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 REPLY BRIEF ON THE MERITS

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QUESTION PRESENTED

Capital Case

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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REPLY ARGUMENT

The core issue for resolution in this case is how best to administer the "total exhaustion" rule of *Rose v. Lundy*, 455 U.S. 519 (1982), in light of 28 U.S.C. § 2244(d) and *Duncan v. Walker*, 533 U.S. 167 (2001), neither of which existed when *Rose* was decided. The Brief of Respondent on the Merits (hereinafter "State's brief") mischaracterizes the stay-and-abeyance procedure and grossly overstates the procedure's impact on habeas corpus proceedings. The State's brief ultimately advocates a punitive rule never contemplated in *Rose*, *Duncan* or the AEDPA of complete forfeiture of either federal habeas review or unexhausted claims. The State's proposed rule runs contrary to the writings of justices of this Court that have addressed the issue and every court of appeals (other than the Eighth Circuit) that has decided the issue.

I. STAY-AND-ABEYANCE IS CONSISTENT WITH ROSE.

A. Stay and abeyance serves the underlying principles of *Rose*.

In opposing the use of a stay-and-abeyance procedure in federal habeas cases, the State makes two interrelated contentions: (a) that stay-and-abeyance "seeks not only to eviscerate the statute of limitations, but also to undermine the total exhaustion rule of *Rose,"* and (b) that this purported evisceration of *Rose* occurs because stay-and-abeyance radically departs from *Rose* and introduces opportunities for delay and piecemeal litigation that did not exist before. *State's Brief* at 14, 23-25. Neither of these contentions is accurate.

First, nothing petitioner Rhines has done in the lower courts or argued to this Court can fairly be described as advocating evisceration of the limitations period or elimination of the exhaustion requirement. Rhines was more diligent than most in getting to federal court, by filing his petition when "fewer than three weeks had run on the one-year limitations period." *State's Brief* at p. 8; J.A. 33. Additionally, Rhines sought and obtained the stay-and-abeyance order from the district court not as a means of somehow dodging his exhaustion obligations, but for the express purpose of fully complying with them, just as *Rose* requires. Rhines then filed a state court petition within the 60 day period allotted by the district court. J.A. 139-144. Thus, Rhines' conduct in the lower courts gives no indication that he is pursuing the agenda ascribed to him by the State's brief.

Second, and more importantly, stay-and-abeyance procedure entails nothing approaching the sort of radical departure from *Rose* about which the State warns but never describes in detail. In fact, with one exception, the stay-and-abeyance procedure employed by the district court in this case follows precisely the course taken by lower federal courts since *Rose* was decided, and does so for precisely the same reason: facilitation of "total exhaustion." The lone exception – made necessary by 2244(d) and *Duncan*, neither of which were foreseen in 1982 – is that stay-and-abeyance involves the administrative suspension of habeas proceedings, rather than the dismissal without prejudice of those proceedings. In every other way, stay-and-abeyance and strict application of *Rose* are identical. In each, a mixed petition is not permitted to proceed to adjudication; in each, the prisoner is instead afforded the option of returning to state court to exhaust remaining

remedies; and in each the prisoner is rightly spared the unnecessarily punitive forfeiture of federal review of his unexhausted claims when he commits the procedural offense of filing a mixed petition.[1]

The total exhaustion principle of *Rose* is not 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 exhaustion principle as applied in *Rose* is based on comity considerations that "one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant on the litigation, have had an opportunity to pass on the matter." *Rose*, 455 U.S. at 518 (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)). Stay-and-abeyance, particularly when conditioned on a requirement as here that a Petitioner return within sixty days to exhaust claims in state court, serves comity interests and rigorously enforces the exhaustion requirement. Indeed, a stay is the proper way for a district court to "defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent power . . . pass upon the matter." *Rose*, 455 U.S. at 518; s*ee Wilton v. Seven Falls Co.*, 515 U.S. 277, 278 (1995); *Deakins v. Monaghan*, 484 U.S. 193, 202 (1988); *see also Lambrix v. Singletary*, 520 U.S. 518, 521, 524 (1997) (taking notice without disapproval of a federal court's use of abeyance procedure).

[1] The State's suggestion that ascertaining the exhaustion status of federal habeas claims is an endeavor devoid of complexity or nuance, *see State's Brief* at 33, is belied by this very case. As the State itself explains: "The State contended there were twelve unexhausted issues; Petitioner stipulated four were unexhausted; and the court found four additional issues unexhausted." *State's Brief* at 8-9; J.A. 128-133.

