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

REPLY BRIEF FOR PETITIONER

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I.

INTRODUCTION

This Court prescribed the question presented for review, which asks whether claims filed in a habeas corpus petition after exhaustion proceedings, when those claims were not included in the pre-exhaustion federal petition which was dismissed without prejudice, constitute "second or successive" applications. The Court's question assumes that, although Mr. Slack's initial federal habeas corpus filing was dismissed "without prejudice" to allow him to exhaust articulated claims not contained in the initial filing, and although he then did exhaust those claims, the Ninth Circuit treated claims not contained in the initial filing as "second or successive" applications. Despite respondents' arguments to the contrary, Resp. Br. at 13-14 and n.5, 37-38, that is exactly the rule the lower courts applied.

The district court dismissed Mr. Slack's claims of ineffective assistance of trial and appellate counsel, and others, specifically on the ground that they "were not raised in Slack's previous petition." JA 141.[1] In denying reconsideration, the district court ruled that "the instant petition is Slack's second petition and thus successive," and "a second petition is abusive when new grounds are alleged and a petitioner failed to allege them in a previous petition, even if the previous federal petition was dismissed for failure to exhaust state remedies. [Citation]" JA 156. The district court in this case thus dismissed as abusive the same ineffective assistance claims Mr. Slack cited during his 1991 federal proceeding, necessarily finding that those claims, whether or not they were now exhausted,

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[1] Mr. Slack referred to the claims of ineffective assistance of trial and appellate counsel in his motion to stay proceedings on his 1991 federal petition to allow exhaustion. JA 17-18. These claims were then raised in his state petition, CR 16, ex. 31, and in his renewed federal petition. JA 35, 37-44. The final version of Mr. Slack's federal petition contained these claims, somewhat rearranged, JA 79-89, along with admittedly unexhausted claims, JA 72, 78, 89, which were filed pursuant to the district court's order appointing counsel and directing counsel to explore all available claims with Mr. Slack. JA 64-65.

were "second or successive" because they had not been included in the initial petition.

In the opening brief, petitioner demonstrated that the district court's ruling falls well outside formal judicial, statutory or rules-based doctrines of habeas corpus law, all of which make clear that a "second or successive" habeas application is a petition filed after a federal court has resolved a previous petition. The abuse doctrine under Rule 9(b) of the Rules Governing Section 2254 Cases (and the current rule under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(b)), is a modified res judicata rule. Its application requires adjudication of a previous petition, as this Court clearly indicated in *McCleskey* by emphasizing the "vital relevance" of a "prior adjudication" in applying the abuse doctrine. *McCleskey v. Zant*, 499 U.S. 467, 482 (1991); and this Court's relevant decisions dealing with subsequent petitions – in the context of a "second" petition raising a new claim, as in *McCleskey*, or a "successive" petition raising a claim adjudicated in a previous petition, as in *Kuhlmann v. Wilson*, 477 U.S. 436, 451 (1985) – have focused upon the preclusive effect of a prior final judgment on the merits of the previous petition.

The respondents fail to address the res judicata basis of the abuse doctrine. They thus fail to supply a coherent answer to the question posed by this Court: What is a "second or successive" application? Respondents also do not offer a coherent explanation of how a dismissal without prejudice for exhaustion could be given the same preclusive effect as a "first round" of habeas litigation on the merits, *cf. McCleskey*, 499 U.S. at 492, or how a petitioner (or a district court) can employ the dismissal for exhaustion procedure prescribed by *Rose v. Lundy*, 455 U.S. 509 (1982), without necessarily running afoul of the abuse of the writ doctrine. By contrast, Mr. Slack's resolution of the court's question accommodates the doctrines of *McCleskey* and *Rose*, is consistent with this Court's recent decision in *Stewart v. Martinez-Villareal*, 523 U.S. 677, 118 S.Ct. 1618 (1998), and provides a coherent and rational definition of a "second or successive" petition.

II.

ARGUMENT

A. A "Second Or Successive" Habeas Corpus Application Requires A Prior Adjudication Of The Merits Of A Petition.

As petitioner demonstrated in his opening brief, a habeas application cannot be "second or successive" if there has been no previous merits adjudication by a federal court. Respondents make no attempt to define the term "second or successive", and thus ignore the fact that the Ninth Circuit's rule runs directly counter to 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); to the lower courts' uniform construction of "second or successive" petition as one filed after a previous merits adjudication by a federal court; and to the exhaustion rule under *Rose v. Lundy*, 455 U.S. 509, 520-22 (1982) and *Ex Parte Hawk*, 321 U.S. 114 (1944). Respondents are similarly silent about the fact that, just last term, in *Stewart v. Martinez-Villareal*, 523 U.S. 677, 118 S.Ct. 1618, 1621 (1998), this Court stressed 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.

