231 F.3d 568
United States Court of Appeals,
Ninth Circuit.

Saksit **NAKARANURACK**, Petitioner–Appellant,
v.
UNITED STATES of America,
Respondent–Appellee.

No. 97–16242. | Argued and Submitted April 24, **2000** | Filed Oct. 27, **2000**

Resident alien petitioned for writ of habeas corpus challenging order of deportation. Following remand, 68 **F.3d** 290, the United States District Court for the District of Nevada, Lloyd D. George, J., dismissed petition for lack of jurisdiction. Alien appealed. The Court of Appeals, B. Fletcher, Circuit Judge, held that: (1) section of Antiterrorism and Effective Death Penalty Act (AEDPA), precluding court review of final order of deportation against any alien who was deportable by reason of having committed criminal offense, would be applied retroactively, and (2) because such section eliminated requirement that alien file for direct review of deportation decision, alien's failure to file such petition did not bar Court of Appeals from considering his habeas petition.

Reversed and remanded.

West Headnotes (8)

[1] Habeas Corpus
Review de novo

A district court's dismissal of a habeas petition based on procedural default presents an issue of law reviewed de novo.

Cases that cite this headnote

[2] Habeas Corpus
Subsequent appeals; review of intermediate court

Court of Appeals would not consider alien's argument that Court of Appeals had erred in holding in prior opinion that district court lacked habeas jurisdiction over claim challenging deportation order unless alien had exhausted his remedies by filing petition for review, or demonstrated that he could not have done so, inasmuch as alien could have called for en banc rehearing or filed petition for certiorari in Supreme Court if he had wished to challenge validity of prior holding.

1 Cases that cite this headnote

[3] Aliens, Immigration, and Citizenship
Retroactive operation

Section of Antiterrorism and Effective Death Penalty Act (AEDPA), precluding court review of final order of deportation against any alien who was deportable by reason of having committed criminal offense covered by certain sections of Immigration and Nationality Act (INA), barred alien from seeking court review of deportation decision made by Board of Immigration Appeals (BIA), notwithstanding that alien's case before BIA was pending when AEDPA was enacted. Immigration and Nationality Act, § 106(a)(10), as amended, 8 U.S.C.(1994 Ed.) § 1105a(a)(10).

1 Cases that cite this headnote

[4] Habeas Corpus
Aliens

Section of Antiterrorism and Effective Death Penalty Act (AEDPA), precluding court review of final order of deportation against any alien who was deportable by reason of having committed criminal offense covered by certain sections of Immigration and Nationality Act (INA), did not deprive Court of Appeals of jurisdiction over alien's habeas petition challenging deportation order. Immigration and Nationality Act, § 106(a)(10), as amended, 8 U.S.C.(1994 Ed.) § 1105a(a)(10).

Cases that cite this headnote

[5] Federal Courts
Statutory provisions in general

Present law usually governs when jurisdictional rules change during the pendency of a case, since

jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties; this reasoning applies whether the changed jurisdictional rule withdraws or confers jurisdiction.

1 Cases that cite this headnote

[6] Aliens, Immigration, and Citizenship
Retroactive operation

Retroactive application is given to the section of the Antiterrorism and Effective Death Penalty Act (AEDPA) that precludes court review of a final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by certain sections of the Immigration and Nationality Act (INA). Immigration and Nationality Act, § 106(a)(10), as amended, 8 U.S.C.(1994 Ed.) § 1105a(a)(10).

Cases that cite this headnote

[7] Federal Courts
Determination of question of jurisdiction

The Court of Appeals applies new jurisdictional rules to retroactively grant jurisdiction even when it was lacking at the time the case was filed.

Cases that cite this headnote

[8] Habeas Corpus
Aliens

Because Antiterrorism and Effective Death Penalty Act (AEDPA) eliminated requirement that alien file for direct review of deportation decision made by Board of Immigration Appeals (BIA) before filing habeas petition challenging deportation, alien's failure to file such petition did not bar Court of Appeals, under exhaustion of remedies doctrine, from considering his habeas petition challenging deportation order. Immigration and Nationality Act, § 106(a)(10), as amended, 8 U.S.C.(1994 Ed.) § 1105a(a)(10).

1 Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the District of Nevada; Lloyd D. George, District Judge, Presiding. D.C. No. CV–94–00011–LDG.

Before: B. FLETCHER, HAWKINS, and THOMAS, Circuit Judges.

Opinion

B. FLETCHER, Circuit Judge:

Petitioner Saksit **Nakaranurack** is a Thai citizen who came to the United States at the age of six. In 1988, he was convicted of a drug offense. The INS initiated deportation proceedings against him, and in 1990 an Immigration Judge denied discretionary waiver of deportation pursuant to INA § 212(c). The Board of Immigration Appeals ("BIA") affirmed in 1993.

