[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-10011

IN RE: ANTHONY JOHNSON,

Petitioner.

Application for Leave to File a Second or Successive
Motion to Vacate, Set Aside,
or Correct Sentence, 28 U.S.C. § 2255(h)

(January 20, 2016)

Before MARTIN, ROSENBAUM, and JILL PRYOR, Circuit Judges.

MARTIN, Circuit Judge:

Anthony Johnson has filed a pro se application for authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside, or correct his federal sentence. We can authorize such a filing only if we certify that the second or successive motion is based on either:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) 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. § 2255(h). It is Mr. Johnson's duty to "make[] a prima facie showing that the application satisfies the requirements of this subsection." 28 U.S.C. § 2244(b)(3)(C).

Mr. Johnson's application relies in part on Johnson v. United States, __ U.S. __, 135 S. Ct. 2551 (2015). The Supreme Court recently granted certiorari in Welch v. United States, No. 15-6418, 2016 WL 90594 (U.S. Jan. 8, 2016), to decide "[w]hether Johnson v. United States, 135 S. Ct. 2551 (2015), announced a new substantive rule of constitutional law that applies retroactively to cases that are on collateral review." Pet. for Writ of Cert. at i, Welch v. United States, No. 15-6418, 2015 WL 9666637 (U.S. Sept. 2, 2015). Because Mr. Johnson's petition raises the question that will be decided in Welch, we hold his case in abeyance until the Supreme Court decides Welch.

We recognize that it will likely take the Supreme Court longer than 30 days from now to decide Welch. This means that we may not rule on Mr. Johnson's application within the 30-day timeframe specified by 28 U.S.C. § 2244(b)(3)(D) ("The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion."). This Court has never decided if this 30-day timeframe is mandatory. All eight of the

Courts of Appeals that have decided this question in a published opinion have said it is not.[1] We agree with those courts.

I.

We do not read the language of § 2244(b)(3)(D) to make the 30-day timeframe mandatory. It's true that the statute says a court "shall grant or deny" applications like Mr. Johnson's "not later than 30 days" after filing. But the statute makes no provision for what happens when compliance with this timeline isn't practical. The law is well-established that "[a] statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply

[1] See Rodriguez v. Bay State Corr. Ctr., 139 F.3d 270, 272 (1st Cir. 1998); Word v. Lord, 648 F.3d 129, 129 n.1 (2d Cir. 2011) (per curiam) ("[W]here an issue requires a published opinion that cannot reasonably be prepared in [] time [] we may exceed the thirty-day time limit." (quotation omitted)); In re Vial, 115 F.3d 1192, 1194 n.3 (4th Cir. 1997) (en banc) (noting that "the importance of the issue presented justified" exceeding "the 30–day time limitation established by 28 U.S.C.A. § 2244(b)(3)(D)"); In re Siggers, 132 F.3d 333, 334–35 (6th Cir. 1997) ("[F]ailure 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)," "[b]ecause the provision is hortatory or advisory rather than mandatory."); Gray-Bey v. United States, 201 F.3d 866, 867 (7th Cir. 2000) ("We agree with our sister circuits . . . that the 30–day period may be extended for those few cases which require reasoned adjudication and cannot be resolved within the statutory period."); Ezell v. United States, 778 F.3d 762, 765 (9th Cir. 2015) ("We agree with the majority of our sister circuits and hold that when a § 2255(h) motion presents a complex issue, we may exceed § 2244(b)(3)(D)'s thirty-day time limit."); Browning v. United States, 241 F.3d 1262, 1263 (10th Cir. 2001) ("[W]e agree with other circuits that the time limit in section 2244(b)(3)(D) is hortatory or advisory rather than mandatory." (quotation omitted)).

The Third, Eighth, and D.C. Circuits do not appear to have ruled on this question. And though the Fifth Circuit has said it is "statutorily required" to rule within 30 days, In re White, 602 F. App'x 954, 956 (5th Cir. 2015) (unpublished), it does not appear to have published an opinion addressing the question.

with the provision." Fort Worth Nat. Corp. v. Fed. Sav. & Loan Ins. Corp., 469 F.2d 47, 58 (5th Cir. 1972)[2] (emphasis added). See also Gray-Bey, 201 F.3d at 868 (noting that interpreting the 30-day timeframe as hortatory rather than mandatory "reflects a reconciliation between the commands of legislation and the exigencies of judicial decisionmaking that is well grounded in the law").

