No. 98-6322

In The

Supreme Court of the United States

ANTONIO TONTON SLACK,

Petitioner,

v.

E.K. MCDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, and FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Rule 9 of the Rules Governing Section 2254 Cases, former 28 U.S.C. § 2244(b), and current 28 U.S.C. § 2244(b) each codify a bright-line rule of res judicata – known in habeas corpus practice as abuse of the writ – which governs the filing of "second or successive" habeas corpus applications. The question on which the Court granted review is:

> If a person's petition for habeas corpus under 28 U.S.C. § 2254 is dismissed for failure to exhaust state remedies and he subsequently exhausts his state remedies and refiles the § 2254 petition, are claims included within that petition that were not included within his initial § 2254 filing 'second or successive' habeas applications?

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to this proceeding.

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I.

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit denying Mr. Slack's request for a certificate of probable cause to appeal is unpublished and is reproduced in the Joint Appendix (JA) at 197. The memorandum decision and order of the United States District Court is unpublished. JA 152.

II.

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit denying Mr. Slack's request for a certificate of probable cause to appeal was filed on July 7, 1998. A petition for writ of certiorari was filed on October 6, 1998. Petitioner invokes the jurisdiction of this court under 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 1978 (1998) ("this Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability"). This court granted certiorari on February 22, 1999. JA 198.

III.

STATUTORY PROVISIONS INVOLVED

This case involves Rule 9(b) of the Rules Governing § 2254 Cases, and the provisions of former 28 U.S.C. § 2244(b), which was the statutory predicate for Rule 9(b). Because the question posed by the Court appears to pertain to "second or successive" applications in general, this case also involves the current provisions of 28 U.S.C. § 2244(b) enacted by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). These provisions are reproduced in an Appendix to this brief.

IV.

STATEMENT OF THE CASE

The Court's order granting certiorari on February 22, 1999 was limited to the following question:

> If a person's petition for habeas corpus under 28 U.S.C. § 2254 is dismissed for failure to exhaust state remedies and he subsequently exhausts his state remedies and refiles the § 2254 petition, are claims included within that petition that were not included within his initial § 2254 filing 'second or successive' habeas applications?

The following facts and prior proceedings pertain to the question before the Court.

A. The Judgment Of Conviction And Direct Appeal.

In 1989, the State of Nevada charged 19-year-old petitioner Antonio Tonton Slack with first degree murder in connection with the death of Alanna Holmes, who died from a single close-range shot in the neck. The shooting took place at the apartment of Kamal Bey who owned the gun that fired the fatal shot. CR 16 (Exhibits in Support of Motion to Dismiss Petition for Writ of Habeas Corpus), Ex. 9 at 122, 133-134. Mr. Slack turned himself in to police soon after the shooting because he was "having nightmares about seeing her when we was playing with the gun and she died." *Id.* at 228. At trial, Mr. Slack testified in his own defense and admitted to having shot Ms. Holmes, but asserted that the killing was accidental. *Id.* at 221-223. Mr. Bey was the State's star witness, testifying that he did not believe Mr. Slack's contention that the shooting was accidental, because, although Mr. Slack exclaimed immediately after the shooting "Cuzz, cuzz, I shot her, I shot her. I ain't mean to shoot her," he looked strange, like he was about to "crack a smile." *Id.* at 138. On May 16, 1990, a jury acquitted Mr. Slack of first degree murder, but convicted him of second degree murder. The state trial court sentenced Mr. Slack to life in the Nevada State Prison for the second degree murder, and imposed a consecutive life sentence because Mr. Slack had used a deadly weapon in connection with the killing. JA 3; *see* JA 36.

Mr. Slack pursued a timely direct appeal to the Nevada Supreme Court. On November 5, 1991, the Nevada Supreme Court dismissed Mr. Slack's appeal. JA 3.

B. Mr. Slack's Proper Person Federal Habeas Corpus Proceeding Is Dismissed Without Prejudice Less Than Three Months After It Is Filed.

Following the affirmance of his conviction on direct appeal, Mr. Slack filed a proper person petition for writ of habeas corpus in the United States District Court for the District of Nevada on November 27, 1991 (the 1991 filing). The 1991 filing raised the same issues Mr. Slack originally raised in his brief to the Nevada Supreme Court. JA 6. After the State of Nevada obtained an extension of time to answer, Mr. Slack moved to stay the proceedings "pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982)," so that he could pursue post-conviction relief proceedings in the Nevada state courts. Mr. Slack included in his motion a list of unexhausted issues that were not contained in his initial filing, which he proposed to exhaust during state court habeas corpus litigation. JA 17-18. On February 19, 1992, noting that there was "no objection by either party," JA 21, the district court dismissed the 1991 filing "without prejudice" and granted Mr. Slack leave "to file an application to renew upon exhaustion of all State remedies." JA 22.

C. Mr. Slack Returns To State Court To Exhaust His Claims.

On July 10, 1992, Mr. Slack, again acting in proper person, filed a post-conviction petition for writ of habeas corpus in the Nevada state trial court. Among other things, Mr. Slack alleged that he had been denied his Sixth and Fourteenth Amendment rights to the effective assistance of trial and appellate counsel, and made allegations of facts

outside the record supporting this claim.[1] Without appointing counsel, the state trial court summarily denied Mr. Slack's petition, finding that there was no need for trial counsel to interview witnesses or file pre-trial motions. JA 24. On February 1, 1993, Mr. Slack filed a timely notice of appeal, and a request for appointment of counsel. JA 23. On December 30, 1993, without appointing counsel, and without any briefing or oral argument, the Nevada Supreme Court dismissed the appeal, ruling only that Mr. Slack's claims were "repelled by the record." JA 31.

D. Mr. Slack Returns To Federal Court With An Exhausted Petition.

On March 27, 1995, Mr. Slack returned in proper person to the federal district court and filed an amended petition for writ of habeas corpus, which contained the claims Mr. Slack had just presented in the Nevada courts, as well as the issues he had raised in the 1991 filing. JA 35. Mr. Slack further notified the federal court of the 1991 filing, reminding the court that that filing had been "dismissed without prejudice." JA 45. On June 1, 1995, Mr. Slack filed a motion for the appointment of counsel alleging that he was "incompetent with the knowledge of litigating the law." JA 48. The State of Nevada opposed the motion, urging the court not to "waste

[1] These included an allegation that trial counsel failed to properly investigate a number of matters concerning the State's star witness, Kamal Bey, a juvenile who had originally been charged as an adult in connection with Ms. Holmes' killing because his fingerprints were found on the murder weapon, but who was given a six-month sentence in a prosecution in juvenile court. Mr. Slack alleged that trial counsel had been ineffective for failing to sufficiently investigate Mr. Bey's agreement with law enforcement authorities, especially by failing to request a copy of the agreement itself, which apparently required specific testimony from Mr. Bey before it would be enforced. JA 38. Mr. Slack also alleged that his trial counsel had failed to take sufficient steps to interview other witnesses who had testimony that could have refuted Mr. Bey's testimony, and failed to file pre-trial motions to exclude Mr. Bey's accomplice testimony. *Id.*

scarce judicial resources." JA 53. The State argued, "Slack acknowledges that he is receiving the benefit of services of the inmate law clerks. He is entitled to nothing more." JA 54. On February 29, 1996, the district court denied Mr. Slack's motion for the appointment of counsel. After the State filed additional procedural motions seeking a more definite statement and seeking to dismiss for lack of factual exhaustion, Mr. Slack renewed his request for the appointment of counsel. JA 56. The State again opposed the motion. JA 61.

On February 13, 1997, the district court finally concluded that it was "in the best interest of justice" to appoint counsel. JA 64. The district court appointed the Federal Public Defender to represent Mr. Slack, and directed counsel to "discuss and explore with petitioner, as fully as possible, the potential grounds for habeas corpus relief in Petitioner's case . . . advise petitioner that all possible grounds for habeas corpus should be raised at this time, and that failure to do so may result in loss of the omitted grounds under the rules regarding abuse of the writ;" and allowed counsel time to review the file and amend the petition. JA 64-65. On December 24, 1997, counsel filed an amended petition for writ of habeas corpus. JA 66.[2] Counsel acknowledged that claims 2

[2] The petition alleges seven federal constitutional grounds for relief:

(1) Insufficient evidence to support the conviction;

(2) Insufficient notice provided by the charging document;

(3) Improper introduction of evidence of Mr. Slack's sexual relationship with the victim;

(4) Failure of the trial court to properly instruct the jury on (a) reasonable doubt, (b) premeditation and deliberation, and (c) malice aforethought;

(5) Ineffective assistance of trial counsel through (a) failure to take steps to prevent the introduction of sexual misconduct evidence, (b) failure to object to improper jury instructions, and (c) failure to develop the facts of the case and present available defenses;

and 4(c) in the amended petition had not yet been presented to the state courts. JA 72, 78.

E. The District Court Dismisses Claims Raised By Mr. Slack's Federal Habeas Counsel As "Abusive" Under Rule 9(b), Even Though Mr. Slack Has Never Received A Federal Adjudication Of Any Claim.

On December 28, 1997, the State moved to dismiss based on the lack of complete exhaustion. *See Rose v. Lundy*, 455 U.S. 509, 510 (1982). JA 92. The State also argued that all of the claims which had not been raised in the unadjudicated 1991 filing were subject to dismissal with prejudice for abuse of the writ. According to the State, by noting the existence of Mr. Slack's 1991 filing, and by pleading abuse of the writ, it had shifted the burden to Mr. Slack to demonstrate "cause and prejudice" under *McCleskey v. Zant*, 499 U.S. 467 (1991) and that, absent such a showing, the district court was compelled to dismiss claims 2, 4(c), 5, 6 and 7 as abusive, under the standards applicable to "second or successive" petitions. *See Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996), *cert. denied*, 520 U.S. 488 (1997); Rules Governing Section 2254 Cases, Rule 9(b). JA 103-110.

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(6) Ineffective assistance of appellate counsel; and

(7) Cumulative error.

These claims raise significant federal constitutional defects in the state proceedings. For instance, pursuant to statute, Nev. Rev. Stat. § 200.020(2), Mr. Slack's jury was instructed that "Malice **shall be implied** when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." (Emphasis supplied.) This instruction had the effect – especially in light of the fact that Mr. Slack claimed that the killing was accidental – of forcing the jury to presume malice unless Mr. Slack could demonstrate either that the decedent provoked him or that he did not possess an "abandoned and malignant heart." Such a mandatory presumption arguably violates *Sandstrom v. Montana*, 442 U.S. 510 (1979) and *Yates v. Aiken*, 484 U.S. 211 (1988).

