Introduction

Since its inception in 1996, the Anti-Terrorist and Effective Death Penalty Act (the AEDPA) has drastically changed federal habeas practice. Its effects have largely been detrimental to petitioners. However, constitutional challenges can potentially blunt the AEDPA’s effect. The certificate of appealability may be subject to such a challenge.

The Certificate of Appealability

When a federal district court denies a writ of habeas corpus, the prisoner cannot simply appeal the decision. He or she must obtain a certificate of appealability (COA), which vests the court of appeals with jurisdiction to hear the appeal. The pre-AEDPA equivalent was the certificate of probable cause (CPC). The purpose of the COA/CPC requirement was (and is) to prevent frivolous appeals:

In 1908, concerned with the increasing number of frivolous habeas corpus petitions challenging capital sentences which delayed execution pending completion of the appellate process, Congress inserted the requirement that a prisoner first obtain a certificate of probable cause to appeal before being entitled to do so. The primary means of separating meritorious from frivolous appeals should be the decision to grant or withhold a certificate of probable cause.¹

Either a circuit justice or a district judge may grant a COA, as was earlier true of the CPC.² The Supreme Court, however, has jurisdiction to review the denial of a COA.³ Pre-AEDPA, a CPC was issued when the prisoner made a “substantial showing of [a] federal right.”⁴ This required demonstration of any of the following:

- that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are “adequate to deserve encouragement to proceed further.”⁵
The AEDPA changed the CPC to the COA, but largely retained the burden required to obtain a CPC. A COA is proper where “the applicant has made a substantial showing of the denial of a constitutional right.”10 Where a district court denies a writ on its merits, the required “substantial showing” is made by meeting the above CPC requirements.7 Where a denial is entered on procedural grounds, the substantial showing sufficient to warrant a COA is satisfied where “jurists of reason would find it debatable” both “whether the petition states a valid claim of the denial of a constitutional right” and “whether the district court was correct in its procedural ruling.”8

Where, however, the petitioner prevails at the district court, the state need not seek a COA: “If an appeal is taken by a State or its representative, a certificate of appealability is not required.”9 This is also implicit in the requirement that the applicant make a “substantial showing of the denial of a constitutional right”10 – “The government is never an applicant in a habeas proceeding, and can never show a denial of a constitutional right.”11 Where the district court grants only some of the requested relief, leading to appeals from both state and petitioner, the state’s appeal is automatic, while the petitioner must obtain a COA before the court of appeals has jurisdiction to hear his or her claim that the district court erred. COAs are rarely issued; according to a federal briefing attorney, a COA is granted in all the Texas federal courts only every few months.12

Interestingly, some pre-AEDPA versions of the law did not exempt the state from appealing without a CPC, and before 1968 no such statutory dispensation was made for the state at all. At that time some courts of appeals, including the Fifth Circuit, felt that the state should not have to obtain a CPC.13 The Second Circuit felt differently.14

**The Need for an Equal Protection Challenge**

One wonders why successful habeas petitioners should have their relief delayed by frivolous state appeals, which could last until the petitioners have served their entire sentences. In 1983 Professor Ira Robbins asked the following:

...if the justification for the certificate of probable cause lies in the need to protect the courts of appeals from an inundation of frivolous requests for review, then why should not the requirement of a certificate also apply to the states, which certainly are just as capable of pursuing frivolous appeals?15

Robbins also quotes Bennett H. Brummer, the Public Defender in Miami, who testified before Congress with similar views:

In my judgment, fairness requires that, if an obstacle to appellate review is to be created, both parties should be subject to the same conditions.... My experience indicates that the Attorney General of the State of Florida will appeal every adverse habeas corpus decision, regardless of whether his case has merit.16

My own experience indicates that the Texas Attorney General also appeals most or all of its habeas losses, regardless of the merit of his position – in 2000, the AG attempted to appeal a federal court’s grant of an out-of-time state petition for discretionary review, despite the knowledge that the awarded PDR had by this time not only been filed, but had already been refused.17

Despite the lack of a state COA/CPC requirement, constitutional challenges appear rare or absent; a search of the cases has turned up no equal protection attack. In 1961, the Third Circuit noted that no attack of any kind on the CPC discrepancy had been made, despite the earlier uncertainty of the state’s potential need to seek a CPC18:

While numerous decisions have held that the lack of a certificate by the petitioner deprived the court of jurisdiction on appeal our attention has not been called to any case in which the issue has been raised that it is necessary for a state or its representative to obtain the certificate nor have we found any.19