Instead of attempting to reconcile the Ninth Circuit's construction of "second or successive" petition with "formal judicial, statutory, or rules-based doctrines of law," *Lonchar*, 517 U.S. at 317, respondents invite this Court to fashion a new, undefined species of writ "abuse," ostensibly designed to prevent the situation where "a habeas petitioner . . . ping-pong[s] back and forth between state and federal court by simply obtaining serial dismissals without prejudice to exhaust state remedies." Resp. Br. at 19.[2] Respondents' invitation entails exactly the type of *ad hoc* rule

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[2] *Amicus* Rutherford Institute describes Mr. Slack as "a hapless pro se defendant" who was unfairly forced to "navigate the treacherous waters of habeas corpus procedure without benefit of legal education or representation." Rutherford *Amicus* brief at 2, 9. Respondents implicitly

making this Court condemned in *Lonchar*. Moreover, adopting a "seemingly perverse" res judicata rule is unnecessary because currently-existing rules and statutes provide a regular and predictable structure for conducting and controlling exhaustion procedures. Thus, to the extent that respondents seek to solve the supposed problem of repeated exhaustion dismissals by adopting an idiosyncratic and incoherent definition of "second or successive" petition – and it is not clear from respondents' brief what their proposed definition is – their proposal is unnecessary in practice as well as impermissible under *Lonchar*.

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

Under this Court's abuse of the writ precedents, no habeas application can be "second or successive" in the absence of a prior merits adjudication. This Court's ruling in *McCleskey v. Zant*, 499 U.S. 467, 489 (1991), brought the abuse of the writ doctrine under Rule 9(b) substantially into line with traditional res judicata principles by holding that a "second or successive" habeas corpus application could not be entertained unless the federal court had grounds to excuse the failure to raise the claims in the "first round" of habeas litigation. The *McCleskey* Court reached this result by examining the history of the doctrine, noting that the Court's cases had given "controlling weight" to the existence of "a prior refusal to discharge on a like application," and then concluding:

> 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.

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concede that Mr. Slack, as a non-capital petitioner, had no incentive to file the serial mixed petitions that form the basis for virtually every argument in their brief. Resp. Br. at 19 n.7.

McCleskey, 499 U.S. at 482 (emphasis supplied). In sum, *McCleskey* adopted a straightforward, bright-line rule which gives preclusive effect only to a prior federal adjudication.

The cases following *McCleskey* have all reaffirmed the presumptive res judicata effect of the initial adjudication, and have carefully distinguished between applications filed before and after an initial federal adjudication. *See, e.g., Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618, 1622 (1998); *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 1502 (1998); *Felker v. Turpin*, 518 U.S. 651, 664 (1996); *Schlup v. Delo*, 513 U.S. 298, 319 (1995). In sharp contrast, the Court has disapproved restrictions on first habeas corpus petitions, even in the face of assertedly inequitable conduct, where no previous federal adjudication has occurred. *Lonchar v. Thomas*, 517 U.S. 314, 321 (1996).

Respondents do not address Mr. Slack's res judicata arguments and it is noteworthy that respondents do not discuss the actual rule of *McCleskey*.[3] Instead, respondents seize on the

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[3] Respondents cite a pre-*McCleskey* lower court decision for the proposition that "res judicata as such does not apply in habeas proceedings." Resp. Br. at 20, citing *Hill v. Lockhart*, 877 F.2d 698 (8th Cir. 1989), *aff'd on rehearing*, 894 F.2d 1009 (8th Cir. 1990), *cert. denied*, 497 U.S. 1011 (1990). Ironically, *Hill*'s ultimate holding rests on a res judicata theory: "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." *Hill*, 894 F.2d at 1010.

Respondents briefly mention one res judicata case, *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 320 (1927), arguing that it condemns the "piecemeal" fashion in which Mr. Slack supposedly seeks to litigate his case. Resp. Br. at 24-25. *Baltimore Steamship*, and every other res judicata case, criticize "piecemeal" litigation where a claimant obtains a judgment on the merits arising out of a single set of operative facts, and then seeks later to bring a second lawsuit pertaining to those same facts. Mr. Slack sought a single federal adjudication, which he has not received, and has continued to pursue all adequate and available state court remedies so that he can present all of his claims for a single federal adjudication. This does not constitute "piecemeal" litigation at all. *See Camarano v. Irvin*, 98 F.3d 44, 46 (2d Cir. 1996). Respondents, by contrast, seem to be advocating the very sort of "piecemeal" litigation condemned by *Baltimore*

McCleskey decision's reference to a "qualified" form of res judicata as though it supports the Ninth Circuit's ruling here, Resp. Br. at 20, but they fail to acknowledge this Court's express recognition that this "qualified" form of res judicata represents "a middle position between the extremes of res judicata and endless successive applications." *McCleskey*, 499 U.S. at 480. The reason why respondents ignore the actual rule of *McCleskey* is plain: The "middle position" adopted in *McCleskey* cannot be stretched to support the Ninth Circuit's preclusion rule here, which applies res judicata in a more "extreme" fashion than in any other area of the law by attaching preclusive effect to a "without prejudice" dismissal.