In response, Mr. Slack argued that the substance of most of the claims in the petition had already been fairly presented to the state courts and thus met the exhaustion requirement. JA 132-134. Mr. Slack further asserted that, even if any of his claims were deemed unexhausted, those claims could not be barred as abusive because (1) he had not completed a "first round" of federal habeas because he had never received a prior adjudication of any of his claims; and (2) any unexhausted claims could not be deemed "abusive" under Rule 9(b) or under *Farmer* because they had not been deliberately withheld. JA 134-138.

On March 13, 1998, the district court entered an order concluding that because Mr. Slack had not raised Claims 2, 4(c), 5, 6 and 7 in his previous unadjudicated petition, those claims were presumptively abusive under Rule 9(b) and *McCleskey*. The district court accordingly directed Mr. Slack "to file points and authorities addressing whether he can overcome the abuse of the writ bar that is applicable to grounds 2, 4(c), 5, 6 & 7 of the instant amended habeas petition." JA 143. The court's order held that the only way Mr. Slack could overcome a finding of abuse was to demonstrate "cause and prejudice" or a "fundamental miscarriage of justice" – the standard *McCleskey* applies to "second or successive" petitions. JA 142-143.

On March 26, 1998, Mr. Slack filed a motion for reconsideration of the district court's order. JA 145. Mr. Slack argued that, because no prior adjudication had occurred, the amended petition could not constitute a "second or successive" one within the meaning of Rule 9(b). Mr. Slack accordingly argued that the court could not find the claims abusive under Rule 9(b) or under any other doctrine. JA 146-147, 149-150.

On March 31, 1998, the district court entered an order dismissing Mr. Slack's petition. The court dismissed grounds 2, 4(c), 5, 6 and 7 with prejudice on the ground that they were "abusive" under Rule 9(b), citing *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996) and *McCleskey v. Zant*, 499 U.S.

467 (1991), because they had not been raised in the initial unadjudicated petition. JA 155-156. The district court further concluded that Claim 3 was unexhausted because, although Mr. Slack had presented the facts supporting the claim to the state courts during the direct appeal, he "had not argued his Fifth or Fourteenth Amendment right to due process was violated when prejudicial evidence was presented to the jury." JA 157-158.

On April 29, 1998, Mr. Slack filed a timely notice of appeal. JA 161. On May 11, 1998, Mr. Slack filed an application for a certificate of probable cause to appeal, arguing that it was at least "debatable among jurists of reason" whether the lower court erred regarding its dismissal of Claims 2, 4(c), 5, 6 and 7 as abusive. Specifically, Mr. Slack explained that it is debatable (1) whether his amended petition constituted a "second or successive" one under Rule 9(b); (2) whether the lower court properly applied the abuse of the writ standard under these facts, where there was no showing that he had deliberately withheld any of the claims; and (3) whether the lower court properly determined that claim 3 was unexhausted. JA 163.

On May 19, 1998, the district court denied Mr. Slack's application for a certificate of probable cause to appeal. JA 182. On July 7, 1998, a two-judge panel of the Court of Appeals for the Ninth Circuit summarily denied Mr. Slack's request for a certificate of probable cause. JA 197. On February 22, 1999, this Court granted Mr. Slack's petition for certiorari. JA 198.

V.

SUMMARY OF THE ARGUMENT

For more than a century, this Court's exhaustion and abuse of the writ precedents have rested on the premise that a "second or successive" habeas corpus application is one filed after a previous federal application has been adjudicated on the merits. Settled exhaustion doctrine, including the "complete exhaustion" rule of *Rose v. Lundy*, 455 U.S. 509 (1982),

thus directly contemplates that a "without prejudice" dismissal for state court exhaustion proceedings will not have preclusive effect on any later federal habeas proceedings. Similarly, numerous abuse of the writ precedents explicitly describe the doctrine as a form of "res judicata," which by definition attaches preclusive weight only to a prior merits adjudication.

There are sound reasons why the Court has built its habeas corpus jurisprudence on the premise that no application for habeas corpus can be "second or successive" in the absence of a prior federal adjudication: That bright-line rule is the only one that makes any sense as a matter of comity, consistency and fairness. Anglo-American law has a "deep-rooted historic tradition that everyone should have his . . . day in court." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (citations and internal quotation marks omitted). The doctrine of res judicata, which precludes a party from litigating claims that were, or could have been, adjudicated in a previous proceeding, "rests at bottom upon the ground that the party to be affected . . . , has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings." *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 476 (1918) (citations omitted).

Without acknowledging these clear, well-grounded principles, the Ninth Circuit has substantially deprived prisoners such as Antonio Slack of any "opportunity to be heard" in federal habeas corpus proceedings, by adopting an ad hoc definition of the term "second or successive" that attaches preclusive, res judicata effect to a prior "without prejudice" dismissal for lack of complete exhaustion. The unfairness inherent in such a rule is demonstrated by this case, in which the district court applied the Ninth Circuit's punitive rule to bar Mr. Slack from pursuing his claims simply for trying to do what this Court contemplated under the complete exhaustion rule of *Rose v. Lundy*. After he filed his initial propria persona

federal petition, Mr. Slack realized that he had unexhausted constitutional claims in addition to those presented in the petition, and promptly asked the court to stay proceedings while he exhausted those claims. The parties, including the state, then agreed to dismissal of the petition without prejudice, and Mr. Slack, again in propria persona, promptly sought to litigate those claims in the state court. When he returned to federal court, however, the lower courts barred merits review of virtually all of Mr. Slack's claims by giving preclusive effect to the "without prejudice" dismissal. The effect of the Ninth Circuit's rule is that Mr. Slack's claims are precluded as a result of the 1991 habeas proceeding, in which he had no "opportunity to be heard" with respect to his unexhausted claims, and no "opportunity to litigate" those claims because of the complete exhaustion rule of *Rose v. Lundy*.

Such a rule runs directly counter to the promise of *Rose v. Lundy* that a dismissal for exhaustion is without prejudice to further proceedings; it wholly contradicts the principled evolution of the abuse of the writ doctrine as an aspect of res judicata, *see McCleskey v. Zant*, 499 U.S. 466, 489-90 (1991); *Felker v. Turpin*, 518 U.S. 651, 664 (1996); *Lonchar v. Thomas,* 517 U.S. 314, 323-324 (1996); and the Court must disavow it, just as every other lower court to consider the issue has done. Indeed, just last term, in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618, 1621 (1998), this Court said it would be "seemingly perverse" to apply a construction of "second or successive" application that would attach preclusive effect to a dismissal without prejudice for exhaustion. And yet, the Ninth Circuit has applied this "seemingly perverse" rule here to bar any consideration of the majority of Mr. Slack's claims.

Only three years ago, in *Lonchar v. Thomas*, 517 U.S. 314 (1996), the Court directed lower courts not to dismiss habeas corpus petitions in an "ad hoc" fashion, but to apply restrictions recognized by "formal judicial, statutory, or rules-based doctrines of law." This Court emphasized that clear

rules are of extreme importance in the habeas context because they "reduce uncertainty, avoid unfair surprise, minimize disparate treatment of similar cases, and thereby help all litigants." *Id.* at 324. The need for bright-line rules is "particularly strong when dismissal of a *first* habeas petition is at issue. Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Id.* at 324 (emphasis in original).

The res judicata and exhaustion principles applied in *Martinez-Villareal* and *McCleskey* supply the "bright line" rule, limiting the application of the abuse doctrine to cases in which there has been a previous merits adjudication, which must govern the disposition of this case. Just as in *Lonchar*, the Ninth Circuit's attempt to deviate from "formal judicial, statutory, or rules-based doctrines of law," by treating a post-exhaustion habeas application as a "second or successive" one, is impermissible. Currently existing rules and statutes, including established principles governing exhaustion of remedies, *see Rose v. Lundy*, 455 U.S. 509, 520-22 (1982), and the applicable Federal Rules of Civil Procedure, provide a regular and predictable structure for conducting exhaustion procedures which is inconsistent with the ad hoc preclusion rule devised by the Ninth Circuit. The Ninth Circuit's unprecedented treatment of a post-exhaustion petition as "second or successive" habeas corpus application will, just as the *Lonchar* Court predicted, introduce substantial uncertainty and unfairness into habeas corpus litigation. By forcing the district courts to ignore constitutional claims that have been litigated or discovered during state court exhaustion proceedings, the Ninth Circuit's preclusion rule also vitiates the very comity concerns underlying the exhaustion doctrine. No legitimate purpose is served by such a rule. This Court should vacate the ruling below, and affirm the straightforward rule that the dismissal of a habeas application without prejudice for exhaustion, without adjudication of any claim, does not

make a renewed petition a "second or successive" habeas application.

VI.

ARGUMENT

A "SECOND OR SUCCESSIVE" HABEAS CORPUS APPLICATION CANNOT EXIST IN THE ABSENCE OF A PRIOR MERITS ADJUDICATION

A. Formal Judicial, Statutory And Rules-Based Doctrines Of Habeas Corpus Law All Make Clear That A Habeas Corpus Petition Cannot Be "Second Or Successive" In The Absence Of A Prior Merits Adjudication.

In *Lonchar*, this Court examined the "formal judicial, statutory, or rules-based doctrines of law" governing the resolution of habeas corpus petitions, 517 U.S. at 317, and then considered whether the rule adopted by the lower court could be supported within that framework. 517 U.S. at 323-332. The analysis here is identical. The "formal judicial, statutory, or rules-based doctrines of law" that apply to Mr. Slack's case make it clear that under well-established habeas corpus doctrine – governing exhaustion, abuse of the writ and the term "second or successive" application – a habeas application cannot be "second or successive" as to any claim if there has been no previous merits adjudication by a federal court.[3] The basis for the unprecedented ruling preventing Mr. Slack from litigating his claims in federal court is *Farmer v. McDaniel*, 98 F.3d 1548, 1555-57 (9th Cir. 1996), *cert. denied*, 520 U.S. 1188 (1997), in which a divided panel of the Ninth Circuit ruled that a petition can properly be labeled "second or

[3] Mr. Slack's petitions were filed before the enactment of AEDPA, and his case is therefore governed by pre-AEDPA law. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). As shown below, however, the definition of a "second or successive" habeas corpus application is the same under both AEDPA and pre-AEDPA law. *See* pp. 31-32, below.

successive" – and therefore "abusive" under Rule 9(b) – even though no prior federal adjudication had ever occurred. The analysis below demonstrates that, like the lower courts' rulings in *Lonchar*, the Ninth Circuit's *Farmer* rule has no historical, statutory or common law basis, and has no support in legitimate policy considerations. The Ninth Circuit's rule should accordingly meet the same fate as did the ad hoc rule in *Lonchar*.

1. This Court's Exhaustion Precedents Make Clear That A Habeas Application Filed After An Unconditional Federal Court Order Dismissing An Earlier Petition "Without Prejudice" For Lack Of Complete Exhaustion Cannot Be "Second Or Successive."

