No. 03-221

In The
Supreme Court of the United States

CHERYL K. PLILER, WARDEN OF
CALIFORNIA STATE PRISON-SACRAMENTO,

Petitioner,

v.

RICHARD HERMAN FORD,

Respondent.

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

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

1 This Court held over twenty years ago that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." *Rose v. Lundy,* 455 U.S. 509, 522 (1981). The question presented is:

Whether the dismissal of such a "mixed" habeas petition is improper unless the district court informs the petitioner about the possibility of a stay of the proceeding pending exhaustion of state remedies and advises the petitioner with respect to the statute of limitations in the event of any refiling.

2. Under Federal Rule of Civil Procedure 15(c), "[a]n amendment of a pleading relates back to the date of the original pleading when relation back is permitted by the law that provides the statute of limitations applicable to the action, or [¶] . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. . . . The question presented is:

Whether a second, untimely habeas petition may relate back to a first habeas petition, where the first habeas petition was dismissed and the first proceeding is no longer pending.[1]

[1] Ford adopts the "Opinion or Judgment Below", "Statement of Jurisdiction" and "Relevant Statutory Provisions" sections set forth in the Petitioner's Brief on the Merits.

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RESPONDENT'S STATEMENT OF THE CASE

In 1988, respondent Richard Herman Ford, ("Ford") and Robert Anthony Von Villas ("Von Villas"), both former Los Angeles Police Department Officers, were convicted of first-degree murder for financial gain and conspiracy to commit the murder of Thomas Weed. Ford was sentenced to life without the possibility of parole. Pet. App. 18, the "Weed case" J.A. 62.[2]

Ford appealed to the California Court of Appeal, which affirmed the judgment of conviction and sentence. *See People v. Von Villas,* 11 Cal.App.4th 175, 257-61 (1992); Pet. App. 4. The California Supreme Court summarily denied review, *see* Pet. App. A19, and a petition for writ of certiorari was denied by this Court on October 4, 1993. *Ford v. California,* 510 U.S. 838 (1993). Pet. App. 18-19, J.A. 63-64.

In a separate trial, also in 1988, Ford and Von Villas were convicted of conspiracy to commit murder and two counts of attempted murder of Joan Loguercio occurring in June and July, 1983, and with robbery, conspiracy to commit robbery, and assault with a firearm in connection with an unrelated jewelry store robbery occurring on November 22, 1982. Ford received a sentence of 36 years to life on March 11, 1988. Pet. App. 16, J.A. 39.

Ford appealed to the California Court of Appeal, which affirmed his conviction and sentence. *People v. Von*

[2] The appendix to the petition for certiorari is abbreviated as "Pet. App." and is followed by the applicable page number. All references are to section A unless otherwise noted. The Joint Appendix is abbreviated as "J.A." and is followed by the applicable page number.

Villas, 10 Cal.App.4th 201, 274-275 (1992). The California Supreme Court summarily denied review on January 14, 1993. J.A. 41. A Petition for Writ of Certiorari was denied by this Court on June 14, 1993. *Ford v. California,* 508 U.S. 975 (1993). Pet. App. 16.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996, "AEDPA," became effective. 28 U.S.C. § 2244. Under the rule that a one-year "grace period" must be provided for prisoners who wish to challenge convictions that became final before the AEDPA's enactment, Ford was required to file any federal habeas petitions on or before April 24, 1997. *Id.* at 21; 28 U.S.C. § 2244(d).[3] Ford timely filed two pro se federal habeas corpus petitions challenging his convictions in the respective cases, along with motions to stay the proceedings on exhausted claims while he perfected any unexhausted claims in state court. *Id.* at 14; First Petition (Weed), J.A. 79-83, Motion to Stay (Weed), J.A. 73-74, First Petition

[3] The AEDPA establishes a one-year statute of limitation for the filing of federal habeas corpus petitions, which commences on the latest of four triggering dates. 28 U.S.C. § 2244(d)(1)(A)-(D). The most commonly applicable triggering date is the date on which the conviction becomes final. *Id.* at 2244(d)(1)(A). The AEDPA did not, however, provide an exception to this limitation period for prisoners whose convictions became final before its enactment so, to avoid finding that the AEDPA time limit violated the Ex Post Facto Clause, lower courts have uniformly created a one-year "grace period" in which those prisoners may timely file their federal petitions. *See* 28 U.S.C. § 2254(d); *Duncan v. Walker,* 533 U.S. 167, 183, n.1 (2001); *Patterson v. Stewart,* 251 F.3d 1243, 1245 (9th Cir. 2001). For ease of reference, respondent will hereafter refer to the "limitation period" rather than the "grace period."

(Loguercio), J.A. 36-47; Motion to Stay (Loguercio), J.A. 48-49.[4]

In July and August of 1997, after the limitation period had expired, the magistrate judge issued reports giving Ford two options. Under the first option, Ford could withdraw the unexhausted claims from his petitions and proceed with only the exhausted claims. Under the second option, the court would dismiss the petitions "without prejudice," to allow Ford to return to state court, exhaust his unexhausted claims, and return to federal court. Pet. App. 17, 19. The magistrate judge did not, however, inform Ford that the limitation period had run, and therefore a dismissal "without prejudice" would have the effect of being a dismissal "with prejudice." In other words, if Ford chose the option of dismissing the federal petitions and returning to state court to exhaust, he would be time-barred when he attempted to refile his federal petitions unless the court found the statute was equitably tolled. *Id.* at 14.

The reports directed Ford to notify the court only if he wanted to withdraw the unexhausted claims and proceed solely on the exhausted claims. If he failed to do so, the default presumption was that Ford had agreed to dismissal of the entire petition without prejudice in order to exhaust the unexhausted claims. J.A. 52 (Loguercio); J.A. 82 (Weed); Pet. App. D1-2, E2-4.

[4] With respect to the Weed petition, the magistrate judge determined that seven of the eleven claims were unexhausted. J.A. 80. With respect to the Loguercio petition, the magistrate judge determined that two of the eleven claims were unexhausted. J.A. 50-53.

As to Ford's motions to stay, the court concluded it did not have the discretion to stay a mixed petition so the motion to stay the proceedings was denied.[5,6] Ford did not withdraw his unexhausted claims to perfect his stay motions. *Id.* Instead, Ford opted to have the respective petitions dismissed in order to exhaust his unexhausted claims. J.A. 54-55; *see also* Pet. App. E2 (Loguercio).[7]

The magistrate judge issued reports recommending that the district court dismiss Ford's respective habeas

[5] In his Return in the Weed case, Ford indicated he wanted the Court to stay the petition or to dismiss the petition without prejudice. In his Traverse he acknowledged he failed to exhaust several grounds, but indicated he wanted to proceed on all of the exhausted claims. Pet. App. 80, 81. In light of this inconsistency, the magistrate judge "ordered [Ford] to confirm his intentions and his understanding of the consequences of his desired course of action" by selecting one of the following three options: (1) that the petition be dismissed to permit Ford to exhaust the issues framed in grounds 2, 3, and 8-12, and if denied, file a new petition containing the exhausted claims; (2) that he dismiss his unexhausted claims and proceed on the exhausted claims; (3) that he establish the foregoing claims had been exhausted by habeas review in the California Supreme Court. Pet. App. 81-82. Notwithstanding, the magistrate judge waived this requirement when it indicated the court would construe Ford's silence as his consent to dismissal of the entire petition without prejudice. J.A. 82.

[6] However, the magistrate judge did not inform Ford of the highly technical procedural requirement that it could entertain the stay motions if Ford elected to dismiss the unexhausted claims and then renew the stay motions he attempted to make prematurely. Pet. App. 14.

[7] Ford did not provide a written response in the Weed case. Therefore, in accordance with its Order, the magistrate judge construed this as a request to dismiss the petition without prejudice. Pet. App. D1-5. In the Loguercio case, Ford filed a Return notifying the court he wished to dismiss the petition "WITHOUT PREJUDICE," so he could return to state court to exhaust his unexhausted claims. Pet. App. 54-55; Pet. App. E2.

petition without prejudice because they were partially exhausted petitions under *Rose v. Lundy*, 455 U.S. 509 (1981). Pet. App. D1-2 (Weed), E1-E4 (Loguercio). On September 11, 1997 (Loguercio) and October 14, 1997, (Weed), the district court adopted the magistrate's report and dismissed the petitions, "without prejudice." J.A. 17, 20; Pet. App. D1-5 (Weed); Pet. App. E7 (Loguercio).