The principle is especially compelling when a statutory timeframe is directed at the judiciary. This kind of timeframe implicates a court's power to hold proceedings in abeyance, and "[a]n appellate court's power to hold an order in abeyance . . . has been described as 'inherent,' preserved in the grant of authority to federal courts to 'issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law,' All Writs Act, 28 U.S.C. § 1651(a)." Nken v. Holder, 556 U.S. 418, 426–27, 129 S. Ct. 1749, 1756–57 (2009). "A reviewing court must bring considered judgment to bear on the matter before it, but that cannot always be done quickly enough to afford relief to the party aggrieved by the order under review. The choice for a reviewing court should not be between justice on the fly or participation in what may be an 'idle ceremony.'" Id. at 427, 129 S. Ct. 1257. Here too, we see no reason to perform the idle ceremony of answering a question that the Supreme

[2] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding all decisions of the Fifth Circuit handed down before October 1, 1981.

Court plans to answer soon.

The rule that Congress must be explicit when it tries to restrict jurisdiction based on a deadline is additionally important here because this is a habeas case. In habeas cases, this rule finds further support in "the fact that equitable principles have traditionally governed the substantive law of habeas corpus." Holland v. Florida, 560 U.S. 631, 646, 130 S. Ct. 2549, 2560, (2010) (quotation omitted). That being the case, "we will not construe a statute to displace courts' traditional equitable authority absent the clearest command." Id. (quotation omitted). See also Schlup v. Delo, 513 U.S. 298, 319, 115 S. Ct. 851 (1995) ("[H]abeas corpus is, at its core, an equitable remedy."); Jones v. Cunningham, 371 U.S. 236, 243, 83 S. Ct. 373 (1963) ("[Habeas corpus] never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose"). Our traditional equitable authority includes the power to make adjustments "that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500, 61 S. Ct. 643, 645 (1941).

Although the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established certain procedural limits on the scope of habeas review (including the gatekeeping procedure at issue in this case), it did so "without

undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law." Holland, 560 U.S. at 649, 130 S. Ct. at 2562. See also Slack v. McDaniel, 529 U.S. 473, 483, 120 S. Ct. 1595, 1603 ("AEDPA's present provisions [] incorporate earlier habeas corpus principles."). The Supreme Court has told us that AEDPA's "purposes, and the practical effects of our holdings, should be considered when interpreting AEDPA. This is particularly so when petitioners 'run the risk' under the proposed interpretation of 'forever losing their opportunity for any federal review.'" Panetti v. Quarterman, 551 U.S. 930, 945–46, 127 S. Ct. 2842, 2854 (2007) (quoting Rhines v. Weber, 544 U.S. 269, 275, 125 S. Ct. 1528, 1533 (2005)).

There is another reason to join the view of the other Courts of Appeals on this question: "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." Clark v. Martinez, 543 U.S. 371, 380–81, 125 S. Ct. 716, 724 (2005). Here, interpreting § 2244(b)(3)(D) as precluding a Court of Appeals from holding a second or successive application in abeyance raises substantial constitutional questions. Specifically, it may interfere with the judiciary's ability to grant

effective habeas relief, implicating both the Due Process Clause and the Suspension Clause.

"Congress knows the difference between encouraging and mandating specific conduct, and knows how to impose binding obligations on courts when it wishes to do so." Siggers, 132 F.3d at 336. Congress chose not to include language in AEDPA that would have made the 30-day timeframe mandatory. And "we resist[] an interpretation of the statute that would 'produce troublesome results,' 'create procedural anomalies,' and 'close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent.'" Panetti, 551 U.S. at 946, 127 S. Ct. at 2854. We are thus convinced that we have jurisdiction over Mr. Johnson's application beyond § 2244(b)(3)(D)'s 30-day timeframe.[3]

II.

Our ruling today follows how we have long treated § 2244(b). This isn't the first time we have recognized that the § 2244(b)(3)(D) timeframe can be exceeded

[3] The exact mechanism used to ensure time for proper consideration of a case can vary. In Triestman v. United States, 124 F.3d 361 (2d Cir. 1997), the Second Circuit dealt with the 30-day timeframe "by denying the motion within thirty days' and "then stay[ing] [the] mandate and order[ing] briefing on the question of whether or not it was appropriate to reconsider that decision." Id. at 367. Of course, whether a court proceeds through the steps taken in Triestman or the more straightforward one of simply holding a case in abeyance beyond the time limit, the outcome is the same. Although we see no problem with the Triestman approach, we also don't believe that the statute requires it.

when proper handling of a case requires more than 30 days. In the past, we have scheduled briefing and oral argument beyond the 30-day timeframe. See In re Davis, 565 F.3d 810 (11th Cir. 2009) (per curiam). Mr. Davis filed an application to file a second or successive habeas petition on October 22, 2008. See CMS Docket, In re Davis, No. 08-16009. The panel ordered briefing, entered a conditional stay, allowed the filing of amicus briefs, and heard oral argument. Id. The panel then denied the application six months after the original application had been filed. Id. We expect that Mr. Johnson's application will take less time than that. All we need to know to rule here is whether the Supreme Court has made Johnson retroactive to cases on collateral review. This is a yes-or-no question, and Welch is unlikely to leave any doubt about the answer.

