "new legal consequences to events completed before its enactment" and "impairing rights acquired under preexisting law." In so doing, it found meritless the defendants' position that the court should "apply the law in effect at the time it renders its decision," as the Supreme Court held in *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974). There is a key distinction between *Bradley* and the case at issue. In *Bradley,"*[t]here was no manifest injustice in applying the new fee statute . . . given that fees had already been awarded under an alternative theory." In the case before the court of appeals, such an injustice would be done. "Throughout 1995, the inmates' attorneys presumably expected that, as the court had ordered, they would be reimbursed for their monitoring work under 42 U.S.C. § 1988 at the then-established rate. Application of the PLRA in determining the attorneys' fees would frustrate those expectations." In addition, the attorneys made their decision to represent the prisoners within the parameters of § 1988.

The Sixth Circuit also addressed dicta in *Landgraf* that attorneys' fees determinations are "'collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.'" 511 U.S. at 277. In classifying these determinations as collateral, the Supreme Court linked them to cases involving new procedural rules and recognized that "'the mere fact that a new rule is procedural does not mean that it applies to every pending case.' *Id.* at 275 n.29." Application "ordinarily depends on the posture" of a particular case. The same is true for an attorneys' fees provision, the court of appeals observed, because such a provision "may also affect the substantive rights of the parties, and in this instance . . . it does." The court emphasized that the issue of "whether fees earned by the plaintiffs' attorneys after April 26, 1996, will be limited by the PLRA is not before us."

Glover v. Johnson, No. 95-1521 (6th Cir. March 2, 1998) (Ryan, J.) (Judge Wellford dissented).

District court defines physical injury needed to comply with § 1997e(e) under *Siglar v. Hightower.* Plaintiff alleged an assault in which he received a cut on the face, bloody nose, cuts in his mouth, and other cuts and abrasions. The district court noted that in *Siglar v. Hightower,* 112 F.3d 191, 193 (5th Cir. 1997), the Fifth Circuit held that "under the Eighth Amendment, § 1997e(e) excludes from Constitutional recognition a de minimis injury." The district court held that a physical injury cognizable under the statute "is an observable or diagnosable medical condition requiring treatment by a medical care professional. It is not a sore muscle, an aching back, a scratch, an abrasion, a bruise, etc., which lasts even up to two or three weeks. . . . Injuries treatable at home and with over-the-counter drugs, heating pads, rest, etc., do not fall within the parameters of 1997e(e)."

Luong v. Hatt, 979 F. Supp. 481, 485–86 (N.D. Tex. 1997).

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Habeas Corpus

Special Procedures in Capital Cases

Supreme Court holds that inmates were not entitled to injunction barring state from claiming benefits of special habeas procedures in capital cases. "Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C.A. § 2261 et seq. (Supp. 1998), provides certain procedural advantages to qualifying States in federal habeas proceedings. This case requires us to decide whether state death-row inmates may sue state officials for declaratory and injunctive relief limited to determining whether California qualifies under Chapter 154." The district court had issued a declaratory judgment holding that California did not qualify for the Chapter 154 procedures, and enjoined the state from attempting to invoke Chapter 154's benefits in state or federal proceedings. With slight modification, the Ninth Circuit affirmed the order and injunction. *See Ashmus v. Calderon*, 123 F.3d 1199, 1204–09 (9th Cir. 1998) [Habeas & Prison Litig. Update #11]. *Accord Hill v. Butterworth*, 133 F.3d 783, 785 n.7 (11th Cir. 1997). *Contra Booth v. State*, 112 F.3d 139, 141–46 (4th Cir. 1997) [Habeas & Prison Litig. Update #7].

The Supreme Court reversed, holding that the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, was not applicable under these circumstances. The Act provides that "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Here, the "underlying 'controversy' between petitioners and respondent is whether respondent is entitled to federal *habeas* relief setting aside his sentence or conviction obtained in the California courts. But no such final or conclusive determination was sought in this action. Instead, respondent carved out of that claim only the question of whether, when he sought habeas relief, California would be governed by Chapter 153 or by Chapter 154 in defending the action. Had he brought a habeas action itself, he undoubtedly would have obtained such a determination, but he seeks to have that question determined in anticipation of seeking habeas so that he will be better able to know, for example, the time limits which govern the habeas action."

The Court concluded that "previous decisions of this Court bar the use of the Declaratory Judgment Act for this purpose." As in a case where a declaratory judgment was not allowed, "respondent here seeks a declaratory judgment as to the validity of a defense the State may, or may not, raise in a habeas proceeding. Such a suit does not merely allow the resolution of a 'case or controversy' in an alternative format, . . . but rather attempts to gain a litigation advantage by obtaining an advance ruling on an affirmative defense . . . . The 'case or controversy' actually at stake is the class members' claims in their individual habeas proceedings. Any judgment in this action thus would not resolve the entire case or controversy as to any one of them, but would merely determine a collateral legal issue governing certain aspects of their pending or future suits."

"If the class members file habeas petitions, and the State asserts Chapter 154, the members obviously can litigate California's compliance with Chapter 154 at that time. Any risk associated with resolving the question in habeas, rather than a pre-emptive suit, is no different from risks associated with choices commonly faced by litigants."

"We conclude that this action for a declaratory judgment and injunctive relief is not a justiciable case within the meaning of Article III. The judgment of the Court of Appeals accordingly is reversed, and the case is remanded with instructions that respondent's complaint be dismissed."

Calderon v. Ashmus, 118 S. Ct. 1694, 1696–1700 (1998).

Second or Successive Petition

Supreme Court holds that habeas petition challenging competency to be executed, previously dismissed as premature, is not second petition prohibited by AEDPA. Before the enactment of the AEDPA, a state death row inmate filed a habeas petition under 28 U.S.C. § 2254 claiming, in part, that he was incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). The district court granted the writ on some grounds, but dismissed the competency claim as premature. The Ninth Circuit reversed, but specifically stated that its order was not intended to affect later litigation on the *Ford* claim.

After unsuccessfully pursuing his claim of incompetency in the state courts, the inmate moved to reopen his *Ford* claim in the district court in 1997. That court, however, concluded that the AEDPA barred the claim as a second or successive petition, 28 U.S.C. § 2244(b). The inmate then petitioned the appellate court for permission to file a second or successive

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claim, § 2244(b)(3). The Ninth Circuit ruled that the inmate's *Ford* claim should be treated as a first petition and heard in the district court because this was, in effect, the first time he had been able to have that claim adjudicated. His previous petition, the court reasoned, should be treated like one that had been dismissed without prejudice for failure to exhaust, which does not trigger § 2244(b). *See Martinez-Villareal v. Stewart*, 118 F.3d 628, 630–34 (9th Cir. 1997) (per curiam) [Habeas & Prison Litig. Update #10]. *See also Carlson v. Pitcher*, 137 F.3d 416, 420 (6th Cir. 1998) (agreeing with other circuits that habeas petition filed after previous petition was dismissed without prejudice for failure to exhaust state remedies is not "second or successive application").

The Supreme Court agreed with the Ninth Circuit's reasoning and affirmed its decision. "The State contends that because respondent has already had one 'fully-litigated habeas petition, the plain meaning of § 2244(b) as amended requires his new petition to be treated as successive.' . . . This may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim, but this does not mean that there were two separate applications, the second of which was necessarily subject to § 2244(b). There was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. Respondent was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief. The Court of Appeals was therefore correct in holding that respondent was not required to get authorization to file a 'second or successive' application before his *Ford* claim could be heard."

"We believe that respondent's *Ford* claim here—previously dismissed as premature—should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies. True, the cases are not identical; respondent's *Ford* claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time. But in both situations, the habeas petitioner does not receive an adjudication of his claim. To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review."

Finding that the *Ford* claim was not a second or successive petition gave the Court jurisdiction to review the appellate court decision. *See* § 2244(b)(3)(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."). "[F]or the same reasons that we find we have jurisdiction, we hold that the Court of Appeals was correct in deciding that respondent was entitled to a hearing on the merits of his *Ford* claim in the District Court." The Court noted that its decision does not reach "the situation where a prisoner raises a *Ford* claim for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application." The Fifth Circuit has held that a petition in that instance was second or successive and subject to § 2244(b). *See In re Davis*, 121 F.3d 952, 953–56 (5th Cir. 1997) [Habeas & Prison Litig. Update #10].

Stewart v. Martinez-Villareal, 118 S. Ct. 1618, 1620–22 (1998) (two justices dissented).

Supreme Court holds that recall of mandate did not violate AEDPA standards but was an abuse of discretion, sets standards for sua sponte recall of mandate in light of the AEDPA. In 1995, the district court granted a state death row inmate's first habeas petition, thus invalidating his death sentence. A panel of the Ninth Circuit reversed the grant in 1996, and denied the inmate's petition for rehearing and suggestion for hearing en banc in March 1997. The court issued its mandate denying all habeas relief in June, after the Supreme Court denied certiorari. The state then set an execution date for August, the California Supreme Court denied the inmate's fourth state habeas petition, and the Governor of California denied clemency. A few days before the execution date, and after denying the inmate's motion to recall the mandate, an en banc panel of the Ninth Circuit recalled its mandate sua sponte and granted habeas relief, vacated the death sentence, and remanded for further proceedings. The court stated that the recall was warranted because "procedural misunderstandings" within the court had prevented an earlier en banc review and the original panel's decision "would lead to a miscarriage of justice." *See Thompson v. Calderon*, 120 F.3d 1045, 1048–51 (9th Cir. 1997).

