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FACTS

John Marvin Booth and four other petitioners brought an action for a declaratory judgment and injunction against the State of Maryland under 42 U.S.C. § 1983. Petitioners asserted that under the Anti-Terrorism and Effective Death Penalty Act of 1996,[1] ("AEDPA"), Maryland was not entitled to the benefits of the "opt-in" classification under chapter 154.[2] Petitioners further sought to have the court enjoin Maryland from invoking chapter 154 as a defense to the prisoners' prospective habeas corpus cases.[3]

Disallowing Maryland's Eleventh Amendment[4] immunity defense, the United States District Court for the District of Maryland found for the petitioners and granted both the requested declaratory judgment and injunction. The court reasoned that Maryland was not entitled to the benefits of chapter 154 because the state had not met all of the requirements of the section.[5] Maryland appealed the judgment to the United States Court of Appeals, Fourth Circuit, asserting that the prisoners' suit was barred by the Eleventh Amendment.[6]

HOLDING

The court of appeals reversed and held that the Eleventh Amendment barred the prisoners' suits,[7] and that the suits did not penetrate that immunity by falling under one of the two exceptions.[8]

[1] 28 U.S.C. §§ 2261-2266 (1996). For a thorough analysis of the act's effect on habeas corpus proceedings, *see Raymond*, "The Incredible Shrinking Writ: Habeas Corpus Under the Anti- terrorism and Effective Death Penalty Act of 1996," *Cap. Def. J.*, Vol. 9, No. 1, p. 52 and *Eade*, "The Incredible Shrinking Writ, Part II: Habeas Corpus Under the Anti-terrorism and Effective Death Penalty Act of 1996," *Cap. Def. J.*, Vol. 9, No. 2, p. 55.

[2] Under chapter 154 of AEDPA a state is entitled to certain benefits if it complies with the requirements of the act. To comply, a state must, among other things, establish "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent persons whose capital convictions and sentences ... have ... become final...." 28 U.S.C. § 2261(b) (1996). If a state voluntarily complies with the requirements, it is termed an opt-in state. If a state is an opt-in state, then prisoners from the state who seek federal habeas corpus relief must follow chapter 154's requirements, including filing "in the appropriate district court not later than 180 days [(as opposed to one year),] after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2263 (a) (1996).

[3] *Booth v. Maryland*, 112 F.3d 139, 140 (4th Cir. 1997).

[4] "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Supreme Court has consistently held that a state's immunity against suits brought by its own citizens (sovereign immunity), is implied in the Eleventh Amendment. *Booth*, 112 F.3d at 141.

[5] *Booth v. Maryland*, 940 F. Supp. 849 (D. Md. 1996).

[6] *Booth*, 112 F.3d at 141.

[7] *Id.* at 142.

[8] *Id.* at 144-45.

ANALYSIS/APPLICATION IN VIRGINIA

I. Application of Eleventh Amendment Immunity

On appeal, the court of appeals avoided addressing the substance of petitioners' (hereafter referred to as "Booth") claims by finding at the outset that the suit was barred under the Eleventh Amendment. The court first looked to the history of state immunity to suit. According to the court, the Constitution was adopted by the states despite fears that the states would be subjected to Federal court summons. Those fears later led to the adoption of the Eleventh Amendment after the case of *Chisholm v. Georgia*,[9] in which the Court held that a state was in fact susceptible to a suit by a citizen of the United States. The *Booth* court applied this understanding of the Eleventh Amendment to Booth's suit and declared the suit barred unless Booth could demonstrate that the suit fell under one of the two exceptions to the amendment.[10]

A. The *Ex Parte Young* Exception

Booth first asserted that his suit fell under the exception to the Eleventh Amendment established in the case of *Ex Parte Young*,[11] which held that the amendment does not "bar suits seeking to enjoin state officials from committing continuing violations of federal law."[12] Initially, the court of appeals characterized the exception as quite limited and strictly enforced. The court then turned to the actions of the state, both actual and potential, and found no violation of federal law. Maryland's announcement of its intention to invoke chapter 154 in Booth's upcoming habeas corpus proceeding was found not to violate federal law. Even the actual raising of chapter 154 by the state would not be unlawful, according to the court of appeals. The court stated that "[w]hether [or not] Maryland successfully invokes the defense, the state cannot have violated federal law merely by raising it."[13]