After the dismissals, Ford proceeded expeditiously. On September 29, 1997, 18 days after dismissal in the Loguercio case, and on October 24, 1997, ten days after dismissal in the Weed case, Ford filed respective habeas corpus petitions in the California Supreme Court challenging his state court convictions. On March 25, 1998, the California Supreme Court summarily denied the petitions. Pet. App. A17-18, A-20. One week later, on April 1, 1998, having exhausted his state remedies, Ford returned to federal court and filed second pro se federal habeas corpus petitions. J.A. 84-103 (Weed); J.A. 104-120 (Loguercio); Pet. App. B1-8 (Loguercio), C1-9 (Weed).

The state moved to dismiss contending Ford's petitions were time-barred, having been filed after AEDPA's April 24, 1997 cut-off date. Ford argued he had diligently litigated his state petitions in reliance on the magistrate judge's 1997 reports that his dismissals without prejudice permitted his return to federal court after exhausting his claims. Pet. App. B4 (Loguercio), C4 (Weed). The district court dismissed the respective petitions as time-barred. Pet. App. 18, 21, C1-9 (Weed); Pet. App. B1-8 (Loguercio). As a result, none of the timely-filed and exhausted constitutional claims set forth in either the initial Loguercio or Weed petitions were ever reviewed.

Ford filed a notice of appeal and applied for a certificate of appealability ("COA"). The district court denied the COA requests, but the Ninth Circuit granted Ford's request for COA's on the question of whether his federal habeas petitions were timely under AEDPA's one-year statute of limitations, 18 U.S.C. § 2244(d). Pet. App. 21.

The Ninth Circuit reversed. It found the dismissals of Ford's initial petitions were improper. In consideration of the fact Ford was proceeding *pro se*, the court held Ford's decision to have his timely-filed petitions dismissed without prejudice was uninformed; the magistrate judge had not informed Ford of either the procedural deficiency that precluded it from considering Ford's stay motions, nor of the time bar he would face if he opted for dismissal of his petitions in their entirety. Pet. App. 15. The court further held that because Ford had been misled and the original dismissals were improper, he could employ the amendment procedures of Federal Rule of Civil Procedure 15 to have the second petition relate back to and preserve the filing date of the initial petitions which were improperly dismissed. *Id.* at 31. As far as the new claims raised in the second petitions were concerned, the court remanded five claims newly asserted in the second Weed petition for consideration of equitable tolling, and affirmed the dismissal of two claims newly raised in the second Loguercio petition. Pet. App. 35-39.

Judge Silverman dissented, writing that requiring the district court to incorporate a warning about the statute of limitations when informing a habeas petitioner of his options with respect to a mixed petition was tantamount to requiring the district judge to improperly act as the petitioner's legal advisor. Pet. App. 6.

The majority and dissenting opinions were amended on May 15, 2003. Pet. App. 7-13. The Ninth Circuit denied the Warden's petition for rehearing and the suggestion for rehearing en banc. Pet. App. 13. The matter failed to receive a majority vote in favor of the suggestion for rehearing en banc. Fed. R. App. P. 35; Pet. App. A13.

SUMMARY OF ARGUMENT

Petitioner has used the narrow holding below to launch a broad-based attack on the right of prisoners who file mixed petitions to return to federal court after exhausting state remedies. This Court consistently has construed governing habeas law to protect that right. It should do the same here. Nothing in AEDPA, or any of this Court's decisions, mandates a different result.

1. Under *Rose v. Lundy,* 455 U.S. 509, a prisoner who files a mixed petition is faced with a choice. If he wishes to proceed in federal court on his exhausted claims, then unexhausted claims will be purged from the petition so that he can do so. But if he is prepared to forgo immediate federal review, then the petition will be dismissed in its entirety "without prejudice," so that he may fully exhaust his state remedies and then return to federal court for one hearing on all of his claims. The decision below turns on a narrow holding that, in the course of offering the choice mandated by *Rose,* a district court must inform a prisoner if one of the options – dismissal for full exhaustion and then return to federal court – is no longer available, as a result of AEDPA's statute of limitations.

Petitioner addresses that limited holding only in passing. Instead, petitioner uses this case as a vehicle for

a far broader argument: that stay procedures routinely employed in the lower courts to effectuate *Rose's* "complete exhaustion" alternative are impermissible. That is not the question on which this Court granted certiorari. Nor is it a question easily reached in this case, which turns critically not on the availability of a stay, but rather on the magistrate judge's failure to inform Mr. Ford that one of his "choices" amounted here to a waiver of federal review of any of his claims.

2. In any event, the widely accepted stay procedures put at issue by petitioner are entirely consistent with *Rose* and with AEDPA. *Rose* precludes *adjudication* of claims that have not first been presented to state court, but it does not even suggest that a *stay* of federal proceedings is somehow inconsistent with comity principles. On the contrary, a stay allows a district court to defer to state courts' initial consideration of a prisoner's claims. And there is no provision in AEDPA that purports to override the inherent authority of district courts to control their dockets through the issuance of stays.

Nor, contrary to petitioner's argument, will stay procedures undermine AEDPA's statute of limitations by encouraging strategic delays and abusive litigation. The stay procedures in question may be invoked only after a prisoner has filed a *timely* petition – which is all that AEDPA's statute of limitations requires. District courts retain ample means of preventing abusive tactics. And the vast majority of habeas petitioners – those, like respondent, not under a sentence of death – have every incentive to speed, not delay, adjudication of their federal claims.

3. On the narrow issue actually presented by this case, the court below was correct in requiring that a

prisoner be informed if one of his *Rose* choices – dismissal for the purpose of complete exhaustion and then a return to federal court – is functionally foreclosed by AEDPA's statute of limitations. Under *Rose,* the magistrate or district court judge is already engaged in instructing the prisoner about his options. All that is required by the decision below is that those instructions not be misleading – that they not hold out the prospect of post-exhaustion federal review if that review is in fact time-barred under AEDPA. This Court's decisions recognize that instructions will sometimes be necessary so that *pro se* prisoners can make informed judgments and do not inadvertently forfeit their rights. *See Castro v. United States,* 124 S. Ct. 786 (2003). This case is no different.

Nor did the Court of Appeals err in providing a remedy under Rule 15(c) for the improper dismissal of Ford's first petitions. Petitioner's argument that Rule 15 does not apply in habeas cases is foreclosed by the statutory text (specifically providing that petitions may be "amended or supplemented as provided in the rules of procedure applicable to civil actions," 28 U.S.C. § 2242) and contrary to uniform case law in the federal courts of appeals. The narrow decision of the court below to use Rule 15(c) to provide relief in this instance, where the original petitions were *improperly* dismissed, is not precluded by AEDPA and is within the court's remedial discretion.

4. If it does not affirm the decision below, then this Court should remand for consideration of equitable tolling. The court of appeals did not rule on whether Ford was entitled to relief under equitable tolling principles, though it suggested – correctly – that he would be. The issue was not presented for review in the petition for certiorari. The

proper resolution of the issue should be committed in the first instance to the court below.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY HELD THAT RIGHTS ADVISEMENTS MUST BE GIVEN TO A PRO SE PRISONER LITIGANT REGARDING THE AVAILABLE OPTIONS BEFORE DISMISSING A MIXED PETITION.

A. Petitioner Has Waived The Claim That The Stay Procedure Is Improper.

Petitioner challenges the validity of the Ninth Circuit's opinion, asserting the majority erred when it held that dismissal of a mixed petition is improper absent advisement and information designed to effectuate stay and abeyance. It contends Ford was *not* entitled to be apprised of the court's ability to consider his stay motions because this would encourage "stay and abeyance", a procedure it says, contravenes Congressional intent and the dictates of *Rose,* 455 U.S. 509, and *Duncan,* 533 U.S. 167. Pet. Br. 12-26. Before reaching the merits of these arguments, it is important to clarify what this case is and is *not* about.

This case did *not* concern, and in the proceedings below the petitioner did *not* challenge the propriety of the Ninth Circuit's stay procedure. The Ninth Circuit made no *holding* regarding the propriety of a stay, nor did it find the district court abused its discretion when it dismissed, rather than stayed Ford's mixed petition, though a reading of petitioner's brief most assuredly suggests otherwise. Most significantly, the Ninth Circuit's

analysis was explicitly "not affected" by the availability of the stay and abeyance procedure. Pet. App. 26. Also, the sole issue certified on appeal in the proceedings below concerned the statute of limitations – specifically, whether Ford's federal habeas petitions were timely under AEDPA's one-year statute of limitations. *Id.* at 21. It was in that context the Ninth Circuit held the district court was required to apprise Ford, who was proceeding pro se, of his *options* with respect to his mixed petitions where dismissal could jeopardize claims potentially barred by AEDPA's statute of limitations. Pet. App. 3, 25. Respecting that issue, that was all the Ninth Circuit decided. *Ford v. Hubbard,* 330 F.3d 1086 (9th Cir. 2003), while *approving* the stay procedure as an alternative to dismissing the petition in its entirety when valid claims would otherwise be forfeited, formally left the district court with the *discretion* to follow that procedure, but did not explicitly address the propriety of that procedure, or *require* that it do so. *See* i*d.* at 26.

