No. 03-9046

In The
Supreme Court of the United States

CHARLES RUSSELL RHINES,

Petitioner,

v.

DOUGLAS WEBER, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S BRIEF ON THE MERITS

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CAPITAL CASE

QUESTION PRESENTED

Can a federal court stay, or must it dismiss, a 28 U.S.C. § 2254 Petition for Habeas Corpus that includes exhausted and unexhausted claims when the stay is necessary to permit the Petitioner to exhaust claims in state court without having his federal petition barred by the one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act?

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Rhines v. Weber*, 346 F.3d 799, *rehearing en banc denied*, 2003 U.S. App. LEXIS 23865, docket no. 02-2990 (8th Cir. 2003), and is reproduced in the Joint Appendix ("J.A."). J.A. 145-148. The memorandum decision of the United States District Court for the District of South Dakota is not published, but is in the Joint Appendix. J.A. 127-136.

The affirmance of the capital murder conviction of Petitioner is published at *State v. Rhines*, 548 N.W.2d 415 (S.D. 1996), *cert. denied*, 519 U.S. 1013 (1996), and is in the Joint Appendix. J.A. 149-245. The reported decision reflecting denial of Petitioner's first state habeas corpus petition is *Rhines v. Weber*, 608 N.W.2d 303 (S.D. 2000), and is in the Joint Appendix. J.A. 292-317.

BASIS FOR JURISDICTION

The United States Court of Appeals for the Eighth Circuit reversed the district court's grant of a stay of Petitioner's timely-filed habeas corpus petition through an opinion and judgment entered on October 7, 2003. *Rhines v. Weber*, 346 F.3d 799 (8th Cir. 2003); J.A. 145-146. The United States Court of Appeals for the Eighth Circuit denied the petition for rehearing en banc on November 24, 2003. J.A. 148. Petitioner filed his petition for writ of certiorari on February 19, 2004, which was granted on June 28, 2004. *Rhines v. Weber*, 124 S.Ct. 2905 (2004).

For this case, 28 U.S.C. § 1254(1) provides the jurisdiction of the Supreme Court of the United States.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 9 of the United States Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Section 2254 of Title 28 of the United States Code provides in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
>
> (A) the applicant exhausted the remedies available in the courts of the State . . .

Section 2244 of Title 28 of the United States Code provides in relevant part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review

> or the expiration of the time for seeking such review;
>
> . . .
>
> (2) The 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.

STATEMENT OF THE CASE

Petitioner Charles Russell Rhines ("Rhines") was convicted in state court in South Dakota of third degree burglary and first degree murder. J.A. 16-19. Rhines was sentenced to death by lethal injection. J.A. 17.

Rhines appealed to the Supreme Court of South Dakota, raising a number of challenges to his conviction and sentence. Despite finding that the aggravating circumstance of "depravity of mind" in the South Dakota death penalty statute was unconstitutional because it did not adequately channel the sentencing jury's discretion, the Supreme Court of South Dakota upheld Rhines' conviction and death sentence. *State v. Rhines*, 548 N.W.2d 415, 448-49 (S.D. 1996), *cert. denied*, 519 U.S. 1013. This Court denied Rhines' initial petition for certiorari on December 2, 1996. *Rhines v. South Dakota*, 519 U.S. 1013 (1996).

On December 5, 1996,[1] Rhines filed his first state habeas corpus petition. J.A. 32. Only two days had elapsed between the denial of Rhines' petition for writ of certiorari and the filing of his first state court habeas corpus petition. J.A. 32-33; *see Rhines v. South Dakota*, 519 U.S. 1013 (1996). The state trial court denied relief, and the Supreme Court of South Dakota affirmed the denial of habeas corpus relief to Rhines on February 9, 2000. *Rhines v. Weber*, 608 N.W.2d 303 (S.D. 2000); J.A. 292.

Rhines signed his *pro se* federal habeas corpus petition on February 17, 2000, which was eight days after the Supreme Court of South Dakota affirmed denial of his state court habeas corpus petition. J.A. 3-19. That petition was filed in the United States District Court for the District of South Dakota on February 22, 2000. J.A. 3.

On May 15, 2000, acting *pro se*, Rhines filed a "Motion to Toll Time" out of concern for the one-year statute of limitations contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). J.A. 25-29.[2] Respondent, through the South Dakota Attorney General's Office, countered Rhines' Motion to Toll Time by advising the district court:

> [I]n addition to two days from December of 1996, Petitioner also had a period of either six days or

[1] The Antiterrorism and Effective Death Penalty Act of 1996 became effective on April 24, 1996.

[2] Rhines miscalculated the time left in his AEDPA one-year limitation period in his *pro se* Motion to Toll Time. J.A. 25. The South Dakota Attorney General's Office properly calculated that only eight to fourteen days, based on whether the "mailbox rule" applies, had run on Rhines' one year AEDPA period when he filed his federal habeas corpus petition. J.A. 33.

> twelve days in February 2000 that ran against the statute of limitations. Petitioner has had a maximum of fourteen days (more likely eight days) that have run against the statute of limitations in Section 2244.
>
> Since Petitioner is in no danger of losing his right to file for federal habeas corpus relief, there is no reason to toll the time of the statute of limitations.

J.A. 33. Respondent then requested "that Petitioner's Motion to Toll Time be denied because it is unnecessary, only eight (or fourteen) days having run on the Section 2244 one-year statute of limitations." J.A. 33. The district court then denied Rhines' *pro se* Motion to Toll Time as "unnecessary." J.A. 35.