Respondents' reliance on dictum from *Sanders v. United States*, 373 U.S. 1 (1963) is also misplaced. There, the Court discussed the standards for dismissing "second or successive" petitions in the pre-*McCleskey* era in the context of a 28 U.S.C. § 2255 case. The *Sanders* analysis began from the premise that res judicata does not apply in habeas proceedings. *Sanders*, 373 U.S. at 8. The Court thus refused to take literally language in § 2255 that "seem[ed] to empower the sentencing court to apply res judicata virtually at will" on the ground that to do so would constitute a suspension of the writ under the United States Constitution. *Id.* at 13-15. The Court set out a series of "basic rules to guide the lower courts" as to when "controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief," *Id.* at 15, and directed the lower courts to allow merits litigation on "second or successive" petitions in the absence of a subjective intent by the petitioner "to vex, harass or delay" the proceedings. *Id.* at 18. The Court finally held that, in the § 2255 context, the principles regarding abuse of the writ developed in *Fay v. Noia*, 372 U.S. 391 (1963) and *Townsend v. Sain*, 372 U.S. 293 (1963), "govern equally here." *Sanders*, 373 U.S. at 18.

The *Sanders* decision assumed that a "second or successive" petition was one filed after "denial of a prior application for federal habeas corpus or § 2255 relief," *Sanders*, 373 U.S. at 15, and thus,

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Steamship, by having the federal court preclude (i.e., adjudicate) some of Mr. Slack's claims while he continues to pursue litigation of other claims.

to the extent that *Sanders* retains any vitality, it supports Mr. Slack's position. More important, subsequent authorities have repudiated the *Sanders* Court's rejection of res judicata principles. Soon after *Sanders*, Congress amended 28 U.S.C. § 2244(b) to provide for a qualified form of res judicata in habeas corpus proceedings. In *Kuhlmann v. Wilson*, 477 U.S. 436, 450-51 (1986), this Court explained, "it is clear that Congress intended, as the general rule, to give preclusive effect to a judgment denying on the merits a habeas petition alleging grounds identical in substance to those raised in the subsequent provision." *McCleskey* later honored this intent by holding that general res judicata principles are in fact applicable in the habeas corpus context through the abuse of the writ doctrine of Rule 9(b), *McCleskey*, 499 U.S. at 480; and this Court's decision in *Felker* completed the repudiation of *Sanders* by holding that application of res judicata principles under the standards of AEDPA in the habeas corpus context does not constitute a suspension of the writ. *Felker*, 518 U.S. at 664. In light of these subsequent cases overruling *Sanders*, respondents' reliance on that case is a virtual concession that existing law does not support their position.

Respondents also attempt to distinguish this Court's recent decision in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998). *Martinez-Villareal* held that a habeas petition filed after a previous merits adjudication, and after three previous "without prejudice" exhaustion dismissals, was not "second or successive" as to a *Ford* claim which could not have been raised at the time of the initial filing, because "it is certain that respondent's *Ford* claim would not be barred under principles of res judicata." *Id.* at 1622; *see* Pet. Br. at 27-31. In other words, the Court in *Martinez-Villareal* applied straightforward principles of res judicata in allowing a post-adjudication proceeding to go forward because the petitioner could not have litigated the claim at the time of the original federal adjudication. If res judicata principles did not bar Mr. Martinez-Villareal's post-adjudication (and post-exhaustion-dismissal) *Ford* claim, they similarly do not bar consideration of Mr. Slack's pre-adjudication claims.[4] Under *Martinez-Villareal*,

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[4] Respondents describe the Court's decision in *Martinez-Villareal* as having been "based on the temporal relationship of petitioner's capacity to

any time a litigant has had no prior opportunity for a federal adjudication, it would be "seemingly perverse" to invoke rules of preclusion to prevent one. *Id.* at 1621. As noted in the opening brief and below, such an opportunity does not exist when a petitioner has not exhausted all of his state remedies.

In sum, respondents fail to address the analytical framework established by this Court's caselaw for defining a "second or successive" application. That framework requires this Court to adopt a definition consistent with the established principles of res judicata cited by petitioner.

2) The Lower Courts' Consistent Construction Of The Term "Second Or Successive" Supports The Conclusion That A "Second Or Successive" Application Is One Filed After A Previous Merits Adjudication.

