



10-1981

Rose v. Lundy

Lewis Powell Jr.

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Decision - Grant
(Conflict)

CA 6, contrary to rule in CA 5
& CA 9, ~~has~~ held that a state
prisoner may assert fed. court
habeas corpus relief by a petition
advancing several claims not all
of which have been presented to
state court - i.e. ~~no~~ state remedies
not exhausted -

The CA 5 & CA 9 rule is that
~~a~~ a H/C petition ~~will~~ be
dismissed, w/out prejudice, if it
includes a claim not exhausted in
state courts.

PRELIMINARY MEMORANDUM

Feb. 20
January 23, 1981 Conference Rule of CA 5 prevents
List 1, Sheet 4 piece-meal ~~total~~ litigation.
No. 80-846

ROSE, WARDEN

v.

LUNDY

Cert to CA 6
(Celebrezze, Engel,
and Martin) (Order)

Federal/Habeas

Timely

1. SUMMARY: The state raises four questions for review of
the lower court's decision granting respondent habeas corpus
relief: (1) whether a petition for relief under 28 U.S.C. §2254
should be dismissed, without prejudice, where the petition
presents several claims for relief but not all of them have been
presented to the state courts; (2) whether habeas corpus relief

I am inclined to recommend a grant because
of the conflict over the 1st question here.

GM

was properly granted on the grounds of prosecutorial misconduct and an improper jury instruction when resp failed to object at trial and did not demonstrate cause and prejudice for this procedural default, the state courts overlooking resp's failure to object; (3) whether the DC erred in granting habeas corpus relief without considering the entire state trial transcript, but only portions thereof; and (4) whether the lower courts erred in concluding that resp's right of confrontation was abridged when the state trial court limited his cross examination of a rape victim.

2. FACTS: Resp was convicted in a Tennessee state court of rape and crime against nature. The victim was enticed into resp's car by resp's fourteen year-old female companion, with whom resp had been having sexual relations "for years," at resp's direction on the pretext of giving the victim a ride home. The three drove past the victim's home, however, and resp ordered the victim to disrobe. She did so, and was blindfolded with her brassiere. The victim was taken to resp's apartment, where resp forced her to drink some whiskey and then raped her. Resp later compelled the victim to perform fellatio on him, and various sexual acts with his fourteen year-old female companion. As soon as resp fell asleep, the companion fled the apartment. The victim could not do so, since resp was lying on her. As soon as resp rolled over, however, the victim fled the apartment, hailed a passing taxi, and immediately reported having been kidnapped and raped. Resp was convicted of rape and crime against nature, the latter offense being based on one of the sexual acts resp

forced the victim to perform with his companion. The convictions were upheld, in an opinion, by the Tennessee Ct. of Crim App. Cert to the Tennessee S. Ct. was denied.

3. DECISIONS BELOW: Resp brought a petition for habeas corpus relief under 28 U.S.C. §2254. The DC (Morton) described the petition as presenting four grounds for relief: (1) cross-examination of the victim was unconstitutionally limited; (2) the prosecuting attorney was guilty of prejudicial conduct in making certain remarks in front of the jury; (3) the prosecuting attorney commented on the failure of the defendant to testify and (4) the trial court gave an improper charge to the jury that every witness is presumed to swear the truth. The DC explicitly found that the third and fourth grounds had not been presented to the highest court in Tennessee, and that there had been no exhaustion of remedies as to those grounds. The DC therefore declined to consider these claims "in the constitutional framework." He noted, however, that "in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally." Resp's first claim for relief, which the DC concluded had been exhausted, was that the trial court erroneously restricted his counsel's cross-examination of the victim. The victim had apparently made statements to defense counsel prior to trial concerning sexual relations she had with various individuals prior to the rape. Defense counsel had asked the victim how often she had intercourse with specified individuals in certain periods, and the victim responded that she did not remember how many times. Defense counsel then asked the

not presented

victim whether she had told him earlier the number of times that she had had intercourse. The trial court sustained an objection to this line of inquiry. The Tennessee Ct. of Crim. App. had ruled that resp was not prejudiced by the restriction of cross examination, since at an offer of proof the victim stated that she did not remember what she had told the defense counsel. The DC held that this amounted to a denial of resp's rights of confrontation. The DC also granted relief on the basis of several instances of prosecutorial misconduct. The DC reviewed the record and concluded, inter alia, that the prosecuting attorney had impugned the conduct of defense counsel, commented on the credibility of the various witnesses, misrepresented the law to the court, stated in the presence of the jury that "the defendant's violent nature would be material in this case," and personally evaluated the state's proof.

The CA affirmed by order. It specifically rejected the state's contention that the DC should have dismissed the habeas petition because it asserted some claims which the petr had not yet exhausted in the state court system. The CA cited two decisions adopting such a rule, Galertieri v. Wainwright, 582 F.2d 348 (CA 5 1978) and Gonzales v. Stone, 546 F.2d 807 (CA 9 1976), and then curtly noted that this rule had not found favor in the Sixth Circuit and expressly declined to adopt it. The CA then concluded that the DC had reached correct constitutional conclusions. Finally, it rejected the state's argument that any constitutional errors could not be reviewed because of the cause and prejudice rule of Wainwright v. Sykes, 433 U.S. 72 (1977).

Conflict

The court stated that Sykes did not apply since the state courts of Tennessee had not applied any state contemporaneous objection rule but had proceeded to consider resp's claims on the merits.