The Supreme Court reversed, holding that the appellate court abused its discretion in recalling its mandate because the miscarriage of justice standard—which requires some showing of actual innocence—was not met on the facts of this case. The Court also articulated a standard for a sua sponte recall of mandate in light of the requirements and restrictions of the AEDPA. After initially affirming that appellate courts have an inherent power to recall their mandates, though under very limited circumstances, the Court had to determine whether the recall here was barred by the AEDPA's restrictions on second or successive habeas petitions, 28 U.S.C. § 2244(b).

"In a § 2254 case, a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2244(b). Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2). If the court grants such a motion, its action is subject to AEDPA irrespective of whether the motion is based on old claims (in which case § 2244(b)(1) would apply) or new ones (in which case § 2244(b)(2) would apply)."

Under the language of the statute, "§ 2244(b) applies only where the court acts pursuant to a prisoner's 'application.' This carries implications for cases where a motion to recall the mandate is pending, but the court instead recalls the mandate on its own initiative. Whether these cases are subject to

§ 2244(b) depends on the underlying basis of the court's action. If, in recalling the mandate, the court considers new claims or evidence presented in a successive application for habeas relief, it is proper to regard the court's action as based on that application. In these cases, § 2244(b)(2) applies irrespective of whether the court characterizes the action as *sua sponte*."

Here, however, "the Court of Appeals was specific in reciting that it acted on the exclusive basis of Thompson's first federal habeas petition. The court's characterization of its action as *sua sponte* does not, of course, prove this point; had the court considered claims or evidence presented in Thompson's later filings, its action would have been based on a successive application, and so would be subject to § 2244(b). But in Thompson's case the court's recitation that it acted on the exclusive basis of his first federal petition is not disproved by consideration of matters presented in a later filing. Thus we deem the court to have acted on his first application rather than a successive one. As a result, the court's order recalling its mandate did not contravene the letter of AEDPA."

However, even if AEDPA does not govern a case like this, "a court of appeals must exercise its discretion in a manner consistent with the objects of the statute. In a habeas case, moreover, the court must be guided by the general principles underlying our habeas corpus jurisprudence," such as a state's interest in finality. "[W]e hold the general rule to be that, where a federal court of appeals *sua sponte* recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence. The rule accommodates the need to allow courts to remedy actual injustice while recognizing that, at some point, the State must be allowed to exercise its '"sovereign power to punish offenders."'"

"This standard comports with the values and purposes underlying AEDPA.... Section 2244(b) of the statute is grounded in respect for the finality of criminal judgments. With the exception of claims based on new rules of constitutional law made retroactive by this Court, *see* § 2244(b)(2)(A), a federal court can consider a claim presented in a second or successive application only if the prisoner shows, among other things, that the facts underlying the claim establish his innocence by clear and convincing evidence. *See* § 2244(b)(2)(B). It is true that the miscarriage of justice standard we adopt today is somewhat more lenient than the standard in § 2244(b)(2)(B). . . . The miscarriage of justice standard is altogether consistent, however, with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence. And, of course, the rules applicable in all cases where the court recalls its mandate . . . further ensure the practice is limited to the most rare and extraordinary case."

Calderon v. Thompson, 118 S. Ct. 1489, 1498–1502 (1998) (four justices dissented).

Seventh Circuit holds that motion to recall the mandate is functional equivalent of second or successive petition. In petitioner's capital case, the appellate court had previously affirmed the district court's order denying relief under 28 U.S.C. § 2254, denied a petition for rehearing and rehearing en banc, issued its mandate, and twice denied stays of execution. A week before his scheduled execution, petitioner asked the court to recall its mandate and entertain arguments based on a neurosurgeon's recent testimony at a clemency hearing concerning defendant's claim of possible brain injury.

The appellate court characterized the motion as the equivalent of a motion under Fed. R. Civ. P. 60(b) in a district court, which should be construed as a second or successive habeas application under § 2244(b). "Otherwise the statute would be ineffectual. Instead of meeting the requirements of sec. 2244(b), the petitioner would restyle his request as a motion for reconsideration in the initial collateral attack and proceed as if the AEDPA did not exist." Consequently, "a motion filed in the court of appeals after the time for rehearing has expired (or rehearing has been sought and denied) may be granted only if it meets the substantive criteria of sec. 2244(b)(2)." Because petitioner could not meet that test, the motion was denied.

Burris v. Parke, 130 F.3d 782, 783–85 (7th Cir. 1997) (Cudahy, J., dissented). *See also U.S. v. Rich*, No. 97-30464 (5th Cir. May 13, 1998) (Garza, J.) (affirmed: Rule 60(b) motion for reconsideration of previous denial of § 2255 motion treated as request to file successive § 2255 motion); *Lopez v. Douglas*, No. 96-6384 (10th Cir. Apr. 8, 1998) (per curiam) (same for § 2254 petitioner). *Cf. Buchanan v. Gilmore*, 139 F.3d 982, 984 (4th Cir. 1998) (death row inmate's petition under 42 U.S.C. § 1983 "is in essence a petition for a writ of habeas corpus . . . [and therefore] is a successive motion that is barred by 28 U.S.C. § 2244"); *In re Sapp*, 118 F.3d 460, 462–63 (6th Cir. 1997) (same: "a death row inmate cannot escape the rules regarding second or successive habeas petitions by simply filing a § 1983"); *Williams v. Hopkins*, 130 F.3d 333, 336 (8th Cir. 1997) (agreeing with *Sapp*).

Second Circuit holds that habeas petitioner does not have burden of proving that petition filed in district court is not second or successive application. A state inmate filed a § 2254 petition attacking his 1977 conviction. When the district court discovered the inmate had previously filed a § 2254 petition, it transferred the petition to the appellate court, per Second Circuit procedure, so he could file a motion for authorization to file a successive petition. On a form provided by the appellate court, the inmate represented that he had never filed a prior petition attacking his 1977 conviction. Because the record did not indicate whether the prior petition attacked the 1977 conviction or another conviction, the appellate court denied the motion without prejudice and remanded to the district court "for inquiry and fact-finding as to whether the proposed petition is second or successive."

The appellate court found that, while the AEDPA sets procedures for filing a successive petition, it "does not say who

must demonstrate that the current petition is (or is not) 'successive.' We think that a petitioner attempting to comply with such a rule could do little more than attest that he had not filed prior petitions, as Thomas has done in his petition. But that is insufficient for our purposes, because the AEDPA's limitation on successive petitions would be nullified if we had to rely on the bald statement of a pro se litigant as to so subtle a legal issue. On the other hand, the Government can easily find out and show in district court whether prior petitions have been filed." Thus, on remand the district court should "determine more particularly whether the petition was indeed successive. In doing so, the district court should determine whether the prior petition was dismissed with prejudice and whether the instant petition attacks the same judgment that was attacked in the prior petition. . . . If the prior petition succeeded in winning an amendment of the sentence, the district court should determine whether the pending petition is addressed to the amended components of the sentence."

Thomas v. Superintendent/Woodbourne Corr. Facility, 136 F.3d 227, 229–30 (2d Cir. 1997) (per curiam).

Seventh Circuit holds that habeas petition challenging aspects of resentencing after successful habeas petition is not second or successive. Petitioner had been resentenced in 1992 following his successful § 2254 motion. In 1996, he filed another § 2254 petition that challenged aspects of the resentencing hearing. The district court dismissed the petition, concluding that it was a second petition that had to be authorized by the appellate court. Petitioner then filed an application for permission to file a second habeas petition, but argued that it was his first collateral attack on the second sentencing proceeding. The appellate court agreed and remanded to the district court with instructions to accept the habeas filing.

"The claims Walker seeks to bring in his new petition challenge aspects of his resentencing; he does not present any claims challenging his conviction. None of these new claims were raised in his first petition, nor could they have been; Walker is attempting to challenge the constitutionality of a proceeding which obviously occurred after he filed, and obtained relief, in his first habeas petition. Therefore, although Walker had filed an earlier habeas petition in 1988, the petition that he now wishes to file cannot be considered a second or successive petition to the earlier one for purposes of § 2244 because it constitutes Walker's first federal challenge to the proceedings that resulted in his current state custody. We hold that a second habeas petition attacking for the first time the constitutionality of a newly imposed sentence is not a second or successive petition within the meaning of § 2244." The court noted that, "had Walker sought to challenge aspects of his conviction the district court would have been correct in dismissing his petition as successive."

Walker v. Roth, 133 F.3d 454, 455 (7th Cir. 1997) (per curiam). *Accord Esposito v. United States,* 135 F.3d 111, 113–14 (2d Cir. 1997) (same, for § 2255).

First Circuit rules on several aspects of decision to grant or deny application for successive petition. Petitioner was convicted of murder in 1971. His state court appeals were unsuccessful, as were two federal habeas petitions, the last of which was filed in 1984. In 1995 he began another round in the state courts, this time claiming that the use of "moral certainty" language in the reasonable doubt instruction given to his jury was in violation of *Cage v. Louisiana,* 498 U.S. 39 (1990). After the state courts had rejected his claim, and after the passage of the AEDPA, petitioner requested authorization from the First Circuit to pursue a third federal habeas petition in the district court. He contended that *Cage* is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A).