Despite the fact the Ninth Circuit was not presented with and did not *decide* whether a stay was a proper alternative to dismissing the petition in its entirety, and despite the fact the validity of the Ninth Circuit's stay procedure is not among the questions presented in the petition for certiorari, *see* Cert. Pet. 1, petitioner nonetheless uses this case as a forum to rail against the appropriateness of that procedure. The most aggressive of petitioner's contentions – that a stay is contrary to AEDPA and anything short of "total exhaustion" is improper – are *not* at issue and need be rejected if for no other reason than the fact petitioner has waived any right to raise such arguments in this Court.

B. A Stay Pending Exhaustion Effectuates The Established Rule that The Filing Of A Mixed Petition Does Not Foreclose Federal Review.[8]

In *Rose,* 455 U.S. 509 this court held that a "mixed" petition, that is, a petition raising both exhausted and unexhausted claims, should be dismissed "without prejudice," leaving the prisoner with the *choice* of returning to state court to exhaust his claims or amending or resubmitting the habeas petition to present only exhausted claims to the district court. *Id.* 514, 520.

In *Rose,* a pre-AEDPA decision, this Court anticipated its rule of exhaustion had the potential to be exercised in a manner that was unfair, with a resultant loss to a prisoner of his right to federal habeas review. As a result, it entered a rare admonition, cautioning district courts that such dismissals must be accomplished in a manner that "*does not unreasonably impair the prisoner's right to relief*." *Rose,* 455 U.S. at p. 522, italics added.

Rose thus makes explicit that what this Court wanted to achieve, and what the AEDPA now reinforces, *see* 28 U.S.C. § 2254(b)(1)(A), is the assurance that a district court will not grant relief on unexhausted claims without expense to a prisoner's right to collateral review. This is

[8] As noted, presumably because the Ninth Circuit did not actually rule on the question, petitioner did not include stay and abeyance in the questions presented in its petition for certiorari, *see* Cert. Pet. 1, but nonetheless challenges the validity of that procedure. Respondent's arguments regarding the validity of the stay procedure, are not a waiver or concession. *See United States v. Eric B.,* 86 F.3d 869, 879 n.21 (9th Cir. 1996).

not a matter of speculation. When afforded the opportunity, this Court has consistently construed governing habeas law in a manner designed to protect a prisoner's right to habeas review. *See Stewart v. Martin-Villareal,* 523 U.S. 637, 643 (1998) ("Once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied" and a habeas petitioner may return to federal court.) *Id.* at 644. "To hold otherwise, would mean that a dismissal of a first petition for technical procedural reasons would bar a prisoner from ever obtaining federal habeas review." *Id.* at 645; *Slack v. McDaniel,* 529 U.S. 473, 486 (2000) (dismissal under *Rose* always "contemplated that the prisoner could return to federal court after the requisite exhaustion"; *Felker v. Turpin,* 518 U.S. 651, 663-664 (1964) ("There may be circumstances where the limitation period at least raises serious constitutional questions and possibly renders the habeas remedy inadequate and ineffective".)

Before AEDPA there was no statute of limitations for the filing of federal habeas petitions, and a prisoner seeking to file a second federal petition after fully exhausting state remedies faced no time bar. Under AEDPA the prisoner has just one year. 28 U.S.C. § 2244(d). After AEDPA the *choices* remain the same, but as this case illustrates, the consequences are very different, and as a result, so are the mechanics for exhaustion. If a prisoner comes to federal court too soon, *i.e.,* with one or more unexhausted claims, and does so late in the allotted year, as did Ford, 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 to return to federal court. If a prisoner does not have the opportunity to make an informed

choice as to whether to amend the petitions, and of the running of AEDPA's potential time bar, *see Duncan,* 533 U.S. 167, a "dismissal without prejudice" can be substantively transformed into a "dismissal with prejudice".[9] In this context, a stay of the exhausted claims pending exhaustion constitutes a preferable alternative where outright dismissal would otherwise jeopardize the timeliness of a collateral attack. *See id.* at 183 (Stevens, J., with whom Souter, J., joins, concurring in part and in the judgment). Viewed in context, the advisements required by the Ninth Circuit when a prisoner files a mixed habeas petition, properly address this Court's concerns for exhaustion on the one hand and preservation of federal writ review on the other in compliance with *Rose,* while doing so a manner that is without undue burden to the district courts.

Showing no regard, let alone recognition for *Rose's* fairness prong, petitioner myopically and improperly focuses its challenge on the first of *Rose's* tandem rules, "total exhaustion," and does so in the most draconian of ways: contending complete and unequivocal dismissal of

[9] As Justice Breyer explained in *Duncan,* 533 U.S. at 186, 57 percent of federal habeas petitions are dismissed for failure to completely exhaust state remedies. Citing U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions 17 (1995) (hereinafter Federal Habeas Corpus Review). And it can take courts a significant amount of time to dispose of even those petitions that are not addressed on the merits; on the average, district courts took 268 days to dismiss petitions on procedural grounds. *Id.* Thus, a prisoner who files a petition within the AEDPA limitations period, will often have his petition dismissed as mixed only after the period has expired – which is exactly what happened to Ford.

Ford's mixed petitions in their entirety and without advisements are required. Pet. Br. 17-19 ("The possibility that a refiled petition might be time-barred does not dictate a contrary result."). This is simply wrong. *Rose* explicitly affords a prisoner "*the choice* of returning to state court to exhaust his claims or amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Rose,* 455 U.S. at 510, italics added. At a minimum Ford was entitled under *Rose* to withdraw his unexhausted claims from his mixed petition and to proceed with his exhausted claims. *Id.* at 520.

Nor is there any basis for petitioner's contention the stay procedure endorsed by the Ninth Circuit for the handling of mixed petitions conflicts with *Rose. See* Pet. App. 26. *Rose* had no occasion to consider alternative procedures for accomplishing total exhaustion. The issue there was only whether the habeas court should proceed to adjudicate a mixed petition. *See Rose,* 455 U.S. at 513 n.5. Petitioner's contrary contention, that outright dismissal of a mixed petition is the *only* proper course of action under *Rose,* notwithstanding AEDPA's newly imposed limitation period, finds no support in *Rose.* Pet. Br. 17.

Petitioner's more sustained contention, indeed, it's principal theme, and one made without regard for the issue upon which certiorari was granted (the validity of the advisements), centers around the propriety of the *disposition* recommended by the Ninth Circuit for Ford's mixed petitions. It contends a stay of a mixed petition pending exhaustion is improper, therefore no error was committed when the district court failed to inform Ford about his options with respect to his mixed petitions and to the fact a portion of the one-year limitation period of AEDPA had already elapsed. The procedure endorsed, it

contends, and the advisements relative to it, is improper because it defies congressional intent, is at logger-heads with this Court's decisional law, and subverts AEDPA's limitation periods. As to each of these contentions, petitioner is incorrect.

There is no question district courts have the inherent authority to issue stays in proceedings before them. *See Landis v. North American Co.,* 299 U.S. 248 (1936); *Arkadelphia Co. v. St. Louis Southwester Ry. Co.,* 249 U.S. 154, 146 (1919) (The power to stay proceedings is "inherent in every court" so long as it retains control of the subject matter and of the parties); *Enelow v. New York Life Ins. Co.,* 293 U.S. 379, 381 (1935) (The authority to stay proceedings is appropriately used "to control the progress of the cause so as to maintain the orderly processes of justice"). The petitioner offers no reason, and there is nothing to suggest this authority does not apply in the habeas context. As Justice Stevens noted in his concurring opinion in *Duncan,* "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." *Duncan,* 533 U.S. at 182-83 (Stevens, J., concurring in part and concurring in the judgment) (citation omitted).)

As the Ninth Circuit properly recognized, allowing district courts to stay mixed petitions not only effectuates *Rose,* it properly advances a significant purpose of AEDPA – to afford state prisoners their right to federal habeas review lest dismissal otherwise jeopardize the timeliness of a collateral attack. (Pet. App. 22, 25; citing *Zarvela v. Artuz,* 254 F.3d 374, 380 (2nd Cir. 2001); *Freeman v. Page,* 208 F.3d 572, 576 (7th Cir. 2000); *Nowaczyk v. Warden, New Hampshire State Prison,* 299 F.3d 69, 79 (1st Cir. 2002); *Palmer v. Carlton,* 276 F.3d 777, 781 (6th Cir. 2002).