Consistent with the order of the district court, Rhines, through his court appointed counsel, filed his Amended Petition for Writ of Habeas Corpus and Statement of Exhaustion, which raised thirteen general grounds, with subparts totaling 35 claims, asserting constitutional defects in his conviction and sentence. J.A. 39-60. Respondent challenged twelve of those claims as unexhausted. J.A. 72-79.

On July 3, 2002, more than sixteen months after Rhines had filed his federal habeas corpus petition, the district court determined that eight of the 35 claims in the petition had not been exhausted. J.A. 128-133. At Rhines' request, and relying both upon the concurrences by Justice Souter and Justice Stevens in *Duncan v. Walker*, 533 U.S. 167 (2001) and upon the developing court of appeals authority, the district court held the petition in abeyance to allow Rhines to present the unexhausted claims to state court without jeopardy of a time bar to his federal petition

under AEDPA. J.A. 134-136. The district court issued the stay "conditioned upon Petitioner commencing state court exhaustion proceedings within sixty days of this order and returning to this court within sixty days of completing such exhaustion." J.A. 136. Rhines complied with the district court's order by starting his second state court habeas corpus case on August 22, 2003, within sixty days of the July 3, 2002, order.[3] J.A. 139-144.

Respondent appealed to the United States Court of Appeals for the Eighth Circuit raising, among other issues, the propriety of the district court's stay of Rhines' mixed habeas corpus petition. J.A. 137-138. The United States Court of Appeals for the Eighth Circuit, relying on its decision in *Akins v. Kenney*, 341 F.3d 681 (8th Cir. 2003), vacated the district court's grant of a stay. *Rhines v. Weber*, 346 F.3d 799, *rehearing en banc denied*, 2003 U.S. App. LEXIS 23865, docket no. 02-2990 (8th Cir. 2003); J.A. 145-148. The Eighth Circuit remanded the case to the district court to determine whether Rhines could proceed on exhausted claims by deleting unexhausted claims from his petition. *Id.*; J.A. 146. This Court thereafter granted Rhines' Petition for Writ of Certiorari. *Rhines v. Weber*, 124 S.Ct. 2905 (2004).

SUMMARY OF ARGUMENT

A stay of the unexhausted claims of a mixed § 2254 habeas corpus petition is an appropriate way to address the situation where the one year AEDPA statute of

[3] Rhines' second state habeas petition is dated August 3, 2002, and was sent for filing and service on August 22, 2003. J.A. 142-144.

limitations runs before the district court determines a federal petition to be mixed. A stay under such circumstances reconciles the total exhaustion requirement of *Rose v. Lundy*, 455 U.S. 509 (1982), with the statutory and constitutional right of a § 2254 petitioner to have federal court review of exhausted claims.

District courts have inherent authority to issue stays in proceedings before them. Nothing in the AEDPA prohibits a court from staying the exhausted claims of a mixed petition to allow a habeas petitioner to present unexhausted claims to state court. A stay of exhausted claims to permit state court resolution of unexhausted claims serves the underlying purposes of *Rose* of ensuring to state courts the first opportunity to review all claims of constitutional error in state court convictions and requiring total exhaustion in a manner that "does not unreasonably impair the prisoner's right to relief." *Id*. at 522.

Although this case is the first occasion where the issue has been squarely presented to this Court, several justices of this Court have recognized the propriety of a stay of a timely filed petition when the AEDPA statute of limitations runs while the case is pending in federal court. *Duncan v. Walker*, 533 U.S. 167, 182 (2001) (Souter, J., concurring) ("nothing bars a district court from retaining jurisdiction pending complete exhaustion of state remedies"); *id*. at 182 (Stevens, J., concurring) ("in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies"); *Pliler v. Ford*, 124 S.Ct. 2441, 2448-49 (2004), (Ginsburg, J., dissenting); *id*. at p. 2450 (Breyer, J., dissenting) ("the other conditions that I raised in *Duncan* support the lawfulness of the Ninth Circuit's stay-and-abeyance procedure"); *see*

also id. at 2448 (O'Connor, J., concurring). With the exception of the United States Court of Appeals for the Eighth Circuit from which this appeal stems, all other circuit courts of appeals that have considered the issue approve of a stay of a timely-filed mixed petition under similar circumstances.

Literal application of the *Rose* mandate to dismiss Rhines' petition would contravene the reasoning of *Rose* and recent holdings of this Court protecting the rights of prisoners who file mixed petitions to return to federal court after presenting their claims to state court. *See Slack v. McDaniel*, 529 U.S. 473 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). Unwavering adherence to the rule of dismissal of a mixed petition without allowing a court the option of a stay would create a "trap for the unwary" prisoner and would result in the illogical bar of Rhines' federal habeas rights as untimely, where he allowed only one or two weeks to run on his AEDPA one-year limitation before coming to federal court. According to Department of Justice statistics, approximately 93% of petitions are filed pro se, approximately 57% of petitions are dismissed as containing unexhausted claims, and district courts took an average of nine months to dismiss claims on procedural grounds. As a practical matter, blind adherence to dismissal of mixed petitions without regard to the AEDPA one-year statute of limitations is untenable.