This is a case about how the rules that govern exhaustion of state court remedies interact with the claim-preclusion rules of the abuse of the writ doctrine. Analysis of this subject begins with *Rose v. Lundy*, 455 U.S. 509, 520-22 (1982), where the Court addressed the interplay between these two doctrines. *Rose* presented the question whether the inclusion of any unexhausted claims in a habeas corpus application compelled the dismissal of the entire petition. Recognizing that "[t]he exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings," *id.* at 518 (citations omitted), the *Rose* court adopted a "total exhaustion" rule. That rule requires the presentation of a fully exhausted habeas corpus petition prior to the adjudication of that petition by a federal court, and "requir[es] dismissal of petitions containing both exhausted and unexhausted claims." *Id.* at 519. In discussing why this rule would not constitute a trap for unwary litigants, this Court explained:

> Those prisoners who misunderstand this requirement and submit mixed petitions nevertheless are entitled to resubmit a petition with only exhausted claims or to exhaust the remainder of their claims.

Id. at 520. Justice O'Connor's plurality opinion warned, however, "a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent petitions." *Id.* at 521.

Rose thus sets forth clear standards on how the exhaustion doctrine affects the course of federal habeas corpus litigation, and in particular how *Rose* affects the claim preclusion rules under the abuse of the writ doctrine. Under *Rose*, a federal habeas petitioner is presumptively entitled to only a single adjudication of his claims by the federal courts and that adjudication can occur only after the petitioner has fully exhausted any available state remedies for all of the constitutional claims on which he or she wants to proceed. Once a federal adjudication occurs, the litigation is presumptively over, and as *Rose* expressly makes clear, the federal adjudication creates the potential that later proceedings will constitute an "abuse of the writ" under Rule 9(b). Before an adjudication occurs and while state remedies remain "available," however, a litigant may (and generally must) return to state court to exhaust state remedies; and the federal court must dismiss the petition "without prejudice" so that the state courts remain free to control the scope of the exhaustion litigation without interference from the federal courts. In short, *Rose* holds that the federal courts must either "back off" until the state proceedings are over or, if state remedies are not available or effective, must adjudicate the federal petition under the same standards that govern all first petitions – at which point any federal collateral attack on the state court conviction will generally end.

Nothing in *Rose*, however, remotely supports the idea that the rules governing the exhaustion of state remedies – which are designed solely to channel claims in the first instance into the state courts and thereby to ensure that the state courts have the first opportunity to consider them – into a doctrine that precludes consideration of the claims of an unwary but non-abusive litigant, such as Mr. Slack. A doctrine intended to encourage petitioners to conduct thorough

exhaustion proceedings simply cannot be advanced by precluding federal consideration of the claims which are exhausted, and nothing in more than a century of exhaustion precedent condones or supports such a result. Rather, the Court's precedents have consistently recognized that the exhaustion rule is a doctrine which commands only deferring adjudication until the entire state court process has been completed, and is not a doctrine of preclusion.

2. This Court's Entire Body Of Exhaustion Law, As Well As Current Statutes Dealing With Exhaustion, Make Clear That The Doctrine Is Solely About Abstaining From Interference With State Court Proceedings, And Is Not In Any Way A Rule Of Preclusion.

More than 110 years ago, in *Ex Parte Royall*, 117 U.S. 241, 251-52 (1886), the Court affirmed lower court decisions dismissing habeas corpus petitions, on the ground that state court proceedings had not yet been completed. The Court reasoned that exhaustion of remedies was necessary:

> in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution. . . . [The instant federal petition does not] suggest any reason why the state court of original jurisdiction may not, without interference upon the courts of the United States, pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted.

Id. at 252-53. The Court accordingly affirmed the dismissals, but explicitly "without prejudice to the right of the petitioner to renew his application to that court at some future time should the circumstances render it proper to do so." *Id.* at 254.

In *Whitten v. Tomlinson*, 160 U.S. 231 (1895), the Court affirmed a federal court dismissal of a pre-exhaustion petition, again "without prejudice to the right of the petitioner to renew the motion," 160 U.S. at 299, explaining that the prisoner should not be discharged:

> in advance of any proceedings in the courts of the state to test the validity of his arrest and detention. To adopt a different rule would unduly interfere with the exercise of the criminal jurisdiction of the several states, and with the performance by this Court of its appropriate duties.

Id. at 247. *Accord*, *Riggins v. United States*, 199 U.S. 547, 551 (1905) (dismissal without prejudice for exhaustion required by "settled rule"); *Baker v. Grice*, 169 U.S. 284, 293 (1898).

This principle of deferring federal court adjudication had become black-letter law by the time of *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13, 17-18 (1925), where the Court held that "in the regular and ordinary course of procedure, the power of the highest state court in respect of [constitutional] questions should first be exhausted. When that has been done, the authority of this court may be invoked to protect a party against any adverse decision involving a denial of a federal right properly asserted by him." The Court relied not only on *Ex Parte Royall* on this point, but on a line of eleven exhaustion cases decided since 1886. *Tyler*, 269 U.S. at 18.

The Court has applied these principles to a procedural situation indistinguishable from Mr. Slack's. In *Ex Parte Hawk*, 321 U.S. 114 (1944) (per curiam), the petitioner had been convicted of murder and the state supreme court affirmed the conviction on direct appeal. Mr. Hawk then proceeded directly to federal court, and the federal court dismissed his petition for lack of complete exhaustion. The state courts summarily denied Mr. Hawk's petition for writ of habeas corpus, and Mr. Hawk filed another federal habeas corpus petition, which the lower federal courts dismissed for lack of complete exhaustion. *Id.* at 115-16. On appeal, this Court observed that "petitioner has not yet shown that he has

exhausted the remedies available to him in the state courts, and he is therefore not at this time entitled to relief." *Id.* at 116. The Court then sketched out the state court remedies that remained available to Mr. Hawk, and determined that "as petitioner does not appear to have exhausted his state remedies his application will be denied without prejudice. . . . " *Id.* at 118. "In 1948, Congress codified the exhaustion doctrine in 28 U.S.C. § 2254, citing *Ex Parte Hawk* as correctly stating the principle of exhaustion." *Rose v. Lundy*, 455 U.S. 509, 516 (1982) (plurality opinion); *accord*, *Darr v. Burford*, 339 U.S. 200, 214 (1950); *Irvin v. Dowd*, 359 U.S. 394, 405 (1959).

In *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490 (1973), the Court again explained the policies underlying the exhaustion doctrine:

> As applied in our earlier decisions, the [exhaustion] doctrine preserves the role of the state courts in the application and enforcement of federal law. Early federal intervention in the state criminal proceedings would tend to remove federal questions from the state courts, isolate those courts from constitutional issues, and thereby remove their understanding of and hospitality to federal protected interests. Second, [the doctrine] preserves orderly administration of state judicial business, preventing the interruption of state adjudication by federal judicial proceedings.

(Emphasis added.)

Like *Rose*, recent cases have reaffirmed the fundamental principle that the federal courts should refrain from making any adjudication on the merits until all the available state court proceedings have run their course. *Vasquez v. Hillery*, 474 U.S. 254, 247 (1986) ("exhaustion doctrine seeks to afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary."); *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (per curiam) (exhaustion doctrine "serves to minimize friction between our state and federal systems of justice by allowing the State an initial opportunity to pass upon and correct

alleged violations of prisoner's rights"); *Picard v. O'Connor*, 404 U.S. 270, 275 (1971) (exhaustion doctrine designed to give "States an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights. [citations] We have consistently adhered to this federal policy for it would be unseemly for a federal district court to upset a state court conviction without an opportunity to correct a constitutional violation."); *see also Granberry v. Greer*, 481 U.S. 129, 134 (1987) (where non-exhaustion not raised, comity and federalism interests provide federal courts with discretion to address claims forthwith or to require "series of additional state and district court proceedings before reviewing the merits of the petitioner's claims.")

Just as *Rose* did, these authorities establish a clear duty for the lower federal courts: Either let the state proceedings run their course, or entirely adjudicate the federal application. More specifically, the Court's exhaustion teachings provide federal courts with two options when faced with a habeas corpus petition that does not consist solely of exhausted claims: (1) Dismiss the petition without prejudice and require additional state court proceedings before conducting a presumptively final adjudication; or (2) "Address the merits forthwith" if special circumstances, such as "unavailable" or "ineffective" state court remedies, or the circumstances expressly set forth in § 2254(b)(2), will permit doing so.[4]

[4] For instance, dismissal is not required when an applicant's unexhausted claims would be barred by an independent, clearly-established, regularly-applied state procedural rule. Nevada has chosen not to impose such absolute impediments to state collateral review as a matter of state law. *See, e.g., Glauner v. State*, 107 Nev. 482, 813 P.2d 1001 (1991) (per curiam) (no statute of limitations in collateral proceedings); *Pertgen v. State*, 110 Nev. 554, 875 P.2d 361, 364 (1994) (per curiam) (Nevada courts examine merits of constitutional claim to determine if procedural bar applies). Imposition of an anticipatory state default bar by a federal court is impermissible unless state courts would necessarily be required to apply a default rule. *See, e.g., Banks v. Horn*, 126 F.3d 206, 212-13 (3d Cir. 1997); *Sloan v. Delo*, 54 F.3d 1371, 1381 (8th Cir. 1995), *cert. denied*, 516 U.S. 1056 (1996); *Woods v. Kemna*, 13 F.3d 1244, 1245-46 (8th Cir. 1994); *Ashker v. Leapley*, 5 F.3d 1178, 1180 (8th Cir. 1993); *Hull v. Freeman*, 991 F.2d 86, 91 (3d Cir. 1993) (dismissing possibly defaulted claim on nonexhaustion grounds in interest of "federal-state comity" so that state courts can determine whether petitioner qualifies for exception to state procedural rule); *Johnson v. Lewis*, 929 F.2d 460, 464 (9th Cir. 1991). Federal courts that sit in states that have clear procedural prohibitions on successive review, however, can apply those rules in the course of adjudicating an otherwise unexhausted petition. Under *Castille v. Peoples*, 489 U.S. 346, 351-52 (1989), a federal court need not dismiss a mixed petition where "it is clear that [the petitioner's otherwise unexhausted] claims are now procedurally barred under [state] law." This is because "a habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991).

Neither AEDPA, nor *Granberry*, nor *Rose*, nor any of the Court's exhaustion decisions suggest that the federal courts may limit further proceedings to claims already contained in an unexhausted and dismissed federal habeas petition. And the reason for the omission is plain: such an option would be inconsistent with the comity interests that underlie the exhaustion doctrine by allowing the federal courts to interfere with ongoing state proceedings while at the same time avoiding a final federal adjudication of the merits of any claim.