At the time, **Nakaranurack** was entitled to file a petition for review of the BIA decision in this court. However, because of his attorney's errors, **Nakaranurack** did not learn of the BIA decision until after the deadline for filing such a petition. **Nakaranurack** then filed a habeas action alleging all the claims he would have raised in a petition for review, but not explaining why he had failed to file a petition for review.

In 1994, the habeas court dismissed the petition for lack of jurisdiction because, by failing to file a petition for review of the ***570** BIA decision, **Nakaranurack** had not exhausted available remedies. **Nakaranurack** appealed. In a published opinion, we held that "an alien may petition for habeas review of a deportation order *only* if the issues raised concerning the validity of that deportation order had not and could not have been determined in a prior judicial proceeding." ***Nakaranurack*** *v. United States,* 68 **F**.**3d** 290, 294 (**9th** **Cir**.1995) ("***Nakaranurack*** *I*"). However, we held, if **Nakaranurack** had no notice of the BIA decision, he could not have filed a petition for review, and therefore habeas review would be appropriate. *Id.* Consequently, we remanded to the district court for a factual determination as to "whether

Nakaranurack was afforded an opportunity to challenge the BIA's decision." *Id.*

On remand, the district court held a hearing and determined that Nakaranurack had notice and an opportunity to file a petition for review from the BIA decision. Since Nakaranurack had defaulted on the petition for review, the district court dismissed the petition for lack of jurisdiction. Nakaranurack appeals the dismissal of his habeas petition here.

I

[1] The district court had jurisdiction pursuant to 28 U.S.C. § 2241. *See Magana–Pizano v. INS,* 200 F.3d 603 (9th Cir.1999). We have jurisdiction pursuant to 28 U.S.C. § 2253. A district court's dismissal of a habeas petition based on procedural default presents an issue of law reviewed de novo. *See Fields v. Calderon,* 125 F.3d 757, 759–60 (9th Cir.1997).

II

[2] Nakaranurack argues that this court erred when, in *Nakaranurack I,* we held that the district court lacked habeas jurisdiction unless Nakaranurack had exhausted his remedies by filing a petition for review, or demonstrated that he could not have done so. This contention must fail; if Nakaranurack wished to challenge the validity of our ruling in *Nakaranurack I,* he could have called for an *en banc* rehearing of the case or filed a petition for certiorari in the Supreme Court, both of which are now foreclosed by virtue of the passage of time. However, this is not the end of our inquiry.

While this case was pending before the district court for the second time, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104–132, 110 Stat. 1214 (1996), and the jurisdictional landscape shifted. Among other things, AEDPA eliminated direct review of final orders of deportation against criminal aliens such as Nakaranurack. AEDPA § 440(a) amended the former 8 U.S.C. § 1105a(a)(10) (section 106(a)(10) of the INA) to read as follows:

> Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i), shall not be subject to review by any court.

110 Stat. 1214, 1276.[1] The criminal acts referenced in AEDPA § 440(a) are now codified at 8 U.S.C. § 1227, and include "a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance ... other ***571** than a single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. § 1227(a)(2)(B)(i). In his habeas petition, Nakaranurack states that he was convicted of "Unlawful Delivery of a Controlled Substance, to wit: Cocaine, a felony." Thus, AEDPA § 440(a) eliminated petitions for direct review of BIA decisions in cases such as Nakaranurack's.

If we apply § 440(a) retroactively, the entire jurisdictional question framed by the panel in *Nakaranurack I* becomes moot—a petition for direct review of the BIA decision no longer exists and is no longer a bar to habeas jurisdiction.

[3] **[4]** The government argues that AEDPA § 440(a) must be applied retroactively.[2] The government relies primarily on our decision in *Duldulao v. INS,* 90 F.3d 396 (9th Cir.1996). In *Duldulao,* we held that § 440(a) applies to revoke our jurisdiction over a petition for direct review of a BIA decision that was pending on the date of AEDPA's enactment (April 24, 1996). We held:

> AEDPA section 440(a) withdraws the jurisdiction that Congress had previously conferred on courts of appeals to review certain final orders of deportation. When a statute confers jurisdiction and Congress repeals that statute, "the power to exercise such jurisdiction [is] withdrawn, and ... all pending actions f[a]ll, as the jurisdiction depend[s] entirely upon the act of Congress."
> *Duldulao,* 90 F.3d at 399 (quoting *Assessors v. Osbornes,* 76 U.S. (9 Wall.) 567, 575, 19 L.Ed. 748 (1869) (alterations in original)).

[5] Our holding in *Duldulao* was based in large part on the Supreme Court's decision in *Landgraf v. USI Film Products,* 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). We cited *Landgraf,* 511 U.S. at 274, 114 S.Ct. 1483, for the proposition that "present law usually governs" when

jurisdictional rules change during the pendency of a case "because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.' " *Duldulao,* 90 F.3d at 399 (quoting *Landgraf,* 511 U.S. at 274, 114 S.Ct. 1483). This reasoning applies whether the changed jurisdictional rule *withdraws* or *confers* jurisdiction. *See Landgraf,* 511 U.S. at 274, 114 S.Ct. 1522; *Duldulao,* 90 F.3d at 399. Indeed, both the Supreme Court and our court have retroactively applied new jurisdictional rules that grant jurisdiction, even where jurisdiction was lacking at the time the action was filed.