B. Even the State agrees that *Rose* does not mandate dismissal of Rhines' Petition.

Despite opposing stay-and-abeyance, the State acknowledges that *Rose* does not mandate dismissal of Rhines' federal habeas corpus petition. "The State . . . does not argue that the entire case must be dismissed, *unless* Petitioner refuses to dismiss unexhausted claims." *State's Brief* at p. 10 (emphasis in original); *see also State's Brief* at p. 12 ("Petitioner is not presently in danger of having his case dismissed. . . . Petitioner is thus in no danger of losing all federal remedies, although he may be in danger of losing some issues that have not been previously exhausted.").[2]

The State must concede that *Rose* does not require dismissal of Rhines' petition because *Rose*, after all, adopted the total exhaustion rule expressly to "leav[e] 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." *Rose*, 455 U.S. at 510.[3] After *Duncan*, the

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[2] The State also rewrites the question presented as being "whether a federal court must, under *Rose v. Lundy*, 455 U.S. 509 (1982) and *Duncan v. Walker*, 533 U.S. 167 (2001), dismiss a habeas corpus petition containing both exhausted and unexhausted issues (a "mixed petition"), *unless the Petitioner dismisses the unexhausted issues*." *State's Brief* at p. 4 (emphasis added); *see also State's Brief* at i (stating the question presented in a way that presumes that "the state prisoner may now pursue all of his exhausted claims in federal court").

[3] *Rose* made clear that the total exhaustion rule was to promote comity without "unreasonably impair[ing] the prisoner's right to relief." *Rose*, 455 U.S. at 522. The plurality in *Rose* reinforced that it was the petitioner who had the option "to amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims." *Id*. at 521 (plurality opinion).

only way to preserve that choice to a prisoner like Rhines is through stay-and-abeyance. There is nothing in the AEDPA or in *Duncan* that suggests that Congress or this Court intended to take that choice away from a petitioner like Rhines.

II. STAY-AND-ABEYANCE IS NOT INCONSISTENT WITH AEDPA OR *DUNCAN*.

Congress in 28 U.S.C. § 2254(b) provided:

> (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 has exhausted the remedies available in the courts of the State . . .

28 U.S.C § 2254(b) (emphasis supplied).

Congress did *not* provide that a mixed petition shall not be filed, cannot be held in abeyance, or shall be dismissed, or that the federal court shall have no jurisdiction over a mixed petition.[4] The wide acceptability of stay-and-abeyance in the

[4] Congress in the AEDPA loosened the exhaustion rule by providing in § 2254(b)(2): "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). As Justice Stevens has written, there is "every reason" to invoke stay and abeyance "when AEDPA gives a district court the alternative of simply denying a petition containing unexhausted but nonmeritorious 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 v. Walker*, 533 U.S. 167, 183 (2001) (Stevens, J., concurring).

courts of appeals signals that the procedure is not inconsistent with the AEDPA or with *Rose*.[5]

Stay-and-abeyance does not supplant the tolling provision of the AEDPA's one year statute of limitations; rather, stay-and-abeyance only applies when a petitioner, such as Rhines here, has met the responsibility of timely filing within the one year AEDPA limitation period. Indeed, it would be wholly inconsistent with the AEDPA one year statute of limitations to bar claims filed by a petitioner like Rhines. Rhines, by the State's own admission, filed his federal habeas corpus petition when only eight to fourteen days had run in his one year period. J.A. 33, *see State's Brief* at p. 8. After Rhines filed his Motion to Toll Time to the district court, the State responded that the motion was unnecessary because "Petitioner is in no danger of losing his right to file for federal habeas corpus relief" due to his timely AEDPA filing. J.A. 33. The district court, on the State's request, denied Rhines' Motion to Toll Time as "unnecessary." J.A 35. Under those circumstances, Rhines satisfied the AEDPA's one year statute of