4. CONTENTIONS: (1) The state contends that the petition for writ of habeas corpus should have been dismissed, without prejudice, for failure to comply with the exhaustion requirement of 28 U.S.C. 2254 (b): "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of the state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state." Permitting federal courts to consider "mixed" habeas petitions containing exhausted and unexhausted claims jeopardizes the principles of federal-state comity. As the CA itself noted, there is a clear conflict in the circuits on whether mixed habeas petitions should be dismissed. As the Galertieri and Gonzales opinions make clear, the Fifth and Ninth Circuits have adopted the rule which petr urges. The issue was presented to the Court in Francisco v. Gathright, 419 U.S. 59, 63-64 (1974), but the Court decided the case on other grounds and did not reach the present question. The state argues that adopting the rule of the Fifth and Ninth Circuits would eliminate piece-meal litigation and relieve federal courts from the burden of successive habeas petitions. See Schneckloth v. Bustamonte, 412 U.S. 218, 259-263 (1972) (Powell, J., concurring). The rule would encourage prisoners to fully develop all their claims in state courts before travelling to the federal system, thus serving interests in the administration of justice. See Stone v.

Powell, 428 U.S. 465 (1976). (2) The state argues that the alleged instances of prosecutorial conduct relied upon by the DC should not have been considered by the federal habeas court, since resp had not objected to the prosecutor's statements at trial nor had he shown cause and prejudice excusing his failure to do so. The state argues that Tennessee has long operated under a procedural rule requiring contemporaneous objections.

(3) The state also argues that the DC should not have granted relief without reviewing the entire state trial transcript. The state had filed only those portions of the trial transcript which had been cited in resp's petition pertinent to a specific claim for relief. The resulting injustice was clear. The DC, for example, held that the confrontation clause claim was aggravated in that the state's evidence rested solely upon the credibility of the rape victim. However, if the DC had only reviewed the entire transcript, it would have realized that the rape victim's testimony was corroborated in all respects by the defendant's female companion who was an eyewitness to the crimes. (4) The state also argues that the DC erred on the merits of resp's confrontation clause claim. As the offer of proof made clear, the judge's decision to limit cross examination did not prejudice petr.

Resp argues that claims in a petition for writ of habeas corpus which meet the exhaustion requirement can be considered by the court even though other claims in the petition do not do so. He argues that the exhaustion requirement should not be used as a blunderbuss to prevent the consideration of meritorious federal

claims. (2) Resp notes that the confrontation claim and the prosecutorial misconduct claim were presented to the Tennessee courts, which decided the issues and did not base their decision on the failure of resp to make a contemporaneous objection. (3) Resp notes that the state did not raise the question of the status of the trial transcript in its brief before the CA, nor did it in its main brief before the CA ask for a remand in order that the DC might consider the entire record. The state filed only a partial transcript, failed to request an evidentiary hearing, failed to assign the question of the record as error and cannot now be heard to complain of an incomplete transcript. (4) Resp argues that his right to confrontation was, as the DC found, unconstitutionally abridged. The jury was entitled to observe the demeanor of the victim as she denied remembering making the statements to the defense counsel.

Q 5. DISCUSSION: The main question presented by the state, whether a petition containing both exhausted and unexhausted claims can be considered by a federal habeas court, is a critical one in the administration of justice and one on which there is a sharp conflict in the circuits. The CA here offered no reason for rejecting the established rule in the Fifth and Ninth Circuits other than that "such a rule has not found favor in the Sixth Circuit." The rule adopted by the Sixth Circuit encourages the filing of successive habeas petitions and undermines desirable finality in criminal cases. The rule which the state urges would encourage defendants to present all their claims to the state court system before resorting to federal courts, thus

yes

serving policies of comity recognized in 28 U.S.C. §2254(b). All of the societal values which Justice Powell noted had been subordinated by the extension of habeas corpus beyond its historic bounds, "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded," Schneekloth v. Bustamonte, 412 U.S. 218, 259 (Powell, J., concurring, joined by Burger, C.J., and Rehnquist, J.), would be served by adoption of the rule of the Fifth and Ninth Circuits. (2) The state's argument that Sykes barred review in the DC because of resp's failure to object at trial does not seem meritorious, because the state courts declined to apply the Tennessee contemporaneous objection rule. The rule in Sykes is based on the existence of an independent and adequate state ground in the failure to object, and if the state courts do not want to apply their contemporaneous objection rule, that is their business, and no independent and adequate state ground barring review can be said to exist. The state's other claims are largely fact specific, and not as significant as the critical question they raise concerning the availability of habeas review when unexhausted claims are presented.

I recommend a grant.

There is a response.

1/10/81
JBP

Roberts

Ops in petn.

Supreme Court of the United States
Washington, D. C. 20543

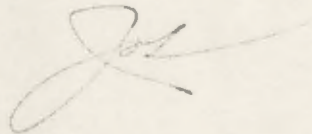
March 12, 1981

MEMORANDUM TO: Law Clerks

FROM: John Ale

RE: No. 80-846, Rose v. Lundy (granted
2/23/81)

Always on top of hot issues (though not necessarily handling them well--see my last circulation), the Virginia Law Review has a note in the works on the issue in this case. I realize it won't be argued until next term, by which time this issue should be on the streets, but once again they've asked me to send something around. File it away for your successors' (and your Justice's) reading pleasure.



ATTORNEY ERROR AS "CAUSE" UNDER *WAINWRIGHT v. SYKES*: THE CASE FOR A REASONABLENESS STANDARD AFTER *WASHINGTON v. DOWNES*

In *Wainwright v. Sykes*,¹ the United States Supreme Court held that failure to comply with a state's contemporaneous objection rule forecloses federal habeas corpus review of a state defendant's constitutional claims. In so ruling, the Court left open a possible avenue to defendants who could show both "cause" and "prejudice" in connection with their failure to make a timely constitutional objection during their trial.² The *Wainwright* majority, however, defined neither "cause" nor "prejudice,"³ and the Court has not addressed these issues in subsequent opinions. This doctrinal vacuum has troubled lower federal courts, especially when petitioners assert attorney error as the cause of their failure to make a timely objection.