Mr. Slack's opening brief also demonstrated that, under the exhaustion and abuse of the writ jurisprudence of this Court, the courts of appeals outside the Ninth Circuit (and the Ninth Circuit itself in a post-AEDPA case, *In re Turner*, 101 F.3d 1323 (9th Cir. 1997)) have uniformly held that no application filed after an earlier dismissal without prejudice for lack of complete exhaustion can be "second or successive." Pet. Br. at 31-36. The uniform recognition that a petition filed after a previous dismissal without prejudice for exhaustion is not a "second or successive" application 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). Respondents do not contest the uniformity of the lower court interpretations of "second or successive"

be executed vis-a-vis the time he filed his successive petition." Resp. Br. at 26-27. While it is true that the timing of the *Ford* claim was important in *Martinez-Villareal*, it was important there only because established principles of res judicata, as incorporated through the term "second or successive" petition, could not bar a claim that the petitioner could not have litigated at the time of the first federal adjudication. *Martinez-Villareal*, 118 S.Ct. at 1622.

application, nor do they dispute that the lower courts (and this Court in *Martinez-Villareal)* have rejected a mechanical interpretation of "second or successive" application, and have instead examined the question in terms of the principles that underlie the exhaustion and abuse of the writ doctrines.[5]

Respondents thus fail to confront Mr. Slack's arguments regarding the lower courts' consistent interpretation of "second or successive" application. Instead, respondents assert that the uniform lower court construction of "second or successive," which excludes petitions filed after an exhaustion dismissal, supposedly involved cases where only one prior dismissal had occurred. Resp. Br. at 28-29. No authority exists to support such a rule, and not a shred of language from any of the cited cases supports respondents' reading of them.[6] By contrast, every one of the lower court decisions cited in the opening brief refutes respondents' position because they all recognize that the absence of a prior adjudication does not allow a court to give preclusive effect to a dismissal

[5] When there has been no prior adjudication, a subsequent petition may be numerically a "second" one, but as this Court recognized in *Martinez-Villareal*, 118 S.Ct. at 1621, 1618, the application of the "second or successive" petition bar is not a matter of mechanical counting, but is governed by res judicata principles.

[6] Respondents' position cannot be reconciled with at least four cases, including this Court's cases, cited in Mr. Slack's opening brief: *Martinez-Villareal*, 118 S.Ct. at 1622 (holding that petition filed after three previous exhaustion dismissals and an adjudication of the merits was not "second or successive"); *Ex Parte Hawk*, 321 U.S. 114 (1944) (dismissing habeas petition "without prejudice" for continued exhaustion, despite the existence of at least one previous exhaustion dismissal); *McWilliams v. Colorado*, 121 F.3d 573, 575 (10th Cir. 1997) (holding that petition filed after previous exhaustion dismissal was not "second or successive" even though it appeared that the renewed petitions contained unexhausted claims, and leaving for the district court "the determination of whether Mr. McWilliams had in fact exhausted state remedies"); and *Dellenbach v. Hanks*, 76 F.3d 820, 822 (7th Cir. 1996) (holding that a petition filed after **two** previous "without prejudice" dismissals was not "second or successive," reasoning that "it is not an abuse to file a successive petition if the previous petition **or petitions** were not denied on the merits.") (Emphasis added), *cert. denied*, 519 U.S. 894 (1996).

without prejudice. Like the Ninth Circuit's decision in *Farmer*, discussed below, the respondents offer no coherent analytical basis for a "one exhaustion dismissal" rule; and such a rule, detached from any basis in the res judicata principles of the abuse doctrine, would be exactly the kind of ad hoc rule this court condemned in *Lonchar*. *See* Pet. Br. at 10-12.

3) 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.

Petitioner's brief discussed the analytical flaws in the Ninth Circuit's decision in *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996), *cert. denied*, 520 U.S. 1188 (1997), on which the district court based its ruling in this case. Pet. Br. at 37-46. In particular, the Ninth Circuit's rule gives radically different treatment to petitions raising previously adjudicated claims and petitions raising new claims, although both situations arise under the same "second or successive" application provisions of rule 9(b) that this Court interpreted in *Kuhlmann* and *McCleskey*. Respondents nonetheless argue that the *Farmer* court's textual analysis of Rule 9(b) and of *Sanders* correctly concluded that a petition can be found abusive even if there was no adjudication of any claim in a previous petition dismissed for exhaustion. Respondents' argument, and the *Farmer* analysis, disregard the basic premise of *McCleskey* and *Kuhlmann*: Abuse of the writ is a modified res judicata rule, and such a rule simply does not apply (to "same" or "new" claims) when there has been no prior adjudication. *McCleskey* clearly departed from, and in fact overruled, *Sanders*; and *Farmer* demonstrates the confusion which arises from trying to apply both pre-*McCleskey* and post-*McCleskey* doctrine simultaneously.