The court then prescribed the appropriate avenue for Booth to raise his concerns about the applicability of chapter 154: the habeas corpus proceeding itself. The court cited to *Hamblin v. Anderson*[14] as an example of the correct way to raise such concerns. In arguing against this procedure, Booth suggested that the mere possibility of a successful chapter 154 defense by the state forces petitioners to file the writ within 180 days and thereby violates their rights.[15] The court disagreed:

> A party bringing suit must always take the possibility of a successful affirmative defense into account in its litigation strategy. In many different actions, litigants must file a case and plot strategy without clear foreknowledge of how the case will unfold. To file earlier rather than later is a decision many a prudent litigant will make.[16]

[9] 2 U.S. 419, 2 Dall. 419 (1793).

[10] *Booth*, 112 F.3d at 142.

[11] 209 U.S. 123 (1908).

[12] *Booth*, 112 F.3d at 142 (citing *Ex Parte Young*, 209 U.S. at 159-60).

[13] *Id.* at 143.

[14] 947 F. Supp. 1179 (N.D. Ohio 1996).

[15] *Booth*, 112 F.3d at 143.

[16] *Id.*

The court's rationale assumes that the state's status as an opt-in state, and its invocation of the procedures of chapter 154, is appropriately characterized solely as an affirmative defense to the writ of habeas corpus, raised by the state at the proceeding itself. The court's own language betrays that assertion: Booth "need only raise [his] contention during federal habeas corpus proceedings. In order to **ascertain what procedures** will govern federal review of a capital case, a federal court may be required to determine whether the state has satisfied the requirements of chapter 154."[17] Thus, the question of whether the petitioner has 180 days or one year to file is not merely a matter of an affirmative defense, it is a mater of basic procedure for filing the writ.

In its analysis of Booth's case, the court of appeals framed the issue such that it was easily answered and not seriously disputed. If the question is whether the petitioner's complaint against the state of Maryland violated the Eleventh Amendment, the answer is yes. By reciting the Eleventh Amendment, ticking through the exceptions, and reciting the requirements for state waiver, the court of appeals was able to reach a clear cut answer. But the practical implications of the court's decision are grave. While the court declined to find that Maryland was violating federal law by its intention to invoke chapter 154, the states's actions in fact present serious due process concerns.

The United States Supreme Court has held that "[t]he essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.'"[18] "All that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to present their case."[19] As a result of the court's ruling, habeas petitioners will not know the applicable filing deadline for their petitions until after the state has answered. If a prisoner condemned to die does not know as basic a matter as the time limitation for filing a writ of habeas corpus, he does not have "a meaningful opportunity to present [his] case."[20]

B. The Habeas Corpus Exception

Booth also asserted that Maryland was not immune to his suit because it was habeas corpus related, and thus constituted the habeas corpus exception to the Eleventh Amendment. The court of appeals agreed that habeas corpus suits are not subject to Eleventh Amendment immunity, essentially because they allege continuing violations of federal law, thus falling under the *Ex Parte Young* exception. The court found, however, that Booth's complaint was not a habeas corpus suit and consequently did not fall under the second exception.[21]

C. Waiver of Eleventh Amendment Immunity

Booth also asserted that Maryland waived its Eleventh Amendment immunity by declaring its intention to invoke chapter 154 at the habeas corpus proceeding. The court of appeals addressed this question by reference to *Atascadero State Hospital v. Scanlon*,[22] which described the two ways in which a state may waive its immunity. A state may waive its Eleventh Amendment immunity explicitly in a statute or constitutional provision or by "voluntarily participating in federal programs when Congress expresses 'a clear intent to condition participation in the programs . . . on a State's consent to waive its constitutional immunity.'"[23] With respect to the second method for waiver, the court observed that not only did AEDPA not require states to waive their constitutional immunity, the act "is replete with provisions which evidence an intent to increase federal judicial deference toward the states."[24] The court concluded that Maryland had not waived its Eleventh Amendment immunity under the *Atascadero* standards.[25]