3. Dismissal Without Prejudice Is Not A Judgment On The Merits And Therefore Cannot Be Given Preclusive Effect.

The complete exhaustion rule of *Rose v. Lundy* is designed to avoid premature federal adjudication of constitutional claims, by allowing the state court proceedings to address the claims first. A necessary concomitant of such abstention is that the federal court does not adjudicate any claim by dismissing a premature federal petition: abstention is a doctrine that postpones federal adjudication but does not preclude it. *E.g., Coleman v. Thompson*, 501 U.S. 722, 731 (1991). This rule is consistent with the general law relating to

dismissals without prejudice and with res judicata principles. *See* pp. 21, 24-27 below. It has always been clear that a dismissal for lack of exhaustion is "without prejudice,"[5] and "dismissal without prejudice is a dismissal that does not operate as an adjudication on the merits, [citation], and thus does not have res judicata effect." *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 396 (1990), quoting in part, Fed. R. Civ. P. 41(b); *accord Public Service Commission of Missouri v. Brashear Freight Lines, Inc.*, 312 U.S. 621, 626-27 (1941) (holding order of dismissal "without prejudice to the right of defendants to maintain an independent action or suit thereon," had no preclusive effect on later action involving same subject matter); *United States v. Seckinger*, 397 U.S. 203, 206 n.6 (1970) (holding prior dismissal, that expressly "left open the option of the United States to pursue its claim against Seckinger at a later time," did not trigger principles of res judicata).[6]

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[5] Although all of the controlling authorities require "without prejudice" dismissals, nothing in those authorities would prohibit a "without prejudice" dismissal "under the terms and conditions as the court deems proper," Fed. R. Civ. P. 41(a)(2), which could include a condition expressly requiring that any petition filed after returning from state court contain only exhausted claims. Such a rule would allow the exhaustion proceeding to be conducted without any limitation imposed by the federal courts, and would avoid a strained and unprecedented interpretation of the exhaustion and abuse of the writ doctrines by tying the court's power to limit the exhaustion procedure to already existing rules and jurisprudence. *See* p. 47, below.

[6] The lower courts have, of course, uniformly followed this rule. *E.g.*, *Mann v. Haigh*, 120 F.3d 34, 36 (4th Cir. 1997) ("the district court's earlier dismissal was made expressly without prejudice and, accordingly, has neither an issue nor a claim preclusive effect."); *Bowden v. United States*, 106 F.3d 433, 441 (D.C .Cir. 1997) ("The district court based its dismissal of that claim on its earlier dismissal of the identical claim in Bowden's initial suit. Because the earlier dismissal was without prejudice, however, it cannot provide the foundation for the dismissal that is before us now."); *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1467 (10th Cir. 1993) (quoting *Cooter v. Gell)*; *Heath v. Cleary*, 708 F.2d 1376, 1380 n.4 (9th Cir. 1983) (dismissal for exhaustion of administrative remedies not judgment on merits and has no preclusive effect); *Humphreys v. United States*, 272 F.2d 411, 412 (9th Cir. 1959) ("a suit dismissed without prejudice pursuant to Rule 41(a)(2) leaves the situation the same as if the suit had never been brought in the first place.").

All courts agree that dismissals for lack of complete exhaustion in the habeas context must be without prejudice. *E.g.*, *O'Guinn v. Dutton*, 88 F.3d 1409, 1411-13 (6th Cir. 1996) (en banc); *Johnson v. Lewis*, 929 F.2d 460, 464 (9th Cir. 1991). In this case, however, the fact that the previous dismissal was without prejudice did not prevent the Ninth Circuit from attaching a prejudicial preclusive effect to that dismissal.

4. The Ninth Circuit's Rule Cannot Be Squared With The Applicable Exhaustion Principles.

The rule applied by the Ninth Circuit in this case failed to acknowledge or apply these principles. Instead the Ninth Circuit rule reduces a dismissal "without prejudice" for exhaustion proceedings to a cruel hoax, because it gives the dismissal preclusive effect as to any claim not in the prematurely-filed petition. This procedure misleads the petitioner as to the character of the dismissal in a way that *Rose v. Lundy* does not remotely countenance, and it places Mr. Slack in the same position as the petitioner in *Stewart v. Martinez-Villareal*, 118 S.Ct. at 1620. In that case, the district court and the Court of Appeals ruled that the judgment in the petitioner's fourth federal habeas corpus proceeding would not bar later consideration of his *Ford* claim, *Ford v. Wainwright*, 477 U.S. 399 (1986), because it was premature, but when he later attempted to assert it the district court held that the claim was barred as "second or successive." Here, the district court assured Mr. Slack, by the order dismissing the initial petition "without prejudice" for exhaustion and granting leave to "renew" his action after exhaustion proceedings, that the judgment would not have preclusive effect, and the state did not object to that action. JA 21-22. When Mr. Slack returned to federal court, however, the district court did apply a preclusion bar, just as the district court did in *Martinez-Villareal*.

Such a rule turns the exhaustion rule into exactly what the court in *Rose v. Lundy* said it was not, a trap for the unwary.

The Ninth Circuit rule also violates the due process element of the res judicata doctrine. The validity of an application of res judicata under the due process guarantee of the Fifth or Fourteenth Amendment depends upon whether the party sought to be precluded had an adequate opportunity to litigate the claim in the earlier proceeding. *See, e.g., Richards v. Jefferson County*, 517 U.S. 793, 797 n. 4 (1996); pp. 25-26, below. Mr. Slack could not have litigated his unexhausted claims in the 1991 filing precisely because they were unexhausted. To hold that these claims are precluded by the dismissal of that premature petition mocks the exhaustion doctrine and this Court's well-settled jurisprudence.

Nothing in the history, purpose or language of the exhaustion doctrine permits such a result, which this Court characterized in *Stewart v. Martinez-Villareal*, 118 S.Ct. at 1621, as "seemingly perverse." Rather, sound application of those principles compels a finding that, when the district court refrained from adjudication by dismissing Mr. Slack's 1991 filing "without prejudice," that dismissal had no preclusive effect on later state court and federal court proceedings. The answer to the question posed by the Court is thus clear as a matter of settled exhaustion doctrine: Where a person's petition for habeas corpus under 28 U.S.C. § 2254 is dismissed for failure to exhaust state remedies, and he subsequently exhausts his state remedies and refiles the § 2254 petition, the earlier "without prejudice" dismissal can have no preclusive effect, and claims included within that petition that were not included within his initial § 2254 filing are not "second or successive" habeas applications.

B. This Court's Abuse Of The Writ Precedents – Which Describe That Doctrine As A "Modified Res Judicata Rule" – Make Clear That No Petition Can Be "Second Or Successive" In The Absence Of A Prior Merits Adjudication.

The Ninth Circuit rule giving preclusive effect to a "without prejudice" dismissal not only clashes with settled exhaustion law, it runs equally afoul of this Court's precedents concerning abuse of the writ. The Court's decisions dealing with the "modified res judicata" abuse of the writ doctrine demonstrate that Rule 9 of the Rules Governing Section 2254 Cases, former 28 U.S.C. § 2244(b), and current 28 U.S.C. § 2244(b), have applied a bright-line res judicata rule in determining what constitutes a "second or successive" habeas application. Any bright-line rule of "res judicata"must focus its inquiry on the effect of a prior federal adjudication – as the Court consistently has – and not on the mere filing of a federal petition that was dismissed "without prejudice." The vice of the Ninth Circuit rule is that it gives preclusive effect to a dismissal without prejudice just as it would give preclusive effect to a "first round" of habeas corpus litigation on the merits.

1. The Court Applies Res Judicata Principles In The Habeas Context Through The Abuse Of The Writ Doctrine By Attaching "Vital Relevance" To A Prior Adjudication.

In *McCleskey v. Zant*, 499 U.S. 467, 489 (1991), this Court brought the abuse of the writ doctrine applied under Rule 9(b) substantially into line with traditional res judicata principles. It held that a "second or successive" habeas corpus application could not be entertained unless the court found "cause and prejudice" for the failure to raise the claims in the "first round" of habeas corpus litigation, or found that a "miscarriage of justice" would result from refusal to entertain the petition. Examining caselaw from *Ex Parte Cuddy*, 40 F. 62 (C.C.S.D. Cal. 1889), through *Salinger v. Loisel*, 265 U.S.

224 (1924), *Wong Doo v. United States*, 265 U.S. 239 (1924), *Price v. Johnston*, 334 U.S. 266 (1948), and *Sanders v. United States*, 373 U.S. 1 (1963), and through the modern codification of the doctrine in former § 2244(b) and Rule 9(b), the Court recognized that cases such as *Cuddy*, *Salinger* and *Wong Doo*, had "adopted a middle position between the extremes of res judicata and endless successive applications." *McCleskey*, 499 U.S. at 480. The history of the "abuse of the writ" doctrine demonstrated that early cases, such as *Wong Doo*, had given "controlling weight" to the existence of a "a prior refusal to discharge on a like application," and the Court concluded:

> So while we rejected res judicata in a strict sense as a basis for dismissing a later habeas action, we made clear that **the prior adjudication bore vital relevance** to the exercise of the Court's discretion in determining whether to consider the petition.

McCleskey, 499 U.S. at 482. (Emphasis supplied).

The *McCleskey* court noted that current statutes and rules continue to describe the abuse doctrine as "a qualified application of the doctrine of res judicata" *id.* at 486, *quoting*, S.Rep. No. 1797 at 2, U.S. Code Cong. & Admin. News 1966, p. 3664, and emphasized that other cases, including *Woodard v. Hutchins*, 464 U.S. 377 (1984) (per curiam); *Antone v. Dugger*, 465 U.S. 200 (1984) (per curiam); and *Rose v. Lundy*, 455 U.S. 509, 521 (1982) (plurality opinion), had also focused on the presence or absence of a prior adjudication. *McCleskey*, 499 U.S. at 487-89. *McCleskey* relied on all of these decisions to support the adoption of a "modified res judicata" rule in habeas corpus cases that places strict limits on a district court's discretion to consider "second or successive" petitions, because scarce judicial resources should be expended upon those litigants pursuing their "first round of federal habeas. . . . " *Id.* at 1469.

McCleskey thus adopted a straightforward, bright-line rule that gives preclusive effect to a prior federal adjudication, which can be overcome only where a litigant demonstrates either "cause and prejudice" or a "miscarriage of

justice." The cases following *McCleskey* have all reaffirmed the presumptive "res judicata" effect of the initial adjudication, and have carefully distinguished between proceedings filed before and after an initial federal adjudication. *E.g.*, *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 1502 (1998) (rules of habeas litigation change drastically when court has "to revisit the merits of an earlier decision denying habeas relief" because petitioner "has already had extensive review of his claims in federal and state court."); *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (AEDPA codifies "modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ' "); *Schlup v. Delo*, 513 U.S. 298, 319 (1995) (statutory and caselaw developments result in "qualified application of the doctrine of res judicata"). In sharp contrast, the court has disapproved attempts to place restrictions on first habeas corpus petitions, even in the face of apparently inequitable conduct, where no previous federal adjudication of constitutional claims has occurred. *Lonchar v. Thomas*, 517 U.S. 314, 321 (1996).

