SUPREME COURT OF THE UNITED STATES

No. 03–221

CHERYL K. PLILER, WARDEN, PETITIONER *v.* RICHARD HERMAN FORD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 21, 2004]

JUSTICE BREYER, dissenting.

I join JUSTICE GINSBURG's dissent. But I write separately to "addres[s] the propriety of" the Ninth Circuit's "stay-and-abeyance procedure." *Ante*, at 5 (majority opinion). That procedure would have permitted Richard Ford, the respondent, to ask the federal court to stay proceedings and hold his federal habeas petition (in abeyance) on its docket while he returned to state court to exhaust his unexhausted federal claims. Thus Ford would not have had to bring his federal petition again, after expiration of the 1-year limitations period. California's courts thereby could have considered his unexhausted claims without forcing him to forfeit his right to ask a federal court for habeas relief.

What could be unlawful about this procedure? In *Rose* v. *Lundy*, 455 U. S. 509 (1982), the Court, pointing to considerations of comity, held that federal habeas courts must give state courts a first crack at deciding an issue. *Id.*, at 518–519. It prohibited the federal courts from considering unexhausted claims. The Court added that, where a habeas petition is "mixed" (containing both exhausted and unexhausted claims), the federal habeas court should dismiss the petition. *Id.*, at 520. *Rose* reassured those prisoners (typically acting *pro se*), however, that the dismissal would not "unreasonably impair the

prisoner's right to relief." *Id.*, at 522. That reassurance made sense at that time because the law did not then put a time limit on refiling. It thereby permitted a prisoner to return to federal court after he had exhausted his state remedies. *Id.*, at 520. Of course, the law prohibits a prisoner from "abusing the writ," but ordinarily a petitioner's dismissal of his mixed petition, his presenting unexhausted claims to the state courts, and his subsequent return to federal court would not have constituted an abuse.

Fourteen years after *Rose,* Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA imposed a 1-year statute of limitations for filing a habeas petition. 28 U. S. C. §2244(d)(1). One might have thought at first blush that the 1-year limitations period would not make much practical difference where an exhaustion-based dismissal of a mixed petition was at issue, for AEDPA tolls the limitations period while "a properly filed application for State post-conviction or other collateral review . . . is pending." §2244(d)(2). In *Duncan* v. *Walker*, 533 U. S. 167, 181–182 (2001), however, this Court held that the words "other collateral review" do not cover a federal habeas proceeding. And that fact means that a *pro se* habeas petitioner who mistakenly files a mixed petition in federal court may well find that he has no time to get to state court and back before his year expires. Hence, after *Duncan*, the dismissal of such a petition will not simply give state courts a chance to consider the unexhausted issues he raises; it often also means the permanent end of *any* federal habeas review. *Ante*, at 4; see also *Duncan*, *supra*, at 186, 191 (BREYER, J., dissenting) (citing statistics that 93% of habeas petitioners are *pro se;* 63% of all habeas petitions are dismissed; 57% of those are dismissed for failure to exhaust; and district courts took an average of nearly nine months to dismiss petitions on procedural grounds).

Indeed, in this very case—a not atypical scenario—the limitations period expired while the petition was pending before the District Court.

I dissented in *Duncan,* arguing that Congress could not have intended to cause prisoners to lose their habeas rights under these circumstances. 533 U. S., at 190. Although the majority reached a different conclusion, it did so primarily upon the basis of the statute's language. See *id.*, at 172–178.

Accepting the majority's view of that language, I nonetheless believe that the other considerations that I raised in *Duncan* support the lawfulness of the Ninth Circuit's stay-and-abeyance procedure. That procedure recognizes the comity interests that *Rose* identified, and it reconciles those interests with the longstanding constitutional interest in making habeas corpus available to state prisoners. There is no tension between the two. It is thus not surprising that nearly every circuit has adopted a similar procedure. *E.g.*, *Crews* v. *Horn*, 360 F. 3d 146, 152 (CA3 2004) ("[V]irtually every other Circuit that has considered this issue has held that, following AEDPA, while it usually is within a district court's discretion to determine whether to stay or dismiss a mixed petition, staying the petition is the only appropriate course of action where an outright dismissal could jeopardize the timeliness of a collateral attack" (internal quotation marks omitted)); *Nowaczyk* v. *Warden*, 299 F. 3d 69, 79 (CA1 2002); *Palmer* v. *Carlton*, 276 F. 3d 777, 781 (CA6 2002); *Zarvela* v. *Artuz*, 254 F. 3d 374, 381 (CA2 2001); *Freeman* v. *Page*, 208 F. 3d 572, 577 (CA7 2000); *Brewer* v. *Johnson*, 139 F. 3d 491, 493 (CA5 1998); cf. *Mackall* v. *Angelone*, 131 F. 3d 442, 445 (CA4 1997); but cf. *Akins* v. *Kenney*, 341 F. 3d 681, 685–686 (CA8 2003) (refusing to stay *mixed* petitions). See also *Duncan*, 533 U. S., at 182–183 (STEVENS, J., concurring in part and concurring in judgment) ("[T]here 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 192 (BREYER, J., dissenting) (noting "JUSTICE STEVENS' sound suggestions that district courts hold mixed petition in abeyance").

I recognize that the *Duncan* majority also noted the importance of respecting AEDPA's goals of "comity, finality, and federalism." *Id.*, at 178 (internal quotation marks omitted). But I do not see how the Ninth Circuit's procedure could significantly undermine those goals. It is unlikely to mean that prisoners will increasingly file mixed petitions. A petitioner who believes that he is wrongly incarcerated would not deliberately file a petition with unexhausted claims in the wrong (*i.e.*, federal) court, for that error would simply prolong proceedings. Those under a sentence of death might welcome delays, but in such cases deliberate misfiling would risk a finding that the filer has abused the writ and a consequent judicial refusal to hold the petition in abeyance. Moreover, a habeas court may fashion a stay to prevent abusive delays; for example, by providing a time limit within which a prisoner must exhaust state-court remedies. See, *e.g.*, *Zarvela, supra*, at 381.

Nor does the Ninth Circuit procedure seriously undermine AEDPA's 1-year limitations period. That provision requires a prisoner to file a federal habeas petition with at least one exhausted claim within the 1-year period, and it prohibits the habeas petitioner from subsequently including any new claim. These requirements remain.

Given the importance of maintaining a prisoner's access to a federal habeas court and the comparatively minor interference that the Ninth Circuit's procedure creates with comity or other AEDPA concerns, I would find use of the stay-and-abeyance procedure legally permissible. I also believe that the Magistrate Judge should have informed Ford of this important rights-preserving option.

See *ante*, at 1 (GINSBURG, J., dissenting). For these reasons, I respectfully dissent.