Permitting courts the discretion to stay the exhausted claims in a mixed petition is the best way to reconcile *Rose*, *Duncan*, the AEDPA, and principles in the Court's recent decisions of *Slack* and *Stewart*. As the district court did here, the stay can be conditioned on a petitioner's conscientious pursuit in state court of unexhausted claims and can be refused when the petitioner is abusing the

writ. Delay tactics may be blunted through a number of means, and very few habeas corpus petitioners have an incentive to delay their request for relief from perceived constitutional defects in their convictions or sentences.

ARGUMENT

I. Introduction.

Three years ago, in *Duncan v. Walker*, 533 U.S. 167 (2001), this Court held that a federal petition for a writ of habeas corpus does not constitute an "application for State post-conviction or other collateral review" under 28 U.S.C. § 2244(d)(2), capable of tolling the one year limitations period prescribed by 28 U.S.C. § 2244(d)(1). As a result, the limitations period continues to run even after the filing of a timely § 2254 federal habeas petition, and through the time a district court takes to determine whether the claims in the petition satisfy the pre-AEDPA "total exhaustion" rule of *Rose v. Lundy*, 455 U.S. 509 (1982). When the district court's determination of the petition's exhaustion status occurs after the limitations period has run, a "without prejudice" dismissal of a "mixed" petition under *Rose* results in the immediate and permanent termination of the petitioner's ability ever to secure federal review of his constitutional claims in a habeas corpus proceeding.

Recognizing the potential for unfairness occasioned by a *Rose* dismissal after the *Duncan* decision, many lower federal courts have sought a workable method of enforcing the total exhaustion rule without destroying a petitioner's ability to seek federal habeas corpus review once full exhaustion has been achieved. With the exception of the

United States Court of Appeals for the Eighth Circuit, every court of appeals that has resolved this issue has determined that staying a federal petition while state court proceedings are completed is an acceptable and effective means of fulfilling the mandate of *Rose* without unfair and unwarranted prejudice to the prisoner's right to have a federal court review the merits of his habeas claims. The question posed by this case is whether those courts are correct in finding flexibility in *Rose*'s rule sufficient to accommodate the changes wrought by the AEDPA and *Duncan*, or whether a petitioner like Rhines – who arrived in federal court with approximately 350 days remaining on his one-year limitations period – must suffer preclusive consequences never envisioned by *Rose* when a district court determines that his petition is mixed.

II. The District Court was correct to stay Rhines' petition pending exhaustion of his previously unexhausted claims.

A. A stay is the method by which a federal court with jurisdiction should make way for state court proceedings.

Acting consistently with the constitutional protection of habeas corpus, Congress has granted federal jurisdiction over claims of deprivation of constitutional rights arising out of state court convictions and sentences. 28 U.S.C. § 2254(a); U.S. CONST. Art. I, § 9. Congress has made exhaustion of claims in state court a procedural prerequisite to a grant of habeas corpus relief. 28 U.S.C. § 2254(b)(1). The exhaustion requirement is not, however, jurisdictional. *Granberry v. Greer*, 481 U.S. 129, 131 (1987); *Strickland v. Washington*, 466 U.S. 668, 679 (1984); *see* 28 U.S.C. § 2254(b)(1). Rather, the underpinnings of

the exhaustion rule arise out of state-federal comity interests. *Ex parte Royall*, 117 U.S. 241, 251 (1886); *see Strickland*, 466 U.S. at 679; *Rose*, 455 U.S. at 515-518.

This Court has made clear that a petitioner's failure to exhaust state remedies before invoking § 2254 cannot "bar the prisoner from ever obtaining federal habeas review," or "bar the prisoner from raising non-frivolous claims" that a federal court has "yet to review." *Slack v. McDaniel*, 529 U.S. 473, 487 (2000). Indeed, the object of the complete exhaustion rule is not to "'trap the unwary *pro se* prisoner.'" *Id.* at 487 (quoting *Rose*, 455 U.S. at 520). Rather, the exhaustion requirement controls *when* federal claims will be heard in § 2254 cases, not *whether* they will be heard.

This well-established understanding of the role of the exhaustion requirement in § 2254 cases reflects the federal courts' "virtually unflagging obligation to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-818 (1976); *see also Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 716 (1966) ("federal courts have a strict duty to exercise the jurisdiction that is conferred on them by Congress"); *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964); *McClellan v. Carland*, 217 U.S. 268, 281 (1910) ("When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction").

In cases where federal jurisdiction exists, district courts have both inherent authority and broad discretion to issue stays. *See Clinton v. Jones*, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own

docket"); *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (power to stay proceeding is "inherent in every court" retaining jurisdiction over an action). As this Court has recognized, "[u]nlike the outright dismissal or remand of a federal suit . . . an order merely staying the action 'does not constitute abnegation of judicial duty. On the contrary, it is a wise and productive discharge of it. There is only postponement of decision for its best fruition.'" *Quackenbush*, 517 U.S. at 721 (quoting *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959)); *see also Harrison v. NAACP*, 360 U.S. 167, 177 (1959) (abstention under which district court retains jurisdiction over federal action pending proceedings in state court does not "involve the abdication of federal jurisdiction, but only the postponement of its exercise").