Under the pre-*McCleskey* regime of *Sanders*, before res judicata principles were applied, it made some sense to examine the petitioner's subjective intent in determining whether the writ was being abused. After the *McCleskey* decision imposed clear res judicata principles on the abuse doctrine, however, analysis of the petitioner's intent was eliminated; but at the same time, the res judicata rule recognized the "vital relevance" to the proceedings of the "prior adjudication." The *Farmer* decision simply confused the supposedly "abusive" conduct when a petitioner suffered dismissals for exhaustion with the fundamental requirement of a prior adjudication which, under the res judicata rule of *McCleskey*, is a necessary predicate for finding that a "second or successive" application is an abuse of the writ.

The *Farmer* decision itself also contains no rational limiting principle on its idiosyncratic theory of abuse of the writ. The *Farmer* court held that the petitioner could obtain review of all the exhausted claims in his third amended petition (whether or not they had appeared in his previous dismissed federal petitions) since a petition filed after exhaustion "cannot be an abuse of the writ, as it is the very reason for dismissing the petition for failure to exhaust in the first place." 98 F.3d at 1560. But if a petition filed after a previous petition is dismissed for exhaustion can ever be subject to Rule 9(b) as a "second or successive" one, as respondents claim, then the *Farmer* decision is wrong on this point, and any post-exhaustion petition should have been subject to the abuse doctrine. The *Farmer* decision offers no principled rationale for treating the petitioner's third amended petition as subject to the abuse of the writ doctrine, but not the second amended petition, and thus it does not provide this Court with any rational alternative to applying res judicata principles to determine what a "second or successive" application is.[7]

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[7] Mr. Slack's opening brief also catalogued the absurd and unconstitutional results that application of the *Farmer* rule would create. Pet. Br. at 42-46. Respondents do not dispute Mr. Slack's analysis, but assert that this Court should ignore the ramifications of adopting the *Farmer* rule. Resp. Br. at 40-41. Petitioner submits that this Court not only can but must consider the consequences of adopting the Ninth Circuit's *Farmer* rule on the definition of "second or successive" application, since that term is used in both pre-AEDPA law applicable here and in AEDPA itself. 28 U.S.C. § 2244(b).

4) 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."

The Ninth Circuit's ruling in this case also cannot be reconciled with this Court's exhaustion jurisprudence. Pet. Br. at 12-22. Despite respondents' insistence that "nothing in *Rose* [*v. Lundy*, 455 U.S. 509 (1982)]" undermines the ruling below, Justice O'Connor's plurality opinion addressed this very situation:

> Those prisoners who misunderstand this [exhaustion] 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 (emphasis added). The *Rose* opinion warned only of the potential preclusive consequences if a petitioner obtained an adjudication by a federal court on the merits: "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 (emphasis added). *Rose* thus clearly contemplates that habeas litigants like Mr. Slack could return to federal court to secure a merits adjudication of their federal claims once all available state proceedings have run their course, as long as they have not already proceeded to a merits adjudication of some of their claims in federal court.

In the opening brief, petitioner also discussed *Ex Parte Hawk*, 321 U.S. 114 (1944), which was central to this Court's analysis in *Rose*. *See* Pet. Br. at 15-19.[8] Although this case falls squarely within the factual and legal terms of *Hawk*, respondents' brief does not refer to that case, which is especially revealing in light of the importance of *Hawk* to exhaustion doctrine. Like Mr. Slack, Mr. Hawk filed a mixed petition after a previous dismissal for lack of complete exhaustion. Despite this previous exhaustion dismissal, this Court recognized that "petitioner has not yet shown that he has

[8] *Hawk* was the case on which the current statutory exhaustion provision was based. *See Darr v. Burford*, 339 U.S. 200, 214 (1950); *Irvin v. Dowd*, 359 U.S. 394, 405 (1959).

exhausted the remedies available to him in the state courts, and he is therefore not at this time entitled to relief," *id.* at 116, and concluded that "as petitioner does not appear to have exhausted his state remedies his application will be denied without prejudice. . . . " *Id.* at 118. This Court should simply follow *Hawk* in this case.