II. The Efficiency Argument

Lastly, Booth asserted that concerns of judicial efficiency and economy would be served by substantive consideration of the chapter 154. In his brief to the court, Booth asserted that:

> because "five judges of the lower court would each have the power and jurisdiction during the five inmates' individual habeas proceedings to consider whether Maryland satisfies the requirements of Chapter 154, then as a matter of judicial economy and power this question can surely be addressed by a single judge in a single proceeding."[26]

The court quickly denounced Booth's argument against application of the Eleventh Amendment immunity, saying that the Constitution is "not simply a document of judicial economy and convenience . . . [and that] it imbues the states with attributes of sovereignty."[27] The court further stated that "policy, no mater how compelling, is insufficient, standing alone, to waive [sovereign] immunity."[28]

III. Avoiding the AEDPA Trap

The court's position is clear: the proper time to inquire about the time limits for filing a writ of habeas corpus is after the writ is filed. The court cited with approval several cases in which chapter 154 was raised as an affirmative defense to the petitions.[29] As interpreted by the court of appeals, chapter 154 presents petitioner with a Hobson's choice: either file in 180 days, cutting in half the preparation time, or take up to one year to file, and risk that the court will find that the state is an opt-in state. For attorneys who are unaware of the time limits in AEDPA, this may be a

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[17] *Id.* at 144 (emphasis added).

[18] *Matthews v. Eldridge*, 424 U.S. 319, 348 (1976) (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951)). *See also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (Frankfurter, J., concurring in part that the constitutional guarantee of due process requires notice and a meaningful opportunity to be heard).

[19] *Matthews*, 424 U.S. at 348-49 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970)).

[20] *Id.* at 349.

[21] *Booth*, 112 F.3d at 145.

[22] 473 U.S. 234 (1985) (holding that the test for determining whether a State has waived its immunity from federal court jurisdiction is a stringent one).

[23] *Booth*, 112 F.3d at 145 (quoting *Atascadero*, 473 U.S. at 247).

[24] *Id* at 145. As support for its observation, the court of appeals cited 28 U.S.C. § 2254(d)(1) (no relief for claims decided in state court unless decision was contrary to clearly established federal law); 28 U.S.C. § 2254(e)(1) (factual determination of state court presumed correct unless rebutted by clear and convincing evidence); and 28 U.S.C. § 2264(a) (in capital cases in complying states, federal court can consider only claims that were raised and decided on merits in state court).

[25] *Id.* at 145.

[26] *Id.* at 145 (quoting Appellees' Brief at 15).

[27] *Booth*, 112 F.3d at 146.

[28] *Id.* at 146 (quoting *Library of Congress v. Shaw*, 478 U.S. 310, 321 (1986)).

[29] *Id.* at 144. *See, e.g., Bennett v. Angelone*, 92 F.3d 1336 (4th Cir. 1996); *Mata v. Johnson*, 99 F.3d 1261 (5th Cir. 1996); *Bread v. Netherland*,

deadly trap for their clients. As unpalatable and unjust as it is, under the current fourth circuit interpretation, caution dictates that defense attorneys file a writ of habeas corpus within the 180 day time period.

Summary and Analysis by:
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949 F. Supp. 1255 (E.D. Va. 1996); *Wright v. Angelone*, 944 F. Supp. 460 (E.D. Va. 1996); *Satcher v. Netherland*, 944 F. Supp. 1222 (E.D. Va. 1996); & *Zuern v. Tate*, 938 F. Supp. 468 (S.D. Ohio 1996).