This Court has endorsed federal court exercise of the inherent authority to stay a proceeding to avert an unfair statute of limitations problem. *See*, *e.g.*, *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) (as between staying or dismissing an action in favor of parallel state proceedings, "a stay will often be the preferred course, because it assures that the federal action can proceed without risk of a time bar"); *Deakins v. Monaghan*, 484 U.S. 193, 203 n.7 (1988) (approving stay because, "unless [the federal court] retained jurisdiction during the pendency of the state proceeding, a plaintiff could be barred permanently from asserting his claims in the federal forum by the running of the applicable statute of limitations").[4] Thus, the district

[4] The courts of appeals have likewise held that, when a timely-filed action suffers from a non-jurisdictional procedural defect, the appropriate course is to stay the action in order to avoid a time bar. *See*, *e.g.*, *Burris v. Farley*, 51 F.3d 655, 659 (7th Cir. 1995) (Easterbrook, J.) (Plaintiffs asserting employment discrimination claims and facing

(Continued on following page)

court's stay of Rhines' federal petition was within the court's inherent authority and consistent with the constitutional and congressional grant of habeas corpus jurisdiction.

B. The Eighth Circuit is alone in refusing to authorize a district court to stay a habeas corpus petition pending total exhaustion as a means of preserving the petitioner's ability to obtain federal review of his claims.

As Justice O'Connor recently observed, the stay-and-abeyance procedure employed by the district court "is not an idiosyncratic one." *Pliler v. Ford*, 124 S.Ct. 2441, 2448 (2004) (O'Connor, J., concurring). On the contrary, with the exception of the Eighth Circuit, the courts of appeals that have addressed the question are unanimous in recognizing a district court's authority to issue a stay to preserve a habeas petitioner's ability to obtain federal review when his initial petition is found to be mixed. *Nowaczyk v. Warden*, 299 F.3d 69, 79-80 (1st Cir. 2002); *Delaney v. Matesauz*, 264 F.3d 7, 13 n.5 (1st Cir. 2001); *Neverson v. Bissonnette*, 261 F.3d 120, 126 n.3 (1st Cir. 2001); *Zarvela v. Artuz*, 254 F.3d 374, 381 (2nd Cir. 2001), *cert. denied*, 534 U.S. 1015 (2001); *Crews v. Horn*, 360 F.3d

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exhaustion requirements "may protect themselves by filing . . . in time to satisfy the statute of limitations and asking the district court to suspend proceedings" until additional claims can be exhausted and added to the original Complaint); *Oubichon v. N. Am. Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973) ("in cases where the state agency has been bypassed, the district court should retain jurisdiction for a period sufficient to allow the employee to seek redress through the state agency").

146, 152 (3rd Cir. 2004); *Brewer v. Johnson*, 139 F.3d 491, 493 (5th Cir. 1998); *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002); *Tinker v. Hawks*, 172 F.3d 990, 991 (7th Cir. 1999); *Brambles v. Duncan*, 330 F.3d 1197, 1203 (9th Cir. 2003); *Kelly v. Small*, 315 F.3d 1063, 1070 (9th Cir. 2003); *see also Mackall v. Angelone*, 131 F.3d 442, 445 (4th Cir. 1998), *cert. denied*, 522 U.S. 1100 (1998) (noting without criticism district court order holding federal habeas case in abeyance to allow exhaustion of claims in state court); *Thompson v. Wainwright*, 714 F.2d 1495, 1498 (11th Cir. 1983) ("[A] district court having before it a habeas petition containing only exhausted claims may continue the case at the petitioner's request pending his presenting to the state courts other claims that are not included in the petition and have not been exhausted"); *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir. 2000) ("had the district judge dismissed the federal petition [containing unexhausted claims] we would have reversed. . . . [D]ismissal is not proper when that step could jeopardize the timeliness of a collateral attack").

As these courts have recognized, "while it usually is within a district court's discretion to determine whether to stay or dismiss a mixed petition, staying the petition is the only appropriate course of action when outright dismissal 'could jeopardize the timeliness of a collateral attack.'" *Crews*, 360 F.3d at 152 (quoting *Zarvela*, 254 F.3d at 380) (additional internal quotation marks omitted). As the Second Circuit has explained:

> [T]he enactment of AEDPA has altered the context in which the choice of mechanics for handling mixed petitions is to be made. Before AEDPA, there was no statute of limitations. In that context, Justice O'Connor could write, "Our

> interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each on to state court." With unlimited time, a prisoner could leisurely consider all possible federal claims and develop state court writs to exhaust them. After AEDPA, the prisoner has just one year. If he mistakenly comes to federal court too soon, *i.e.*, with one or more unexhausted claims, and does so late in the allotted one year, a dismissal of his mixed petition risks the loss of all of his claims because the one year limitations period will likely expire during the time taken to initiate state court exhaustion and return to federal court after exhaustion is completed.

Zarvela, 254 F.3d at 379 (quoting *Rose*, 455 U.S. at 510). Thus, "there is a growing consensus that a stay is required when dismissal could jeopardize the petitioner's ability to obtain federal review." *Nowaczyk*, 299 F.3d at 79.

It is hardly surprising that the overwhelming majority of courts of appeals have taken this approach. The exhaustion requirement as defined by this Court and codified in § 2254(b) was not designed to trap unwary prisoners and strip them of any opportunity for federal review. *Rose*, 455 U.S. at 520. Rather, it is, and has always been, a rule of timing.