Petitioner also argues a stay is prohibited by AEDPA, but petioner can offer no support nor is there anything to suggest Congress intended to inhibit that authority when it enacted AEDPA in 1996. Pet. Br. 20-23. This is apparent from the fact the only way in which Congress altered the mechanics for handling a mixed petition was to authorize denial of a habeas petition on the merits if the petition contained unexhausted claims. *See* 28 U.S.C. § 2254(b)(2); *Lindh v. Murphy,* 521 U.S. 320, 333 n.7 (1997) (AEDPA provision newly authorized federal courts to reject unexhausted claim on merits). Congress, of course, could have precluded stay and abeyance if it wished to do so. *Hartford Underwriters Ins. Co. v. Union,* 530 U.S. 1, 6 (2000); *see also Williams v. Taylor,* 529 U.S. 420, 431 (2000). That Congress said nothing about stay and abeyance, evinces an intent to permit district courts to stay a mixed petition pending exhaustion. *Bates v. United States,* 522 U.S. 23, 29-30 (1997) (Congress acts intentionally and purposely in the disparate inclusion or exclusion of particular words) quoting *Russello v. United States,* 464 U.S. 16, 23 (1983).

Betraying a fundamental misunderstanding of the rule it seeks to invoke, petitioner also contends stay and abeyance contravenes this Court's admonition that federal courts have a "virtually unflagging obligation to exercise the jurisdiction given them." Pet. Br. 23, citing *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817-18 (1976). If one should question the need for federal collateral review requirements that merit such respect, the answer simply is that the respect is sustained in no small part by the existence of such review. ("It is the occasional abuse that the federal writ of habeas corpus stands ready to correct.") *Jackson v. Virginia,* 443 U.S. 307, 322 (1979). A stay accommodates the abstention

concerns in *Colorado River* because the court is not dismissing the petition but is only staying the exercise of its power. "[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 v. Allstate Insurance Co.,* 517 U.S. 706, 716 (1966). *Colorado River* thus supports a stay over a *Rose* dismissal because the district court is abstaining from deciding exhausted claims whenever it dismisses a petition with unexhausted claims. Ironically, the rule of total exhaustion advocated by petitioner results in the very divestiture of the jurisdiction it contends the court should retain.

Moreover, the contention a stay pending exhaustion contravenes *Duncan* by permitting AEDPA's limitations period to be tolled during the pendency of a federal habeas proceeding, Pet. Br. 13, 16-17, is easily dispelled. First, the petitioner's reading of AEDPA's tolling provision assumes a stay has the same effect as would tolling AEDPA's statute of limitations during federal as well as state proceedings, a contention expressly rejected by the *Duncan* Court. *See Duncan,* 533 U.S. at 181 (reserving questions). Second, the discretionary nature of a stay distinguishes it from automatic operation of a statutory tolling provision. Third, *Duncan* does not govern as it was explicitly limited to an interpretation of the relevant tolling provision and did not pass on the stay procedure endorsed by Justices Stevens and Souter. *Id.* at 181-182. A case of course, is not authority for a proposition not decided. *R. A. V. v. City of St. Paul,* 505 U.S. 377, 386, n.5 (1992) (it is "contrary to all traditions of our jurisprudence

to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned"); *United States v. Stanley,* 483 U.S. 669, 680 (1987) ("no holding can be broader than the facts before the court"). Fourth, petitioner misconstrues the distinction between a stay of proceedings and tolling under section 2244(d)(2). Under petitioner's view a stay of proceedings is inappropriate if it would avoid what otherwise would be a time bar. But in fact the opposite is true; a stay is called for precisely because it would avoid what otherwise would be a statute-of-limitations problem. *Wilton v. Seven Falls Co.,* 515 U.S. 277 (1995); *Deakins v. Monaghan,* 484 U.S. 193, 202 (1988). Petitioner's contrary theory, that a statute of limitations is somehow at odds with a district court's inherent authority to stay an action, therefore finds no support in the decisional law and there is substantial law to the contrary. Fifth, this Court's ruling in *Duncan* does not bear on this issue because here, unlike the situation in *Duncan,* the time period was violated unless there was equitable tolling for the state proceedings, even if the time during which Ford's first federal habeas petitions were pending are taken into account. *Duncan,* 533 U.S. 167.

Nor does a stay of a perfected petition offend *Rose* or the legislative objectives of comity, finality and federalism the exhaustion requirement serves. *Woodford v. Garceau,* 538 U.S. 202, 206 (2003) quoting *Williams v. Taylor,* 529 U.S. 420, 436 (2000). *Rose* holds that a federal district court may not consider a habeas claim until after it has been fairly presented to the state courts. *Rose,* 455 U.S. at 515. ("[I]t 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 *Darr v. Burford,* 339 U.S. 200, 204 (1950) (italics added); *see also O'Sullivan v. Boerckel,* 526 U.S. 838, 844 (1999).[10] A stay counsels in favor of, not against the principles of comity discussed in *Rose* by "defer[ring] to the state court action" as to unexhausted claims.

While petitioner's argument assumes a congressional desire to obtain expeditious federal review and achieve finality, the alternative to a stay of exhausted claims in mixed petitions which it proposes is hardly salutary. It involves the filing of a "protective" petition in state court in order to trigger AEDPA's state-court tolling provision. Pet. Br. 18 n.5, citing *Atkins v. Kenney*, 341 F.3d 681 (8th Cir. 2003). In this manner, petitioner can "toll," the proceedings and there will still be time to refile in federal court after a dismissal of a mixed petition. *Id.* Without question, this imposes needless burdens upon state courts in derogation to the comity interests at the core of the *Rose* dismissal requirement. *See Rose,* 455 U.S. at 518 (citation omitted). ("The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of

[10] Because the Ninth Circuit has held that principles of comity and judicial economy mandate dismissal of any unexhausted claims, Pet. App. 22-23; and *see Rose,* 455 U.S. at 518-20, contrary to petitioner's contention, those principles are not applicable to Ford's exhausted claims, since the state courts already had an opportunity to consider those issues raised in his mixed federal petition.

federal law and prevent disruption of state judicial proceedings"). Other options, equally unfeasible, involve a shifting of the burdens to the federal courts to expedite consideration of habeas petitions on the merits. R. Hertz & J. Liebman, 1 *Federal Habeas Practice and Procedure* § 5b at 274 (4th ed. 2001). Under that scenario, it is possible that courts, understanding dismissal for nonexhaustion could bar the prisoner from ever obtaining federal habeas review where the refiled petition is time-barred, may tend to resolve those issues in favor of finding the exhaustion requirement has been satisfied simply to avoid imposing a dismissal where prisoners have acted in good faith. For similar reasons, they may reach the merits of a federal petition's claims without sending the petitioner back to state court for exhaustion, again undermining the comity interests at stake.

Finally, petitioner's sturm und drang is that stay and abeyance will encourage the abuse of habeas corpus that results from delayed and repetitive filings (Effective Death Penalty Act of 1995, H. Rep. No. 104-23, 104th Cong., 1st Sess., 9 (1995)), but offers no empirical basis for projecting that consequence. Rather, the contrary is more likely true. It is unlikely prisoners will deliberately seek to delay by repeatedly filing unexhausted petitions in federal court, as the petitioner suggests. Pet. Br. 32-33, 35-36. Prisoners not under a sentence of death (the vast majority of habeas petitioners) have no incentive to delay adjudication of their claims. Rather, "[t]he prisoner's principal interest . . . is in obtaining speedy federal relief." *See Rose,* 455 U.S. at 520.

The premise that stay and abeyance will lead to vexatious litigation is unlikely for the still further reason that AEDPA was expressly designed to deter such abuse.

The prisoner who chooses to go into federal court with unexhausted claims runs the risk the district court will simply deny those claims on the merits, thereby subjecting any subsequent petition the petitioner may attempt to file to the extremely rigorous second or successive application requirements contained in § 2244(b). 28 U.S.C. § 2254(b)(2); *Duncan,* 533 U.S. at 182-83 (Stevens, J., concurring). Clearly, no prisoner with even the most rudimentary understanding of habeas procedure, would view the real possibility of a denial on the merits and its attendant second or successive petition consequences a risk worth taking merely "to hold the federal proceedings 'hostage' and delay adjudication of their federal law claims." Pet. Br. 20, 21.

District courts also have the power to prevent vexatious repeated filings by, for instance, ordering that a petition filed after a mixed petition is dismissed must contain only exhausted claims, *see Slack,* 529 U.S. at 489, or to dismiss mixed petitions on the merits if they raise insubstantial claims. (28 U.S.C. § 2254(b)(2); *see Duncan,* 533 U.S. at 182-83 (Stevens, J., concurring).) Finally, the Federal Rules of Civil Procedure, applicable to habeas proceedings, provide the federal courts with alternative ways to stop vexatious practitioners. (*See* discussion, *infra* at section II.) A rule which would preclude a district court from retaining jurisdiction pending complete exhaustion, therefore provides no additional incentive whatsoever to consolidate all grounds for relief in one § 2254 petition.