The first issue to resolve was whether there was any effect on petitioner's application from the fact that the appellate court had exceeded the 30-day limit in § 2254(b)(3)(D) ("court of appeals shall grant or deny the authorization to file a second or successive petition not later than 30 days after the filing of the motion"). The court agreed with two other circuits that have found that the limit is not mandatory, although it should be followed when possible. "Before operating as a mandate, a statutory time limitation addressed to a public official generally must contain both an express command that the official act within a given temporal period and a consequence attached to noncompliance. . . . [Section 2244(b)(3)(D)] specifies no consequence for the court's failure to honor this obligation. . . . While section 2244(b)(3)(D) directs the courts of appeals to work within a specified time frame . . . it operates as a guideline, not as an imperative." The court added that "we will, of course, make a diligent, good-faith effort to comply with the 30-day time limit. We anticipate little difficulty doing so in the ordinary mine-run of cases. Yet, certain applications will present issues that are sufficiently complex or novel to demand more time. . . . If circumstances counsel against issuing a ruling within 30 days, we must retain the flexibility to bring the appropriate quantum of attention to bear." *Accord In re Siggers,* 132 F.3d 333, 336 (6th Cir. 1997); *Galtieri v. United States,* 128 F.3d 33, 36–37 (2d Cir. 1997).

The court next looked to what is required for petitioner to make a "prima facie showing" that he met the requirements of § 2254(b)(2). The court adopted the standard set by the Seventh Circuit, that a "prima facie showing" is "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court. . . . If in light of the documents submitted with the application it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition, we shall grant the application." *Bennett v. United States,* 119 F.3d 468, 469–70 (7th Cir. 1997). *Accord Woratzeck v. Stewart,* 118 F.3d 648, 650 (9th Cir. 1997). The First Circuit emphasized that "despite its superficially lenient language, the standard erects a high hurdle."

As to whether petitioner could meet that standard, the court noted that the basis of his claim fell under

§ 2254(b)(2)(A): "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." The court quickly determined that petitioner satisfied two of the three parts of § 2254(b)(2)(A)—*Cage* set forth a new rule of constitutional law and it was unavailable to him at the time of his previous habeas actions. "The remaining question is whether *Cage*'s rule has been 'made retroactive to cases on collateral review by the Supreme Court.'"

Before the AEDPA, in the absence of a direct statement by the Supreme Court, the lower federal courts could determine whether a new rule of constitutional law merited retroactive application. However, the AEDPA "invests the [Supreme] Court with the sole authority to make such declarations. Insofar as second or successive petitions are concerned, the statute's precedent-limiting provision, fairly read, eliminates the lower federal courts' role in deeming new rules of constitutional law a permissible basis for habeas relief. . . . Consequently, an application to file a second or successive habeas petition must point to a Supreme Court decision that either expressly declares the collateral availability of the rule (such as by holding or stating that the particular rule upon which the petitioner seeks to rely is retroactively available on collateral review) or applies the rule in a collateral proceeding."

Petitioner asserted that either of two cases demonstrated that *Cage* had been made retroactive by the Court. One of the cases predated *Cage*, and the court concluded it could not be used to show that *Cage* had been applied retroactively by the Supreme Court. The other case involved a memorandum decision by the Court, *Adams v. Evatt*, 511 U.S. 1001 (1994), to vacate and remand for reconsideration (in light of another Supreme Court case) a Fourth Circuit decision that held *Cage* did not apply retroactively for purposes of *Teague v. Lane*, 489 U.S. 288 (1989). The Fourth Circuit then held that *Cage* was retroactively applicable on collateral review for *Teague* purposes. Petitioner argued that the "vacation and remand were tantamount to a reversal of the Fourth Circuit, and . . . thereby operates as a de facto declaration that *Cage* applies retroactively." The court here disagreed, reasoning that "a summary reconsideration order does 'not amount to a final determination on the merits.' . . . Such an order merely directs the lower court to reexamine the case against the backdrop of some recent, intervening precedent; it does not compel a different result." Thus, *Cage* was not made retroactive "by the Supreme Court," and the court denied authorization to file a successive petition.

Rodriguez v. Bay State Corr. Ctr., 139 F.3d 270, 272–76 (1st Cir. 1998). *Accord In re Smith*, No. 97-00552 (5th Cir. May 28, 1998) (Barksdale, J.) (holding *Cage* has not been made retroactive: "we join those other circuits holding that an application to file a second or successive habeas petition must point to a Supreme Court decision that either expressly declares the collateral availability of the rule (such as by holding or stating that the particular rule upon which the petitioner seeks to rely is retroactively available on collateral review) or applies the rule in a collateral proceeding"). *But see Nevius v. Sumner*, 105 F.3d 453, 462 (9th Cir. 1996) (without ruling on merits of applicant's claim that *Adams* made *Cage* retroactive, concluding that claim was sufficient "prima facie showing" required for filing successive petition).

One-Year Limitation Period

Third Circuit holds that limitation period is tolled when petitioner files an application for post-conviction relief according to the procedural rules of the state, and that district court should not investigate application's merits. With some exceptions, a state prisoner usually must file for federal habeas relief under the AEDPA within one year of "the date on which the [state court] judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). However, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." § 2244(d)(2).

In this case, petitioner was originally sentenced in 1988. After his conviction was affirmed on direct appeal, he filed a petition for post-conviction relief under Pennsylvania's Post Conviction Relief Act (PCRA). That petition was denied, and a second PCRA petition was dismissed in 1995. His petition for allowance of appeal was denied by the Pennsylvania Supreme Court on Sept. 26, 1996. The current federal petition for habeas relief was filed on July 30, 1997. The district court dismissed the petition as time-barred under § 2244(d)(1), without discussing § 2244(d)(2). Petitioner then requested a certificate of appealability to appeal the dismissal.

The appellate court had to decide whether petitioner's second PCRA petition, including the petition for allowance of appeal, was "a properly filed application for State post-conviction or other collateral review" under § 2244(d)(2), such that the one-year period of limitation was tolled. The court concluded "that 'a properly filed application' is one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing. . . . If a petitioner complies with these procedural requirements, or other procedural requirements the state imposes, his petition, even a second or successive petition, is 'a properly filed application' for purposes of § 2244(d)(2). . . . Further, we reject the notion that a meritless PCRA petition cannot constitute 'a properly filed application' under § 2244(d)(2). Rather, in considering whether a petition for post-conviction relief is properly filed, district courts should not inquire into its merits. . . . After all, Congress chose the phrase 'a properly *filed* application,' one into which we do not read any requirement that the application be non-frivolous." *See also Hughes v. Irvin*, 967 F. Supp. 775, 778 (E.D.N.Y. 1997) ("properly filed" under § 2244(d)(1) means "submitted in accordance with any applicable procedural requirements").

Therefore, because petitioner's second PCRA petition was pending until Sept. 26, 1996, his "one-year period did not

expire until September 26, 1997," his July 1997 habeas filing was "well within § 2244(d)(1)'s time limitation, and the district court erred in dismissing it as untimely."

Lovasz v. Vaughn, 134 F.3d 146, 148–49 (3d Cir. 1998). *See also Cox v. Angelone*, No. CIV. A. 3:97CV925 (E.D. Va. Mar. 11, 1998) (Merhige, J.) (following § 2244(d)(2), holding that § 2254 petition filed Dec. 10, 1997, was timely—although petitioner's one-year grace period would have ended Apr. 24, 1997, the period his state habeas petition was pending, Mar. 3 to Oct. 31, 1997, is excluded from the calculation).

Seventh Circuit holds that § 2255 petition should be consolidated with, not preempted by, other post-conviction motions to ensure that one-year period does not run out. Defendant filed a motion for new trial under Fed. R. Crim. P. 33, which was denied by the district court. While his appeal of that denial was pending, he filed a § 2255 petition one week before the end of the one-year period allowed under the AEDPA to file such a petition. The district court dismissed the petition, following circuit precedent that only extraordinary circumstances justify entertaining a collateral attack while another proceeding that might reverse the conviction is under consideration.

The appellate court vacated the dismissal and remanded. "The district court relied on a principle that as originally articulated was limited to direct appeals from the conviction and sentence. . . . We have never considered whether the same approach is best when the appeal concerns the denial of a post-trial motion. Perhaps the question has not arisen because it did not matter before the AEDPA. A prisoner may select from a palette of post-trial motions the one that best suits his circumstances, and if more than one is made at the same time the court can and should consider them together. Consolidation is harder if the decision concerning one motion is on appeal when the second reaches the district court, but until the AEDPA the prisoner could wait to file the second. No longer. Now delay can be dispositive."

"Priority now must go to petitions under § 2255, for once the direct appeal ends the clock starts ticking. Treating all issues together still makes sense, and it remains a poor use of judicial resources to have separate challenges to a conviction pending at the same time, but it is no longer appropriate to achieve these benefits by denying the § 2255 motion, as opposed to consolidating all of the defendant's motions or, when that is not possible, deferring action on the § 2255 petition until the appeal is over. Today a district court that receives a Rule 33 motion during the year after the conviction has become final should ask the defendant whether he plans to file a § 2255 petition addressing other issues. If the answer is 'yes,' the judge should defer adjudication of the Rule 33 motion so that all issues may be taken up together. Any other course fractures the case into slivers, jeopardizes the defendant's opportunity for one complete collateral attack, or both."

"A district court sometimes may find it prudent to grant or deny a § 2255 petition on the merits, even if some other post-judgment motion is pending. Congress expressed in the AEDPA a strong preference for swift and conclusive resolution of collateral attacks. A petition should be granted at once if it is clearly meritorious . . . . A petition should be denied at once if the issues it raises clearly have been forfeited or lack merit under established law. Only the more difficult petitions, whose evaluation requires an evidentiary hearing or a substantial investment of judicial time, should be deferred."

O'Connor v. United States, 133 F.3d 548, 550–51 (7th Cir. 1997).