Even the Eighth Circuit recognized this reality, albeit only in part. The Eighth Circuit did not rigidly require that the district court "must dismiss habeas petitions containing both unexhausted and exhausted claims," *Rose*, 455 U.S. at 522, where dismissal would preclude federal review even of Rhines' exhausted claims. *Rhines v. Weber*, 346 F.3d at 799. Instead, the Eighth Circuit remanded to

the district court, noting that its approach did not "preclude a petitioner from electing to forego further state court proceedings, in which case he would presumably proceed on all claims in the federal habeas action and contest any argument by respondent that the unexhausted claims are procedurally barred." *Id.* As will be shown, the Eighth Circuit drew the line in the wrong place.

C. Nothing in the AEDPA prohibits utilization of a stay-and-abeyance procedure.

Neither the text nor the underlying intent of §§ 2254(b) or 2244(d) restricts a federal district court's authority to stay a timely filed habeas petition to allow a petitioner to exhaust federal claims. As a textual matter, nothing in the AEDPA supports the Eighth Circuit rule denying district courts authority to stay mixed petitions. So long as the petition is filed before the one-year statute of limitations of § 2244(d)(1) runs, the stay-and-abeyance procedure satisfies that statutory requirement. Likewise, the stay-and-abeyance procedure does not contravene the requirement that a petition "shall not be *granted*" absent exhaustion of state remedies. 28 U.S.C. § 2254(b)(1) (emphasis added). Indeed, had Congress intended to adopt a rule like that of the Eighth Circuit, § 2254(b)(1) would have been written to expressly prohibit the *filing* of habeas petitions that do not satisfy the total exhaustion requirement to eliminate jurisdiction over any petition containing unexhausted claims. But Congress did not do so, and, as it is codified, the exhaustion requirement is a limitation only on the federal court's authority to grant relief and is not a limitation on federal court jurisdiction or inherent authority to issue a stay.

Furthermore, the stay-and-abeyance procedure is in no way inconsistent with congressional intent. In § 2244(d)(2), Congress specifically provided for unlimited tolling of the limitations period while state post-conviction or other state collateral proceedings are pending. 28 U.S.C. § 2244(d)(2); *Duncan v. Walker*, 533 U.S. 167, 176 (2001). Congress plainly had no intent to require the immediate adjudication of all federal claims irrespective of the time it might take for state collateral review proceedings to take their course. As this Court has recognized, "§ 2244(d)(2) balances the interests served by the exhaustion requirement and the limitation period," and "promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued." *Duncan*, 533 U.S. at 179. The stay-and-abeyance procedure is but a supplemental method of serving the same interests where a timely filed petition is found to contain both exhausted and unexhausted claims.

In this case, Rhines diligently complied with the AEDPA's limitations period, filing his initial habeas petition with at least 350 days remaining on his one year period. Nothing in the AEDPA suggests a congressional intent to deprive a prisoner like Rhines of the opportunity for habeas relief on the basis of a district court determination – made after the limitations period has expired – that one or more of his claims is unexhausted. If Congress had intended to preclude a district court from utilizing the stay-and-abeyance procedures adopted by the majority of courts of appeals, it could have so legislated. *Hartford Underwriters Ins. Co. v. Union*, 530 U.S. 1, 6 (2000); *see also Williams v. Taylor*, 529 U.S. 420, 431 (2000).

D. Stay-and-abeyance serves the objectives of *Rose v. Lundy*.

The *Rose* decision preceded enactment of the AEDPA by fourteen years. In *Rose*, this Court determined that "because the total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, we hold that a district court must dismiss petitions containing both unexhausted and exhausted claims." *Rose*, 455 U.S. at 522. In light of the AEDPA and this Court's ruling in *Duncan*, however, dismissal of Rhines' habeas petition does "unreasonably impair the prisoner's right to relief." *Id*. Dismissal of the mixed petition in this case would forever bar Rhines from exercising his right to have a federal court consider the merits of any part of his federal habeas petition. *See Duncan*, 533 U.S. at 181-182. Such an approach would do mischief with *Rose*, because strict adherence to that holding disserves and disregards the reasons behind both the *Rose* holding and the total exhaustion rule.

The total exhaustion rule was "principally designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Rose*, 455 U.S. at 518. In *Rose*, this Court explained the rationale behind the total exhaustion doctrine as follows:

> Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation,

> have had an opportunity to pass upon the matter."

Id. at 518 (quoting *Dar v. Burford*, 339 U.S. 200, 204 (1950)).

Dismissal of Rhines' petition, however, does not "defer action . . . until courts of another sovereignty . . . have had an opportunity to pass on the matter." *Id*. When a timely filed federal claim is endangered by a statute of limitations issue, the granting of a stay of a mixed petition is the way that a court should defer "action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers . . . have had an opportunity to pass on the matter." *Id.*; *see Wilton v. Seven Falls Co.*, 515 U.S. 277, 278 (1995); *Deakins v. Monaghan*, 484 U.S. 193, 202 (1988). Blind adherence to dismissal of mixed petitions after the passage of AEDPA and the *Duncan* decision does not defer action to state courts; rather, it deprives prisoners like Rhines of their statutory and constitutional right to present the merits of their claims at all in federal court.