A recent case from the United States District Court for the Eastern District of Virginia, *Washington v. Downes*,⁴ illustrates the problems that arise when a state defendant asserts lawyer error as the *Wainwright* "cause" for his failure to make a timely objection on a constitutional claim.⁵ In *Downes*, Judge Robert Merhige ruled that a defendant claiming such error must first exhaust⁶ state habeas corpus remedies for

¹ 433 U.S. 72 (1977).

² See *id.* at 90-91.

³ See *id.* at 87 ("We leave open for resolution in future decisions the precise definition of the 'cause'-and-'prejudice' standard . . .").

⁴ 475 F. Supp. 573 (E.D. Va. 1979).

⁵ The defendant in *Downes* failed to raise a constitutional claim in a Virginia court and was precluded from raising the issue on appeal by the state's contemporaneous objection rule. See VA. SUP. CT. R. 5:21. In pertinent part, this rule provides: "Error will not be sustained to any ruling below unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." *Id.*

⁶ The exhaustion doctrine, codified in the federal habeas corpus statute, 28 U.S.C. § 2254 (1976), is rooted in the doctrine of federal-state comity. See note 38 *infra*. The exhaustion doctrine provides that a state has the first opportunity to consider the federal constitutional claims that arise from a state criminal proceeding and prevents a federal habeas corpus petitioner from avoiding or shortcutting the entire state adjudicatory process. See *Darr v. Burford*, 339 U.S. 200 (1950). See also *Fay v. Noia*, 372 U.S. 391, 415-24 (1963); Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 1623-24 (5th ed. 1980); S. SALTZBURG, *AMERICAN CRIMINAL PROCEDURE* 1220-21 (1980).

According to the exhaustion doctrine, only after the state courts have decided the federal issue on the merits may the federal habeas petitioner litigate the issue in the federal courts. The federal habeas petitioner is required to exhaust fully only one avenue of relief under state law, see *Brown v. Allen*, 344 U.S. 443 (1953), but the state courts must have had the chance "to apply [the] controlling legal principles to the facts" bearing upon the claim. See

ineffective assistance of counsel⁷ before claiming that the error satisfies *Wainwright's* "cause" requirement.⁸ Judge Merhige dismissed without prejudice the defendant's underlying claim that her confession was coerced, thus effectively reserving the doctrinal question of the degree of lawyer error required to satisfy the *Wainwright* test.

The opinion is open to alternative interpretations on the doctrinal issue. First, the court's demand that an ineffective assistance of counsel claim be pursued in state court suggests that the standards for ineffective assistance and *Wainwright* "cause" may be identical in this context. Alternatively, the dismissal without prejudice leaves open the possibility that a lesser degree of lawyer incompetence might satisfy the *Wainwright* test.

This note first examines *Washington v. Downes*. Next, it analyzes the policies underlying *Wainwright v. Sykes* and examines the possible alternatives for measuring attorney error under *Wainwright*. The note concludes that a reasonableness standard of attorney error that does not necessarily reach the level of a constitutional claim for ineffective assistance of counsel is the proper standard for satisfying the *Wainwright* exception.

I. *Washington v. Downes*: A CRITIQUE

In *Washington v. Downes*,⁹ a state prisoner brought a habeas corpus petition pro se in a federal district court contesting the validity of her state court conviction.¹⁰ The petitioner asserted four grounds for relief, three of which the court dismissed with prejudice.¹¹ The petitioner's

Picard v. Connor, 404 U.S. 270, 272 (1971). The state court must also have had the opportunity to decide the issue on the same constitutional theory presented in the federal habeas corpus proceeding. See *id.* at 276-78.

⁷ The right to effective assistance of counsel in state criminal trials is a fundamental constitutional right. It was first applied to capital cases in *Powell v. Alabama*, 287 U.S. 45, 68-71 (1932), and was further developed in *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938). This right is grounded in the due process clause of the fourteenth amendment, U.S. CONST. amend. XIV, or in the sixth amendment, U.S. CONST. amend. VI, as applied to the states through the fourteenth amendment. The standards for measuring what level of attorney conduct meets this requirement remain uncertain. See note 59 *infra*.

⁸ See 475 F. Supp. at 577.

⁹ 475 F. Supp. 573 (E.D. Va. 1979).

¹⁰ The petition was filed pursuant to the federal habeas corpus statute, 28 U.S.C. § 2254 (1976).

¹¹ The three claims that were dismissed on the merits were (1) that the petitioner's confession was inadmissible because obtained while she was under the influence of narcotics; (2) that there was insufficient evidence to support the conviction; and (3) that the sentencing judge failed to comply with the terms of a plea agreement. The federal court dismissed the first claim on the basis of legal precedent. The court dismissed the second claim because it found the conviction was supported by sufficient evidence. See 475 F. Supp. at 575-76, 578. The court did not consider the facts underlying the third claim, because the petitioner

fourth claim was that her confession was coerced. Because the petitioner failed to object to the admission of her confession on this ground at trial, however, her claim ran afoul of Virginia's contemporaneous objection rule.¹² According to this rule, unless a party makes a timely objection to an issue at the trial level, the party is barred from raising a claim relating to that issue on direct appeal in the state courts.¹³ Similarly, following *Wainwright v. Sykes*,¹⁴ a federal court usually will decline to hear the claim in a collateral proceeding unless the defendant can show a cause for failure to raise the claim and actual prejudice to his case.¹⁵

In *Downes*, the petitioner sought to invoke the *Wainwright* cause-prejudice exception to obtain a collateral determination on her fifth amendment claim. According to the petitioner, her failure to object to the introduction of her confession resulted from her attorney's advice, who, at least with regard to this matter, performed inadequately.¹⁶ While Judge Merhige recognized that "the issue of ineffective assistance [was] raised as 'cause for the Court to review the coerced confession claim, and not as a claim in its own right,'" ¹⁷ the court declined to consider whether the

had pled "not guilty" and had received a trial and because the court did not find evidence of a plea bargain that caused the petitioner to waive her constitutional rights. See *id.* at 578.