[5] In Petitioner's Brief on the Merits, Petitioner Rhines cited thirteen decisions from courts of appeals requiring or allowing stay-and-abeyance, including those in the first, second, third, fourth, fifth, sixth, seventh, ninth, and eleventh circuits. *Petitioner's Brief on the Merits* at pp. 13-14. Additional court of appeals' decisions approving of stay-and-abeyance or similar procedures also include *Griffin v. Rogers*, 308 F.3d 647, 651-52 (6th Cir. 2002); *Newell v. Hanks*, 283 F.3d 827, 834 (7th Cir. 2002); *Anthony v. Cambra*, 236 F.3d 568, 574 (9th Cir. 2000); *Calderon v. United States District Court*, 134 F.3d 981, 986-87 (9th Cir. 1998). The United States Court of Appeals for the Eighth Circuit remains the lone court of appeals that has considered the issue and that has declined to approve of stay-and-abeyance. *Rhines v. Weber*, 346 F.3d 799 (8th Cir. 2003), *cert. granted*, 124 S.Ct. 2905 (2004); *Akins v. Kenney*, 341 F.3d 681 (8th Cir. 2003).

limitation, and there is no reason why stay-and-abeyance under such circumstances is inconsistent with the AEDPA tolling provision or *Duncan*.

The State's suggestion that suspending the running of the limitations period for time spent exhausting state court remedies is inconsistent with Congress' desire to "expedite the habeas process," *State's Brief* at 23, is itself at odds with § 2244(d)(2). Congress in § 2244(d)(2) expressly authorized tolling of the limitations period as a means of furthering the exhaustion requirement, *see Duncan*, 533 U.S. at 178, and did so without regard to whether the state court exhaustion litigation takes the form of a first, second, or subsequent application, so long as it is "properly filed." The class of habeas petitioners affected by the Court's decision in this case are those petitioners presenting claims for which a state remedy actually remains available,[6] as opposed to those petitioners whose claims were not fairly presented to the state courts but are nevertheless technically exhausted due to a procedural bar from state court review. The group of habeas petitioners affected by this Court's ruling therefore could have properly filed applications for state court relief, and in so doing secure the tolling available via § 2244(d)(2).

The State mistakenly asserts that stay-and-abeyance "is a procedure manufactured by lower federal courts to neutralize *Duncan's* holding," *State's Brief* at 12, when, in actuality, the stay-and-abeyance procedure originates from the inherent authority of courts to issue stays and is

[6] In Rhines' case, South Dakota allows a second state habeas action under certain circumstances where there has been ineffective assistance of habeas counsel appointed by the state court in the first habeas corpus case. *Jackson v. Weber*, 637 N.W.2d 19, 22-24 (S.D. 2001).

endorsed in concurring opinions of two justices who formed part of the majority in *Duncan*. Justice Souter, joining the Court's opinion "in full" in *Duncan*, pointed out in his concurrence "that nothing bars a district court from retaining jurisdiction pending complete exhaustion of state remedies." *Id*. at 182 (Souter, J., concurring). Justice Stevens, in his concurrence in *Duncan*, wrote that "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." *Id*. at 182-83 (Stevens, J., concurring). The only justices who reached the issue of stay-and-abeyance in *Duncan* approved of the procedure. Stay-and-abeyance is not inconsistent with *Duncan*.

III. THE STATE HAS MISCHARACTERIZED STAY AND ABEYANCE AND ITS EFFECTS.

The State's main practical attack on stay-and-abeyance is that it will create delay. *State's Brief* at 23, 25, 27. The State labors under the misapprehension that prisoners who, rightly or wrongly, believe themselves entitled to habeas corpus relief would favor delay. 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 v. Ford*, 124 S.Ct. 2441, 2446 (2004) ("It is certainly the case that not every litigant seeks to maximize judicial process").

The State's concern about delay is illusory. Because stay-and-abeyance does nothing more than to afford a habeas petitioner the same opportunity to exhaust previously unexhausted claims that has been available under *Rose,* the State's predictions of interminable delays and

evisceration of §2244(d)'s limitations period are inaccurate. Any delays occasioned by stay-and-abeyance are no different from the delays inherent in a dismissal without prejudice under *Rose*. Under either procedure, the federal proceedings stop to permit the state exhaustion proceedings to run their course.

Moreover, the stay-and-abeyance rules that have developed outside the Eighth Circuit effectively preempt abusive delays by empowering district courts to set and enforce deadlines for initiating state court exhaustion proceedings and returning to federal court once those proceedings are concluded.[7] Indeed, the district court in this case gave Rhines sixty days within which to file his state court habeas petition, and Rhines complied with this order. J.A. 136, 139-144. The State's Brief neither acknowledges this important feature of stay-and-abeyance procedure, nor offers any evidence as to how it might be insufficient to curb unreasonable exhaustion-related delays.