The Court in *Rose* reasoned that a "rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error." *Rose*, 455 U.S. at 518-19. A stay of the exhausted claims in a federal petition likewise encourages, and indeed generally requires as a term of the stay, that the prisoner promptly file in state court to seek relief on any unexhausted claims. *See*, *e.g.*, J.A. at 136; *Zarvela v. Artuz*, 254 F.3d 374, 381 (2nd Cir. 2001), *cert. denied*, 534 U.S. 1015. However, blind adherence to the mandate of *Rose* to dismiss mixed petitions, after the *Duncan*

decision, does not allow "prisoners to seek full relief first from state courts." *Rose*, 455 U.S. at 518-19. Rather, such a dismissal deprives prisoners of their right to have a federal court consider a timely filed § 2254 petition on its merits if the petitioner had the misfortune of having his one-year AEDPA limitations period lapse before the district court determined the petition to be mixed.

The Court in *Rose* contemplated, as was the case in 1982, that a prisoner could return to state court and exhaust remaining issues without jeopardy to returning to federal court. Before AEDPA, the Court in *Rose* observed that dismissal of a mixed petition meant "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending *or resubmitting* the habeas petition to present only exhausted claims to the district court." *Id*. at 510 (emphasis added). Under the AEDPA as interpreted by *Duncan*, the dismissal of a timely filed federal habeas claim that had the one-year § 2244(d) limitation period lapse during its pendency does not permit the prisoner to pursue state court remedies without jeopardy to return to federal court and certainly does not permit "resubmitting" the federal habeas claim after dismissal. Indeed, the dismissal of such a timely filed federal habeas claim that had the one year lapse during its pendency would extinguish any opportunity for consideration of the merits of any claim, exhausted or unexhausted, in federal court.

Indeed, the various manners in which the holding is expressed within *Rose* indicated that the *Rose* Court never meant the total exhaustion rule to frustrate return to state court to exhaust claims or to bar federal court consideration of the merits of exhausted claims. At its conclusion, the *Rose* decision stated: "We hold that a district court

must dismiss habeas petitions containing both unexhausted and exhausted claims." *Id*. at 522. However, the Court at the outset of the *Rose* opinion indicated that the district court did not need to dismiss the petition, but could allow amendment of the petition by stating "that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Id*. at 510. Meanwhile, the plurality of the Court noted that "[a] total exhaustion rule will not impair [the interest of a prisoner in speedy federal relief] since he can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all claims." *Id*. at 520. (plurality opinion).

In sum, the underlying assumption in *Rose* – that a petitioner could have his claim dismissed, exhaust claims in state court, and then return to federal court thereafter with a fully exhausted petition – no longer holds true in the aftermath of *Duncan*. The requirement in *Rose* of dismissal of mixed petitions turned on the fact, true in 1982 and not so today, that there would be no jeopardy to any prisoner's right to later seek federal habeas relief by virtue of having a mixed federal petition exhausted. *See id*. at 510.

E. Stay-and-abeyance is fully consistent with this Court's decisions in *Duncan v. Walker* and *Pliler v. Ford*.

While the Court did not squarely address the propriety of a stay-and-abeyance procedure in either *Duncan* or *Pliler*, several Justices took the opportunity in those cases

to express their approval of such an approach as a means of facilitating exhaustion while avoiding unfairness. For example, in *Duncan*, Justice Stevens concurred in the Court's judgment, and expressly agreed with the Court's reading of § 2244(d)(2). *Duncan*, 533 U.S. at 182. Justice Stevens recognized the importance of providing appropriate "safeguards against the potential for injustice that a literal reading of § 2244(d)(2) might otherwise produce." *Id*. at 184. With regard to such safeguards, Justice Stevens noted:

> [A]lthough the Court's pre-AEDPA decision in *Rose* prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies. Indeed, there is every reason to do so when AEDPA gives a district court the alternative of simply denying a petition containing unexhausted but meritorious claims. *See* 28 U.S.C. § 2254(b)(2) (1994 ed., Supp. V), and when the failure to retain jurisdiction would foreclose federal review of a meritorious claim because of the lapse of AEDPA's 1 year limitations period.

Duncan, 533 U.S. at 182-183 (Stevens, J., concurring). Justice Souter, who joined the Court's opinion "in full," also joined Justice Stevens "in pointing out that nothing bars a district court from retaining jurisdiction pending complete exhaustion of state remedies." *Id.* at 182.

In *Pliler*, three more Justices noted the possibility of stay-and-abeyance as a solution to the difficulties produced by *Duncan*'s application in mixed petition cases. First, Justice O'Connor observed that the Court had not

been required to address the "propriety of the stay-and-abeyance procedure," but went on to note that "the procedure is not an idiosyncratic one; as Justice Breyer describes . . . seven of eight Circuits to consider it have approved stay-and-abeyance as an appropriate exercise of a district court's equitable powers." *Pliler*, 124 S.Ct. at 2448 (O'Connor, J., concurring).[5] Justice Breyer went further, describing the stay-and-abeyance procedure and asking, "What could be unlawful about this procedure?" *Id*. at 2449 (Breyer, J., dissenting). Justice Breyer also explained that, "after *Duncan*, the dismissal of [a mixed] petition will not simply give state courts a chance to consider the unexhausted issues . . . ; it often also means the permanent end of *any* federal habeas review," and that stay-and-abeyance "recognizes the comity interests that *Rose* identified, and it reconciles those interests with the longstanding constitutional interest in making habeas corpus available to state prisoners." *Id*. at 2450 (Breyer, J., dissenting) (emphasis in original). Justice Ginsburg registered the view that resolution of the propriety of stay-and-abeyance is "pivotal," and noted that "[a] related question also postponed by the Court's opinion is whether