In two recent cases, this Court assumed that Congress did not want to deprive state prisoners of first federal habeas corpus review, and this Court has interpreted statutory ambiguities accordingly. In *Stewart,* 523 U.S. 637, 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. And in *Slack v. McDaniel,* this Court held that a federal habeas petition filed after dismissal of an initial filing for nonexhaustion should not be deemed a "second or successive petition," lest "the complete exhaustion rule" become a "'trap'" for "'the unwary pro se prisoner.'" 529 U.S. at 487 (quoting *Rose,* 455 U.S. at 520). Making the same assumption here, would militate in favor of stay procedures for federal habeas petitions.

On the other hand, the position advocated by petitioner would bar Ford, who simply followed the options he was given, from raising the exhausted claims asserted in the initial petitions as well as the nonfrivolous claims developed in the second state exhaustion proceedings contemplated by the *Rose* dismissals, though a federal court had yet to review a single constitutional claim. This result would be contrary to this Court's admonition that the complete exhaustion rule is not to "trap the unwary pro se prisoner." *Ibid.,* internal quotation marks omitted. *Slack,* 529 U.S. at 487.

Abrogation of a court's equitable power to stay as advocated by petitioner would totally undermine this Court's decisions in *Rose* and *Slack* and create precisely the same trap for Ford, the "unwary pro se prisoner" which this Court has condemned and which the Ninth Circuit sought to avoid by the required advisements. Instead of Ford's habeas corpus petitions being dismissed because they were mixed, dismissals of the exhausted petitions would instead be affirmed on limitations grounds, if the argument put forth by petitioner is

adopted. Such a result would not further the interests the AEDPA was designed to address and would create a situation in which "a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review," something this Court has sought to avoid. *Stewart,* 523 U.S. at 645.

The stay procedures adopted by the lower courts constitute a reasonable and proper mechanism for handling mixed claims. Inapposite to the petitioner's contention, the Ninth Circuit's stay procedure and as a necessary corollary, the advisements relative to it, does not conflict with but instead effectuates the mandate of AEDPA and this Court by insuring a pro se petitioner such as Ford, who has proceeded diligently and in good faith, does not lose the opportunity to have his claims heard on the merits.

Returning to the facts of this case, this Court should reject petitioner's attack on the stay procedure adopted by the Ninth Circuit and the advisements relative to it, and affirm the decision below.

Ford acted with due diligence, filing timely habeas petitions that included exhausted as well as unexhausted claims. He also contemporaneously filed motions to stay. Following the only procedure of which he was aware, he relied on the district court's assurances that dismissal would be "without prejudice," elected to dismiss, expeditiously pursued his state post-conviction remedies, and expeditiously returned to federal court after fully exhausting his state claims, only to find he was time barred. Most assuredly, this is a classic case of "damned if you do, damned if you don't."

In recognition that a district court must dismiss a habeas petition containing unexhausted claims, *Rose,* 455 U.S. at 509, the Ninth Circuit held that the dismissals of Ford's mixed petitions were improper where the district court failed to inform Ford, who was proceeding pro se, of his options with respect to his mixed petitions and to the fact that a portion of the one-year limitations period of AEDPA had already lapsed. Ford and the Ninth Circuit acknowledged there was a procedural deficiency – the filing of mixed habeas petitions – that prevented the district court from *considering* Ford's stay motions. To correct that deficiency, Ford was required to amend his habeas petitions to dismiss the unexhausted claims and proceed with only the exhausted claims, and then seek a hearing on the motions to stay the exhausted claims. However, when given a choice of his options, the magistrate judge neither informed Ford of this fact, and Ford did not withdraw his unexhausted claims to perfect his stay motions. Pet. App. 14.

At a minimum, the district court's outright dismissal of Ford's mixed petition without having adequately informed him of his options was improper given that the statute of limitations had already run while Ford's first petitions were pending in the district court, and the granting of a stay was the only appropriate remedy where outright dismissal would otherwise jeopardize the timeliness of a collateral attack. For this reason the decision of the Ninth Circuit should be affirmed.

Yet even if this Court rejects the stay procedure, affirmance is nonetheless required. *Rose* plainly commands that a prisoner be given "*the choice* of returning to state court to exhaust his claims or amending or resubmitting the habeas petition to present only exhausted claims

to the district court." *Rose*, 455 U.S. at 510, italics added. There is no question Ford was entitled under *Rose* to withdraw his unexhausted claims and to proceed with his exhausted claims. However, as the court below correctly held, that right is meaningful only if a pro se prisoner litigant is advised that his other "choice", dismissal of the entire petition for complete exhaustion may preclude federal habeas review because a portion of the AEDPA limitations period had already run. This Court should affirm the Court of Appeals' holding that a district court must advise a prisoner of the potential AEDPA time bar in order to make the prisoner's choice a meaningful one.

Obviously the choices offered, were not real choices at all, which leads to another point; the Court should also affirm the Court of Appeals' holding that Ford was entitled to relief for the improper dismissal of his first petitions without the necessary advisements. The magistrate judge gave Ford who was proceeding pro se, what was in effect a Hobson's choice: either withdraw his unexhausted claims and proceed only on the exhausted ones, or to dismiss his petitions in their entirety and "without prejudice" so he could return to state court and exhaust his then-unexhausted claims. But at the time the AEDPA's limitation period had already expired by more than four months, so, absent equitable tolling, federal review of *all* of Ford's claims, including those already exhausted, were barred if he chose to dismiss. As the Ninth Circuit found, the district court's offer of dismissal "without prejudice", definitively, although not intentionally, misled Ford into believing dismissal for complete exhaustion was a viable

alternative to proceeding with his exhausted claims, when it fact it was not.[11]

For the reasons given, this Court should affirm the decision below.

C. This Court Should Affirm The Court Of Appeals' Holding That A Magistrate Or District Judge Must Advise A Prisoner Of His Options and The Potential AEDPA Time-Bar In Order To Make The Prisoner's Choice Under *Rose A* Meaningful One.

While petitioner contends the Ninth Circuit's advisement requirements run afoul of *Rose* and AEDPA, Pet. Br. 23, the contrary proposition is in fact true. The advisements required by the majority simply implement what this Court *already* requires. Before a mixed petition is dismissed, *Rose* requires that a prisoner be given "*the choice* of returning to state court to exhaust his claims or amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Rose*, 455 U.S. at 510, italics added. *Castro* holds that advisements may be necessary in the habeas context to insure that pro se prisoners can make informed judgments and do not inadvertently forfeit their rights. *See Castro,* 124 S. Ct.

[11] Petitioner relies heavily on the fact Ford did not appeal from the denial of his first petitions. There was no reason to do so; as a result of the district court's deceptive advice, Ford was led to believe he could return to federal court upon exhaustion. Where a dismissal is "without prejudice," there is no reason a pro se litigant will seek to contest it on appeal. *See Castro*, 124 S. Ct. at 793.

791-92. As this Court necessarily concluded in *Rose,* to avoid unwarranted unfairness, dismissals for want of exhaustion must be accomplished in a manner that "does not unreasonably impair the prisoner's right to relief." *Rose,* 455 U.S. at 522. Forcing pro se prisoner litigants to make a choice, without any corresponding information relative to that choice, impairs their ability to competently represent themselves, is unfair, and virtually guarantees a forfeiture of the very right to federal habeas review which *Rose* and *Castro* sought to protect.

The Ninth Circuit's decision was properly animated by such concerns. Cognizant that the rights of pro se prisoner litigants require careful protection where highly technical requirements are involved, especially when enforcing those requirements might result in the loss of the opportunity to prosecute or defend a lawsuit on the merits, Pet. App. 24; *see Conley v. Gibson,* 355 U.S. 41, 48 (1957); *Foman v. Davis,* 371 U.S. 178, 181 (1962), the notification and election procedure approved by the Ninth Circuit, which requires the district court to notify a pro se prisoner litigant his petition contains unexhausted claims, to warn the prisoner of his limitations period status, and to permit him to choose either to amend the petition to delete unexhausted claims, or to accept a dismissal, fulfills the objectives of exhaustion in a manner that does not unreasonably impair the prisoner's right to relief.[12] Proceeding

[12] This Court and several federal courts of appeal have adopted an analogous procedure to warn federal prisoners about the consequences of a district court's recharacterization of a post-trial pleading as a motion for relief pursuant to 28 U.S.C. § 2255, and to allow those prisoners to make an informed determination as how to proceed. *See, e.g.*, *Castro,* 124 S. Ct. at 786; *United States v. Evans,* 224 F.3d 670, 675

(Continued on following page)

without such basic procedural safeguards would create an unacceptable risk of trapping large numbers of prisoners into unwittingly sacrificing their first and only opportunity for federal habeas review. *Longchar v. Thomas,* 517 U.S. 314, 324 (1996) ("Dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denied the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty").