**The Appropriate Standard of Review of the Proposed Equal Protection Claim**

A denial of equal protection by the federal government violates the Fifth Amendment.20 The equal protection claim proposed here must show that unsuccessful petitioner-appellants are “similarly situated” to state appellants; the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged.21

The petitioner-appellant need not be in an identical position, but merely “similarly situated” to the appellant state “for purposes of the challenged government action.”22 Also, since prisoners are not a “suspect class”23 the challenge will be reviewed under the rational basis standard, i.e., the law must further a “legitimate government interest.”24; If a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relationship to some legitimate end.25

Specifically the Equal Protection Clause prohibits prejudicial disparities before the law. Under it a system which might be constitutionally unobjectionable, if applied to all, may be brought within the prohibition if some have more favorable treatment.26 Fortunately, therefore, the Supreme Court does not take kindly to laws which unnecessarily show either harshness or leniency to some litigants and not others:

Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or
general hardships are rare. 27

Such an “indiscriminate imposition of inequalities” has been specifically barred from the appellate sphere: “When an appeal is afforded ... it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the equal protection clause.” 28 “Therefore, principles of due process and equal protection mandate that an appeal process established by statute must be fairly and equally accessible to all litigants.” 29

On this basis, a state requirement that certain civil appellants pay a double bond violates the Equal Protection Clause. 30 Although the law’s backers insisted the requirement discouraged ill-taken appeals, the Supreme Court decided otherwise:

The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond. 31

Discouraging frivolous appeals serves a legitimate government interest. 32 There is no serious doubt that the COA requirement, if applied equally, would be constitutional. However, that interest would be even better served by a requirement that the state initially show that its appeals are nonfrivolous. As appellants, the petitioner and the state are “similarly situated” – the two are simply on opposite sides of the district court’s decision.

There is also no rational basis for exempting the state from the need to obtain a COA or CPC; while winnowing out frivolous appeals is eminently proper, the exception made for the state furthers no “legitimate government interest.” On the contrary, it violates the Equal Protection Clause by failing to screen out “meritless appeals” by one class of appellants – states – while burdening the class of petitioner-appellants. 33

Several possible avenues exist to solve the problem. First, the requirements for the issuance of a CPC could be imposed on the state, compelling the state to demonstrate that any issue the state would restore equal protection, but would also remove the sensible goal of discouraging frivolous appeals.

Conclusion

I made this equal protection challenge in Shiloh-Bryant, 37 the case in which the state tried to reverse an already-refused PDR. Soon after the motion was filed, the Texas AG, either realizing the case’s mootness or not wishing to have the equal protection claim heard, quickly dismissed its appeal. A future challenge under the Equal Protection Clause to the state’s exemption from seeking a COA could serve the habeas petitioner well.

Endnotes

2. 28 U.S.C.A. § 2253 (West 1995); Newby v. Johnson, 81 F.3d 567, 569 (5th Cir. 1996). A federal prisoner filing a habeas action under 28 U.S.C. § 2255, however, did not have to seek a CPC. The AEDPA changed this, requiring both § 2254 and § 2255 petitioners to obtain a COA before appealing.
5. Barefoot, 463 U.S. at 893 fn. 4 (brackets in original).
8. Slack, 529 U.S. at 478.
10. § 2253(c)(2).
11. United States v. Pearce, 146 F.3d 771, 773 (10th Cir. 1998).
13. See State of Texas v. Givens, 352 F.2d 514 (5th Cir. 1965), based on the reasoning used in United States ex rel. Tillery v. Cavell, 294 F.2d 12 (3rd Cir. 1961), cert. denied sub. nom. Tillery v. Moroney, 370 U.S. 945, 82 S.Ct. 1589, 8 L.Ed.2d 811 (1962). In Tillery there was no finding that the statute was ambiguous, but nevertheless the court looked to the legislative history of the contemporaneous version of § 2253 to find no apparent purpose in subjecting the state to its precepts. Tillery, 294 F.2d at 15.
18. Tillery, 294 F.2d at 14 fn.3.
23. Wottlin, 136 F.3d at 1036.
27. Romer, 517 U.S. at 633 (internal quotations and citations omitted).
30. Lindsey, 405 U.S. at 79.
31. Lindsay, 405 U.S. at 78.
33. Lindsay, 405 U.S. at 78.
34. Barefoot, 463 U.S. at 893 fn. 4.
35. Pearce, 146 F.3d at 773.
37. Shiloh-Bryant, 104 F.Supp.2d 696.

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