Third Circuit applies "mailbox rule" to habeas petitions; also holds that any petition filed before April 23, 1997, was timely. Petitioner's state conviction became final Sept. 21, 1995. On April 22, 1997, he submitted a § 2254 petition to prison officials for mailing to the federal district court. The petition was received by the clerk of the court on April 28, 1997, and docketed May 5. The district court dismissed the petition as untimely under § 2244(d), finding that it had not been filed within the one-year limitation period, which the court considered to end on April 23, 1997. The court declined to extend to habeas petitions the ruling of *Houston v. Lack*, 487 U.S. 266 (1988) (pro se prisoners' notices of appeal are considered filed when given to prison authorities for mailing to district court).

The appellate court reversed and remanded for the district court to consider the petition. The court first agreed with several others that "applying § 2244(d)(1) to bar the filing of a habeas petition before April 24, 1997, where the prisoner's conviction became final before April 24, 1996, would be impermissibly retroactive. Even under § 2244(d)(1)'s time limitation, would-be petitioners are afforded one full year to prepare and file their habeas petitions, and as of April 24, 1996, have been placed on notice of this time constraint. We reject the notion that petitioners whose state court proceedings concluded before April 24, 1996, should be afforded less than one year with notice. Accordingly, we hold that habeas petitions filed on or before April 23, 1997, may not be dismissed for failure to comply with § 2244(d)(1)'s time limit." *Accord Calderon v. United States Dist. Ct. for Cent. Dist. of Cal.*, 128 F.3d 1283, 1287 (9th Cir. 1997); *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (same, for §§ 2254 and 2255), *rev'd on other grounds*, 117 S. Ct. 2059 (1997); *Cox v. Angelone*, No. CIV. A. 3:97CV925 (E.D. Va. Mar. 11, 1998) (Merhige, J.); *Parker v. Johnson*, 988 F.3d 1474, 1475 (N.D. Ga. 1998). *But see Robles v. Senkowski*, No. 97 Civ. 2798 (S.D.N.Y. Apr. 2, 1998) (Cedarbaum, Sr. J.) (under "reasonable time" test of *Peterson v. Demskie*, 107 F.3d 92 (2d Cir. 1997), petition filed more than five years after conviction was final and "334 days after April 24, 1996, was not filed within a reasonable period").

The court added that the same rule should apply to the one-year limit for § 2255 petitions. "Federal prisoners challenging their sentences, no less than state prisoners seeking habeas relief, are entitled to one full year with notice to file such motions. Thus, § 2255 motions filed on or before April 23, 1997, may not be dismissed for failure to comply with § 2255's one-year period of limitation." *Accord United States v. Flores*,

135 F.3d 1000, 1005–06 (5th Cir. 1998) ("one year, commencing on April 24, 1996, presumptively constitutes a reasonable time for those prisoners whose convictions had become final prior to the enactment of the AEDPA to file for relief under 28 U.S.C. § 2255"); *United States v. Simmonds*, 111 F.3d 737, 746 (10th Cir. 1997) (same); *Landa v. United States*, 991 F. Supp. 866, 868 (E.D. Mich. 1998) (same).

The court then held that *Houston* should be applied to habeas petitions. "Since the enactment of § 2244(d), at least one court has applied *Houston* to a motion under § 2244(b)(3) for authorization to file a second or successive § 2255 motion. *In re Sims*, 111 F.3d 45[, 47] (6th Cir. 1997). In so doing, the court stated that 'for purposes of the one-year limitation periods established by § 2244(d),' a § 2244(b)(3) motion is deemed filed on the date that the motion is given to prison authorities for mailing." Concluding that, as in other situations where *Houston* has been applied, a habeas petitioner "remains entirely at the mercy of prison officials," the Third Circuit held "that a pro se prisoner's habeas petition is deemed filed at the moment he delivers it to prison officials for mailing to the district court. And because we see no reason why federal prisoners should not benefit from such a rule, and for the purposes of clarity and uniformity, we extend this holding to the filing of motions under § 2255."

Burns v. Morton, 134 F.3d 109, 112–13 (3d Cir. 1998). *See also United States v. Dorsey*, 988 F. Supp. 917, 920 (D. Md. 1998) (treating § 2255 motion "as filed when it was delivered to prison authorities for forwarding by depositing it in the prison mailbox"); *Hughes v. Irvin*, 967 F. Supp. 775, 778 (E.D.N.Y. 1997) (same, for § 2254 petition). A panel of the Eighth Circuit also applied the mailbox rule to a § 2254 petitioner, but that opinion was recently vacated pending rehearing en banc. *See Nichols v. Bowersox*, No. 97-3639 (8th Cir. Apr. 3, 1998), *vacated pending reh'g en banc* (May 19, 1998). *Cf. United States ex rel. Barnes v. Gilmore*, 987 F. Supp. 677, 679–82 (N.D. Ill. 1997) (applying mailbox rule to § 2254 petition, but holding that petition would be denied as untimely because petitioner filed bad faith in forma pauperis application and failed to pay required $5 filing fee within one-year limitation period).

Retroactivity

D.C. Circuit holds that, where one § 2255 motion was filed before the AEDPA, application of AEDPA standard for bringing second motion was not impermissibly retroactive when defendant could not meet pre-AEDPA standard. Before the AEDPA was enacted and while his direct appeal was pending, defendant filed a § 2255 motion claiming ineffective assistance of trial counsel. That motion was denied and he did not appeal the denial. After the AEDPA took effect, defendant's convictions were affirmed on direct appeal. Shortly thereafter he moved for authorization to file a second § 2255 motion, claiming ineffective assistance of *appellate* counsel. He contended that applying the AEDPA's standards for filing a second motion would be impermissibly retroactive because his second claim was not available at the time he filed his first § 2255 motion. Alternatively, he argued that he met the new standard.

The appellate court concluded that "the new standards and procedures under AEDPA for filing § 2255 motions could only be improperly retroactive as applied to Ortiz if he would have met the former cause-and-prejudice standard . . . and previously would have been allowed to file a second § 2255 motion, but could not file a second motion under AEDPA. Although we agree with the parties that Ortiz can show cause, we conclude that he cannot show prejudice and, consequently, that he cannot demonstrate that applying the new AEDPA standards to his claims would be impermissibly retroactive." The court also found that defendant could not meet the AEDPA standards for filing a second § 2255 motion and denied authorization.

United States v. Ortiz, 136 F.3d 161, 165–67 (D.C. Cir. 1998). *See also In re Sonshine*, 132 F.3d 1133, 1135 (6th Cir. 1997) (following similar test to find AEDPA did not have impermissible retroactive effect on second § 2255 motion; also limited holding of *In re Hanserd*, 123 F.3d 922 (6th Cir. 1997) [Habeas & Prison Lit. Update #9], which held specifically that legitimate claim under *Bailey v. United States*, 116 S. Ct. 501 (1995), could be brought in second, post-AEDPA § 2255 motion after denial of pre-AEDPA, pre-*BAILEY* motion, but had also indicated generally that federal prisoners only had to satisfy AEDPA's requirements if they had filed a previous § 2255 motion post-AEDPA).

Exhaustion of Remedies

Third Circuit vacates grant of habeas relief on unexhausted claims. In 1992, petitioner was convicted of first-degree murder and sentenced to life in prison. Various post-trial motions and appeals were filed and rejected, and the Pennsylvania Supreme Court denied her direct appeal July 2, 1996. She did not pursue collateral relief through the Pennsylvania Post Conviction Relief Act (PCRA).

In September, petitioner began her federal habeas action, which included her prior claims and several new grounds for relief. Although the state argued that petitioner had not exhausted her state remedies and that it did not waive the exhaustion requirement, the district court found that the unusual circumstances of the case warranted allowing discovery and holding an evidentiary hearing. In April 1997, the court granted the petition after concluding that petitioner had exhausted her state remedies because 1995 amendments to the PCRA had left her without a state forum in which to raise her claims of actual innocence and prosecutorial misconduct. *See* 28 U.S.C. § 2254(b)(1)(B)(i). The court also concluded that to the extent that there may be claims that a state court would view as not being waived, the state proceedings would be ineffective to protect petitioner's rights. *See* § 2254(b)(1)(B)(ii).

Concluding that Supreme Court precedent and the AEDPA require petitioner to present her unexhausted claims in state court, the appellate court vacated and remanded. "The Su-

preme Court has made clear that a section 2254 petition which includes unexhausted as well as exhausted claims, i.e., a mixed petition, must be dismissed without prejudice. *Rose v. Lundy,* 455 U.S. 509, 522 . . . (1982)." The Court later held that, if a state failed to raise the nonexhaustion defense in the district court, the appellate court should consider whether, in that case, the interests of justice would be served by requiring exhaustion or, if "perfectly clear" that petitioner has no colorable claim, addressing the merits of the petition. *See Granberry v. Greer,* 481 U.S. 129, 134–35 (1987).

The appellate court found that some of the provisions in the AEDPA are derived from *Granberry*. For one, § 2254(b)(3) requires that a state "expressly" waive the exhaustion requirement. Second, § 2254(b)(2) gives district courts the authority to deny a habeas petition on the merits despite a petitioner's failure to exhaust state remedies. These sections do not, however, provide a standard for when a court should dismiss a petition on the merits rather than require complete exhaustion, so the appellate court used *Granberry* to conclude that it must be "perfectly clear that the applicant does not raise even a colorable federal claim" to waive the exhaustion requirement. Because "section 2254(b)(2) does not provide the district court with the authority to *grant* relief on the merits where the petitioner fails to exhaust state remedies . . . , a strict reading of the statute compels us to conclude that if a question exists as to whether the petitioner has stated a colorable federal claim, the district court may not consider the merits of the claim if the petitioner has failed to exhaust state remedies and none of the exceptions set forth in sections 2254(b)(1)(B)(i) and (ii) applies." (Emphasis added.)