As was the case in *Martinez-Villareal*, the district court told Mr. Slack that the dismissal of his petition in 1991 was "without prejudice" to his right to litigate a new petition after exhaustion proceedings. JA 22. This representation was consistent with the general law, which denies any preclusive effect to a dismissal without prejudice. See Pet. Br. at 19-20. Respondents in fact concede that the "exhaustion requirement is not a rule of preclusion." Resp. Br. at 19. This concession essentially ends the analysis: If a dismissal without prejudice for exhaustion does not have preclusive effect, there is no basis for the district court's ruling here, or the *Farmer* rule on which it is based, that such a dismissal can have preclusive effect.[9]

[9] Respondents assert that one of the authorities cited by Mr. Slack for the general lack of preclusive effect given to "without prejudice" dismissals, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 397 (1990), supports the "district court's application of Rule 9(b) to Slack's new claims," because Fed. R. Civ. P. 41(a)(1) was "designed to curb abuses of procedural rules which allowed dismissals or nonsuits right up to the entry of the verdict." Resp. Br. at 17. But Rule 41(a)(1) does not apply in the exhaustion context, because that part of the rule deals only with unilateral dismissals by the plaintiff without a court order. In the exhaustion context, the habeas petitioner generally does not desire dismissal at all and in any event does not unilaterally control dismissal. The state respondents, and the court, have primary control over dismissal by court order under Rule 41(a)(2), because the state decides whether to assert the exhaustion defense or to waive that defense and proceed with adjudication, and the court can decide, under some circumstances, to proceed with adjudication of a mixed petition even though the state has raised exhaustion. *See Granberry v. Greer*, 481 U.S. 129, 134-35 (1987); 28 U.S.C. § 2254(b)(2).

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

As petitioner discussed in the opening brief, there are already rules in place, none of which respondents address, to deal with a petitioner who repeatedly seeks dismissal of his petition solely for the purpose of delay, without deforming or overruling this Court's jurisprudence on exhaustion and abuse of the writ. The federal courts can use a conditional dismissal order under Fed. R. Civ. P. 41(a)(2), or the stay and abeyance procedure authorized by the Ninth Circuit Court of Appeals, or the laches provision of Rule 9(a), to prevent what the respondents refer to as the "ping pong" effect of dismissals for exhaustion. Pet. Br. at 46-49.[10] These measures present a rational solution to perceived problems which may arise from dismissals without prejudice under the exhaustion doctrine of *Rose v. Lundy*. Respondents argue merely that these tools do not "trump" the principles applicable to excusing abuse of the writ. Resp. Br. at 41-43. Respondents' argument assumes the answer to the question presented here – that the abuse doctrine does apply to a petition filed after a previous dismissal for exhaustion – and that using these mechanisms would evade the abuse doctrine. Resp. Br. at 43. To the contrary, the measures petitioner cites are reasonable means of dealing with any claimed exhaustion

[10] When a district court dismisses without prejudice for exhaustion, Fed. R. Civ. P. 41(a)(2) would permit the court to condition the dismissal on the petitioner filing only exhausted claims in a renewed petition, and that order would be enforceable under Rule 41(b). Similarly, if the court allows the petitioner to amend his petition to remove unexhausted claims, and stays the federal proceedings on the remainder of the petition to allow exhaustion, *see Calderon v. United States District Court (Thomas)* 144 F.3d 618 (9th Cir. 1998), when the petitioner moves to amend after exhaustion the court could exercise its discretion to allow an amendment to add only claims that are exhausted. To the extent that the state may be able to demonstrate that it suffered actual prejudice from delay occasioned by dismissals for exhaustion, Rule 9(a) of the Rules Governing Section 2254 Cases provides the district court with a basis for dismissal of a petition with prejudice. *Cf. Lonchar v. Thomas*, 517 U.S. 314, 315 (1996).

problems, without abandoning the principled application of the res judicata doctrine of abuse of the writ.

Fundamentally, respondents' complaints about the burdens of repeated dismissals for exhaustion are more properly addressed to the state system. The State of Nevada has not adopted inflexible prohibitions on filing successor habeas petitions.[11] When the state has left its courts open to exhaustion proceedings, as Nevada has done, the federal courts cannot properly be faulted for following the dictates of *Rose v. Lundy* and dismissing mixed petitions to allow for the exhaustion of remedies that the state itself has made available.

B. AEDPA's Technical Amendment To 28 U.S.C. § 2253(c) Did Not Create The Radical, Unconstitutional Shift In Habeas Practice Envisioned By Amici Curiae, And Even If It Did, The Amendment Could Not Be Retroactively Applied In The Absence Of Clear Congressional Intent To Do So And In The Absence Of A Clear Invocation Of The Provision By The Parties.

The amicus curiae brief filed by the attorneys general of several states raises for the first time a number of issues which the respondents in this matter have not asserted, and which are well beyond the certiorari question posed by this Court. This Court has frequently expressed its reluctance to base its ruling in a case upon issues raised only by an amicus, *e.g.*, *Davis v. United States*, 512 U.S. 452, 457 n.* (1994); but since the Court has the power to do so, petitioner must address these issues.[12]

[11] *See* Nev. Rev. Stat. §§ 34.726, 34.800, 34.810; *Glauner v. State*, 107 Nev. 482, 485 n. 3, 813 P.2d 1001 (1991); *cf. O'Sullivan v. Boerckel*, 119 S.Ct. 1728, 1734 (1999) (rejecting unexhausted claims because they would necessarily be defaulted under state law).