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[7] *See*, *e.g.*, *Crews v. Horn*, 360 F.3d 146, 154 (3rd Cir. 2004); *Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002) (instructing district court to condition stay on petitioner's seeking state court relief within ninety days); *Kelly v. Small*, 315 F.3d 1063, 1069-1071 (9th Cir. 2002), *cert. denied*, 538 U.S. 1042 (2003) (following *Zarvela v. Artuz*, *infra*, and finding thirty days ample time for petitioner to return to state court); *Zarvela v. Artuz*, 254 F.3d 374 (2nd Cir. 2001) (amended op.) (district court should condition stay on petitioner's returning to state court within thirty days and returning to federal court within thirty days after exhaustion); *Garraway v. Phillips*, 2004 WL 1088097 (S.D.N.Y. May 14, 2004) (applying *Zarvela*, staying petition conditioned on petitioner returning to state court within thirty days); *Faraci v. Grace*, 331 F.Supp.2d 362 (E.D.Pa. Aug. 16, 2004) (requiring petitioner to return to state court within thirty days to take advantage of the stay).

In asserting that permitting stay-and-abeyance will somehow encourage prisoners to bypass state court and file directly in federal court, the State likewise fails to acknowledge AEDPA's modification of 28 U.S.C. § 2254(b)(2), which permits district courts to deny unexhausted habeas claims on their merits. Given the possibility of outright dismissal with prejudice, it is unlikely that many rational prisoners will view the submission of wholly unexhausted federal habeas petitions as a worthwhile gamble, especially when they stand to gain nothing more than what is available to them through the proper filing of an application for state post-conviction relief. *See* § 2244(d)(2).

With the State's mischaracterizations and overstatements about the operation and effect of stay-and-abeyance procedure fully exposed, it becomes clear that the State is not actually advocating a *defense* of *Rose* or the exhaustion requirement against *erosion* by stay-and-abeyance procedure. Rather, the State is pursuing the *creation* of an unprecedented, one-way turnstile that would prevent prisoners, once in federal court, from returning to state court for any reason without forfeiting the right to federal review. *See State's Brief* at 23-24. Such a rule would be far beyond *Rose*, which has always been understood to permit dismissal for the purpose of pursuing available state court remedies, then returning to federal court. *See Rose*, 455 U.S. at 518 (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)) ("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' "); *see also Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992) ("purpose of exhaustion is not to create a

procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum"). The State's proposed rule is far less about protecting the exhaustion requirement against attack by delay-minded habeas petitioners than it is about creating a penalty for filing a mixed petition – complete forfeiture of either unexhausted claims or federal habeas review – that is grossly disproportionate to the offense.[8] If anything is fundamentally incompatible with *Rose*, this is it.

It is important to place the State's predictions of delay, disruption and evisceration of the federal limitations period in proper context. While the submission of mixed petitions is a relatively common occurrence in the federal district courts, the proportion of those cases in which stay-and-abeyance, if approved by this Court, will be a realistic option is quite small. This is so because, in the vast majority of cases, there is no remaining state court remedy available to the petitioner by the time he arrives in federal court, either because the state limitations period has expired,[9] or the relevant state rules prevent the filing of a

[8] If the State's rule were adopted, a petitioner who, through no fault of his own, discovers a winning claim while in federal court would have no means of exhausting an available state remedy for that claim without simultaneously forfeiting the ability ever to seek federal habeas relief, in the event the state court improperly rejected the new claim. Such a rule is unnecessarily rigid, and serves no legitimate purpose.

[9] *See*, *e.g.*, Ala. R. Crim. P. 32.2(c) (jurisdictional one-year limitations period triggered by issuance of certificate of judgment by Court of Criminal Appeals or expiration of time in which direct appeal could have been filed); Ariz. Crim. P. Rule 32.4(c) (in capital cases, application must be filed within 120 days of notice of post-conviction relief; 60 day extension available for good cause); Ark. R. Crim. P. 37.2(c) (application for post-conviction relief in non-capital case must be filed within 90 days of entry of judgment or 60 days of issuance of appellate mandate); Ark. R. Crim. P. 37.5(b) and (e) (application for post-conviction relief in