[5] Justice O'Connor, in her concurrence in *Pliler*, noted that an affirmatively misled petitioner, whether by the court or the state, should be entitled to equitable tolling of his limitation period. *Pliler*, 124 S.Ct. at 2448 (O'Connor, J., concurring); *see also Duncan*, 533 U.S. at 183 (Stevens, J., concurring.) In this case, Rhines filed a Motion to Toll Time and the state responded by advising that the Motion to Toll Time was unnecessary and that Rhines was "in no danger of losing his right to file for federal habeas corpus relief" because only eight or fourteen days had run in his one year AEDPA period. J.A. 33. The district court agreed that the Motion to Toll Time was unnecessary. J.A. 35. At a minimum, if this Court decided not to approve the stay-and-abeyance procedure, the Court should equitably toll the one year AEDPA period as to Rhines.

the solution in *Rose* . . . to a mixed petition – dismissal without prejudice – bears reexamination in light of the one-year statute of limitations . . . " *Pliler*, 124 S.Ct. at 2448 & n.2 (Ginsburg, J., dissenting). While concurring in the Court's decision to remand in *Pliler*, Justice Stevens, joined by Justice Souter, "fully agree[d] with the views expressed by Justice Ginsburg and Justice Breyer (dissenting opinions)." *Pliler*, 124 S.Ct. at 2448 (Stevens, J. concurring).

There is nothing in either *Duncan* or *Pliler* that precludes a stay as a means for a district court to deal with the situation where the one year AEDPA statute of limitations runs during the pendency of a timely filed mixed petition. Indeed, the only justices who have reached the issue in *Pliler* and *Duncan* have indicated that a stay would be appropriate under these circumstances.

III. Stay-and-abeyance is a necessary safeguard against the potential for unfairness occasioned by *Duncan*.

A. The need for a safe and effective mechanism is acute.

In two recent cases, this Court concluded that Congress through the AEDPA did not want to deprive state prisoners of federal habeas corpus review. In *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), this Court held that a federal habeas petition filed after the initial filing was dismissed as premature, should not be deemed a "second or successive" petition barred by § 2244, lest "dismissal . . . for technical procedural reasons . . . bar the prisoner from ever obtaining federal habeas review." *Id*. at 645. In *Stewart*, this Court reasoned:

> "But none of our cases expounding this doctrine [from *Rose* of dismissal of mixed petitions] have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition.
>
> . . . [The prisoner's habeas] 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 . . . 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.

Id. at 644-45 (citations omitted).

Similarly, in *Slack*, this Court held that a federal habeas petition filed after dismissal of an initial petition for nonexhaustion should not be deemed a "second or successive petition," lest "the complete exhaustion rule" becomes a "trap" for the "unwary pro se prisoner." *Slack*, 529 U.S. at 487 (quoting *Rose*, 455 U.S. at 520). The Court's concern about avoiding making habeas law a trap for the unwary *pro se* litigant is valid. As Justice Breyer noted in both *Duncan* and *Pliler*:

- 93% of habeas petitioners are *pro se*.
- 63% of all habeas petitions are dismissed.

- 57% of those habeas petitions are dismissed for failure to exhaust.
- District Courts took an average of 268 days to dismiss petitions on procedural grounds.

Pliler, 124 S.Ct. at 2450 (Breyer, J., dissenting); *Duncan*, 533 U.S. at 186 (Breyer, J., dissenting); *see U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 17 (1995) at 23-24.[6]

Rhines initially was a *pro se* petitioner. His federal habeas petition was before the United States District Court for the District of South Dakota for slightly in excess of sixteen months before the court ruled it to be a mixed petition. Rhines' experience with the AEDPA limitation running during the pendency of his habeas petition probably is not unusual. What might be unusual in Rhines' case is how diligent he was in timely filing the federal habeas petition, by Respondent's own admission, when only 8 to 14 days had run on his AEDPA limitation period. *See* J.A. 32-33.

In addition, the question of whether a claim is exhausted often can be difficult for lawyers and judges, let alone *pro se* habeas corpus petitioners to discern. *See, e.g., Evicci v. Commissioner of Corrections*, 266 F.3d 26, 28 (1st Cir. 2000) (vacating district court's dismissal for exhaustion, and remanding for further proceedings); *Morgan v. Bennett*, 204 F.3d 360, 369-372 (2nd Cir. 2000) (disagreeing with district court's conclusion that claim had not been

[6] A copy of this publication is at http://www.ojp.gov/bjs/pub/pdf/fhcrcscc.pdf. The publication was compiled in 1995 by the Department of Justice, and apparently has not been updated.

adequately presented to state courts; remanding for merits consideration); *Bear v. Boone*, 173 F.3d 782, 784-785 (10th Cir. 1999) (reversing district court's nonexhaustion ruling and remanding for merits review). Indeed, in Rhines' case, Respondent asserted that 12 of the approximately 35 individual claims in Rhines' Amended Petition were not exhausted, yet the district court found that four of those challenged claims were exhausted. J.A. 128-133.