Examining the facts of the case and the amended PCRA, the appellate court concluded that "we cannot say that requiring Lambert to seek review of her claims in the state courts is futile." Thus, the exceptions to exhaustion in § 2254(b)(1)(B) do not apply and "we will vacate the order of the district court granting the petition for writ of habeas corpus and remand to the district court with the direction to dismiss the petition without prejudice."

Lambert v. Blackwell, 134 F.3d 506, 510–25 (3d Cir. 1997).

Note to readers: Summaries of prison litigation cases will resume in the next issue.

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Habeas Corpus

Certificate of Appealability

Supreme Court holds that it has jurisdiction to review denial of certificate of appealability. Petitioner had filed a motion under 28 U.S.C. § 2255 that was denied by the district court. He appealed, but the appellate court declined to issue a certificate of appealability. He then petitioned the Supreme Court for a writ of certiorari. Reversing its earlier position, the government agreed with petitioner that his claim merited a certificate of appealability and asked the Court to vacate and remand. To do so, the Court first had to establish that it had jurisdiction over the case.

"Cases in the courts of appeals may be reviewed by the Supreme Court . . . (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." 28 U.S.C. § 1254. "There can be little doubt that Hohn's application for a certificate of appealability constitutes a case under § 1254(1). As we have noted, '[t]he words "case" and "cause" are constantly used as synonyms in statutes . . . , each meaning a proceeding in court, a suit, or action.' . . . The dispute over Hohn's entitlement to a certificate falls within this definition. It is a proceeding seeking relief for an immediate and redressable injury, *i.e.*, wrongful detention in violation of the Constitution. There is adversity as well as the other requisite qualities of a 'case' as the term is used in both Article III of the Constitution and the statute here under consideration."

"We also draw guidance from the fact that every Court of Appeals except the Court of Appeals for the District of Columbia Circuit has adopted Rules to govern the disposition of certificate applications. . . . These directives would be meaningless if applications for certificates of appealability were not matters subject to the control and disposition of the courts of appeals. . . . In this instance, as in all other cases of which we are aware, the order denying the certificate was issued in the name of the court and under its seal. That is as it should be, for the order was judicial in character and had consequences with respect to the finality of the order of the District Court and the continuing jurisdiction of the Court of Appeals."

The Court found further support for its holding in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Section 2244(b)(3)(E) provides that "[t]he 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." (Emphasis added.) "It would have been unnecessary to include a provision barring certiorari review if a motion to file a second or successive application would not otherwise have constituted a case in the court of appeals for purposes of 28 U.S.C. § 1254(1)."

"Inclusion of a specific provision barring certiorari review of denials of motions to file second or successive applications is instructive for another reason. The requirements for certificates of appealability and motions for second or successive applications were enacted in the same statute. The clear limit on this Court's jurisdiction to review denials of motions to file second or successive petitions by writ of certiorari contrasts with the absence of an analogous limitation to certiorari review of denials of applications for certificates of appealability. True, the phrase concerning the grant or denial of second or successive applications refers to an action 'by a court of appeals'; still, we think a Congress concerned enough to bar our jurisdiction in one instance would have been just as explicit in denying it in the other, were that its intention."

"In light of the position asserted by the Solicitor General in the brief for the United States filed August 18, 1997, the decision of the Court of Appeals is vacated and remanded for further consideration."

Hohn v. United States, 118 S. Ct. 1969, 1972–78 (1998) (three Justices dissented).

Fifth Circuit holds that *Bailey* claim makes "a substantial showing of the denial of a constitutional right" so as to warrant granting a COA. Defendant pled guilty to using or carrying a firearm during a drug-trafficking offense, 18 U.S.C. § 924(c)(1). After the Supreme Court narrowed the definition of "use" in the statute, *see Bailey v. United States*, 516 U.S. 137 (1995), defendant filed a motion under 28 U.S.C. § 2255. He claimed that, in light of *Bailey*, he was wrongly convicted under the "use" prong of § 924(c)(1) because the district court did not develop an adequate factual basis to support his guilty plea. The district court denied the motion and declined to grant a certificate of appealability which, under § 2253(c)(2), requires an applicant for a COA to make "a substantial showing of the denial of a constitutional right."

Defendant appealed to the appellate court, which granted the COA, vacated his conviction, and remanded to the district court for the entry of a new plea. "Even though *Bailey* itself is a statutory, non-constitutional case, it does not necessarily follow that a prisoner's post-*Bailey* petition for collateral relief

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sounds in statutory, non-constitutional law. We conclude, in fact, that the claim falls squarely within the ambit of the Fifth Amendment. . . . We have stated that if a defendant has been convicted of a criminal act that becomes no longer criminal, such a conviction cannot stand. After all, a refusal to vacate a sentence where a change in the substantive law has placed the conduct for which the defendant was convicted beyond the scope of a criminal statute would result in a complete miscarriage of justice. Our sister circuits have held that a fundamental defect resulting in a complete miscarriage of justice is tantamount to a violation of the Due Process Clause of the Fifth Amendment. . . . Gobert maintains that he was convicted and imprisoned for engaging in conduct that the Supreme Court has since deemed non-criminal. If he is correct, our refusal to vacate his sentence would result in a complete miscarriage of justice; such a result would offend the Due Process Clause of the Fifth Amendment. The foregoing authorities make it clear to us that James Gobert has made a substantial showing of the denial of his constitutional rights to due process, notwithstanding that *Bailey* announced merely a new statutory interpretation. Accordingly, we issue a COA and advance to the merits of his claim."

On the merits, the court held that "the factual basis [underlying Gobert's guilty plea] is devoid of evidence that he or [a coconspirator] used or carried the pistol in relation to the underlying drug offense. . . . Accordingly, it was clear error for the district court to have accepted James Gobert's guilty plea," which requires remand for the entry of a new plea.

United States v. Gobert, 139 F.3d 436, 438–41 (5th Cir. 1998). Note that, before being vacated by the Supreme Court, the Eighth Circuit held that a petitioner making a *Bailey* claim could not receive a COA "because the petitioner is not making a constitutional claim: He is making a claim to a federal statutory right. *Bailey* did no more than interpret a statute, and an incorrect application of a statute by a district court, or any other court, does not violate the Constitution." *Hohn v. United States*, 99 F.3d 892, 893 (8th Cir. 1996) (one judge dissented), *vacated by* 118 S. Ct. 1969 (1998), *supra*.

Second or Successive Petition

Fifth Circuit holds that "good-time" credit claims that do not challenge validity of conviction or sentence are not successive petitions under § 2244. A state prisoner sought permission from the appellate court under 28 U.S.C. § 2244(b)(3) to file two different habeas petitions challenging prison disciplinary convictions that resulted in the loss of good conduct time. He had previously filed two federal habeas petitions, one challenging the good conduct time policy of the Texas Department of Criminal Justice ("TDCJ"), the other challenging his original state conviction. The court concluded that the prisoner could file his current petitions because they did not fall within the statute's definition of restricted habeas petitions that required appellate court permission.

The court found that the AEDPA "does not define what constitutes a 'second or successive' application. Nevertheless, a prisoner's application is not second or successive simply because it follows an earlier federal petition. Instead, section 2244 . . . was enacted primarily to preclude prisoners from repeatedly attacking the validity of their convictions and sentences. Thus, a later petition is successive when it: 1) raises a claim challenging the petitioner's conviction or sentence that was or could have been raised in an earlier petition; or 2) otherwise constitutes an abuse of the writ."

"Under this understanding of the Act, Cain's current petitions are not successive. In these petitions, Cain seeks relief from two post-conviction and post-sentence administrative actions taken by his prison board, contending that he was stripped of his good-time credits without due process of law. Rather than attacking the validity of his conviction or sentence, Cain's petitions focus on the administration of his sentence. . . . Moreover, Cain's current petitions do not present claims that were or could have been raised in his earlier petitions."

The court's conclusion "is bolstered by the fact that a prisoner may seek redress for the loss of good-time credits only through a habeas petition. . . . Under a contrary holding, if a prisoner has previously filed a petition challenging his conviction or sentence, any subsequent petition challenging the administration of his sentence will necessarily be barred by 28 U.S.C. § 2244(b), notwithstanding the possibility that the events giving rise to this later application may not have occurred until after the conclusion of the earlier habeas proceeding. . . . Consequently, we hold that Congress did not intend for the interpretation of the phrase 'second or successive' to preclude federal district courts from providing relief for an alleged procedural due process violation relating to the administration of a sentence of a prisoner who has previously filed a petition challenging the validity of his petition or sentence, but is nevertheless not abusing the writ."

U.S. v. Cain, 137 F.3d 234, 235–36 (5th Cir. 1998) (per curiam). *Cf. In re Jones*, 127 F.3d 1271, 1273–74 (11th Cir. 1998) (per curiam) (denying request to file second petition challenging conviction and death sentence, holding that claim that execution by electric chair violates Eighth Amendment is not cognizable under § 2244(b)(2) because that section does not apply to claims related to a defendant's sentence).

Standard of Review

Eleventh Circuit outlines standard of review under § 2254(d)(1). After being denied relief in state court, petitioner filed a federal habeas action. She alleged that the state courts' adjudication of her claims "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court," § 2254(d)(1). The district court denied the petition, and the appellate court was left to "construe the meaning of [§ 2244(d)(1)] consistent with Congress' intent, this being a question of first impression in this circuit."

