SUPREME COURT OF THE UNITED STATES

No. 98–6322

ANTONIO TONTON SLACK, PETITIONER *v.* ELDON McDANIEL, WARDEN, ET AL.

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

[April 26, 2000]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in part and dissenting in part.

I join the opinion of the Court, except for its discussion in Parts III and IV of whether Slack's postexhaustion petition was second or successive. I believe that the Court produces here, as it produced in a different respect in *Stewart* v. *Martinez-Villareal,* 523 U. S. 637 (1998), see *id.*, at 646 (SCALIA, J., dissenting), a distortion of the natural meaning of the term "second or successive."

The opinion relies on *Martinez-Villareal*, together with *Rose* v. *Lundy,* 455 U. S. 509 (1982), to conclude that a prisoner whose federal petition is dismissed to allow exhaustion may return to federal court without having his later petition treated as second or successive, regardless of what claims it contains. Neither the holdings nor even the language of those opinions suggest that proposition. As for holdings: *Martinez-Villareal* did not even involve the issue of exhaustion, and so has no bearing upon the present case. The narrow holding of *Rose* v. *Lundy* was that a habeas petition containing both exhausted and unexhausted claims must be dismissed, but it can be fairly said to have embraced the proposition that the petitioner could return with the same claims after they all had been exhausted. This latter proposition could be thought to rest upon the theory that a petition dismissed for lack of ex-

haustion is a petition that never existed, so that *any other later petition* would not be second or successive. Or it could be thought to rest upon the theory that the later refiling of the original claims, all of them now exhausted, is just a renewal of the first petition, implicitly authorized by the dismissal to permit exhaustion. The former theory is counterfactual; the latter is quite plausible.

The language the Court quotes from *Rose* and *Martinez-Villareal* also does not justify the Court's mixed-petitions-don't-count theory. The quotation from *Rose* says only that "'prisoners who. . . submit mixed petitions . . . are entitled to . . . exhaust the *remainder of their claims*.'" *Ante*, at 10 (quoting *Rose*, *supra*, at 520 (emphasis added)). This does not suggest that they are entitled to add new claims, or to return, once again, without accomplishing the exhaustion that the court dismissed the petition to allow. And the quotation from *Martinez-Villareal* indicates only that when a prisoner whose habeas petition was dismissed for failure to exhaust state remedies "'then did exhaust those remedies'" and refile in federal court, the court "'could adjudicate *these claims* under the same standard as would govern those made in any other first petition. '" *Ante*, at 11 (quoting *Martinez-Villareal*, *supra*, at 644 (emphasis added)). This does not require treating the later filed petition as a "first" petition regardless of whether it bears any resemblance to the petition initially filed. In fact, *Martinez-Villareal* clearly recognized the potential significance of raising a new claim rather than merely renewing an old one: It held that a petition raising a claim of incompetence to be executed previously dismissed as premature was not second or successive, but expressly distinguished, and left open, the situation where the claim had not been raised in the earlier petition. See *id.*, at 645, n.

The State understandably fears the consequences of the Court's approach, which would allow federal petitions to

be repeatedly filed and dismissed for lack of exhaustion, requiring the State repeatedly to appear and expend its resources, with no help in sight from supposed limitations on "second or successive" petitions. The Court reassuringly observes that this problem can be countered in other ways, without "upsetting the established meaning of a second or successive petition." *Ante*, at 12. But as discussed above, it is not "established" that a first petition ceases to be a first petition when it is dismissed to permit exhaustion. And though the problem of repetitive filings after dismissals for lack of exhaustion can of course be countered in other ways, so can the problem of repetitive filings for all other reasons. It happens to be the whole *purpose* of the "second or successive" provision to solve *precisely that problem*– directly checking the "vexatious litigant," *ibid.*, rather than hoping that the courts will use a patchwork of other provisions to achieve the same end. I do not disagree with the Court that district courts may be able to limit repeated filings through appropriate orders pursuant to Fed. Rules Civ. Proc. 41(a) and (b). This burden on district courts would not be necessary, however– and the States would not be remanded to reliance upon the discretion of district judges– if the limitation on "second or successive" petitions were given its natural meaning.

Because I believe petitioner's inclusion of new and unexhausted claims in his postexhaustion petition rendered it second or successive, he is not entitled to a certificate of appealability, and I would affirm the decision of the Court of Appeals.