¹² See VA. SUP. CT. R. 5:21. For the relevant text of this rule, see note 5 *supra*.

¹³ See, e.g., *Berger v. Commonwealth*, 217 Va. 332, 333, 228 S.E.2d 559, 560-61 (1976) ("Our requirement of timely objection would be meaningless and rendered a nullity if objections . . . could be raised and considered for the first time on appeal."); *Manley v. Commonwealth*, 211 Va. 146, 149, 176 S.E.2d 309, 312 (1970) ("There is a general procedural requirement in most jurisdictions that . . . [a defendant] must take timely steps in the lower court, either through a motion to suppress the evidence before trial or by sufficient objection to the use of the evidence when offered at trial.").

The general rule in most jurisdictions is that an objection must be made at trial before an appellate court will review a question. This practice is either a settled rule of common law, see, e.g., *Chugach Elec. Ass'n v. Lewis*, 453 P.2d 345, 349 (Alaska 1969); *Broitman v. Kohn*, 16 Mich. App. 400, 403-04, 168 N.W.2d 311, 313-14 (1969); *Mattfeld v. Nester*, 226 Minn. 106, 124, 32 N.W.2d 291, 304 (1948), or a specific rule of court, see, e.g., IOWA CODE ANN. § 813.2 (West 1979) (Rule 10.3); KY. R. CRIM. P. 9.22; MASS. R. CRIM. P. 22.

If a claim is raised at trial and the defendant subsequently exhausts state remedies, access to federal review in a habeas corpus forum is available for constitutional questions. If a claim is not raised at trial, however, and the state courts would bar state review under a contemporaneous objection rule, both direct review of the constitutional claim in the United States Supreme Court and a federal habeas corpus proceeding may be precluded. See C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 542-49 (3d ed. 1976). See generally Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050 (1978) [hereinafter cited as *Forfeiture*]; Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943 (1965). If the state court actually considers the merits of the claim, however, it may be considered by the federal courts. See note 6 *supra*.

¹⁴ 433 U.S. 72 (1977).

¹⁵ See *id.* at 90-91.

¹⁶ See 475 F. Supp. at 577.

¹⁷ *Id.*

lawyer's advice amounted to *Wainwright* cause and instead stated that the petitioner might have an ineffective assistance of counsel claim.¹⁸ Although the court recognized that the attorney's advice may have been based on "deliberate calculation" and, therefore, would not be a proper subject for either habeas corpus review in its own right or to show *Wainwright* cause,¹⁹ the court stated that "the advice may have been so inappropriate that it could only have resulted from 'neglect or ignorance rather than from informed, professional deliberation.'"²⁰ If the latter explained the attorney's conduct, the court said, the petitioner could assert an ineffective assistance of counsel claim in a state habeas proceeding.²¹ The court therefore refused to take evidence on the issue and dismissed the petitioner's claim because of her failure to exhaust available state remedies.²² Explaining its justification for dismissing the petitioner's claim without considering the grounds for which it was offered, the court stated that attorney error which is raised as "cause" to satisfy the *Wainwright* requirement does not excuse the petitioner from exhausting her state remedies. According to the court, "[a] petitioner should not ordinarily be permitted to bypass state remedies by making a challenge under the cause exception. This result surely could not have been intended under *Wainwright*, which reserved the cause-prejudice exception for defendants who, but for the exception, would be victims of a miscarriage of justice."²³

Judge Merhige did not fully explain why the assertion of a cause exception "could not have been intended by *Wainwright*." At the very least, this conclusion appears to conflict with the express provision in *Wainwright* itself for an exception to its rule. Nevertheless, the court may have employed the exhaustion requirement as a means to prevent future plaintiffs from using the cause issue as a surrogate for their underlying claim. If, unlike the petitioner in *Downes*, a defendant asserted full ineffective assistance as his *Wainwright* cause, a court might take evidence and rule on the underlying claim to determine whether prejudice resulted from the attorney's conduct.²⁴ A petitioner could thus obtain indirect federal re-

¹⁸ See *id.*

¹⁹ See *Satterfield v. Zahradnick*, 572 F.2d 433 (4th Cir.), cert. denied, 436 U.S. 920 (1978) (stating that calculated trial decision by attorney does not satisfy *Wainwright* cause requirement).

²⁰ 475 F. Supp. at 577 (quoting *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978)).

²¹ *Id.* at 577.

²² See *id.* at 577-78.

²³ *Id.* at 577.

²⁴ Some courts, including the Fourth Circuit, see *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968), require a showing of prejudice for ineffectiveness cases before they grant the remedy of a new trial. This requirement is not universal. See

view on the merits of his substantive claim in spite of his failure to comply with a state contemporaneous objection rule. Alternatively, Judge Merhige may have required exhaustion to give the state courts an opportunity to examine, indirectly, the merits of the coerced confession claim. Having developed a record on the ineffective assistance issue, including the issue of prejudice,²⁶ the state court would be in a position to decide if it should apply the available, though narrow, exception to the Virginia contemporaneous objection rule²⁶ and entertain the underlying claim on the merits.

Finally, the court simply may not have wanted to take evidence on the issue of attorney error without the benefit of a record. The requirement of exhaustion will facilitate subsequent federal habeas corpus review on the cause issue by creating a full state record on the ineffective assistance claim.