2. Res Judicata And Its Habeas Corpus Analogue, Abuse Of The Writ, Cannot Apply In The Absence Of A Prior Merits Adjudication.

By essentially equating the abuse of the writ doctrine with res judicata, this Court incorporated a body of clear, settled doctrine as to claim preclusion. This Court explained in *Cromwell v. County of Sac.*, 94 U.S. 351, 352-53 (1876), that the res judicata rule teaches that a prior

> judgment, if rendered upon the merits, constitutes an absolute bar to subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privy with them, not only as to every matter which was offered and received, but as to any other admissible matter which might have been offered for that purpose.

Accord, *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 319 (1927); *Kremer v. Chemical Construction Corp.*, 456 U.S.

461, 466-67 n.6 (1982) ("Invocation of res judicata and collateral estoppel relieves parties of the cost and vexation of multiple lawsuits, conserves judicial resources, and, by preventing inconsistent decisions, **encourages reliance on adjudication"** (emphasis added)).

Because the entire doctrine centers on the need to "encourage reliance on adjudication," it is hornbook law that res judicata applies only where the initial proceeding resulted in a disposition on the merits. American Law Institute, *Restatement of the Law (Second), Judgments* § 20(1)(b), (2) at 170 (judgment based on dismissal without prejudice or prematurity of action not bar), and Comments (g, k), at 174-175 (1980), *see also id.*, §§ 13, 17. The principle that a res judicata preclusion bar cannot be imposed unless the party had an adequate opportunity to be heard in the previous proceeding, in order to satisfy due process concerns, is equally clear. *E.g.*, *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 476 (1918).[7] In other words, as the *McCleskey* Court observed, res judicata – and its analogue in habeas corpus practice, abuse of the writ – attaches "vital relevance" to the "prior adjudication." *McCleskey*, 499 U.S. at 482. Thus, in cases such as *McCleskey*, *Schlup*, *Felker* and *Thompson*, where a prior federal adjudication had in fact occurred, and

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[7] The limitation of the res judicata bar to cases in which the party could have brought the matter to a dispositive hearing in the previous proceeding was well established at the time of the adoption of the constitution. *E.g.*, *Pickett v. Loggon*, 14 Vesey 215, 232-234, 33 Eng. Rep. 503, 510 (Ch. 1807) (prior judgment, when case came to hearing, acts as bar); *Duchess of Kingston's Case*, Ambler 756, 762-763, 27 Eng. Rep. 487, 490 (Ch. 1775); *Cann v. Cann*, 1 P. Wms. 723, 725-727, 24 Eng. Rep. 586, 587 (K.B. 1721) (no reexamination when case previously "examined and determined"); *Earl of Peterborough's Case*, 1 Bro. P.C. 281, 283, 2 Eng. Rep. 893, 894 (H.L. 1709) (relitigation barred "after issued joined"); *see Aspden v. Nixon*, 45 U.S. (4 How.) 467, 499 (1846); *The Mary*, 13 U.S. (9 Cranch) 126, 145-146 (1815) (party who had "full opportunity to assert his rights" bound by judgment). That protection is therefore implicit in the constitutional guarantee of due process of law. *See, e.g.*, *Medina v. California*, 505 U.S. 437, 446-447 (1992).

the new claims could have been, but were not, litigated in the prior proceeding, the Court precluded further litigation in the absence of compelling circumstances such as "cause and prejudice" or "miscarriage of justice." By contrast, in *Lonchar*, where no prior adjudication had occurred, this Court found that no preclusive effect could attach to prior proceedings, even in the face of allegedly intentional, manipulative delay by the petitioner.

3. Martinez-Villareal Reaffirms That The Abuse Of The Writ Doctrine Is Simply The Habeas Corpus Version Of Res Judicata.

This Court's most recent abuse of the writ decision, *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998), clearly illustrates all of these principles, in the context of AEDPA. In *Martinez-Villareal*, the state courts had convicted Mr. Martinez-Villareal of murder and sentenced him to death. 118 S.Ct at 1619. In addition to state petitions for collateral relief, Mr. Martinez-Villareal filed three petitions for habeas corpus relief in federal court prior to 1993. The federal district court dismissed all of these petitions to allow Mr. Martinez-Villareal to exhaust state remedies. 118 S.Ct. at 1619-20. He then filed a fourth petition, which included for the first time a claim of incompetence to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). The district court granted relief as to the sentence on the basis of other claims in the petition but the grant of relief was reversed on appeal. *Martinez-Villareal v. Lewis*, 80 F.3d 1301 (9th Cir. 1996). The district court dismissed the claim of incompetence to be executed on the ground that it was premature, and the Court of Appeals agreed that the denial of the petition would not affect later litigation of the claim. *Id.* at 1309 n.1.

After the adoption of AEDPA, however, when Mr. Martinez-Villareal moved in the district court to re-open the litigation on the fourth petition, the state objected that the district court had no jurisdiction to address the petition. The

district court ruled that it lacked jurisdiction over any claim as a "second or successive" application under 28 U.S.C. § 2244(b)(3)(A). The petitioner then filed a motion in the Court of Appeals for leave to file a "second or successive" petition under 28 U.S.C. § 2244(b)(3). The Ninth Circuit dismissed the motion and ordered the petition transferred to the district court, holding that the application to re-open the petition did not constitute a "second or successive" application for habeas corpus relief because the *Ford* claim had not been adjudicated in the previous habeas proceeding. *Martinez-Villareal v. Stewart*, 118 F.3d 628, 632-633 (9th Cir. 1998) (per curiam).

This Court affirmed. Chief Justice Rehnquist, writing for the majority, focused on the question of jurisdiction, since the Court would not have jurisdiction under the AEDPA to review a decision of the Court of Appeals granting or denying permission to file a "second or successive" habeas corpus petition. 28 U.S.C. § 2244 (b)(3)(E); *Stewart v. Martinez-Villareal*, 118 S.Ct. at 1620. This Court concluded that the proceeding was properly before it, explaining that

> This may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim but this does not mean there were two separate applications, the second of which was necessarily subject to § 2244(b). There was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. Respondent was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief.

Id. at 1621.

In holding that Mr. Martinez-Villareal's *Ford* claim, which had previously been dismissed without an adjudication on the merits, did not constitute a "second or successive" application for relief, the Court analyzed that question as controlled by its precedents dealing with the exhaustion defense, including *Rose* and *Ex Parte Royall*, and it ultimately

rejected the argument that a "second or successive" petition included one that was filed after a previous petition had been dismissed without prejudice for exhaustion as "seemingly perverse." 118 S.Ct. at 1621. As the Court explained, "[N]one of our cases expounding this [exhaustion] doctrine have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition." *Id.* at 1622.

The Court reasoned that, although Mr. Martinez-Villareal's *Ford* claim was not exactly like his three previous applications that had been dismissed without prejudice for lack of complete exhaustion, the result should be identical because "in both situations, the habeas petitioner does not receive an adjudication of his claim. To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review." 118 S.Ct. at 1622. The Court concluded that such a result would not be justified under any of its teachings, including the res judicata rule applied in *McCleskey*, *Schlup* and *Felker*, because "it is certain that respondent's *Ford* claim would not be barred under principles of res judicata." *Id.* The Court accordingly affirmed the Court of Appeals' ruling that the petitioner's application to review his *Ford* claim was not barred as a "second or successive" one. *Id.*. This holding established beyond any dispute that the meaning of the term "second or successive" is not determined by mechanically counting the number of previous applications, but includes consideration of the res judicata principles underlying the abuse doctrine. *Id.*

Compared to *Martinez-Villareal*, Mr. Slack's case is straightforward. No form of res judicata can apply in the absence of a prior adjudication, and to accept the holding of the lower courts in this case would shift the "second or

successive" focus from the federal merits adjudication – where the Court has said for the past century that it belongs – to an initial federal filing that is dismissed without prejudice. There is no precedent for such a ruling and indeed, in *Martinez-Villareal*, every member of the Court appeared to acknowledge that Mr. Martinez-Villareal's three pre-adjudication dismissals for exhaustion had no preclusive effect on the litigation. *See Martinez-Villareal*, 118 S.Ct. at 1621; *id.* at 1623 (Scalia, J. dissenting) (referring to "second-time collateral federal review"); *id.* at 1625 (Thomas, J. dissenting) (as to earlier dismissals without prejudice for exhaustion, "it could be argued that th[os]e petition[s] should be treated as if [they] had never been filed. In contrast, when a court addresses a petition and adjudicates some of the claims presented in it, that petition is certainly an 'application,' and any future application must be 'second or successive.' ") Such a holding is implicit, in fact, in the majority opinion because if any of the pre-adjudication filings had been "second or successive" then the Court would not have had jurisdiction to act.

In short, Mr. Martinez-Villareal's petition was not "second or successive" because he could not have obtained an adjudication of the *Ford* claim in the previous proceeding; but Mr. Slack's current petition cannot be "second or successive" for an even more basic reason: no federal adjudication has ever occurred, and "it is certain" that in the absence of such a federal adjudication, Mr. Slack's current petition "would not be barred under any form of res judicata." *Martinez-Villareal*, 118 S.Ct. at 1622. The lower courts accordingly applied a "form of res judicata" to Mr. Slack's case that has no principled basis whatsoever.

The significance of *McCleskey* is that it incorporates, through the abuse of the writ doctrine, the same bright-line rules of preclusion for habeas practice that apply in all other areas of the civil law. In this case, the Court should "evenhandedly apply" these res judicata rules, *see Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981), by holding that this clear, established doctrine applies to habeas

cases the same way it does to all other cases: No preclusive effect can attach in the absence of a prior merits adjudication. This Court's rulings in *Martinez-Villareal*, *McCleskey*, and *Rose v. Lundy*, combine to compel this conclusion.

C. The Lower Courts' Consistent Construction Of The Term "Second Or Successive" Demonstrates That A "Second Or Successive" Application Is One Filed After A Previous Merits Adjudication.

Consistent with exhaustion and abuse of the writ principles discussed above, the lower courts outside the Ninth Circuit have uniformly held that no application filed after an earlier dismissal without prejudice for lack of complete exhaustion can be "second or successive." The definition of "second or successive" application is the same under Rule 9(b) and former 28 U.S.C. § 2244 as it is under AEDPA. *E.g.*, *In re Gasery*, 116 F.3d 1051, 1502 (5th Cir. 1997) (per curiam). The term "second or successive" is a term of art, *e.g.*, *Shepeck v. United States*, 150 F.3d 800, 800 (7th Cir. 1998) (per curiam), and by using the term in AEDPA Congress is presumed to have used the term to mean the same thing it did under Rule 9(b).[8] The uniform recognition that a petition filed after a previous dismissal without prejudice for exhaustion is not a "second or successive" application, both before and after the enactment of AEDPA, further demonstrates that the Ninth Circuit rule is outside the "evolutionary" development of habeas doctrine referred to in *Lonchar* and *McCleskey*. *See generally*, 2 James S. Liebman and Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 28.3(b) at 1167-1170 (3d. ed. 1998).