[12] Because of the severe limitation on the length of a reply brief, petitioner can address these issues only in a very summary fashion. To the extent that this Court views any of the assertions made by the attorney general amici as potentially dispositive of this matter, petitioner requests that he be allowed to submit full supplemental briefing on those issues.

Amici primarily assert that federal appellate courts have no jurisdiction under AEDPA to review any procedural or statutory errors at the request of a habeas corpus petitioner. Substantively, amici's position makes no sense and procedurally, it is not properly before this Court.

1. The certificate of appealability provisions of AEDPA do not apply to petitioner's case because respondents have failed to invoke AEDPA; the provisions of AEDPA are not applicable to this case; and the provisions on which amici rely are not jurisdictional.

a) Reliance on the provisions of AEDPA can, in general, be waived by a party's failure to invoke the statute.[13] The respondents have never argued that the certificate of appealability standards of AEDPA applied in this case, *see* JA 185-195, and they do not make that argument here. Petitioner Slack was denied a certificate of probable cause to appeal, under pre-AEDPA law, in the district court; and the court of appeals sua sponte treated the notice of appeal as a request for a certificate of probable cause and denied it. JA 163, 197. Accordingly, any contention that the post-AEDPA standards apply to this case has been waived and is not properly before this Court.[14]

b) The certificate of appealability provisions of AEDPA do not apply to a case in which the petition for writ of habeas corpus was filed pre-AEDPA, even though the notice of appeal was filed post-AEDPA.[15] Petitioner Slack's petition for writ of habeas

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[13] *E.g.*, *Emerson v. Gramley*, 91 F.3d 898, 900 (7th Cir. 1996), *cert. denied*, 520 U.S. 1122, 1139 (1997); *Arnold v. Evatt*, 113 F.3d 1352, 1362 n. 57 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 715 (1998).

[14] The attorney general amici also argue that if a federal habeas petition was filed before the adoption of AEDPA, any claims added after the enactment of AEDPA should be subject to its provisions. Amici offer no authority contradicting the holding of *Lindh v. Murphy*, 521 U.S. 320, 326 (1997), that cases filed prior to the enactment of AEDPA are not subject to the Chapter 153 provisions of AEDPA. Respondents have never asserted that any portion of this proceeding should be subject to AEDPA, and this argument is not properly before this Court.

[15] *Fuller v. Roe*, ___ F.3d ___, 1999 WL 462632, at *2 (9th Cir. July 9, 1999) (per curiam) (citing cases); *United States v. Kunzman*, 125 F.3d

corpus was filed in the district court before AEDPA was enacted, JA 35, and thus the AEDPA provisions amici rely on do not apply here.

c) Amici argue that the requirement of a certificate of appealability is jurisdictional and thus can be reviewed at any time. The requirement of a certificate of probable cause or appealability is jurisdictional; but in a case upon which the amici heavily rely, *Young v. United States*, 124 F.3d 794, 799 (7th Cir. 1997), *cert. denied,* 118 S.Ct. 2324 (1998), Judge Easterbrook's opinion held that a defect in a certificate of appealability does not implicate subject matter jurisdiction and thus was waived by the government's failure to raise the issue.[16] Thus this Court's decision in *Hohn* is controlling: This Court has jurisdiction to review the denial of a certificate of probable cause to appeal, and any issue as to the proper scope of the requested certificate has been waived by the respondents.

2. On the merits, the attorney general amici argue that AEDPA's adoption of 28 U.S.C. § 2253 removed any jurisdiction in the federal appellate courts to correct procedural errors favoring the state in habeas corpus cases. According to amici, Congress accomplished this end by codifying the standard for issuing a certificate of appealability as requiring "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), rather

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1363, 1364 n. 2 (10th Cir. 1997), *cert. denied*, 118 S.Ct. 1375 (1998); *United States v. Skandier*, 125 F.3d 178, 180 (3d Cir. 1997); *Nelson v. Walker*, 121 F.3d 828, 831-832 (2d Cir. 1997); *contra*, *Tiedeman v. Benson*, 122 F.3d 518, 521 (8th Cir. 1997).

In *Hohn v. United States*, 524 U.S. 236 (1998), this Court assumed that AEDPA applied in that situation, but it was not presented with any dispute on that issue and therefore did not actually decide it. The court of appeals decision in *Hohn* was filed before this Court decided, in *Lindh v. Murphy*, 521 U.S. at 336, that "the new provisions of Chapter 153 generally apply only to cases filed after the Act being effective." The certificate of appealability provision of 28 U.S.C. § 2253(c)(2), upon which amici relies, is part of the Chapter 153 amendments.