Nevertheless, the *Downes* tactic of transforming a petitioner's claim of lawyer error into a constitutional claim of ineffective assistance is troubling for several reasons. First, by requiring the defendant to assert involuntarily a sixth amendment claim before allowing litigation of the fifth amendment issue, the court effectively nullified a traditional rule that, where direct review in state courts is precluded, a defendant need not exhaust state collateral remedies on the same ground before petitioning for federal habeas.²⁷ Second, this requirement functionally eliminates the

Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 473-74 (1977). Some courts place the burden of showing lack of prejudice on the state. See, e.g., *United States v. DeCoster*, 487 F.2d 1197, 1204 (D.C. Cir. 1973); *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968). Other courts have placed the burden of showing prejudice on the defendant. See *Thomas v. Wyrick*, 535 F.2d 407, 414 (8th Cir.), cert. denied, 429 U.S. 868 (1976).

²⁶ Virginia requires a showing of prejudice to prevail on a claim of ineffective assistance. See *Slayton v. Weinberger*, 213 Va. 690, 692, 194 S.E.2d 703, 705 (1973).

²⁷ The Virginia contemporaneous objection rule states that an objection must be raised in a timely fashion and with reasonable certainty in order for the issue to be litigated subsequently except for "good cause shown" or to enable the court "to attain the ends of justice." VA. SUP. CR. R. 5:21. See note 5 *supra*. It is thus possible for a Virginia court to waive compliance with the rule, Virginia courts generally apply contemporaneous objection rules strictly. Cf. *Rust v. Indiana Flooring Co.*, 151 Va. 845, 860, 145 S.E. 321, 325 (1928) (stating in a civil context that "only questions raised in the trial court can be reviewed in this court . . . , unless the order or decree is void, upon the face of the record, for lack of jurisdiction or otherwise"). A search of Virginia cases revealed no instance of a Virginia court making an exception based upon Virginia Supreme Court Rule 5:21.

²⁸ See *Brown v. Allen*, 344 U.S. 443, 447 (1953). Virginia's contemporaneous objection rule, see note 5 *supra*, "provides that the Virginia Supreme Court will not notice an objection on appeal" unless it was raised below. *Washington v. Downes*, 475 F. Supp. at 576. Direct appeal on an issue where no timely objection was made would therefore be futile, and federal habeas is technically appropriate. See 28 U.S.C. § 2254 (1976) (stating that applicant shall be deemed to have exhausted state remedies when he has no right under state law to

petitioner's direct access to a federal forum on the sole basis of the *Wainwright* exception. When and if the *Downes* petitioner returns to the federal court, she will bring two constitutional claims. If the *Downes* approach is followed whenever lawyer error is a factor in failing to comply with the state contemporaneous objection rule, the petitioner always will have to assert two constitutional claims to receive relief under one.

Third, the *Downes* approach is potentially unfair to defendants who have no desire to litigate an independent claim of ineffective assistance of counsel. If the state court rules in the defendant's favor, the remedy will be a new trial.²⁸ The defendant, however, may have been pursuing a fifth amendment claim to have certain evidence—a confession in the *Downes* case—excluded from the case.²⁹ Requiring the petitioner to exhaust state remedies for a remedy he may not prefer, therefore, could be unfair in some cases.³⁰

In addition, the *Downes* approach appears to be unduly burdensome to the defendant who claims his attorney committed something less than a constitutional violation in failing to raise a timely objection. In Virginia, at least, the state standards for effective assistance are considerably more lax than those applied in the federal courts.³¹ The defendant therefore may be required to go through a state habeas procedure on a claim he did not voluntarily raise, virtually certain that his claim will be denied. Thus, he will eventually return to federal court on another writ of habeas corpus to litigate the same facts he was prepared to litigate months or even years

raise the questions presented). By, in effect, creating another constitutional ground for the petitioner's habeas petition, the *Downes* court frustrated her reliance upon the exhaustion doctrine as applied to her underlying claim.

²⁸ See *Cross v. United States*, 392 F.2d 360, 367 (8th Cir. 1968) (accused entitled to new trial if denied effective assistance of counsel). See generally Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973).

²⁹ Where a confession is shown to have been taken in violation of a defendant's constitutional rights, the usual remedy is exclusion. See *United States v. Carignon*, 342 U.S. 36, 38 (1951) ("An involuntary confession is inadmissible.").

³⁰ In a great many cases, of course, there is no functional difference between the various claims asserted by a defendant petitioning for habeas corpus. Where time has passed and evidence has grown stale, a new trial may be impossible, and the defendant who prevails on habeas will go free regardless of the substance of his claim.

³¹ Virginia courts adhere to the gross negligence or "mockery of justice" standard. See note 59 *infra*. According to the Supreme Court of Virginia, "[o]rdinarily one is deprived of effective assistance of counsel only in those extreme circumstances where the representation is so transparently inadequate as to make a farce of the trial." *Slayton v. Weinberger*, 213 Va. 690, 691, 194 S.E.2d 703, 705 (1973). When the petitioner asserts her claim in the Fourth Circuit, she will probably have an easier burden. The Fourth Circuit applies an enumeration approach which it has held is consistent with a "community standards" test. See note 59 *infra* and accompanying text.

before.³³

Finally, the procedural tactic employed in *Downes* sends ambiguous signals as to the proper standard to be applied in cases where attorney error is invoked to prove *Wainwright* cause. If the court is implicitly requiring the petitioner to show ineffective assistance of counsel to demonstrate *Wainwright* cause, it should have enunciated this standard and considered its implications. If, on the other hand, the court intends ultimately to apply a standard that recognizes as *Wainwright* cause something less than constitutionally deficient representation, it should not have required exhaustion, because there is no state remedy available for mere attorney error.³⁴

It is this final point—the proper standard for assessing attorney error under the *Wainwright* exception—that the *Downes* court so awkwardly avoided by its unusual procedure. The court could have taken evidence on the attorney's conduct, determined the legal standard upon which to judge *Wainwright* cause, and, if it found that standard met, considered whether the *Wainwright* prejudice requirement was fulfilled and decided the case. Instead, the court required exhaustion of a constitutional claim that the defendant had not even raised. Because the cause issue will eventually return in either a later appeal by the petitioner in *Downes* or in another case, this note examines the alternative standards for judging attorney conduct for purposes of qualifying under the *Wainwright* exception. It is first necessary, therefore, to examine the policies underlying *Wainwright v. Sykes*.³⁵