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capital case must be filed within 118 days of issuance of mandate following affirmance on direct appeal); Fla. R. Crim. P. 3.851 ("Any motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner within 1 year after the judgment and sentence become final"); Ga. Code Ann. §9-14-42 (four year limitations period for seeking post-conviction relief in non-capital felony cases); Idaho Code §19-2719 (legal or factual challenges to death sentence must be filed within 42 days of judgment imposing sentence); Illinois Code §122-1(c) (subject to limited exceptions, petitions for post-conviction relief must be filed within six months of finality on direct appeal or, where no appeal is taken, within three years of date of conviction); Ky R. Crim. P. 11.42(10) (application for post-conviction relief must be filed within three years after judgment becomes final subject to limited exceptions for newly discovered evidence or retroactive new rules); La. Code Crim. Proc. Ann. art. 930.8 (two year limitations period for non-capital cases); Mo. R. Crim. P. 29.15(b) (motion for post-conviction relief must be filed within 90 days of issuance of mandate on direct appeal or, where no appeal is taken, within 180 days of prisoner's delivery to custody); Mont. Code Ann. §46-21-102 (one year limitations period with exception for newly discovered evidence establishing innocence); N.C. Gen. Stat. §15A-1415(a) (120 day limitations period for capital cases, triggered by finality on direct review or appointment of post-conviction counsel); Ohio Rev. Code Ann. §2953.21(A)(2) (petition for post-conviction relief must be filed within 180 days of delivery of trial transcript to appellate court or, if no appeal taken, within 180 days after expiration for time to appeal); Okla. Stat. tit. 22, §1089D.1 (in capital cases, motion for post-conviction relief must be filed within 90 days of filing of initial or reply brief on direct appeal); Pa. Cons. Stat. Ann. §9545(b) (subject to limited exceptions, any petition for post-conviction relief, including a second or successive petition, must be filed within one year of date on which conviction becomes final; any claim brought under an exception must be filed within 60 days of date on which claim became available); Tenn. Code Ann. §40-30-102(a) and (b) (one year jurisdictional limitations period, subject to exceptions for new retroactive rules, actual innocence, or invalidation of prior conviction used to enhance current sentence, running from date of final action by state court on direct appeal or, if no appeal is taken, date judgment became final); Tex. Code Crim. Proc. art. 11.071 §4(a) (in capital cases, absent showing of cause, application for state habeas relief "must be filed in the convicting court not later than the 180th day after the date the convicting court appoints counsel . . . or not later than the 45th day after the date the state's original brief is filed on direct appeal . . . whichever date is later"); Va. Code Ann.

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second application for post-conviction relief.[10] In these

§ 8.01-654.1 (in capital cases involving indigent prisoners, state habeas petition must be filed within 120 days of appointment of counsel); Va. Code Ann. § 8.01-654(A)(2) (in non-capital cases, state habeas petition "shall be filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later").

[10] *See*, *e.g.*, Ala. R. Crim. P. 32.2(b) (successive application for post-conviction relief on grounds not previously raised must be denied absent jurisdictional defect in original trial, or showing of cause and miscarriage of justice); Ariz. Crim. P. Rule 32.2 (successive applications for post-conviction relief prohibited absent satisfaction of limited exceptions); Ark. R. Crim. P. 37.2(b) (grounds for post-conviction relief not raised in initial application for post-conviction relief "may not be the basis for a subsequent petition" absent showing that they were not "intelligently and understandingly waived"); *In re Robbins*, 18 Cal.4th 770, 780-781 (1998) (California petitioner must establish absence of, or good cause for, substantial delay to secure review of second or successive claim for post-conviction relief); Ga. Code Ann. §9-14-51 (second or subsequent petition for state habeas corpus relief barred absent finding that "grounds for relief asserted therein . . . could not reasonably have been raised in the original or amended petition"); Idaho Code §19-2719(5)(a) (successive petitions for post-conviction relief barred absent satisfaction of strict requirements); Illinois Code §122-1(f) (successive petitions for post-conviction relief barred absent showing of cause and prejudice); *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997) (issues which were or could have been raised in a first application for post-conviction relief may not be presented in a successive application); La. Code Crim. Proc. Ann. art. 930.4 (barring repetitive petitions absent satisfaction of limited exceptions); Miss. Code Ann. §99-39-27(9) (barring second or successive applications for post-conviction relief absent showing of intervening new law or newly discovered evidence); Mo. R. Crim. P. 29.15(1) ("The circuit court shall not entertain successive motions [for post-conviction relief]"); Mont. Code Ann. §46-21-105(b) (barring successive applications for post-conviction relief absent showing that grounds could not reasonably have been raised in first application); N.C. Gen. Stat. §15A-1419 (barring successive motions for appropriate relief absent satisfaction of limited exceptions); Ohio Rev. Code Ann. §2953.23 (barring second or successive petitions for post-conviction relief absent showing of both cause and actual innocence of offense or, in capital cases, eligibility for death sentence); Okla. Stat. tit.

