SUPREME COURT OF THE UNITED STATES

No. 03–221

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

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

[June 21, 2004]

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, dissenting.

The three options the Magistrate Judge gave respondent, see *ante*, at 2, did not include the three-step stay and abeyance procedure described *ante*, at 4–5. Under that procedure: (1) unexhausted claims are dismissed from the federal petition; (2) exhausted claims are retained in federal court, but are stayed pending exhaustion in state court of the dismissed unexhausted claims; and (3) post-exhaustion in state court, the original federal petition is amended to reinstate the now exhausted claims, which are then deemed to relate back to the initial filing.[1] The Court today does not "addres[s] the propriety of this stay-and-abeyance procedure." *Ante*, at 5. But that unaddressed issue seems to me pivotal. If the stay and abeyance procedure was a choice respondent could have made, then the Magistrate Judge erred in failing to inform respondent of that option. While I do not suggest that clear statement of the options available to respondent must be augmented by

[1]The Ninth Circuit here allowed relation back of amendments although no pleading remained before the federal court. See *ante*, at 4, n. 1. In contrast, under the stay and abeyance procedure, the original habeas petition, although shorn of unexhausted claims, remains pending in federal court, albeit stayed.

"advisements," *ante*, at 8, I would not defer, as the Court does, the question at the core of this case.[2]

Furthermore, as this Court recognizes, *ante*, at 1, respondent filed his habeas petitions "five days before [the termination of AEDPA's] 1-year statute of limitations." Thus, any new petition by respondent would have been time barred even before the Magistrate Judge dismissed respondent's original petitions. Given that undisputed fact, the Magistrate Judge's characterization of the dismissal orders as "without prejudice" seems to me highly misleading.

Because the Court disposes of this case without confronting the above-described ripe issues, I dissent. Although my reasons differ from those stated in the Ninth Circuit's opinion, I would affirm the Ninth Circuit's judgment to the extent that it vacated the District Court's dismissal of Ford's second petitions.

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[2]A related question also postponed by the Court's opinion is whether the solution in *Rose* v. *Lundy,* 455 U. S. 509 (1982), to a mixed petition—dismissal without prejudice—bears reexamination in light of the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), on the time to file federal habeas petitions. See *Duncan* v. *Walker,* 533 U. S. 167, 182–183 (2001) (STEVENS, J., concurring in part and concurring in judgment) ("[A]lthough the Court's pre-AEDPA decision in *Rose* v. *Lundy* prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies." (citation omitted)); *Crews* v. *Horn*, 360 F. 3d 146, 154, and n. 5 (CA3 2004) (holding that both exhausted and unexhausted claims "should be stayed," and noting that a stay, "as effectively as a dismissal, . . . is a traditional way to defer to another court until that court has had an opportunity to exercise its jurisdiction over a habeas petition's unexhausted claims" (internal quotation marks omitted)).