II. EFFECTUATING *Wainwright*: THE APPROPRIATE STANDARD FOR ASSESSING CAUSE

A. The *Wainwright* Balance

In determining whether the degree of attorney misfeasance necessary to constitute *Wainwright* cause should be identical with the showing necessary to establish constitutionally ineffective assistance of counsel or whether a lesser showing should suffice, the rationale underlying the *Wainwright* decision must be considered. *Wainwright* culminates a line

³³ The same situation could arise for a defendant who claims full ineffective assistance, so long as the standard for enforcing this right is stricter in the applicable federal circuit than in the state courts. Indeed, only if the standards were identical in both forums and if the petitioner prevailed on the claim at the state level would the *Downes* procedure seem to serve the defendant's interests. Even in this case the defendant may receive an unpreferred remedy. See text accompanying notes 28-29 *supra*.

³⁴ See generally note 31 *supra*.

³⁵ 433 U.S. 72 (1977).

of Supreme Court cases³⁵ dealing with the availability of federal habeas corpus review for prisoners who failed to raise their constitutional claims at trial and who consequently were precluded from raising their claims on direct review because of state contemporaneous objection rules.

The Court in *Wainwright* implicitly balanced the competing interests of the defendants in obtaining federal review against those of the state and federal judiciaries in limiting review. On the petitioner's side, his claim to federal habeas corpus turns on the need for supervision of state enforcement of federal rights. In a habeas corpus proceeding, the federal judge is relatively free of the pressure that a state judge may feel to enforce the substantive law of the state by according precedence to factual guilt over any alleged constitutional infractions.³⁶ Additionally, a federal forum facilitates uniform application of federal constitutional law.³⁷

On the other hand, federal deference to state procedural rules serves the interests of federal-state comity.³⁸ Giving effect to a state contempo-

³⁵ See, e.g., *Francis v. Henderson*, 425 U.S. 536 (1976) ("considerations of comity and federalism" require that federal courts give the same effect to corresponding state procedural rules when asked to overturn criminal convictions); *Davis v. United States*, 411 U.S. 233 (1973) (FED. R. CRIM. P. 12(b)(2) requires showing of "cause" to overcome procedural default by federal prisoner's counsel); *Fay v. Noia*, 372 U.S. 391 (1963) (review available absent a deliberate bypass by defense counsel).

³⁶ See Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work to Do*, 31 STAN. L. REV. 1, 38 n.198 (1978); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1057-62 (1970) [hereinafter cited as *Federal Habeas Corpus*].

³⁷ See *Federal Habeas Corpus*, *supra* note 36, at 1061.

³⁸ See *Wainwright v. Sykes*, 433 U.S. 72, 88-90 (1977). Comity in federal-state relationships involves a "proper respect for state functions . . . [and] the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Although a federal court may have the power to hear a case, it may, in the interests of comity, abstain from reviewing matters already decided by a state court. In actions in which federal jurisdiction is based on diversity of citizenship and the federal court would thus apply state law, considerations of comity may persuade the federal court to defer to a state court when the matter involves a political interest of the state. See, e.g., *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959) (federal action involving eminent domain postponed pending state court determination because subject "intimately involved with sovereign prerogative"); *Hawks v. Hamill*, 288 U.S. 52 (1933) (federal courts will not interfere with the activity of state officers where the rights asserted by plaintiff are strictly local). See generally P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 998-1005 (2d ed. 1973).

A defendant seeking review of a state criminal conviction by petition for a writ of habeas corpus in federal court implicates the doctrine of comity. In this context, the doctrine reflects the principle that federal courts should not review state court convictions when the petitioner has an adequate remedy at state law. See *Douglas v. City of Jeannette*, 319 U.S. 157 (1943). Thus, federal courts will review state convictions only when the state's procedures cannot adequately protect the petitioner's constitutional rights. See *Ex parte Young*,

aneous objection rule in federal court also enhances both the finality of convictions and judicial efficiency.³⁹ Requiring a timely objection to the introduction of constitutionally defective evidence diminishes any incentive on the part of the defendant to delay asserting his constitutional claims.⁴⁰ Additionally, timely objections facilitate consideration of the constitutional issue and the underlying facts at a time when the evidence is still fresh.⁴¹

The Supreme Court resolved these competing considerations by announcing that state procedural rules are an adequate ground for barring federal review, but that the petitioner may overcome this bar by establishing both cause for his failure to comply with the procedural rules and prejudice to his case.⁴² The Court felt that this cause-prejudice exception would preserve a federal forum where necessary to prevent a "miscarriage of justice."⁴³

Three overriding policies, therefore, inform the *Wainwright* decision: comity between state and federal courts, judicial efficiency, and the rendering of just decisions in specific cases. In determining which standard for attorney error to apply in cases invoking the *Wainwright* exception, courts should therefore attempt to implement, to the greatest degree possible, each of these three concerns.

B. Ineffective Assistance as the Standard For *Wainwright* Cause

A recent Supreme Court trend toward restricting access to federal habeas corpus⁴⁴ suggests that it may be consistent with current judicial policy to require that the attorney error presented to show *Wainwright* cause also amounts to sixth amendment ineffective assistance. In the context of procedural default, the Supreme Court's decision in *Fay v.*

209 U.S. 123 (1908). The concern for comity underlies the statutory requirement that the petitioner exhaust state remedies before obtaining access to the federal courts on a habeas petition. See *Ex parte Royall*, 117 U.S. 241 (1886); 28 U.S.C. § 2254 (1976). See also note 6 *supra*.