[16] *Accord*, *United States v. Talk*, 158 F.3d 1064, 1068 (10th Cir. 1998) (failure to object to erroneously issued certificate of appealability waives issue), *cert. denied*, 119 S.Ct 1079 (1999).

than "a substantial showing of the denial of a federal right" which was the standard prescribed for a certificate of probable cause by *Barefoot v. Estelle*, 463 U.S. 880 (1983). Amici's argument suffers from insurmountable problems.

a) The amici's position would work a radical change in the availability of appellate review of procedural issues in habeas corpus practice without any indication that Congress intended that result. No court, including this Court, has ever suggested that the "substantial showing of the denial of a federal right" prescribed by *Barefoot*, or the standard now codified in § 2253, refers to anything but the underlying substantive claims of a petition.[17] The only case in which this issue has been addressed, which is not discussed by amici on this point, is *Trevino v. Johnson*, 168 F.3d 173, 176-177 (5th Cir. 1999), pet. for cert. filed, no. 98-9936 (June 17, 1999). There, the court of appeals considered whether the district judge abused his discretion in declining to recuse himself. The court held that a certificate of appealability was required to review the merits of the substantive claims, but not this procedural issue which arose in the district court proceedings. Amici cite no case, and nothing in the legislative history, remotely suggesting that AEDPA was intended to abolish appellate review of errors relating to exhaustion, procedural default, discovery, or any of the procedural issues which may arise in the course of resolving the underlying substantive claims.[18] It is a "fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones v. United States*, 119 S.Ct. 1215, 1220

[17] Respondents do not assert that petitioner's underlying substantive claims are not constitutional ones, and this court need not consider whether AEDPA made any change in the showing required to issue a certificate of appealability as to the substantive claims.

[18] The authority cited by amici in support of their argument in fact relates to whether the underlying substantive claims must be of constitutional stature, not whether AEDPA eliminated all review of procedural rulings which disfavor the petitioner. *Young v. United States*, 124 F.3d at 799.

(1999).[19] When Congress wanted to eliminate review of procedural issues in AEDPA, it did so explicitly, and it did so in a way that precluded review by either party. 28 U.S.C. § 2244(b)(3)(E) (prohibiting review on rehearing or on certiorari of court of appeals' screening decision to allow a second habeas petition to be filed); *see Hohn v. United States*, 118 S.Ct. at 1976.[20]

b) Most important, however, this Court must reject the interpretation of AEDPA proposed by amici because it would render the statute unconstitutional. Under AEDPA, the state respondents in a habeas case do not have to obtain a certificate in order to appeal, but the petitioner must obtain one. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). If, as amici argue, a certificate cannot be issued to review procedural errors committed by a district court, then only one party, the state, can obtain review of all procedural errors which disfavor it, and the petitioner can never obtain such review. Such a scheme of entirely one-sided review would clearly violate the equal protection and due process clauses of the Fifth

[19] Adoption of the position proposed by amici would also call into question the validity of some of this Court's recent decisions. In *Calderon v. Ashmus*, 523 U.S. 740, 118 S.Ct. 1694 (1998), this Court concluded that a declaratory judgment action to determine whether a state satisfied the "opt-in" standards of AEDPA was premature, in part on the theory that the question of compliance with the "opt-in" standards could be litigated in the habeas proceeding. 118 S.Ct. at 1699. If amici's view is adopted, the decision in *Ashmus* would have to be reconsidered, since that procedural issue could not be reviewed on appeal in federal court at the instance of a petitioner. In *Breard v. Greene*, 523 U.S. 371, 118 S.Ct. 1194, 1699 (1998), this court addressed procedural default issues which, under amici's theory, it could not have jurisdiction to review since the petitioner could never obtain a certificate of appealability to vest jurisdiction in the court of appeals.

[20] If amici's position were adopted, the elimination of any review of procedural and statutory issues on a petitioner's behalf is so radical that it could not be deemed merely procedural and thus applicable retroactively. *See Lindh*, 521 U.S. at 328 and n.4.

and Fourteenth Amendments.[21] Since the interpretation of AEDPA proposed by amici would call into question the constitutionality of AEDPA, and a reasonable alternative construction of § 2253 is available – that the "denial of a constitutional right" refers to the merits of the underlying substantive claims – this Court must reject amici's position.

CONCLUSION

For the reasons stated above and in petitioner's opening brief, this Court should hold that a habeas corpus petition filed after a previous petition has been dismissed without prejudice for exhaustion is not a "second or successive" one for purposes of the abuse of the writ procedure, vacate the order of the court of appeals denying the certificate of probable cause, and remand the cause for further proceedings.

DATED this 2nd day of August, 1999.

Respectfully submitted,

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[21] *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *see M.L.B. v. S.L.J.*, 519 U.S. 102, 126-127, (1996); *Douglas v. California*, 372 U.S. 353 (1963).