In *Andrus v. Charlestone Stone Products Co.,* 436 U.S. 604, 608 n. 6, 98 S.Ct. 2002, 56 L.Ed.2d 570 (1978), the plaintiff filed suit at a time when federal law required plaintiffs to allege a set amount in controversy ($10,000) in federal question cases. The plaintiff failed to allege a sufficient amount in controversy; however, while the case was pending on appeal, Congress passed a statute that eliminated the amount in controversy requirement for federal question cases. *Id.* at 607–08, 98 S.Ct. 2002. Although the district court lacked jurisdiction over the case when it was filed, the Supreme Court held that it now had jurisdiction. *Id.*

Similarly, in *United States v. Alabama,* 362 U.S. 602, 80 S.Ct. 924, 4 L.Ed.2d 982 (1960) (per curiam), the government brought a civil rights action against the state of Alabama at a time when suits against states were barred. The district court dismissed the action, and the court of appeals affirmed. *Id.* at 603–04, 80 S.Ct. 924. While the case was pending before the Supreme Court, Congress passed the Civil Rights Act of 1960, which allowed ***572** such actions against a state. *Id.* at 604, 80 S.Ct. 924. The Supreme Court reversed the dismissal and remanded because, by virtue of the new law, the district court now had jurisdiction. *Id.*

We followed suit in *In Re Arrowhead Estates Dev. Co.,* 42 F.3d 1306 (9th Cir.1994). In that case, the appellant filed a notice of appeal from a bankruptcy court's oral judgment before the final judgment was entered on the record. *Id.* at 1308. At the time, a notice of appeal filed before a judgment was entered was invalid, and the Bankruptcy Appellate Panel ("BAP") therefore dismissed the appeal for lack of jurisdiction. *Id.* at 1310. However, the rules governing notices of appeal changed while the case was pending before our court, so that a notice of appeal filed after the announcement of a decision but before the entry of judgment was treated as filed after the date of entry of judgment. *Id.* We held that the new rule applied retroactively, and therefore the BAP did have jurisdiction over the appeal. *Id.* at 1311.

[6] **[7]** **[8]** These cases persuade us that the district court has jurisdiction. Under *Duldulao,* AEDPA § 440(a) applies retroactively. Thus, regardless of the jurisdictional rules that were in existence when the habeas petition was filed, we apply the jurisdictional rules that exist now. Under *Landgraf, Andrus, Alabama* and *Arrowhead,* we apply new jurisdictional rules to retroactively grant jurisdiction even when it was lacking at the time the case was filed. Since the new jurisdictional rules have eliminated the requirement that aliens such as Nakaranurack file for direct review of a BIA decision before filing a habeas petition, we hold that the jurisdictional bar identified in *Nakaranurack I* is "now of no moment." *Landgraf,* 511 U.S. at 274, 114 S.Ct. 1483 (quoting *Andrus,* 436 U.S. at 607–608 n. 6, 98 S.Ct. 2002). [3]

We therefore reverse the district court's dismissal of this action. We hold that the district court has jurisdiction over the merits of Nakaranurack's habeas petition, and we remand for a hearing on the merits.

REVERSED and REMANDED

Parallel Citations

00 Cal. Daily Op. Serv. 8633, 2000 Daily Journal D.A.R. 11,485

Footnotes

1 IIRIRA subsequently repealed § 1105a altogether. *See* Pub. L. No. 104–208, Div. C., Title II, § 306(b), Sept. 30, 1996, 110 Stat. 3009–612. However, IIRIRA does not apply to this case, because that Act does not apply to cases in which a final order of deportation was filed prior to October 30, 1996. *See Kalaw v. INS,* 133 F.3d 1147, 1150 (9th Cir.1997). If no appeal is taken from a BIA decision, a deportation order becomes final upon the expiration of the time allotted for appeal. *See id.* at 1150, n. 4. The time allotted for Nakaranurack's petition for review thus expired 30 days after the BIA's 1993 decision, far before IIRIRA's passage.

2 Of course, the government makes this contention in a very different context—it argues that we lack jurisdiction over this habeas action because § 440(a) of AEDPA eliminated all review of final orders of deportation against aliens such as Nakaranurack who have been convicted of drug offenses. That argument must fail in light of our recent holding in *Magana–Pizano,* 200 F.3d at 609.

3 In a parallel context, we have recognized that a petitioner need not exhaust administrative remedies when to do so would be futile. *See, e.g., El Rescate Legal Serv., Inc. v. Executive Office of Immigration Review*, 959 F.2d 742, 747 (**9th Cir**.1991); *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 499 (**9th Cir**.1980).

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