Critical to the Ninth Circuit was the fact Ford was proceeding pro se. There is no right to counsel in habeas proceedings, *Coleman v. Thompson,* 501 U.S. 722, 757 (1991); *Pennsylvania v. Finley,* 481 U.S. 551 (1987); *Wainwright v. Torna,* 455 U.S. 586 (1982); *Ross v. Moffitt,* 417 U.S. 600 (1974); *Johnson v. Avery,* 393 U.S. 483, 488 (1969), and Ford's petitions, like the vast majority of federal habeas petitions, were not prepared by counsel. *See* Federal Habeas Corpus Review 14 (finding that 93% of habeas petitioners in study were *pro se).* "Unskilled in law, unaided by counsel, and unable to leave the prison" incarcerated pro se litigants have little control over litigation. *Houston v. Lack,* 487 U.S. 266, 271 (1988).

Certain responsibilities attend a federal court in regard to pro se prisoner litigants. For instance, federal courts sometimes will ignore the legal label that a *pro se* litigant attaches to a motion and recharacterize the motion in order to place it within a different legal category.

(7th Cir. 2000); *United States v. Miller,* 197 F.3d 644, 652 (3d Cir. 1999); *Adams v. United States,* 155 F.3d 582, 584 (2nd Cir. 1998) (per curiam).

See, e.g., Haines v. Kerner, 404 U.S. 519, 520 (1972) (holding that allegations of *pro se* complaints are held to "less stringent standards than formal pleadings drafted by lawyers"). In *Castro*, this Court concluded a district court may not recharacterize a *pro se* litigant's motion as a request for relief under § 2255 – unless the court first warns the *pro se* litigant about the consequences of the recharacterization, thereby giving the litigant an opportunity to contest the recharacterization, or to withdraw or amend the motion. *See also Castro v. United States,* 124 S. Ct. 791-92.

Pro se prisoner litigants are held to the same standard as counsel, which is that of reasonably effective assistance under prevailing professional norms, *Strickland v. Washington,* 466 U.S. 668, 687-688 (1984); *Cuyler v. Sullivan,* 446 U.S. 335, 344 (1980), and their ineffectiveness or incompetence in the context of federal collateral post-conviction proceedings is not a ground for relief. 28 U.S.C. § 2254(i).

In *Strickland*, this Court agreed that reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after thorough investigation of law and facts relevant to plausible options. *Wiggins v. Smith*, 123 S. Ct. 2527, 2535 (2003) citing *Strickland v. Washington*, 466 U.S. at 673. *Rose* explicitly admonished that the total exhaustion rule must be accomplished in a manner that "does not unreasonably impair the prisoner's right to relief." *Rose,* 455 U.S. at 522. The Ninth Circuit's advisement requirements regarding its stay procedure and AEDPA's limitation period simply and without substantial burden fulfill these prudential concerns.

Petitioner's contention the Ninth Circuit's advisement requirements are inappropriate, "gives fresh meaning to the phrase, '[We're] from the government and [we're] here to help you.'" Pet. Br. 23; *United States v. Gomez,* 92 F.3d 770, 772 (9th Cir. 1996). As *Strickland* and *Wiggins* make clear, in order for a pro se prisoner to adequately represent himself, he must be given sufficient information regarding the available options and their consequences in order that his election is an informed one. Absent advisements, a prisoner's ability to make such a decision and to competently represent himself are impaired.

A prisoner's ability to effectively navigate through AEDPA's procedural complexities would thus depend on a prisoner's awareness of the existence of such alternatives or on a sympathetic district judge who informs a prisoner of his options, in derogation to another of this Court's admonitions that the rights of pro se litigants require careful protection. *Ibid.* Subjecting pro se prisoner litigants who file in good faith to permanent loss of the right to seek habeas relief because they do not understand the options available to them would thwart the clear intention of this Court to preserve the right to federal habeas review in contravention to *Rose's* second requirement. *See Castro v. United States,* 124 S. Ct. 791-92. Were this Court to ratify petitioner's view, the longstanding rule of *Rose* would be seriously jeopardized.

This Court should affirm the Court of Appeals' holding that a magistrate or district judge must advise a prisoner of his options with respect to a mixed petition and of AEDPA's time bar and to the fact that a portion of it may have already elapsed. Pet. App. 27-30. These advisements are mandated by this Court's own case law which recognizes it is the court's responsibility to protect the rights of

a pro se litigant where highly technical requirements are involved, especially when enforcing those requirements might result in a forfeiture of the right to federal habeas review of timely-filed and exhausted constitutional claims. Anything less would make the prisoner's choice meaningless, would thwart the right to federal habeas review in derogation to AEDPA's principal purpose, and would undermine the protections that extend to pro se prisoner litigants.

D. The Rights Advisements Which Amount To An Identification Of Time Bars Required By The Ninth Circuit Do Not Impose Substantial Burdens On The District Courts.

According to petitioner, the decision reached by the Ninth Circuit constitutes an unwarranted expansion of existing decisional law. By requiring district courts to inform habeas petitioners that their federal claims may be time-barred "if [they] opt[ ] to dismiss the petitions 'without prejudice' and return to state court to exhaust all of their claims," it contends the Ninth Circuit has visited burdens of unparalleled complexity upon the district court. Not only would the district court be required to dispense correct legal advice regarding the applicability of the statute of limitations, it complains, it also would be required to calculate the limitations deadline, a positively Sisyphean task, and the district courts would be required to act as "advocates". Pet. Br. 23-25; Pet. App. 42. Viewed realistically, petitioner "makes much ado about nothing."

In its apparent zeal to establish error worthy of reversal, petitioner has grossly mischaracterized the holding reached by the Ninth Circuit. The court merely requires the district judge to notify a pro se plaintiff of the

existence of the AEDPA limitation and the fact part or all of the period, whichever is the case, has already run, a relatively simple task. Pet. App. 28-30, n.8. "This simple step helps avoid the unnecessary forfeiture of petitioners' constitutional rights." *Id.* at 28.

This Court has ordered relief in cases under circumstances where a party has been misled by another party. Cf. *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 96 (1990) (equitable tolling was available where a complainant had been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass). Here, the misleading nature of the advisements were even more egregious than those committed in *Irwin.* It was the *district court,* the very party chargeable with protecting Ford's rights, not an adversary who misled Ford about the current status of his claims under the AEDPA one-year statute of limitations and thus deprived him of the opportunity to make a "meaningful" choice among his options. *Id.* at 27-28. "[T]he district court's failure fairly or fully to explain the consequences of the options it presented to Ford deprived him of the opportunity to make a meaningful choice. . . ." *Id.* at 29.

As even the most seasoned of lawyers knows, AEDPA is a confusing, at times impenetrable statute. It imposes stringent procedural rules on habeas petitioners, with often harsh results. To alleviate the burden on pro se litigants, the Ninth Circuit has followed this Court and the Second and Third Circuits in requiring district courts to provide mandatory prophylactic "notice" measures to advise pro se petitioners of the consequences of certain AEDPA procedural provisions that may foreclose consideration of their claims on the merits. *See Castro,* 124 S. Ct. 791-92; *Adams,* 155 F.3d at 584 (per curiam) (mandatory

warning regarding consequences of "second or successive petition" rule when recharacterizing motions under § 2255); *United States v. Miller,* 197 F.3d 644, 646, 652 (3d Cir. 1999) (same); *Mason v. Meyers,* 208 F.3d 414, 418 (3d Cir. 2000) (same, under § 2254). *Rose* already requires a prisoner to be apprised of his options. The decision reached by the Ninth Circuit does nothing more than insure that those options and their consequences are accurately explained. (*Id.* at 29, n.8.)

Other circuits have noted the deceptive nature of a dismissal without prejudice when the claims dismissed are time-barred, and require similar advisements. In *Rodriguez v. Bennett,* 303 F.3d 435 (2nd Cir. 2002), the Second Circuit explained that for a petitioner dismissed "without prejudice" after a year in federal habeas proceedings, the "without prejudice" provision was an illusion; petitioner could never succeed in timely refiling the petition because he would already be time-barred. (*Id.* at 439.) In *Valerio v. Crawford,* 306 F.3d 742 (9th Cir. 2002), the en banc court instructed the district court to inform a petitioner when claims to be dismissed "without prejudice" would actually be time-barred. In *Zarvela,* a case in which the AEDPA period had not yet run, the Second Circuit held that a district court, when informing a habeas petitioner of his options with respect to a mixed petition should "alert the petitioner to the one-year limitations period of AEDPA and to the fact that a portion of that period has already elapsed." *Zarvela*, 254 F.3d at 382; Pet. App. 28-29.