Starting with the phrase "clearly established," the court determined that "the first step in resolving a petitioner's claim

is to determine the 'clearly established' law at the relevant time." Based on Supreme Court precedent that considered similar language, "a district court evaluating a habeas petition under § 2254(d) should 'survey the legal landscape' at the time the state court adjudicated the petitioner's claim to determine the applicable Supreme Court authority; the law is 'clearly established' if Supreme Court precedent would have compelled a particular result in the case."

Regarding the "contrary to" language, "we can readily think of two situations in which a state court decision would be 'contrary to' clearly established Supreme Court case law. The first is when a state court faces a set of facts that is essentially the same as those the Supreme Court has faced earlier, but given these facts the state court reaches a different legal conclusion than that of the Supreme Court. A second situation is one in which a state court, in contravention of Supreme Court case law, fails to apply the correct legal principles to decide a case. Such a result would be 'contrary' in the sense that the state court has not adjudicated the claim in the manner prescribed by the Supreme Court. . . . In either case, the federal court reviewing a petition under § 2254 independently determines what is 'clearly established Federal law as determined by the Supreme Court' and may grant habeas relief if the state court has decided a question of law incorrectly."

"If the state court has applied the proper law, the federal court must then determine whether the state court's application of that law was 'unreasonable.' By its very language, 'unreasonable application' refers to mixed questions of law and fact, when a state court has 'unreasonably' applied clear Supreme Court precedent to the facts of a given case. . . . What does it mean to say that a state court has 'unreasonably' applied the proper law? It does not mean that a federal court may grant habeas relief simply because it disagrees with the state court's decision. This would amount to de novo review, which Congress clearly did not intend." The court adopted the standard of *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996), that relief may be granted "only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists." *See also Jeffries v. Wood*, 114 F.3d 1484, 1500 (9th Cir. 1997) (agreeing with that proposition and adding: "As to more debatable factual determinations, 'the care with which the state court considered the subject' may be important. . . . '[A] responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment.' " (quoting *Lindh v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996) (en banc))).

In the case at hand, the court held that, on petitioner's first claim, the state court did not unreasonably apply the relevant federal law in denying relief. On the second claim, the state court's analysis of the issue was found to be "contrary to" clearly established federal law; however, after de novo review the appellate court also concluded that petitioner was not entitled to relief on that claim and upheld the district court's denial of her petition.

Neelley v. Nagle, 138 F.3d 917, 922–27 (11th Cir. 1998).

One-Year Limitation Period

Third Circuit holds that one-year time limit is subject to equitable tolling. On June 4, 1997, petitioner sought an extension of time from the district court to file a § 2254 petition. His state conviction became final in June 1995, so under Third Circuit case law he had until April 23, 1997 to file. The district court denied the request as untimely under § 2244(d)(1). Petitioner claimed that, under the circumstances, the one-year limit should be equitably tolled: he was delayed in filing his petition because he was in transit between various institutions and did not have access to his legal documents until April 2, 1997, and he did not learn of the new limitation period until April 10, 1997.

Agreeing with *Calderon v. United States Dist. Court for Central Dist. of Cal.*, 128 F.3d 1283 (9th Cir. 1997) (see Habeas & Prison Litig. Update #8), the appellate court held that § 2244 may be tolled and remanded for the district court to consider petitioner's claim. "Time limitations analogous to a statute of limitations are subject to equitable modifications such as tolling . . . . On the other hand, when a time limitation is considered jurisdictional, it cannot be modified and noncompliance is an absolute bar. . . . In determining whether a specific time limitation should be viewed as a statute of limitations or a jurisdictional bar, we look to congressional intent by considering the language of the statute, legislative history, and statutory purpose."

"As the Ninth Circuit recognized, the language of AEDPA clearly indicates that the one year period is a statute of limitations and not a jurisdictional bar. . . . First, § 2244(d)(1) refers to the one year as a 'period of limitation' and a 'limitation period,' and does not use the term 'jurisdiction.' . . . Moreover, the statute affirmatively separates the time limitation provision from the section that deals with jurisdiction. Section 2244(d)(1), the limitation provision, only speaks in terms of a one year filing period and does not purport to limit the jurisdiction of the district courts in any way. Similarly, § 2241, the provision in which Congress explicitly grants jurisdiction to the district courts, does not reference the timely-filing requirement. . . . The legislative history reinforces this conclusion. The congressional conference report does not refer to jurisdiction, . . . and statements by various members of Congress refer to the period as a statute of limitations."

"Such an interpretation is also consistent with the statutory purpose of AEDPA. The statute was enacted, in relevant part, to curb the *abuse* of the writ of habeas corpus. . . . Construing § 2244(d)(1) as a statute of limitation clearly serves this purpose. It provides a one year limitation period that will considerably speed up the habeas process while retaining judicial discretion to equitably toll in extraordinary circumstances."

To provide guidance to the district court in considering the tolling issue on remand, the court noted "that equitable tolling is proper only when the 'principles of equity would make [the] rigid application [of a limitation period] unfair.' . . . Generally, this will occur when the petitioner has 'in some extraordinary

way . . . been prevented from asserting his or her rights.' . . . The petitioner must show that he or she 'exercised reasonable diligence in investigating and bringing [the] claims.' . . . Mere excusable neglect is not sufficient." The court added that "the one year period of limitation for § 2255 cases is also subject to equitable tolling."

Miller v. New Jersey State Dept. of Corr., 145 F.3d 616, 617–19 & n.1 (3d Cir. 1998). *Accord Henderson v. Johnson*, 1 F. Supp. 2d 650, 654–56 (N.D. Tex. 1998) (holding "that § 2244(d)(1) is a statute of limitations that is subject to equitable tolling, not a jurisdictional bar" and setting forth factors to consider; however, petitioners' reasons for not meeting time limit—for one, that another inmate agreed to file the petition for him and fraudulently represented that he had; for the other, that he did not have professional legal assistance, did not know what to do, and that an inmate who had been assisting him left—did not warrant tolling); *Parker v. Bowersox*, 975 F. Supp. 1251, 1252–54 (W.D. Mo. 1997) (for petitioner whose petition was given to prison authorities for mailing before §2244(d)(1) deadline but not received at court until after, holding that "[p]rinciples of equity and fairness require that equitable tolling should be applied to this case" and petition is considered timely filed—"§ 2244(d)(1)'s statute of limitations is not jurisdictional, but is subject to equitable tolling"). *Cf. United States ex rel. Galvan v. Gilmore*, 997 F. Supp. 1027, 1026 (N.D. Ill. 1998) (although ultimately denying petition, citing *Calderon* and *Parker* in holding that "since § 2244(d) does not affect this court's subject matter jurisdiction over habeas petitions, . . . the state can waive the timeliness issue by failing to raise it").

Prison Litigation

Proceedings in forma pauperis

Seventh Circuit holds § 1915(b) constitutional and declares that "income" means "all deposits" made to prisoner's trust account. Plaintiff tendered his complaint to the district court before the Prison Litigation Reform Act (PLRA) was enacted. In its discretion, the court ordered plaintiff to pay $18 toward the filing fee. When he refused, the court declined to file his complaint, and plaintiff appealed. Because the notice of appeal was filed after the effective date of the PLRA, the district court assessed a partial fee under 28 U.S.C. § 1915(b). In his appeal, plaintiff contended that § 1915(b) is unconstitutional because it blocks indigent prisoners' access to the courts and improperly distinguishes between prisoners and other litigants. The Seventh Circuit joined "seven other circuits in holding that § 1915(b) as amended by the PLRA is within Congress' power under the Constitution." Section 1915(b)(4) affords access to prisoners who have "no assets and no means by which to pay the initial partial filing fee." And plaintiff's argument that § 1915(b) violates equal protection is equally as unpersuasive as it was in *Zehner v. Trigg*, 133 F.3d 459 (7th Cir. 1997), which dealt with a different section of the Act.

The court of appeals noted that only 2.5% of deposits to plaintiff's account had been paid to the district court and observed that if the prison had sent 20% as required by the statute, the full appellate filing fee would already have been collected. An examination of the trust account's current statement "implies that the prison believes that only earned income is subject to the PLRA." The court found that "Congress did not define the term 'income' in § 1915(b), but it used several related terms: 'income,' 'deposits,' and 'amount in the account.' These seem to be used as synonyms, which implies that 'income' means 'all deposits.'" Thus, a prison is required to forward "20% of whatever sums enter a prison trust account, disregarding the source." Since plaintiff would already have paid the filing fee in full had the prison complied with the statute, the Seventh Circuit directed that the prison pay over to the district court "all of [plaintiff's] income (other than sums subject to other court orders) until the $105 has been paid in full." The court emphasized that a "prisoner who fails to ensure that the required sum is remitted in one month must make it up later; the statute does not allow deferral past the time when application of the formula would have produced full payment."

Lucien v. DeTella, 141 F.3d 773, 775–76 (7th Cir. 1998).

D.C. Circuit holds that § 1915 is constitutional. On March 18, 1996, plaintiff filed a pro se civil action under 42 U.S.C. § 1983 and applied for in forma pauperis (IFP) status. The prison accounting department certified that as of January 12, 1996, plaintiff had no money in his trust account. After granting the IFP application, the district court sua sponte dismissed the complaint under former 28 U.S.C. § 1915(d) as being "without basis in law or in fact." Plaintiff filed his notice of appeal after the PLRA became effective. The D.C. Circuit allowed him to proceed IFP but ordered him to submit his trust account report and a consent to collection of fees from the account and to pay the appropriate portion of the filing fee. Plaintiff refused and moved for reconsideration, arguing that the PLRA's filing-fee provision (§ 1915) is unconstitutional. The court of appeals appointed an amicus curiae to argue the constitutional question. It underscored that even though plaintiff was no longer incarcerated, his constitutional challenge remained alive and, as the court held in *In re Smith*, 114 F.3d 1247, 1249 (D.C. Cir. 1997), his "'release from prison does not relieve [a former prisoner] of past due obligations under the PLRA.'"