B. Stay-and-abeyance is fair and workable.

As this Court has noted, a "prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims." *Rose*, 455 U.S. at 520 (plurality decision); *see also Pliler*, 124 S.Ct. at 2446. ("It is certainly the case that not every litigant seeks to maximize judicial process"). Rhines faces a death sentence and has mixed goals of wanting quick resolution of constitutional claims that may alter his conviction or sentence, but desiring to delay the carrying out of the ultimate sentence. However, the vast majority of prisoners who find themselves in the dilemma created by the running of the AEDPA limitation during the pendency of their federal case have no incentive to delay presentation of habeas corpus claims. According to Department of Justice statistics, there were 58,257 habeas corpus filings in 2000, 274 of which involved a petitioner facing the death penalty. *U.S. Dept. of Justice, Bureau of Justice Statistics, Special Report, Prisoner Petitions filed in U.S. District Courts, 2000*, *with Trends 1980-2000* at p. 3 (Table 2).[7] Thus, only .47% of those habeas petitioners

[7] This report is available through http://www.ojp.usdoj.gov/bjs/ and is entitled "Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000."

(approximately one out of every 213) are under a penalty of death. Specifically for the federal habeas filings arising out of state court convictions, there were 46,371 filings in 2000, of which 259 involved death penalty sentences. *Id*. This is roughly .558% of the filings, or approximately one out of every 179 petitioners.

Moreover, a court has many ways to deal with a petitioner who is seeking delay. By way of illustration, in this case, the district court required as a term of the stay that Rhines file his state habeas corpus petition within sixty days of the court's order and that Rhines return to federal court within sixty days of completion of his second habeas corpus petition. J.A. 136. These conditions on such a stay are not unusual. *See, e.g.*, *Zarvela*, 254 F.3d at 380-81; *Palmer*, 276 F.3d at 781.

Indeed, through a discretionary stay, federal district courts have the flexibility to prevent abuse of the writ or vexatious litigation. Although the granting of a stay ordinarily would be appropriate when a post-exhaustion filing otherwise would be time-barred, district courts may deny a stay or permission to amend when a petitioner has not exercised reasonable diligence. *See Zarvela*, 254 F.3d at 380-81. The district court may revoke the stay if the petitioner does not act diligently or consistent with the stay. *See Palmer*, 276 F.3d at 781. District courts may condition or limit not only their stays, but also what later amendments to the federal habeas petition that they will allow. For example, the district court can grant a stay but order that the prisoner present only fully exhausted claims in his next federal pleading. *See Slack*, 529 U.S. at 489. In granting a stay, a district court has broad discretion to set the terms, because the stay procedure is rooted in the equitable power and the sound discretion of the court,

allowing for a case-by-case approach that precludes or deters abusive tactics without foreclosing federal review for diligent and good-faith litigants.

This Court already has addressed the concern that prisoners could abuse the writ through successive petitions. In *Slack*, the Court stated:

> The State expresses concern that, upon exhaustion, the prisoner would return to federal court but again file a mixed petition, causing the process to repeat itself. In this manner, the State contends, a vexatious litigant could inject undue delay into the collateral review process. To the extent the tactic would become a problem, however, it can be countered without upsetting the established meaning of a second or successive petition.
>
> First, the State remains free to impose proper procedural bars to restrict repeated returns to state court for post-conviction proceedings. Second, provisions of AEDPA may bear upon the question in cases to which the Act applies . . . Third, the Rules of Civil Procedure, applicable as a general matter to habeas cases, vest the federal courts with due flexibility to prevent vexatious litigation. As Slack concedes, in the habeas corpus context it would be appropriate for an order dismissing a mixed petition to instruct an applicant that upon his return to federal court he is to bring only exhausted claims. *See* Fed. Rules Civil Proc. 41(a) and (b). Once the petitioner is made aware of the exhaustion requirement, no reason exists for him not to exhaust all potential claims before returning to federal court. The failure to comply with an order

> of the court is grounds for dismissal with prejudice. Fed. Rule Civ. Proc. 41(b).

Slack, 529 U.S. at 488-89.

C. Rejection of stay-and-abeyance as a safeguard would contravene this Court's longstanding commitment to ensuring that prisoners receive one full and fair opportunity to seek habeas relief.

The writ of habeas corpus is guaranteed by the United States Constitution. Although the scope of the writ has changed over the years, the importance of its continuing availability is not subject to genuine debate. As Justice Frankfurter wrote more than half a century ago:

> The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for such detention. Of course this does not mean that prison doors may readily be opened. It does mean that explanation may be exacted why they should remain closed. It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world. "The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom." Mr. Chief Justice Chase, writing for the Court, *Ex parte Yerger*, 8 Wall., 85, 95. Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating

> factors between our democracy and totalitarian governments.

Brown v. Allen, 344 U.S. 443, 512 (1953) (opinion of Frankfurter, J.). This Court echoed these sentiments more recently, observing that "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996).

There is no reason to believe that Congress meant, in the AEDPA or in any other statute, to revoke the right to federal habeas corpus relief for prisoners who timely file a habeas corpus petition which is subsequently determined to be mixed. Statistically, the majority of *pro se* litigants can be expected to file mixed petitions. As Justice Stevens noted, however, "Congress could not have intended to bar federal habeas review for petitioners who invoke the court's jurisdiction within the 1-year interval prescribed by AEDPA." *Duncan*, 533 U.S. at 183 (Stevens, J., concurring).

CONCLUSION

Petitioner Rhines requests that the judgment of the United States Court of Appeals for the Eighth Circuit in this case be reversed and that the Court hold that the

district court did not err in granting a conditional stay of Rhines' federal habeas corpus petition.

Respectfully submitted,

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