³⁹ See *Wainwright v. Sykes*, 433 U.S. at 88-90.

⁴⁰ See *id.* at 90. The majority's reasoning was sharply criticized by Justice Brennan, see *id.* at 103-04 (Brennan, J., dissenting), and others, see, e.g., Tague, *supra* note 36, at 43-45; *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 217-18 (1977) [hereinafter cited as *Supreme Court, 1976*].

⁴¹ See *Wainwright v. Sykes*, 433 U.S. at 88.

⁴² See *id.* at 87, 90-91.

⁴³ *Id.* at 91.

⁴⁴ For commentary reflecting on this trend, see *Forfeiture*, *supra* note 13, at 1067-70; Michael, *The "New" Federalism and the Burger Court's Deference to the States in Federal Habeas Corpus Proceedings*, 64 IOWA L. REV. 233 (1979); Rosenberg, *Jettisoning Fay v. Noia: Procedural Defaults by Reasonably Incompetent Counsel*, 62 MINN. L. REV. 341 (1978).

*Noia*⁴⁶ marked the most expansive approach to the availability of federal habeas corpus for petitioners whose substantive claims were precluded by state procedural rules. In this case, the Supreme Court held that "the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute."⁴⁶ Consequently, the Court concluded that, absent a deliberate bypass,⁴⁷ a state procedural bar did not preclude federal habeas corpus review of the petitioner's constitutional claim.

Subsequent cases have limited the scope of this decision. In *Davis v. United States*,⁴⁸ for example, the Supreme Court determined that the Federal Rules of Criminal Procedure require a showing of "cause" before a federal prisoner may overcome a procedural default,⁴⁹ and in *Francis v. Henderson*,⁵⁰ the Court ruled that "considerations of comity and federalism"⁵¹ require that federal courts give the same effect to corresponding state procedural rules when they are asked to overturn criminal convictions. Finally, the Court in *Wainwright* endorsed the concept of a state procedural rule ordinarily constituting an independent and adequate state procedural ground precluding federal habeas corpus review.

The Supreme Court's restrictive approach to federal habeas corpus is illustrated most vividly in another context in *Stone v. Powell*.⁵² In this case, the Supreme Court ruled, in part upon principles of federalism,⁵³ that a petitioner could not present his fourth amendment claim on federal habeas corpus review if he had an "opportunity for full and fair litigation" of the claim in the state court.⁵⁴ While the Supreme Court's language in *Wainwright* does not sweep as broadly as *Stone*, it may be consistent with recent Supreme Court decisions for a federal court to read the *Wainwright* exception in the most restrictive manner. This narrow reading argues in favor of employing the sixth amendment ineffectiveness

⁴⁶ 372 U.S. 391 (1963).

⁴⁷ *Id.* at 399.

⁴⁸ *Id.* at 438. The Court said that relief could be denied if the "habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures." *Id.* at 439.

⁴⁹ 411 U.S. 233 (1973).

⁵⁰ *See id.* at 242.

⁵¹ 425 U.S. 536 (1976).

⁵² *Id.* at 541.

⁵³ 428 U.S. 465 (1976).

⁵⁴ *See id.* at 493-94 & n.35.

⁵⁵ *Id.* at 494.

standard in determining the degree of attorney error necessary to establish *Wainwright* cause.

Nevertheless, the application of such a standard raises potential problems. First, it may be unduly harsh on defendants whose cases are prejudiced by attorney error that falls short of being constitutionally deficient. A constitutional inquiry into an attorney's conduct may focus upon the attorney's entire performance during his representation.⁵⁵ The petitioner asserting *Wainwright* cause, however, may have only a single instance of lawyer error to rely upon. Unless this single event so affected the lawyer's representation as to render it "ineffective," the petitioner will have no opportunity to litigate either the "prejudice" limb of the *Wainwright* test or the merits of his claim. This could lead to the very "miscarriage of justice" the *Wainwright* exception sought to avoid.⁵⁶ Moreover, requiring such an overall failure by the attorney before federal habeas review is allowed would also seem to place an unrealistic burden on a defendant to recognize and control attorney decisions which prejudice his case.⁵⁷

Additionally, requiring a defendant to prove full ineffective assistance of counsel forces him into the anomalous position of having to prove two constitutional violations in order to receive the remedy for a single violation. This burden may place such a disincentive upon the assertion of the *Wainwright* exception as to eliminate it altogether in cases involving attorney error.⁵⁸ Where a separate exhaustion process is required, as was the case in *Downes*, the value of judicial efficiency will also be impaired

⁵⁵ The standards for judging ineffective assistance vary from jurisdiction to jurisdiction. See note 59 *infra*. Additionally, some tests focus more upon the attorney's conduct of the entire trial, while others examine specific instances of attorney failure. See Strazzella, *supra* note 24, at 472.

⁵⁶ The analysis of this problem is complicated by the fact that both the ineffective assistance claim and the *Wainwright* cause claim require proof of prejudice. See note 24 *supra*. Because prejudice will only exist where the constitutional claim overlooked by the attorney has merit, the chances are that, regardless of the formal analysis adopted, the *Wainwright* exception will only apply to cases where ineffective assistance exists. A lesser *Wainwright* cause standard, however, allows the federal court to take evidence on the issue of lawyer error without requiring exhaustion and may make a substantive difference where the standard for ineffective assistance requires analysis of the entire performance of the attorney.

⁵⁷ See *United States v. Brown*, No. 77-2106, slip op. at 11 (D.C. Cir. March 21, 1980) (stating that most defendants lack the legal sophistication to monitor their attorney's performance).