The amicus argued that the filing-fee provision denied plaintiff's due process right of access to the courts and discriminated against prisoners in violation of equal protection. The D.C. Circuit joined several other circuits in holding that the provision does not deny prisoners effective access. Under

§ 1915(b)(4), even a destitute prisoner may file suit without paying an initial fee. Also, only modest payments are required. The court rejected the amicus' further argument that the filing-fee provision "as applied" to plaintiff was unconstitutional because it forced him "to choose between filing a lawsuit and being able to buy the necessities of life."

The court also agreed with four other circuits that the PLRA does not violate equal protection by discriminating against prisoners. The Act is not subject to strict scrutiny and meets the rational-basis test: "Congress legitimately could have determined that requiring indigent prisoners to pay the ordinary filing fee . . . would decrease the amount of meritless litigation by causing prisoners to internalize the cost of filing their lawsuits." In addition, there are rational reasons for treating prisoners and nonprisoners differently: a prisoner's basic necessities are paid for by the state; for many prisoners litigation is a pastime; and it is easier to administer and enforce post hoc installment payments against indigent prisoners than indigents at large. The D.C. Circuit distinguished this case from *Rinaldi v. Yeager*, 384 U.S. 305 (1966), relied upon by the amicus. In *Rinaldi*, the Supreme Court concluded that the statute, which required reimbursement by prisoners who lost their criminal appeal but not by other unsuccessful appellants, "was irrational in relevant part because there was only a weak association between failure and frivolity among direct appeals of a criminal conviction. . . . Here, however, the Congress could rationally have found that most civil litigation initiated by indigent prisoners is meritless."

Tucker v. Branker, 142 F.3d 1294, 1297–1301 (D.C. Cir. 1998).

Sixth Circuit holds "three-strikes" provision applies to pre-PLRA dismissals and does not infringe equal protection or due process principles. Plaintiff appealed the district court's dismissal of seven civil claims. He challenged the retroactive application of the "three-strikes" provision, § 1915(g), and raised equal protection and other constitutional claims. The Sixth Circuit agreed with the conclusion of all other circuits that have addressed the issue that the provision is a procedural rule as defined in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), and thus applies to cases dismissed before the Act's effective date.

The court rejected plaintiff's claim that § 1915(g) infringes upon his right to equal protection by treating him differently than nonindigent, nonprisoner litigants in prosecuting § 1983 claims and by interfering with his fundamental right of access to the courts. Neither indigents nor prisoners are a suspect class; therefore, differentiation is permissible so long as there is a rational basis for it. Congress's intention of deterring the crush of frivolous prisoner filings by barring prisoners from IFP status after they have filed three frivolous lawsuits makes a rational distinction between indigent and nonindigent litigants. It is also rational to differentiate between prisoners and nonprisoners because prisoners have more free time, are provided with basic necessities and legal assistance, and have abused the judicial system in a way nonprisoners have not by indulging in litigation as a recreational activity.

The court also rejected plaintiff's argument on both equal protection and due process grounds that his fundamental right of access to the courts had been infringed. Plaintiff still had the option of litigating his claims in forma pauperis in state court. Moreover, with respect to due process, "[a] legislative body may rationally and appropriately presume that three . . . dismissals are indicative of a propensity to abuse the court system," and as long as IFP prison litigants have the opportunity to air meritorious grievances before other courts, § 1915(g) does not contravene substantive due process principles. The Sixth Circuit found without merit plaintiff's additional arguments that enactment of § 1915(g) constituted passage of a bill of attainder and that the "three-strikes" provision should be invalidated as ex post facto legislation.

Wilson v. Yaklich, 148 F.3d 596, 602–06 (6th Cir. 1998). *Accord Rivera v. Allin*, 144 F.3d 719, 723–30 (11th Cir. 1998).

D.C. Circuit rules that § 1915(g) does not apply to appeals initiated before PLRA's effective date. In August 1995, plaintiff filed a complaint and moved to proceed IFP. After granting his IFP motion, the district court dismissed the complaint for failure to state a claim. Plaintiff filed a notice of appeal on April 22, 1996. Assuming for purposes of analysis that plaintiff had had at least three prior claims dismissed for reasons cited in § 1915(g), the D.C. Circuit stated that determination of whether he was thereby prohibited from proceeding IFP depended on whether the phrase "appeal a judgment" in the statute means "'file an appeal,'" as plaintiff advocated, or "'prosecute an appeal,'" as contended by defendant. Circuits that have considered the question are split. The court held that the phrase, read in concert with the rest of § 1915, "plainly refers to the initiation of an appeal." This conclusion is bolstered by a close reading of subsection b(4), which provides that a prisoner with "no assets and no means by which to pay the initial partial filing fee" cannot be prohibited from pursuing a civil action or appeal. "Because an appellant is required to pay the filing fee '[u]pon the filing of a[] . . . notice of appeal,' Fed. R. App. P. 3(e), it should be obvious that 'appealing a . . . judgment,' in subsection (b)(4), refers to the initiation of an appeal."

The D.C. Circuit further noted that under § 1915(g), a prisoner may not "bring a civil action or appeal a judgment" IFP after having three cases dismissed for the reasons stated in the statute. This wording indicates that subsection (g) applies only when an indigent prisoner files a complaint in district court. "The [defendant's] reading of the phrase 'appeal a judgment,' however, would require continuous application of subsection (g) throughout the prosecution of an appeal. Section 1915 does not otherwise distinguish between trials and appeals, and the [defendant] offers no reason why Congress would have wanted to treat them differently in this instance. Because we can think of none, we conclude that Congress did not intend so strange a result." Plaintiff could keep the IFP status granted by the district court and proceed with his appeal.

Chandler v. District of Columbia Dep't of Corrections, 145 F.3d 1355, 1358–59 (D.C. Cir. 1998). *Accord Cannell v. Lightner,* 143 F.3d 1210, 1212–13 (9th Cir. 1998); *Garcia v. Silbert,* 141 F.3d 1415, 1416–17 (10th Cir. 1998) (distinguishing *Green v. Nottingham,* 90 F.3d 415, 420 (10th Cir. 1996)).

Eighth Circuit holds plaintiff meets imminent danger exception of § 1915(g) and is not required to pay filing fee in full. The district court denied plaintiff IFP status under the "three strikes" rule of § 1915(g) and dismissed his complaint without prejudice. The court granted him leave to proceed IFP on appeal. The Eighth Circuit held that plaintiff had met the exception to the "three-strikes" prohibition on granting IFP status by sufficiently alleging "imminent danger of serious physical injury." Plaintiff "supported the allegations of his complaint with documentary evidence, including corroborative prison disciplinary reports. . . . [B]ecause his complaint was filed very shortly after the last attack, we conclude that [plaintiff] meets the imminent danger exception in § 1915(g)." The court of appeals remanded the case with directions that plaintiff be permitted to file his complaint under § 1915 without making full payment of the filing fee.

Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998) (per curiam) (Beam, J., dissented re allowing action for damages for past injury). *Cf. Baños v. O'Guin,* 144 F.3d 883, 884–85 (5th Cir. 1998) (per curiam) ("prisoner with three strikes is entitled to proceed [IFP] only if he is in imminent danger at the time that he seeks to file his suit in district court or seeks to proceed with his appeal or files a motion to proceed IFP").

Fifth Circuit holds that § 1915(g) applies to petition for writ of mandamus arising from underlying civil rights action. Plaintiff sought a writ of mandamus directing the district court to withdraw its order denying his request to proceed IFP in appealing the dismissal of his civil rights action. In *In re Stone,* 118 F.3d 1032 (5th Cir. 1997), the court decided that a writ of mandamus "may be considered a type of appeal" and the nature of the underlying action would determine whether the PLRA applies. In this case, the court considered whether the "three-strikes" rule of § 1915(g) prevented plaintiff from filing his mandamus petition until he paid the filing fee in full. Since the petition arose from a civil rights action, the court held that § 1915(g) was applicable and required plaintiff to prepay the filing fee "unless his filings claim that he is under imminent danger of serious physical injury."

In re Crittenden, 143 F.3d 919, 920 (5th Cir. 1998) (per curiam).

Fifth Circuit declares order requiring payment of filing fee is not an appealable collateral order. Pursuant to § 1915(b)(2), the district court ordered plaintiff to pay an initial partial filing fee. He did not pay it. In a second order, the court determined that plaintiff "'ha[d] shown good cause for failing'" to pay the fee and stated plaintiff would instead be required to pay the full filing fee in monthly installments. Plaintiff appealed and the Fifth Circuit held that the order was not appealable as a final judgment because it did not end the litigation on the merits and, under § 1915(b)(4), a prisoner with "no assets and no means by which to pay the initial partial filing fee" may not be barred from pursuing a civil action. Further, the district court's order did not fall within the statutory list of appealable interlocutory orders, nor within the collateral-order doctrine.

Thompson v. Drewry, 138 F.3d 984, 985–86 (5th Cir. 1998).

Remedies for Prison Conditions

Ninth Circuit declares termination provision unconstitutional on separation of powers grounds. The district court denied a motion to terminate a consent decree entered into more than 20 years before, finding unconstitutional 18 U.S.C. § 3626(b)(2), which mandates immediate termination of previously granted prospective relief. On appeal from the court's interlocutory order refusing to dissolve an injunction, the Ninth Circuit found the PLRA's language ambiguous in defining the term "relief." Also, it was unclear how the termination provisions of §§ 3626(b)(1) and (b)(2) fit together. Although this lack of clarity might arguably have enabled the court "to read the statute in a manner that avoids the difficult constitutional question," that was not possible in view of legislative history clearly showing Congress's intent "to end perceived *ongoing* micro-management of state and local prison systems by the federal courts."