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cases, any claims not previously presented to the state courts provide no occasion for stay-and-abeyance; rather, such claims are simply deemed to be procedurally defaulted, and either denied on that basis, or considered on their merits after a showing of "cause and prejudice" or "miscarriage of justice." *See*, *e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 749 (1991).

In the small percentage of cases in which a state court is actually willing to entertain a second or subsequent application for post-conviction relief by a prisoner who has already moved on to federal court, there is no compelling federal interest in obstructing access to that review. The State repeatedly invokes the importance of the total exhaustion rule and the limitations period, but fails to acknowledge that both exist not to further federal courts' interest in the speedy disposition of habeas cases, but to further the states' interest in comity, federalism and finality. *See*, *e.g.*, *Duncan v. Walker*, 533 U.S. 167, 179 (2001) ("The 1-year limitation period of § 2244(d)(1) quite

22, §1089D.2. ("All grounds for relief that were available to the applicant before the last date on which an application could be timely filed not included in a timely application shall be deemed waived"); Tenn. Code Ann. §40-30-102(c) ("In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment. If a prior petition has been filed which was resolved on the merits by a court of competent jurisdiction, any second or subsequent petition shall be summarily dismissed"); Tex. Code Crim. Proc. art. 11.071 §5 (in capital cases, second or subsequent application for state habeas relief permitted only on showing that "factual or legal basis for the claim was unavailable on the date the applicant filed the previous application," or that no reasonable juror would have found applicant guilty of underlying offense or eligible for sentence of death); Va. Code Ann. § 8.01-654(B)(2) ("No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition").

plainly serves the well-recognized interest in the finality of state court judgments"); *Rose*, 455 U.S. at 518 (citing *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490-491 (1973)) ("The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings"). When a state has indicated, through its rules or decisions, or through other means, that its courts are willing and able to consider claims that might otherwise be deemed late or successive, a federal mandate requiring a prisoner to avail himself of that remedy only through forfeiture of future federal habeas review would be antithetical to the state interests underlying the exhaustion requirement and the limitations period. *See*, *e.g.*, *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) ("Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief"). To be sure, cases involving such opportunities for further state court review will be rare, but when they do occur, it is stay-and-abeyance, not punitive dismissal, that will best serve the interests of the states.

By failing to adopt stay-and-abeyance, this Court would encourage even greater piecemeal litigation, which *Rose* and the total exhaustion rule sought to reduce. In the absence of an available stay-and-abeyance procedure, petitioners wary about a possible dismissal of their § 2254 petition after their one year AEDPA limitation has run are likely to file "protective" state court habeas petitions whenever they file federal habeas petitions.

Alternatively, absent stay-and-abeyance, § 2254 petitioners concerned about whether they have filed a mixed

petition may file early and repetitive motions with the district court, such as, " . . . asking the district court, at the time of filing the petition, to issue an immediate ruling regarding the exhaustion status of each claim and, if the court is unable to issue such a ruling promptly, to grant equitable tolling conditionally until the court can resolve the claims' exhaustion status and determine the need for a stay pending the prisoner's return to state court to exhaust any remaining state remedies". 1 Hertz & Liebman, *Federal Habeas Corpus Practice & Procedure* § 5.2b at p. 274 (4th Ed. 2001). If this Court places "petitioners in the position of having to employ such cumbersome and time-consuming measures, AEDPA's statute of limitations – a provision that was intended to 'reduce[ ] the potential for delay' – is likely to have the effect of 'impos[ing] a heavier burden on the strict courts.'" *Id*., quoting *Duncan*, 533 U.S. at 179 (majority opinion) and at 192 (Breyer, J., dissenting).

In sum, the stay-and-abeyance procedure endorsed by several members of this Court and adopted by every court of appeals that has considered the issue (other than the Eighth Circuit) is fair, workable, sensible, and consistent with *Rose* and applicable law. *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).

CONCLUSION

For the reasons contained in Petitioner's Brief on the Merits and in this Reply Brief, Petitioner Rhines requests that the Judgment of the United States Court of Appeals for the Eighth Circuit be reversed and that the Court uphold the district court's grant of the conditional stay of Rhines' federal habeas corpus petition.

Respectfully submitted,

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