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[8] Congress could not have intended to adopt the construction of the term "second or successive" used in *Farmer*, since *Farmer* was decided after AEDPA was enacted. 98 F.3d at 1548.

1. Pre-AEDPA Cases.

Prior to the passage of AEDPA, the lower courts addressed the effect of exhaustion dismissals and concluded that the enforcement of the exhaustion doctrine did not divest the federal courts of the ability to adjudicate claims in a post-exhaustion petition on abuse of the writ grounds. One Court of Appeals summed up the situation simply in *Woods v. Whitley*, 933 F.2d 321, 322 n.1 (5th Cir. 1991), explaining that where a first petition is dismissed without prejudice due to lack of complete exhaustion "we disregard it for purposes of abuse of the writ analysis." *Accord, Jones v. Estelle*, 722 F.2d 159, 168 (5th Cir. 1983) (en banc). Similarly, in *Hill v. Lockhart*, 894 F.2d 1009, 1010 (8th Cir. 1990) (en banc), the Eighth Circuit focused on the lack of a prior federal adjudication in holding that "the district court did not abuse its discretion in hearing Hill's second habeas petition, because there had been no final determination on the merits of Hill's first petition."

In *Dellenbach v. Hanks*, 76 F.3d 820, 822 (7th Cir. 1996), the court held that, because a habeas petitioner's first filing was dismissed for lack of complete exhaustion, and the second was dismissed for want of subject matter jurisdiction, the trial court had erred in finding that the third filing constituted an abuse of the writ. Chief Judge Posner's analysis focused on the lack of a prior federal adjudication, and held that "it is not an abuse to file a successive petition if the previous petition or petitions were not denied on the merits," because "dismissal on the basis of a deficiency in the pleadings, rather than on the basis of an adjudication on the merits, [citations], is not a death knell" in habeas corpus practice. *Id.* at 822.

Dismissal for lack of complete exhaustion thus has always meant, under *Rose*, a dismissal "without prejudice"; and that "without prejudice" dismissal was "disregarded" for abuse of the writ purposes because it was not a merits adjudication of any part of the petition. Thus, before passage of

AEDPA, a "second or successive" application was defined as one filed after a previous federal adjudication.

. . .

2. Post-AEDPA Cases.

The "new restrictions on successive petitions," imposed by AEDPA require a prospective applicant to "file in the court of appeals a motion for leave to file a second or successive habeas application in the district court." *Felker*, 518 U.S. at 664; 28 U.S.C. § 2244(b)(2)(A). In performing their "gatekeeping" function under the new statute, the Courts of Appeals were quickly required to decide whether a federal habeas corpus application, filed after a previous petition had been dismissed without prejudice for lack of complete exhaustion, constituted a "second or successive" application. Consistent with the longstanding principle that "the law uses familiar legal expressions in their familiar legal sense," *Henry v. United States*, 251 U.S. 393, 395 (1920); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 342 (1991); *Bradley v. United States*, 410 U.S. 605, 609 (1973), all of the circuits (including the Ninth) unanimously concluded, based on the consistent pre-AEDPA authority, that a federal petition filed after an earlier filing had been dismissed for lack of complete exhaustion is not a "second or successive" application, and that no appellate authorization was required for filing such a petition.

This issue was discussed at length in *Camarano v. Irvin*, 98 F.3d 44 (2d Cir. 1996) (per curiam). There, the government had urged a construction of "second or successive application" that would have limited the habeas petitioner to those claims contained in the initial habeas corpus filing, which had been previously dismissed without prejudice. The Court of Appeals rejected this approach, explaining that "because application of the gatekeeping provisions to deny a resubmitted petition in cases such as this would effectively preclude any habeas review," such a holding "would conflict with the doctrine of writ abuse, as understood both before and after *Felker*." *Id.* at 46.

Just as petitioner Slack has argued above, the Second Circuit looked to this Court's exhaustion and abuse of the writ teachings for guidance. The court recognized that attaching no preclusive effect to the initial federal dismissal ultimately fosters those policies that underlie the exhaustion doctrine:

> It serves the interest in finality by discouraging piecemeal litigation and encouraging petitioners first to exhaust their state remedies and then to 'present the federal court with a single habeas petition.' *Rose v. Lundy*, 455 U.S. 509, 520 (1982). In addition, encouraging petitioners to exhaust their state remedies prior to seeking federal court review promotes harmony between the state and federal courts by allowing state courts to examine state convictions and correct constitutional errors in the first instance.

Id. at 46.

The Court then noted that other circuits had unanimously concluded, prior to AEDPA, that a petition filed after an earlier dismissal for lack of complete exhaustion was not an abuse of the writ, since that position was the only one consistent with this Court's teachings on the subject:

> When a petition is dismissed without prejudice for failure to exhaust, there is no federal adjudication on the merits. To foreclose further habeas review in such cases would not curb abuses of the writ, but rather would bar federal habeas review altogether.

Id. The Court of Appeals then concluded with a discussion of res judicata law:

> It is well established that a dismissal without prejudice has no res judicata effect on a subsequent claim. [Citations] Inasmuch as the new gatekeeping provisions are rooted in the writ abuse doctrine which is itself 'a qualified application of the doctrine of res judicata,' [citations], a dismissal without prejudice can have no preclusive effect on subsequent petitions. Indeed, the phrase "without prejudice" would be devoid of its meaning under any other construction of the amended § 2244.

Id. at 46-47.

Other circuits have unanimously agreed with the reasoning in *Camarano*. *In re Turner*, 101 F.3d 1323 (9th Cir. 1997);[9] *Dickinson v. Maine*, 101 F.3d 791 (1st Cir. 1996) (per curiam); *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997) (noting that "prior to passage of the AEDPA, we consistently held that petitions that were refiled after dismissal for failure to exhaust state remedies were not 'second or successive' for Rule 9(b) purposes, and then agreeing with "the First, Second, Seventh, and Ninth Circuits . . . that a habeas petition filed after dismissal without prejudice for failure to exhaust is neither second nor successive."); *Christy v. Horn*, 115 F.3d 201, 208 (3d Cir. 1997) ("when a prior petition has been

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[9] The Ninth Circuit simply followed *Turner* and *Camarano* when it issued the ruling this Court ultimately affirmed in *Martinez-Villareal*. As the Ninth Circuit explained, litigation of the previously-unadjudicated competence claim was required precisely because the earlier dismissal without adjudication on the merits was analytically controlled by the exhaustion precedents:

> We conclude . . . that the rationale underlying *Turner* applies with equal force to Martinez-Villareal's competency claim. Just as we must dismiss petitions containing unexhausted claims, we must dismiss a competency claim raised in a first petition because it will always be premature. Just as we dismiss unexhausted claims to permit state courts to pass first judgment on those claims, we dismiss a competency claim so that the state court may have the first opportunity to consider that claim once a warrant of execution has issued. And just as we permit an exhausted petition to be heard in federal court even after it had been dismissed previously as unexhausted, so too should we permit a ripe competency claim to be heard in federal court even after it had been dismissed previously as premature. *Turner* reached this result to ensure that a petitioner's federal claims are accorded one hearing in federal court. We now extend *Turner* to competency claims that previously were dismissed without prejudice as premature in order to ensure that such claims are likewise subject to federal review.

Martinez-Villareal v. Stewart, 118 F.3d 628, 632-633 (9th Cir. 1998) (per curiam).

dismissed without prejudice for failure to exhaust state remedies . . . the petitioner may file his petition in the district court as if it were the first such filing," based on the uniform pre-Act law, and importance of "giving the state courts the first opportunity to review state convictions and to correct constitutional errors."); *Carlson v. Pitcher*, 137 F.3d 416, 419-420 (6th Cir. 1998) ("universal approach" before and after AEDPA that "a second-in-time habeas petition was not dismissed as an abuse of the writ when its filing followed a dismissal of the first-in-time petition on exhaustion grounds."); *In re Wilson*, 142 F.3d 939, 940 (6th Cir. 1998); *McWilliams v. State of Colorado*, 121 F.3d 573, 575 (10th Cir. 1997)

In *Benton v. Washington*, 106 F.3d 162, 164 (7th Cir. 1996), the Seventh Circuit rejected a definition of "second or successive" petition that would include prior petitions dismissed for failure to exhaust, reasoning:

> [t]he sequence of filing, dismissal, exhaustion in state court, and refiling in federal court might generate multiple docket numbers, but it would not be right to characterize it as successive collateral attacks. The prisoner launched a single campaign; that skirmishes were spread across several years and two forums would not make it apt to call any of the steps a 'successive' collateral attack.

In sum, the decision in this case, and the eccentric decision in *Farmer* on which it is based, stand alone. Every other Court of Appeals that has ever addressed the question has concluded that a habeas corpus petition filed after a "without prejudice" dismissal for lack of complete exhaustion is not a "second or successive" application, and that is the only conclusion consistent with this Court's reasoning in *Martinez-Villareal* and *McCleskey*. The contrary Ninth Circuit decision here is inconsistent with "formal judicial, statutory, or rules-based doctrines of law," *Lonchar*, 517 U.S. at 323-324, and it must be rejected.

D. The *Farmer* Decision And The Consequent Ruling Below Ignore This Court's Exhaustion And Abuse Of The Writ Teachings, And The Eccentric Definition Of "Second Or Successive" Applications They Apply Leads To Absurd And Unconstitutional Results.

The Ninth Circuit's opinion in *Farmer*, and the consequent ruling in this case, ignored the "evolving body of equitable principles informed and controlled by historical usage, statutory developments and judicial decisions," *McCleskey*, 499 U.S. at 489, by failing to take into account the res judicata basis of preclusion principles and the non-preclusive effect of a "without prejudice" dismissal for exhaustion. Because of this, the *Farmer* rule is based on a faulty, incomplete analysis of the controlling law, and it also fails to consider the absurd and unconstitutional results that that analysis will inevitably generate, including the one in this case.