While petitioner contends a ruling in Ford's favor would require district courts to determine the expiration date under AEDPA for each habeas corpus petition that is filed and to explain to any petitioner, who of his own volition chooses to dismiss his petition that AEDPA may

prevent refiling at a later date, Pet. Br. 24-25, the Ninth Circuit's decision in *Ford* cannot be so broadly construed. The Ninth Circuit does not require a district judge to advise a pro se petitioner how to proceed. It does not require a district court judge to advise a pro se petitioner about every possible factor that could affect his decision, and it does not require the district judge to calculate the limitations period. Nor does it turn the district court into the petitioner's paralegal or "blur[ ] the distinction between impartial decision-making and advocacy." Pet. App. 13. It merely requires the district court to inform a pro se habeas petitioner of the *existence* of the AEDPA one-year limit and the fact that a portion of that period has already lapsed; a relatively simple task. Pet. App. 29, n.8. To accurately explain this option, the judge must inform the petitioner if, on the face of the complaint, the AEDPA statute of limitations has expired that any dismissal of the mixed petition would necessarily be "with prejudice," absent equitable tolling. *Ibid.* To do otherwise affirmatively misleads the pro se petitioner about his options available to him. *Ibid.* Given the important legal interests at stake, the holding of the court is not draconian, it does not impose a substantial burden on district courts – *Rose* already requires that a prisoner be apprised of his options – and it certainly does not call for district courts to act as "advocates".

Under Petitioner's approach, if a *pro se* prisoner litigant unwittingly includes in a § 2254 motion a claim not yet presented to the state courts, he risks dismissal of the entire petition without being apprised of his available options. A prisoner's opportunity to amend a § 2254 petition would thus depend on his awareness of technical legal requirements or run the risk of outright dismissal,

which would render it unlikely or impossible to pursue a timely collateral attack. The decision of the majority simply prevents the state from exploiting a *pro se* prisoner who is not knowledgeable about the intricacies of the exhaustion doctrine and whose only aim is to secure a new trial or release from prison through federal review by requiring compliance with certain minimal safeguards. This Court should affirm the Court of Appeals' holding that Ford was entitled to relief for the improper dismissal of his first petitions without the necessary advisements. Pet. App. 31-33.

II. THE NINTH CIRCUIT'S INTERPRETATION OF FEDERAL RULE OF CIVIL PROCEDURE 15(c) IS NOT CONTRARY TO LAW.

A. The Relation Back Doctrine Applies to Habeas Proceedings.

Petitioner contends the "relation back doctrine" of Rule 15(c) of the Federal Rules of Civil Procedure does not apply to habeas proceedings, is inconsistent with AEDPA's design to expedite the federal habeas process and circumvents the AEDPA's one-year limitations period. None of these contentions has merit.

Petitioner insists that Rule 15(c) cannot apply to habeas corpus cases in light of AEDPA, because allowing relation back of otherwise time-barred claims is inconsistent with the legislative intent that the rules have very limited application to habeas corpus proceedings and to Rule 15(c) in particular. Pet. Br. 30-32. It is of some relevance that *Harris v. Nelson,* 394 U.S. 286, 296 (1969), on which petitioner relies for that proposition, refers not to the relation back doctrine but refers instead to the

inapplicability of the discovery provisions of the Federal Rules to habeas corpus proceedings.

While petitioner contends Rule 15(c) does not apply to post-AEDPA habeas corpus proceedings, there is no reason, why it should not apply. 28 U.S.C. § 2242 states that applications for habeas corpus "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." Similarly, Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts states that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to the petitions filed under these rules." The § 2254 rules do not consider whether an amended petition can relate back to the filing date of the original; Rule 15(c) of the civil-procedure rules therefore governs. Petitioner has cited to no authority that supports the proposition that AEDPA renders Rule 15 inapplicable to federal habeas corpus proceedings, and there is substantial authority to the contrary. *See*, *e.g.*, *Withrow v. Williams,* 507 U.S. 680, 696 n.7 (1993); *Calderon v. Ashmus,* 523 U.S. 740, 750 (1998) (Breyer, J., concurring) (under Habeas Rule 11, and unless otherwise expressly governed by statute, habeas corpus amendments are governed by Rule 15); *Ellzey v. United States,* 324 F.3d 521, 526 (7th Cir. 2003) (Easterbrook, J.); *Woodward v. Williams,* 263 F.3d 1135, 1142 (10th Cir. 2001); *Fama v. Commissioner of Correctional Services,* 235 F.3d 804, 814-16 (2d Cir. 2000); *United States v. Thomas,* 221 F.3d 430, 436 (3d Cir. 2000) (holding that Rule 15(c) applies to post-AEDPA § 2255 petitions); *United States v. Pittman,* 209 F.3d 314, 316-17 (4th Cir. 2000); *Johnson v. United States,* 196 F.3d 802, 805 (7th Cir. 1999) (because the rules governing section 2255 proceedings do not

address amendments to motions for collateral review, Federal Rule of Civil Procedure 15(a) applies); *Anthony v. Cambra,* 236 F.3d 568, 576-78 (9th Cir. 2000) (permitting amended habeas claim to "relate back" to original petition where petition put defendant on notice of amended claim); *Mederos v. United States,* 218 F.3d 1252, 1254 (11th Cir. 2000) (applying Rule 15(c) to post-AEDPA habeas petition and holding that amended pleading related back to original timely pleading); *United States v. Craycraft,* 167 F.3d 451, 457 & n.6 (8th Cir. 1999).

Nor is there any inconsistency between AEDPA's statute of limitations and Rule 15(c)'s amendment regime where, as here, the state is on notice of the claims to be raised; as Moore, a leading treatise explains, "[t]he rationale of allowing an amendment to relate back is that once a party is notified of litigation involving a specific factual occurrence, the party has received all the notice and protection that the statute of limitation requires." James Wm. Moore et al., *Moore's Federal Practice* § 15.19[1] (3d ed. 1999).[13] Here, Ford's amended petitions

[13] In considering the intended application of the Federal Rules of Civil Procedure to habeas corpus it is illuminating to note that in 1938 the expansion of federal habeas corpus to its present scope was only in its early stages. *Harris v. Nelson,* 394 U.S. at 296; *Mooney v. Holohan,* 294 U.S. 103 (1935); *Johnson v. Zerbst,* 304 U.S. 458 (1938); *Waley v. Johnston,* 316 U.S. 101 (1942). It was not until many years later that the federal courts considering a habeas corpus petition were held to be required in many cases to make an independent determination of the factual basis of claims that state convictions had violated the petitioner's federal constitutional rights. *Brown v. Allen,* 344 U.S. 443 (1953); *Townsend v. Sain,* 372 U.S. 293 (1963). In these circumstances it is readily understandable that, as indicated by the language and contemporary exegesis of Rule 15(c), the draftsmen of the rule did not

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are substantively identical to his first – the only change reflecting the disposition of the state-court proceedings – and therefore falls within the scope of the rule. *See* 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1497 (2d ed. 1990) (amendments that merely correct technical deficiencies in earlier pleading meet the Rule 15(c) test and will relate back).

Petitioner insists however, that Rule 15(c) cannot apply to habeas corpus cases in light of AEDPA, because allowing relation back of otherwise time-barred claims would offend Congress's intent to expedite the presentation of claims in federal court. Pet. Br. 32-35. To the contrary, the purpose of Section 2244 was to promote the "exhaustion of available state remedies – which is the object of § 2244(d)(2)." *Artuz v. Bennett,* 121 S. Ct. 361, 365 (2000). To the extent Congress had concerns, these have been addressed by § 2244 which requires state prisoners a full year (plus the duration of state collateral proceedings) to file a federal habeas corpus petition.

In addition, the relation back rule affords a variety of mechanisms to deter abusive litigation and obvert delay. Under Rule 15(a), once a responsive pleading has been served, the habeas petitioner must gain leave of the court before being permitted to amend. Although, under the rule, "leave shall be freely given when justice so requires," the district court may consider whether there is any evidence of "undue delay, bad faith or dilatory motive"

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expressly contemplate that 15(c) of the rules would be applicable to habeas corpus proceedings.

with respect to the filing of the amendment when determining whether leave should be granted. *Foman,* 371 U.S. at 182. So, had Ford, without explanation, waited several years, or even several months, before filing his proposed amendment, it might well have been within the district court's discretion to deny leave to amend under Rule 15(a). However, that is not the case.

Finally, there is no merit to petitioner's contention that Rule 15(c) does not apply to habeas petitions because AEDPA's limitation period is different from other statutes of limitation governing civil causes of action, since its design is to expedite the federal habeas process, particularly in capital cases. Pet. Br. 31-33. The ready explication is that AEDPA already includes a specially "strict standard" for amendment in a limited class of capital cases qualifying for "expedited review." By its terms, this does not include Rule 15(c). *See Calderon,* 523 U.S. at 750 (Breyer, J., concurring) (Rule 15's "liberal standard for amendment" applies in habeas cases outside statutorily defined group of capital cases eligible for expedited review). Section 2266 expressly provides for expedited resolution of an application under section 2254, the adjudication of any motion under section 2255, and the adjudication of a petition for writ of habeas corpus in a capital case. 28 U.S.C. § 2266. Petitioner cannot account for Congress' considered decision to restrict application of Rule 15 and the relation back doctrine in one and only one narrow category of cases.