MU'MIN v. PRUETT

1997 WL 597978 (4th Cir. Aug. 18, 1997)
United States Court of Appeals, Fourth Circuit

FACTS

Dawud Majid Mu'Min was convicted of capital murder and sentenced to death for killing a store owner. The murder occurred while Mu'Min was out on work detail from a state correctional facility, where he was serving 48 years imprisonment for first-degree murder.[1] Prior to trial, Mu'Min's counsel moved for a change of venue, based upon potentially harmful pretrial publicity.[2] The trial judge deferred action on the change of venue motion, and after finding that an impartial jury had been impaneled, the judge denied the motion.[3] The judge also denied Mu'Min's motion in limine to exclude an order memorializing his previous first-degree murder conviction.[4] During the sentencing phase, the jury sent a note to the judge inquiring as to the meaning of "life imprisonment."[5] The judge declined to answer the question and advised the jury not to concern itself with the issue.[6] Mu'Min's counsel did not object to the court's refusal to answer the jury's question.[7] Upon finding both the future dangerousness and vileness predicates,[8] the jury imposed a sentence of death.[9]

On direct appeal to the Supreme Court of Virginia, Mu'Min did not challenge either the judge's denial of his motion for change of venue or the judge's failure to answer the jury's written question, but did challenge the judge's denial of his motion in limine, arguing that the prejudicial impact of the order outweighed its probative value.[10] The supreme court denied relief and upheld the conviction and sentence.[11] The United States Supreme Court granted *certiorari* to consider an unrelated issue and ultimately concluded that the trial court had not erred.[12]

Mu'Min next sought relief on state habeas, asserting ineffective assistance of counsel and several other claims.[13] The state habeas court found Mu'Min's ineffective assistance of counsel claim to be without merit and found that the remainder of his claims had either been previously determined, and thus could not be heard in a state habeas hearing, or were procedurally defaulted.[14] Subsequently, the Supreme Court of Virginia denied review, and the United States Supreme Court denied Mu'Min's petition for a writ of *certiorari*.[15]

In his petition for a writ of habeas corpus in United States District Court, Mu'Min challenged, as violations of his Sixth and Fourteenth Amendment Rights to a fair trial and due process, the trial court's denial of his motion for a change of venue, admission of the order that memorialized his first-degree murder conviction, and refusal to respond to the jury's question.[16] The magistrate recommended that the district court dismiss Mu'Min's petition based on the state supreme court's reliance on the *Slayton v. Parrigan*[17] procedural default rule, which, in essence, dictates that issues not properly raised at trial or on direct appeal are procedurally defaulted and may not be considered in habeas.[18] The magistrate also found that because Mu'Min had not excused his defaults, his claims did not merit habeas review. The district court followed the magistrate's recommendation and dismissed Mu'Min's petition.

[1] *Mu'Min v. Pruett*, 1997 WL 597978 (4th Cir. Aug. 18, 1997) at *1.

[2] *Mu'Min*, 1997 WL 597978, at *1.

[3] *Id.*

[4] *Id.* Most likely, the prosecutors sought to admit this order to establish Mu'Min's status as an escapee at the time of the commission of the crime.

[5] *Id.* at *2.

[6] *Mu'Min*, 1997 WL 597978, at *2.

[7] *Id.*

[8] *See* Va. Code § 19.2-264.2 (1995).

[9] *Mu'Min*, 1997 WL 597978, at *2.

[10] *Id.*

[11] *Id. See Mu'Min v. Commonwealth*, 239 Va. 433, 389 S.E.2d 886 (1990).

[12] *Mu'Min*, 1997 WL 597978, at *2. *See Mu'Min v. Virginia*, 500 U.S. 415, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991), *rehearing denied*, 501 U.S. 1269, 112 S.Ct. 13, 115 L.Ed.2d 1097 (1991).

[13] *Id.*

[14] *Id.*

[15] *Mu'Min*, 1997 WL 597978, at *2. *See Mu'Min v. Murray*, 511 U.S. 1026, 114 S.Ct. 1416, 128 L.Ed.2d 87 (1994).

[16] *Id.* Mu'Min based his claim that the court had erred in refusing to respond to the jury's question upon *Simmons v. South Carolina*, 512 U.S. 154 (1994) (holding that when future dangerousness is at issue, the defense counsel should be permitted to introduce evidence pertaining to a defendant's parole eligibility or ineligibility).

[17] 215 Va. 27, 29-30, 205 S.E.2d 680, 682 (1974) (issues not properly raised at trial or on direct appeal are thus procedurally defaulted and may not be considered in habeas).

[18] *Mu'Min*, 1997 WL 597978, at *2.