1. The Ninth Circuit Applied Faulty And Incomplete Reasoning In *Farmer*.

The Ninth Circuit in *Farmer* based its analysis upon a narrow and distorted parsing of Rule 9(b), taken out of the context of the rule and its historical antecedents, and disregarding normal principles of statutory construction. Rule 9(b) applies by its terms to "second or successive" petitions and, as shown above, that term has been universally construed to exclude petitions filed after a dismissal without prejudice for exhaustion. The *Farmer* court focused, however, on the fact that the first clause of the rule refers to a "prior determination on the merits," while the second clause does not explicitly refer to a prior adjudication but uses the term "abuse of the writ." *Farmer*, 98 F.3d at 1555. The *Farmer* court viewed this supposed textual distinction as implicitly overruling the portions of the statute, former 28 U.S.C. § 2244(b), which explicitly refer to a prior "evidentiary hearing on the merits," or a "hearing on the merits of an issue of law," as the basis for a

district court to refuse to consider a subsequent application. *Farmer*, 98 F.3d at 1555.

Purely as a matter of textual analysis, the *Farmer* court's conclusion is not supported by the language of Rule 9(b) because there is an obvious reason why the first clause refers to a "prior determination on the merits" while the second one does not. The first clause of Rule 9(b) deals with new petitions raising the same claims as those raised in a previous petition, and it thus makes sense that this clause refers to a previous adjudication of the same claim as a basis for refusing to consider it again. But the second clause deals with new claims, which by definition would not have been the subject of a previous adjudication, and there would be no reason to refer to a prior adjudication in the rule. Thus the omission of a reference to a prior adjudication in the second clause does nothing to support reading the limitation of the rule to "second or successive" petitions out of that portion of Rule 9(b).

The *Farmer* court's reading of the rule also violates basic principles of statutory construction. Statutes and rules in pari materia should be harmonized if possible and an implicit repeal of a statute by adoption of an inconsistent rule should not be found if a reasonable harmonizing construction is available. *E.g.*, *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (per curiam). Former 28 U.S.C. § 2244(b) provided explicitly for dealing with a "subsequent application" for habeas relief, and the statute made it clear – as to both same-claim successive petitions and new-claim second petitions – that the restrictions on considering subsequent applications arose only after an adjudication of a previous petition. As Justice Thomas pointed out in *Stewart v. Martinez-Villareal*, "[c]laims presented in a petition dismissed for failure to exhaust are neither 'determined' nor 'adjudicated.' " 118 S.Ct. at 1625 (Thomas, J., dissenting). The statute and Rule 9(b) can easily be harmonized by recognizing that the "abuse of the writ," which is referred to in the Rule, is the same as the "abuse of the writ," following the adjudication of a prior petition, referred to in former 28 U.S.C. § 2244(b).

The *Farmer* court also ignored the principle that a statute must be interpreted in light of the harm it was meant to address. *E.g.*, *United States Nat. Bank of Oregon v. Independent Ins. Agents*, 508 U.S. 439, 455 (1993). The Advisory Committee Notes to Rule 9(b) make it clear that the rule was meant to address the problems raised by filing a habeas application after a previous petition has been decided on the merits. The Notes refer to the situation when:

> A successive application, already decided on the merits, may be submitted in the hope of getting before a different judge in multijudge courts. A known ground may be deliberately withheld in the hope of getting two or more hearings or in the hope that delay will result in witnesses and records being lost.

28 U.S.C. foll. § 2254, 28 U.S.C.A. at 800 (1994). The Advisory Committee Notes thus support the conclusion that, consistent with all other interpretations of "abuse of the writ," the reference to "second or successive" applications in Rule 9(b) applies only to applications filed after a previous petition has been adjudicated; and it is this interpretation of Rule 9(b) through which the *McCleskey* Court brought the abuse doctrine substantially into line with general res judicata principles.

Also in the context of the harm the provision is designed to address, the *Farmer* court's reading of Rule 9(b) would apply in situations in which there is no conduct on the part of the petitioner that could be remotely described as "abusive" in the way that deliberately withholding a claim, *see* former 28 U.S.C. § 2244(b), or presenting a previously adjudicated petition to a new judge in the hope of obtaining a different result, *see* Advisory Committee Notes, 28 U.S.C.A. at 800, or litigating an entire round of federal habeas proceedings before asserting a known claim, *see McCleskey*, 499 U.S. at 490,

would be.[10] This case is a good example. Here, Mr. Slack tried to do what *Rose v. Lundy* and the district court told him to do: he exhausted his available remedies as to claims he knew about and returned to federal court to litigate those claims. Characterizing this conduct as abusive would deprive that term of any rational meaning. *Cf. Lowe v. Pogue*, ___ U.S. ___, 119 S.Ct. 1238 (1999) (per curiam) (describing 31 patently frivolous filings as "abuse" of Supreme Court's certiorari and extraordinary writ process).

The Ninth Circuit's limitation of reviewable claims to those contained in the initial, dismissed petition imposes enormous consequences on the basis of a distinction that simply will not bear the load. Before his initial petition was dismissed without prejudice, Mr. Slack informed the federal district court that there were additional unexhausted claims outside the petition that he wanted to assert; and solely because those claims were not included in the dismissed and superseded initial petition, those claims were subjected to the Ninth Circuit's preclusion rule. If the unexhausted claims had been pleaded in the dismissed petition rather than drawn to the court's attention by motion, apparently the Ninth Circuit rule would not preclude their consideration; but there is no rational distinction between the two situations in terms of the burden on the federal court or the effect of the dismissal of a petition without prejudice that would justify so drastic a difference in treatment.[11] Basing application of the abuse of

[10] The statutory construction rules eiusdem generis and noscitur a sociis would lead to the same conclusion. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995); *Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 129 (1991). In former 28 U.S.C. § 2244(b), "abuse of the writ" is classed with deliberate withholding of a claim, and abuse should thus be interpreted to apply to the same kind of conduct. *See also, Sanders v. United States*, 373 U.S. 1, 18 (1963) (abuse of writ when petitioner conducts litigation "whose only purpose is to vex, harass, or delay").

[11] This case supplies a clear example of the unworkability of this aspect of the *Farmer* rule. The district court, on the state's motion, dismissed one claim (which had been presented in the 1991 filing) without prejudice because it had been defectively exhausted in the state proceedings, while it dismissed other claims with prejudice, on the ground of abuse of the writ. JA 155-158. There is no rational basis for concluding that the federal habeas proceedings are being "abused" by presenting the latter claims, which are ripe for adjudication, but not by presenting the former one.

the writ doctrine on such a distinction trivializes the doctrine itself and the orderly process of habeas litigation of which it is a part.

Moreover, imposing a straitjacket on further proceedings based on an initial, dismissed habeas petition can irrationally compromise the effectiveness of the state exhaustion proceedings. Enforcement of the exhaustion doctrine is designed to "channel claims into the more appropriate forum," *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992), and state court litigation may disclose additional, previously unknown claims.[12] But if a petitioner discovers such claims in the state proceedings "where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court," *id.*, he or she cannot obtain federal review of them because, if they were not in the initial federal petition, the Ninth Circuit preclusion rule will bar their consideration. Thus the Ninth Circuit rule not only distorts the federal proceedings, but it may also deform the state exhaustion proceedings themselves by removing a major incentive – the prospect of eventual federal review – for discovering and asserting all the available claims in the state exhaustion proceedings. There is no shred of evidence that the enactment of Rule 9(b) was intended to cause such a result.

[12] Although Mr. Slack was not given any assistance in his state exhaustion proceedings, despite his request, Nevada courts do have the power to appoint counsel and provide discovery in post-conviction proceedings. Nev. Rev. Stat. §§ 34.750, 34.780.

2. The Ninth Circuit's Rule Will Inevitably Generate Absurd And Unconstitutional Results, Such As The One In This Case.

The Ninth Circuit's interpretation of a "second or successive" habeas corpus application under Rule 9(b) to include an application filed after a petition was dismissed without prejudice for exhaustion is also unsustainable because it would lead to absurd and unconstitutional results. *See, e.g., Edmond v. United States*, 520 U.S. 651, 658 (1997).

As shown above, the res judicata doctrine applies only if the party sought to be precluded had a constitutionally-adequate opportunity to litigate his or her claims in the previous proceeding. *See* pp. 25-26, above. The *Farmer* definition of "second or successive" application would bar Mr. Slack's claims, after he had no opportunity to litigate them in the previous proceeding, and that interpretation must therefore be rejected. Further, if the Ninth Circuit's ruling in this case is upheld, the preclusion of Mr. Slack's claims will also result in a suspension of the writ of habeas corpus, prohibited by Article I, Section 9, of the Constitution. Application of a res judicata rule to bar claims when there has been no previous adjudication of any previous application is far outside the evolutionary development of the abuse doctrine. *Cf. Felker v. Turpin*, 518 U.S. at 664. That rule results in the practical suspension of the writ as to those claims, which has no rational or historical foundation at all, and an interpretation that would lead to these results must be avoided.

Accepting the Ninth Circuit's definition of "second or successive" application would also lead to absurd consequences with respect to AEDPA. The finality provisions of 28 U.S.C. § 2244 apply to "second or successive" habeas corpus applications. The prohibition on entertaining the same claims raised in a previous petition imposed by 28 U.S.C. § 2244(a) is absolute; and the standard for entertaining a petition containing new claims imposed by 28 U.S.C. § 2244(b) is so high as to be practically insurmountable. If a petition filed after a previous petition is dismissed for exhaustion is a "second or successive" one, under AEDPA the filing of a post-exhaustion petition would be an exercise in futility: any claims presented in the pre-exhaustion petition would be absolutely barred as "same claims" under 28 U.S.C. § 2244(a); and any claims not presented in the pre-exhaustion petition would be practically barred as "new claims" under 28 U.S.C. § 2244(b). Obliterating the entire habeas application as the price of complying with *Rose v. Lundy* is so absurd a consequence of the *Farmer* rule that it defies reasoned analysis.