B. Nothing in the Ninth Circuit's Application of the Relation Back Doctrine Was Improper.

Petitioner proceeds along the assumption that because Ford's original petitions were dismissed, the "relation back" doctrine simply does not apply because there is nothing for the claims to relate back to. Pet. Br. 37; *Neverson v. Bissonnette,* 261 F.3d 120, 126 (1st Cir. 2001) ("relation back" doctrine inapplicable where dismissal of initial habeas corpus petition left nothing for the new petition to relate back to); *see also Marsh v. Soares,* 223 F.3d 1217, 1219-20 (10th Cir. 2000) (collecting cases). The crucial flaw in petitioner's contention is that the federal actions should have been stayed, not dismissed, while the district court ruled on Ford's stay motions. *See also Neverson,* 261 F.3d at 126 n.3; *Zarvela,* 254 F.3d at 380; *Post v. Gilmore*, 111 F.3d 556, 557-58 (7th Cir. 1997). Since staying the action was the proper step to take in the first place, the relation back doctrine clearly applies.

The Ninth Circuit's application of the relation back doctrine was entirely proper. Expressly animated by the need to correct the procedural error which led to the dismissal of Ford's petitions in the first place, distinguishes it from *Green v. White*, 223 F.3d 1001, 1003 (9th Cir. 2000), despite petitioner's contrary contention. (Pet. Br. 37; *see* Pet. App. 33, n.13.) In *Green,* the petitioner had *accepted* the *proper* dismissal of his truly mixed petition and, after exhausting state remedies, filed his renewed petition and attempted to have it relate back to an earlier, properly dismissed petition. In that circumstance, the Court rejected the argument that the petition relates back in time as an amendment because nothing remained of the earlier proceeding. *See id.* Unlike *Green,* Ford's petitions were improperly dismissed; Ford was actively misled when

he was informed he had the option of dismissing his mixed petition without prejudice in order to return to state court to exhaust his then-unexhausted claims. Pet. App. 32-33. Moreover, Green still had almost 11 months remaining in his one-year AEDPA statute of limitations, whereas Ford had none. Pet. App. 33, n.14; *Cf. Anthony,* 236 F.3d at 574 n.1 (distinguishing *Green, Van Tran v. Lindsey,* 212 F.3d 1143 (9th Cir. 2000), and *Henry v. Lungren,* 164 F.3d 1240 (9th Cir. 1999) on the fact of acceptance). Finally, Green was represented by counsel, while Ford was proceeding pro se when he filed his first and second habeas petitions. As the Ninth Circuit emphasized, Ford's pro se status was one of the principal reasons why it held the district judge's failure to fairly and fully inform Ford about his options with respect to the mixed petitions and the stay motions constitutes prejudicial error. Accordingly, case law interpreting the acceptance of *proper* dismissals of mixed petitions is inapposite. (Pet. App. 32, *and see* Pet. App. 32-33 at nn.11-12; *Anthony,* 236 F.3d at 574; *see also Freeman v. Page,* 208 F.3d 572, 577 (7th Cir. 2000) (dismissal of mixed federal petition "is not proper when that step could jeopardize the timeliness of a collateral attack"); *Henry,* 164 F.3d at 1241, (an untimely petition may "relate back" to an earlier petition under Fed. R. Civ. P. 15(c)(2) where a district court impliedly retains jurisdiction). Ford, should be entitled to apply Rule 15(c) to his later-filed petitions.

Finally, petitioner contends that a number of other circuits have addressed the specific relation back issue presented here, namely, whether the relation back doctrine applies to a former habeas proceeding. These circuits have held that Rule 15(c) does not apply where the party

bringing suit did not seek to "amend" his original pleading, but, rather, allowed the first petition to be dismissed and then later opted to file a new petition at a subsequent date. *Neverson*, 261 F.3d at 126; *Marsh,* 223 F.3d at 1219 (holding "relation back" doctrine inapplicable when initial habeas petition had been dismissed because there was no pleading to which the new petition could relate back); *Warren v. Garvin,* 219 F.3d 111, 114 (2d Cir. 2000) (same); petition containing an entirely new claim does not relate back to the original filing date; and *see Newell v. Hanks, supra,* 283 F.3d at 834; *Nyland v. Moore,* 216 F.3d 1264, 1266 (11th Cir. 2000); *Jones v. Morton,* 195 F.3d 153, 160-161 (3d Cir. 1999).

As the holding in this case concerns whether a pro se prisoner litigant can employ the relation back doctrine to have the second petition relate back to and preserve filing date of an *improperly*-dismissed initial petition, the above-cited cases which concern an entirely different question regarding the amendment procedures of Federal Rule of Civil Procedure 15(c) are not at all applicable. As this Court has stated in the past, cases are not authority, of course, for issues not raised and resolved. *R. A. V. v. St. Paul,* 505 U.S. 377, 386, n.5 (1992) (it is "contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned"); *United States v. Stanley*, 483 U.S. 669, 680 (1987) ("no holding can be broader than the facts before the court").

There is no question Ford was misled to his detriment.[14] The magistrate judge made dismissal of both petitions appear to be the preferred course of action. First, the magistrate judge cast the alternative – deleting unexhausted claims – in a decidedly negative light, stating that he would "not later rule" on unexhausted claims, and going so far as to require that Ford formally waive any rights to assert those claims. J.A. 52. Then, in response to Ford's express concerns about the AEDPA time bar, the magistrate judge implied the statute of limitations on at least some of Ford's claims had not run. J.A. 53 (limitation period "begins to run only when the factual predicate of the claims could have been discovered through the exercise of due diligence"). Finally, by presenting the choice so that complete dismissal was the default to which Ford had to object, Pet. App. 17, 20, the magistrate judge conveyed that dismissal was the norm.

This Court should affirm the Court of Appeals' holding that Ford was entitled to relief for the improper dismissal of his first petitions without the necessary advisements. Pet. App. 31-33. The court's decision was designed to obvert the obvious error from the misleading character of the court's advisements; in apprising Ford of his options relative to the first petitions, the magistrate judge did not

[14] It is also abundantly clear that Ford did not understand his choices, at least with the Loguercio case, and that despite its concerns, the magistrate judge simply ignored the problem. As previously noted, Ford made inconsistent elections in his Response and Traverse filed in that case. *See* n.5, *supra.* Despite the court's express recognition Ford did not understand his choices, and despite its request that Ford make a clear election, it nonetheless indicated it would construe Ford's silence as consent to dismissal of the entire petition without prejudice.

inform Ford that the AEDPA period had run which substantively transformed the dismissals "without prejudice" to dismissals "with prejudice," absent grounds for equitable tolling. *Id.* at 14. This follows the approach taken by the Second Circuit in *Zarvela,* which held under similar circumstances that "[a] pro se litigant should [not] lose his opportunity to present his constitutional challenge to his conviction." *Zarvela,* 254 F.3d at 382-83.

C. This Court Should Remand This Matter For Consideration of Equitable Tolling.

The Court of Appeals noted that "[a]lthough we need not reach the question here, Ford would also be entitled to relief under equitable tolling principles." Pet. App. 35 n.15. Although petitioner asserts "tolling ('equitable' or otherwise) is unwarranted," Pet. Br. 26, as with the stay issue, this issue is not properly before this Court. The lower court did not rule on the question, petitioner did not include equitable tolling in the questions presented in its certiorari petition, *see* Cert. Pet. i, petitioner did not mention the issue in the petition itself, and that "finding," is not an issue on which certiorari was granted. Petitioner has therefore waived any right to argue against equitable tolling in this Court.[15]

[15] Reviewing the issue as the petitioner suggests would produce troublesome results. It would create procedural anomalies, allowing review where the lower court decision disfavors, but denying review where it favors, the petitioner without any clear indication to the respondent that such was the petitioner's intent. *Cf. Stewart*, 523 U.S. 641-42. Review would prove difficult to reconcile with the basic principle that jurisdiction to review is to be narrowly construed. *Utah v. Evans*, 536 U.S. 452, 463 (2002).

A remand for consideration of equitable tolling is appropriate. As set forth in the *amicus curiae* brief of the Federal Public Defender for the Central District of California, AEDPA is plainly subject to equitable tolling, and Ford presents a classic case for application of the rule. If the Court does not affirm the decision below, it should remand to give the Ninth Circuit an opportunity to rule on the issue.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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