The Ninth Circuit disagreed with other circuits that have held that § 3626(b)(2) does not violate separation of powers principles. Taking issue with their interpretation of Supreme Court precedent, the court found that "Congress . . . has reopened the final judgments of the federal courts and unconditionally extinguished past consent decrees affecting prison conditions." Analyzing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), *Rufo v. Inmates of the Suffolk County Jail,* 502 U.S. 367 (1992), and *Pennsylvania v. The Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), the court of appeals held that this case fell within the rule of *Rufo/Plaut* rather than *Wheeling*. "What differentiates the termination provisions of the PLRA from *Wheeling,* where modification of the injunction was required, is the nature of the 'change in law' that the PLRA brings about." Instead of changing the substantive law underlying the consent decree at issue, Congress "define[d] the scope and nature of the *remedy* that it finds appropriate for prisoners who claim constitutional violations. . . . [T]he only 'change in law' that Congress has brought about is to say, 'terminate the relief.'" This constitutes a reopening by Congress of final judicial decisions.

Beyond that, by directing that consent decrees in this and other similarly situated cases must terminate, Congress "prescribed a rule of decision in a discrete group of Article III cases, in violation of *United States v. Klein,* 80 U.S. (13 Wall.) 128 (1871)." The provision of § 3626(b)(3) that the district court may make "written findings based on the record that prospective relief remains necessary" to correct a current, ongoing constitutional violation and that the relief is narrowly drawn

and "the least intrusive means to correct the violation," does not allow for judicial decision making. "First, the court cannot now make the findings required . . . because no record was made. . . . Second, if the consent decree is being obeyed, there are no 'current and ongoing violations'. . . . Third, if violations of the past decree were occurring, . . . the prisoner class would be required to prove an entirely new case, to establish a present constitutional violation." Moreover, the court would have to render a decision within ninety days from the date of filing the motion in the "new case," effectively prohibiting "meaningful discovery, hearing, briefing, and decision-making."

Taylor v. United States, 143 F.3d 1178, 1181–85 (9th Cir. 1998).

Sixth Circuit rules that automatic stay provision, as amended and construed, does not violate separation of powers by interfering with the court's traditional inherent powers. Defendant moved in two district courts to terminate consent decrees and have prospective relief under the decrees automatically stayed, pursuant to § 3626(e)(2)–(3), thirty days after filing the motions. The courts invalidated the automatic stay provision as a violation of separation of powers and due process. While the consolidated cases were pending on appeal, Congress amended the provision to enable the district court to "postpone the effective date of an automatic stay . . . for not more than 60 days for good cause." Plaintiffs and the Department of Justice argued on appeal that in amending the statute Congress implicitly recognized the courts' inherent power "to suspend the automatic stay in accordance with generally applicable equity standards."

Before reaching the constitutional issue, the Sixth Circuit first held that § 3626(e), as amended by subsection (4), provided specific statutory authorization for immediate appellate review. It also concluded that the controversy was not moot because the parties disputed whether the amended automatic stay provision preserves courts' inherent powers in equity, and the statutory construction advanced by the defendant retained the "objectionable aspects of the automatic stay provision." Since plaintiffs had challenged the provision's validity on its face, the appellate court chose to reach the merits rather than remand the cases for reconsideration.

The court found that the construction of the amended statute advocated by plaintiffs and the Justice Department was not violative of separation-of-powers principles. In contrast, the defendant's contention that the statute does not authorize a court to postpone the effective date of an automatic stay by more than sixty days "amounts to a direct legislative suspension of a judicial order and, alternatively, intrudes impermissibly into the effective functioning of the Judiciary under certain circumstances." The court relied on two rules of statutory construction in interpreting the amended statute: First, without "a clear command from Congress," a statute will not be interpreted "as limiting the equitable jurisdiction of the federal courts." Neither the amended statute itself nor its legislative history revealed such congressional intent. Second, the court will construe a statute to avoid constitutional problems "'unless such construction is plainly contrary to the intent of Congress.'" The interpretation offered by plaintiffs and the Justice Department avoided constitutional infirmities because "the courts retain the power to suspend the automatic stay in accordance with general equitable principles."

Although the Sixth Circuit found that the automatic stay "technically withstands a separation-of-powers challenge" based on *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), since it does not mandate particular evidentiary findings or dictate the result in a specific case, it nevertheless violates separation-of-powers principles because "it is tantamount to direct legislative suspension of an existing court order." Under the defendant's interpretation of the provision, "even if the court postpones the effective date of the automatic stay by the full sixty days allowed, on the ninety-first day after filing its motion, the state officials could simply refuse to comply with existing court orders implementing the consent decrees because the state could claim that . . . those orders 'automatically' have no force." This would result "in a temporary legislative veto over court-ordered relief in an ongoing case," a result that "cannot be harmonized with our tripartite system of governance." Congress would encroach impermissibly into the functioning of the judiciary. "By not allowing for judicial discretion in those cases where a court simply cannot exercise meaningful review within the prescribed time period, the PLRA automatic stay, as construed by the state officials, impedes the courts' substantive decisional role" and thereby violates separation of powers.

By following the statutory construction advanced by the plaintiffs and Justice Department, the court could hold that "§ 3626(e), as amended, does not interfere with the traditional inherent powers of the courts and therefore as so interpreted does not give rise to an unconstitutional incursion by Congress into the powers reserved for the Judiciary." Since the prescribed time period for the automatic stay had passed, on remand the district courts should consider whether to exercise their inherent equitable powers to suspend the stay, to allow it to take effect, or to terminate the decrees.

Regarding the defendant's argument that under § 3626(b)(3) a district court has to make findings based on the record existing at the time the motion to terminate was filed, the court said it would await "a concrete example of how a district court actually proceeded in ruling upon a motion under § 3626(b)(2)."

Hadix v. Johnson, 144 F.3d 925, 933–46, 949 (6th Cir. 1998) (Norris, J., concurred with the reversal of district court decisions but dissented with respect to the reasoning).

Suits by Prisoners

Sixth Circuit holds that attorneys' fees provision does not apply to work performed after PLRA's effective date in cases filed before its enactment. In 1985 and 1987, district courts in two separate cases entered orders awarding fees to plaintiffs' attorneys for monitoring defendants' compliance with remedial orders and a consent decree. In both cases, plaintiffs filed

fee petitions for work performed from January through June 1996. Defendants argued that the PLRA's attorneys' fees limitation, 42 U.S.C. § 1997e(d), should apply. The district courts held the provision inapplicable to fees earned before the Act's effective date but applied it to fees earned after that date. The Sixth Circuit concluded that its decision in *Glover v. Johnson,* 138 F.3d 229 (6th Cir. 1998), that Congress did not intend § 1997e(d) to be applied retroactively to a fee motion for work completed before enactment of the PLRA, controlled with regard to post-enactment fees. Therefore, "the fee limitation is inapplicable to the fee petitions before us, which include work performed both prior to and after the enactment date."

As additional support, the court of appeals cited *Lindh v. Murphy,* 117 S. Ct. 2059 (1997), and *Wright v. Morris,* 111 F.3d 414, 418 (6th Cir.), *cert. denied,* 118 S. Ct. 263 (1997). "[T]he fact that Congress chose to move the attorney fee provision from a section of the PLRA made expressly applicable to pending cases to a section without an effective date raises a negative inference under *Lindh* that Congress intended that the fee provision apply only to cases filed after enactment of the PLRA." In *Wright,* "we held that the plain language of the exhaustion requirement . . . evinced Congress' intent that it not be applied to pending cases. . . . [T]he attorney fee provision . . . contains very similar temporal language."

Hadix v. Johnson, 143 F.3d 246, 252–56 (6th Cir. 1998). *See also Hadix v. Johnson, supra,* 144 F.3d at 947 (award of attorneys' fees for pre-PLRA work governed by 42 U.S.C. § 1988, not PLRA). *But see Madrid v. Gomez,* 150 F.3d 1030, 1036–37 (9th Cir. 1998) (fee provision applies to all cases, including those pending when PLRA took effect). *Cf. Blissett v. Casey,* 147 F.3d 218, 221 (2d Cir. 1998) (rejecting claim that fee provision should apply to all awards of fees entered after PLRA's effective date).

Seventh Circuit holds that prisoner on parole is not subject to PLRA's restriction on bringing civil actions for mental or emotional injury. After his release on parole, plaintiff brought suit alleging mental or emotional injury inflicted upon him while he was incarcerated. The district court ruled that § 1997e(e) applied to actions brought by "former prisoners" and barred the suit because plaintiff failed to allege a "prior showing of physical injury" as required by the statute. The Seventh Circuit held that the statute by its terms does not apply to a prisoner on parole. "[T]he statute says that its object is a 'prisoner *confined* in a jail, prison, or other correctional facility.'" Moreover, the explicit definition of "prisoner" in § 1997e(h) "does not leave wriggle room; a convict out on parole is not a 'person incarcerated or detained in any facility who is . . . adjudicated delinquent for, violations of . . . the terms and conditions of parole.'" In *Robbins v. Switzer,* 104 F.3d 895 (7th Cir. 1997), the court held that in § 1915(b) the term 'prisoner' did not include "a felon who has been released. § 1997e(h) shows that the same reading is right for §1997e."

Kerr v. Puckett, 138 F.3d 321, 322–23 (7th Cir. 1998).

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Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20002-8003