The Ninth Circuit rule would create confusion in other provisions as well. For instance, in the expedited review provisions for capital cases under AEDPA, the tolling provision on the statute of limitations for filing the federal petition is limited to a "first" state post-conviction proceeding, 28 U.S.C. § 2263(b)(2), while the statute of limitations is tolled as to all other cases during the time any "properly filed" state post-conviction petition is pending. 28 U.S.C. § 2244(d)(2). This distinction would be unnecessary if the general provisions did not contemplate that an exhaustion proceeding pursuant to *Rose v. Lundy* might be used; but if a federal application filed after such an exhaustion proceeding would be barred as a "second or successive" one, the distinction made by the statute would be entirely superfluous.[13]

An additional absurdity would arise in the cases of habeas petitioners who seek relief from federal court because of the ineffectiveness of state remedies, as in *Brooks v. Jones*, 875 F.2d 30 (2d Cir. 1989). Petitioner Brooks was convicted of felonies in state court, and the state appellate court consumed eight years in completing the briefing on direct appeal

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[13] Interpreting "second or successive" petition as the *Farmer* court did would also render 28 U.S.C. § 2266(b)(3)(B) superfluous. That provision applies the res judicata standards of 28 U.S.C. § 2244(b) to bar a post-answer amendment to an application which is governed by the expedited review procedures applicable in some capital cases. If failure to include an unexhausted claim in an initial petition would bar post-exhaustion review on that claim as a "second or successive" application, under the *Farmer* definition, the bar on amendment would be redundant.

in his case. Brooks sought federal habeas relief, claiming that the appellate delay violated due process under the federal constitution, but his petition was dismissed without prejudice because of lack of complete exhaustion. On appeal, the Court of Appeals agreed that the delay violated due process, but in reversing the order of dismissal it directed the issuance of a conditional writ, providing for the petitioner's release only if his appeal was not heard within sixty days, based on the state's representation that the state appeal would be resolved forthwith. If the Ninth Circuit's interpretation of "second or successive" application is accepted, then any new petition filed by Mr. Brooks raising his substantive issues would have been subject to preclusion because of the filing of a federal petition that was necessary to have his state appeal heard in the first instance. Cases involving extreme and unconstitutional delays in state proceedings are not uncommon, *e.g.*, *Coe v. Thurman*, 922 F.2d 528, 530-31 (9th Cir. 1991); *Hill v. Reynolds*, 942 F.2d 1494, 1496 (10th Cir. 1991); *Elcock v. Henderson*, 902 F.2d 219 (2d Cir. 1990) (per curiam); *Burkett v. Cunningham*, 826 F.2d 1208, 1218-19 (3d Cir. 1987); and the application of Ninth Circuit's "second or successive" definition would place these petitioners in a truly Kafkaesque dilemma: if the inmate files a federal habeas petition in order to obtain the meaningful state court appellate review to which he or she is constitutionally entitled, *see Evitts v. Lucey*, 469 U.S. 387 (1985), the filing of that federal petition will bar any review of substantive claims, discovered in the course of the resulting state proceedings, which were not in the initial federal petition. Nothing in this Court's abuse of the writ jurisprudence supports such an absurd result.

Carried to its logical extreme, the Ninth Circuit's rule would also bar any amendment of a habeas petition. If the claims presented in an initial petition limit all subsequent litigation to those claims, and the presentation of any new claims not in that petition (regardless of the absence of any adjudication) constitutes a "second or successive" application, then any pre-adjudication attempt to amend a habeas

petition would also be barred under the abuse doctrine. This result should not occur, of course, because 28 U.S.C. § 2242 explicitly provides that an application for habeas corpus relief "may be amended or supplemented as provided in the rules of procedure applicable to civil actions;" and there is no provision of civil law which equates a pre-adjudication amendment of a pleading with a new action that is commenced following an adjudication and which is subject to the res judicata doctrine. *See, e.g.*, Fed. R. Civ. P. 15(a) (amendment of complaint as of right before filing of answer and with leave of court thereafter); *cf. Bonin v. Vasquez*, 999 F.2d 425, 427 (9th Cir. 1993) (approving application of abuse of the writ standards to post-judgment motion to amend under Fed. R. Civ. P. 60(b)); 28 U.S.C. § 2266(b)(3)(B) (limitation on amendment of habeas petition after answer under expedited capital procedures). But the concern that the Ninth Circuit's preclusion rule could be applied to bar even an amendment of a pending petition is not fanciful, because one district court in the Ninth Circuit has done exactly that. In *Anthony v. Cambra*, 21 F.Supp.2d 1094, 1095-96 (N.D. Cal. 1998), the district court held a habeas petition in abeyance to allow the petitioner to exhaust his state remedies as to some claims. Following exhaustion proceedings, the Court refused to allow the petitioner to amend the pending, unadjudicated petition to include the exhausted claims, on the basis of the *Farmer* rule. *Cf. Martinez-Villareal*, 118 S.Ct. at 1624 (Scalia, J., dissenting) (distinguishing between cases in which district court holds petition in abeyance and those in which petition dismissed).

It is consistent with general principles to recognize that a habeas application which is dismissed without prejudice has no effect on subsequent proceedings: like an initial pleading which is subsumed by an amended one, *e.g.*, *Robinson v. Willow Glen Academy*, 895 F.2d 1168, 1169 (7th Cir. 1990), an initial habeas application dismissed without prejudice is superseded by a new application. *See Stewart v. Martinez-Villareal*, 118 S.Ct. at 1625 (Thomas, J., dissenting). Since

the initial application has no significance in the new proceeding, the post-exhaustion petition is the "first" federal habeas petition; and every member of this Court has agreed that the abuse of the writ doctrine simply does not apply to a first petition. *Lonchar v. Thomas*, 517 U.S. at 330-331; *id.* at 341 (Rehnquist, C.J., concurring in judgment) ("a first habeas petition may not be dismissed on the basis of the abuse of the writ," and there is "no other ground under which to dismiss a first petition other than the merits"). The consistent construction of "second or successive" application by this and other courts offers a reasonable alternative that avoids the unconstitutional and absurd results produced by the Ninth Circuit rule. This court should accordingly adhere to the universally-accepted definition of "second or successive" application and bring the Ninth Circuit into line with this Court's abuse of the writ jurisprudence.

E. Current Rules, Statutes And Judicial Doctrines Provide The District Courts With Ample Authority To Tailor The Proceedings To Prevent Misuse Of The Exhaustion Process.

The Ninth Circuit's attempt to deviate from "formal judicial, statutory, or rules-based doctrines of law" cannot survive in light of the holding in *Lonchar*. But just as in *Lonchar*, "this is not to say that a district court has no discretion," 517 U.S. at 325, in dealing with any perceived problems arising from the necessity of dismissing habeas petitions for exhaustion.

It is clear that no such problems are presented here, because Mr. Slack plainly has not engaged in any behavior the Ninth Circuit's rule could legitimately be designed to prevent. Mr. Slack had no incentive to delay adjudication by the federal court of the claims asserted as to the validity of his conviction and life sentence, and there is nothing in this record that even suggests that he engaged in intentional delay. But where a district court is faced with what it believes to be misuse of the exhaustion procedures, current rules, statutes

and judicial doctrines provide ample authority to prevent such misconduct, without deforming the clear, bright line rules on exhaustion and abuse of the writ that this Court has developed over the past century.

First, a district court had discretion, under pre-AEDPA law, to summarily deny on the merits claims that are obviously without merit, even if they appear in a mixed petition. *See Granberry v. Greer*, 481 U.S. 129, 134-135 (1987); *Bailey v. Crowley*, 914 F.2d 1438, 1439 n.1 (9th Cir. 1990) (per curiam). A court faced with a petition that has been "mixed" by the addition of patently unmeritorious claims can thus defeat an attempt to induce a round of exhaustion proceedings intended merely for delay by summarily denying those claims. That power has now been explicitly codified by AEDPA. 28 U.S.C. § 2254(b)(2).

Second, the Federal Rules of Civil Procedure provide a district court with the power to condition a dismissal without prejudice on the petitioner's proper use of the exhaustion process. Under Rule 41(a)(2) of the Federal Rules of Civil Procedure, the district court can condition a dismissal without prejudice at the request of the plaintiff "upon such terms and conditions as the court deems proper." A district court could simply make it a condition of the dismissal-without-prejudice order that any renewed federal petition must contain only exhausted claims, and that any unexhausted claims in such a later petition would not be entertained absent extraordinary circumstances. Such an order would be "proper" because it would be consistent with the purposes of the exhaustion doctrine, and it would clearly be enforceable under Rule 41(b), which allows involuntary dismissal on the merits for failure to comply with "any order of court." *See, e.g., Stern v. Inter-Mountain Tel. Co.*, 226 F.2d 409, 409 (6th Cir. 1955) (per curiam) (failure to comply with conditions of voluntary dismissal grounds for involuntary dismissal with prejudice); *Mobley v. McCormick*, 160 F.R.D. 599, 601-602 (D. Colo. 1995) (failure to comply with court orders grounds for involuntary dismissal with prejudice), *affirmed* 69 F.3d 548 (10th

Cir. 1995); *see also Calderon v. United States District Court (Thomas)*, 144 F.3d 618 (9th Cir. 1998) (district court has discretion to dismiss unexhausted claims in petition and hold remainder of petition in abeyance pending completion of exhaustion proceedings). This method of conditional dismissal removes the prospect of repeated dismissals for exhaustion, without deforming the definition of a "second or successive" petition beyond the res judicata principles recognized in this Court's precedents, and it also would not compromise the effectiveness of the state court exhaustion proceedings.

Third, under pre-AEDPA law, Rule 9(a) can be applied to prevent a petitioner from engaging in intentional manipulative delay in filing a habeas application by allowing dismissal with prejudice when that delay has resulted in prejudice to the state's ability to respond to the petition. *Cf. Lonchar*, 517 U.S. at 321 (no application of Rule 9(a), despite apparently manipulative delay, where no prejudice to state alleged). Under AEDPA, that problem should not arise because of the one-year statute of limitations imposed by 28 U.S.C. § 2244(d)(1).

Fourth, although Nevada has not imposed clearly-established, independent, categorical procedural bars to successive state collateral review,[14] federal courts that sit in states which have adopted such impediments to review can prevent multiple exhaustion dismissals through the anticipatory application of those default rules. Under *Castille v. Peoples*, 489 U.S. 346, 351-52 (1989), a federal court need not dismiss a mixed petition where "it is clear that [the petitioner's otherwise unexhausted] claims are now procedurally barred under

[14] *See Glauner v. State*, 107 Nev. 482, 813 P.2d 1001 (1991) (per curiam) (no statute of limitations in collateral proceedings); *Pertgen v. State*, 110 Nev. 554, 875 P.2d 361, 364 (1994) (per curiam) (Nevada courts examine merits of constitutional claim to determine if procedural bar applies); *compare McKenna v. McDaniel*, 65 F.3d 1483, 1488-89 (9th Cir. 1995), *with Moran v. McDaniel*, 80 F.3d 1261, 1269-70 (9th Cir. 1996).

[state] law," because "a habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer "available" to him. *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). Thus, where a clear state procedural rule would indisputably bar a habeas petitioner's unexhausted claims, a federal court can proceed immediately to adjudication without requiring additional state court exhaustion proceedings. *See* fn. 6, above.

The district courts accordingly have ample and adequate means to deal with any problem which could arise as a result of repeated dismissal for exhaustion proceedings when the petitioner is acting merely to delay adjudication of the petition. To the extent that the Ninth Circuit sought to solve that problem by adopting an idiosyncratic definition of "second or successive" petition – a definition which is inconsistent with established res judicata and exhaustion principles and which has been rejected by every other court that has addressed the issue – its action was unnecessary in practice as well as impermissible under *Lonchar*.

VIII.

CONCLUSION

This Court should vacate the order of the Court of Appeals for the Ninth Circuit and remand this case for further proceedings in accordance with a determination that a habeas corpus application cannot be treated as "second or successive," where the initial petition was denied without prejudice for failure to exhaust state remedies.

Respectfully submitted,

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