Our Court has also recognized our power to sua sponte order rehearing of an application to file a second or successive § 2255 motion. See In re Lambrix, 776 F.3d 789, 794 (11th Cir. 2015) (per curiam). Rehearing under these circumstances is likely to extend the resolution of an application well beyond the 30-day timeframe. Also, rehearing could implicate the same question raised in another pending application, especially when the retroactivity of a recent Supreme Court case is at stake. When this circumstance arises, it makes no sense to treat the timeframe as mandatory for one application but not another. That would result in

two applications which are identical on the merits having opposite outcomes based on the date each application was filed. And the same would be true when a Court of Appeals certifies to the Supreme Court a question that would decide an application to file a second or successive motion. See Felker v. Turpin, 518 U.S. 651, 667 116 S. Ct. 2333, 2341–42 (1996) (Souter, J., concurring). In these cases, the unique procedural posture of an application might make it impractical to properly decide an issue in 30 days. In the same way, it makes no sense here to dispose of Mr. Johnson's case when the Supreme Court is about to answer the very question he has raised.

III.

We are aware of this Court's recent suggestion that "this Court necessarily must apply § 2244(b)(2) under a tight time limit in all cases, since the statute expressly requires us to resolve this application within 30 days, no matter the case." In re Henry, 757 F.3d 1151, 1157 n.9 (11th Cir. 2014). Anything Henry said about § 2244(b)(3)(D) is dicta because it was not necessary to decide the issues then before the Court. See United States v. Kaley, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) ("As our cases frequently have observed, dicta is defined as those portions of an opinion that are not necessary to deciding the case then before us." (quotation omitted)).

Mr. Henry was a death row inmate who filed a request for stay of execution just four days before his scheduled execution, along with an emergency application for leave to file a second or successive federal habeas petition under 28 U.S.C. § 2244(b). Henry, 757 F.3d at 1152–53. Mr. Henry expressly requested "expedited consideration of" his application to file a second or successive motion based on the then-recent decision in Hall v. Florida, ___ U.S. ___, 134 S. Ct. 1986 (2014). He emphasized that his application would be "moot if not ruled on" before his scheduled execution. Notably, Mr. Henry's application did not ask for full briefing or oral argument. Rather, he requested a prompt ruling and an "order authorizing the United States District Court for the Middle District of Florida to consider a second or successive petition for writ of habeas corpus raising a claim of intellectual disability under Atkins v. Virginia," as well as a stay of execution pending the outcome of the second or successive habeas proceedings in the District Court.

Three days after Mr. Henry filed his emergency application, our Court denied it "for two independent reasons: first, the rule enunciated in Hall v. Florida ha[d] not been made retroactive by the United States Supreme Court; moreover, even if it had been, [Mr. Henry] ha[d] not shown a reasonable likelihood that he would benefit from the rule in Hall." 757 F.3d at 1153. This Court also denied

Mr. Henry a stay because he had not established any likelihood of success on the merits. Id. at 1163. Given that the Court denied Mr. Henry's emergency motion on the merits three days after it was filed, that Mr. Henry had requested expedited consideration, and that the 30-day timeframe was not at issue in the case, it is safe to say that anything Henry said about the 30-day timeframe was dicta, not holding. See Kaley, 579 F. 3d at 1253 n.10.

IV.

The federal courts have already failed Mr. Johnson once. We know from Johnson that the statute that required Mr. Johnson's mandatory minimum 15-year sentence violates the Due Process Clause. We also know that the government has long conceded that the Supreme Court made Johnson retroactive to cases on collateral review. And we know that the Supreme Court has granted certiorari in Welch to resolve the circuit conflict on whether Johnson applies retroactively to cases like this one. We will soon know from Welch whether Mr. Johnson's § 2255 motion can proceed. It's simply a matter of time.

Unfortunately, time is the one thing Mr. Johnson (and every other prisoner in the Eleventh Circuit who is in his position) does not have. The Supreme Court decided Johnson on June 26, 2015. That means (as far as we can tell now, and without deciding the question) that the deadline for Johnson-based applications is

June 26, 2016, regardless of when Welch is decided. See Dodd v. United States, 545 U.S. 353, 358–59, 125 S. Ct. 2478, 2482–83 (2005) (holding that the one-year statute of limitations for both "initial [§ 2255] motions as well as second or successive ones" begins to run on the date the Supreme Court initially recognizes a new rule, not the date it makes the rule retroactive). In order to ensure that Mr. Johnson isn't condemned to an unlawful prison sentence solely based on our mistake of law, we hold his application in abeyance until the Supreme Court decides Welch.

APPLICATION HELD IN ABEYANCE.