⁵⁸ It is also possible that identical standards for *Wainwright* cause and ineffective assistance would preclude defendants from raising the ineffectiveness claim separately once they lost on the cause issue. Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts states: "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits . . ." See FED. R. APP. P. 22, rule 9.

because both the state and federal forums will be asked to litigate a question upon which they may have differing or conflicting standards.⁸⁹ Indeed, even among federal courts the actual application of an ineffective assistance standard for cause has produced varying results.⁹⁰

⁸⁹ Courts generally apply one of three standards to determine whether counsel's performance meets constitutional requirements: the "mockery of justice" test, the "reasonable lawyer" test, and the "community standards" test. See generally Strazzella, note 24 *supra*. While many states, including Virginia, see note 31 *supra*, apply the mockery standard, most federal courts use either the reasonable lawyer or community standards tests. Three circuits follow the reasonable attorney test. See, e.g., *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974); *Herring v. Estelle*, 491 F.2d 125 (5th Cir. 1974). Seven circuits adhere to the community standards test. See, e.g., *Dyer v. Crisp*, 613 F.2d 275 (10th Cir.), cert. denied, 445 U.S. 945 (1980); *United States v. Bosch*, 584 F.2d 1113 (1st Cir. 1978); *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978); *United States v. Easter*, 539 F.2d 663 (8th Cir. 1976); *United States ex rel. Williams v. Twomey*, 510 F.2d 634 (7th Cir.), cert. denied, 423 U.S. 876 (1975); *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973); *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970) (en banc). One circuit apparently continues to apply the mockery of justice standard. See *Rickenbacker v. Warden*, 550 F.2d 62 (2d Cir. 1976), cert. denied, 434 U.S. 826 (1977). The Supreme Court has not spoken on the issue, see *Marzullo v. Maryland*, 435 U.S. 1011, 1011 (1978) (White, J., dissenting from denial of certiorari), but some courts have taken dicta from *McMann v. Richardson*, 397 U.S. 759 (1970), as the basis for the community standards test. In *McMann* the Court stated that the relevant inquiry for examining an attorney's performance in the context of a guilty plea was whether counsel's advice was "within the range of competence demanded of attorneys in criminal cases." *Id.* at 771.

⁹⁰ For examples of the manner in which lower courts have viewed ineffective assistance of counsel claims as satisfying the *Wainwright* cause requirement, see *Boyer v. Patton*, 579 F.2d 284, 286-89 (3d Cir. 1978); *Sincox v. United States*, 571 F.2d 876, 879-80 (5th Cir. 1978); *Rinehart v. Brewer*, 561 F.2d 126, 130 n.6, 131-32 (8th Cir. 1977). A typical example of current case law is the Fifth Circuit decision in *Sincox v. United States*, 571 F.2d 876 (5th Cir. 1978), which demonstrates that derelictions less serious than a mockery of justice may establish cause. In *Sincox*, the court noted an earlier decision that "viewed the *Wainwright* rule as juxtaposing the 'cause' exception with prevention of a 'miscarriage of justice.'" *Id.* at 880 (citing *Jiminez v. Estelle*, 557 F.2d 506, 511 (5th Cir. 1977)). The court found ineffective assistance of counsel and *Wainwright* cause where the defense counsel did not object at trial and did not appeal a conviction by a nonunanimous jury, despite the defendant's requests that he so appeal. See *id.* at 879-80.

There is a considerable lack of consensus in these situations, even within the same circuit. In *Arnold v. Wainwright*, 516 F.2d 964, 971 (5th Cir. 1975), cert. denied, 426 U.S. 908 (1976), the Fifth Circuit, construing the Florida contemporaneous objection rule, held that a failure to object by a lawyer who was providing constitutionally effective representation but who, nevertheless, had failed to "exercise reasonable diligence" did not amount to sufficient cause to come within the *Wainwright* exception. In *Jiminez v. Estelle*, 557 F.2d 506 (5th Cir. 1977), another Fifth Circuit panel suggested that an attorney's failure to object to incompetent evidence when he "either ignored the grounds for objection or . . . did not comprehend their importance" could constitute cause. *Id.* at 511.

C. *The Reasonableness Standard for Attorney Error As Wainwright Cause*

A standard granting federal habeas review under the *Wainwright* cause-prejudice exception for those petitioners whose attorneys acted unreasonably with regard to the petitioner's particular claim of prejudicial error would take into account both the petitioner's interest in access to a federal forum and the interests furthered by limiting such access. While trial tactics and reasonable conduct would not constitute cause under this proposed standard, the petitioner would not have to show ineffective assistance of the degree necessary to amount to an independent constitutional violation. Although this standard, which focuses on the reasonableness of the attorney's conduct in failing to advise his client of the need to assert the particular claim in accordance with the state contemporaneous objection rule, resembles the reasonable attorney standard⁶¹ applied in sixth amendment ineffective assistance of counsel cases, its focus is much narrower.

The traditional reasonable attorney standard for sixth amendment purposes examines the attorney's entire performance in representing his client.⁶² The reasonableness standard for purposes of establishing *Wainwright* cause would instead focus on the specific error committed by the petitioner's counsel. The test would be whether, in light of the specific circumstances surrounding the single act of nonobjection, the attorney acted reasonably. This standard may overlap with ineffective assistance in some cases, particularly where one major attorney error is the basis of the allegation of *Wainwright* cause. In situations where the standards do not overlap, however, the proposed standard allows the petitioner to assert the attorney error as *Wainwright* cause and, if the petitioner can demonstrate that the error prejudiced his case, the federal court can rule on the underlying claim.

Two circuits that have recently addressed the issue of the level of attorney error necessary to satisfy the *Wainwright* cause requirement have adopted a similar approach.⁶³ These courts found that an ineffective assistance standard focusing on whether an attorney was "sufficiently competent overall"⁶⁴ is too generalized to protect adequately the petitioner's constitutional rights under *Wainwright*.⁶⁵ In *Tyler v. Phelps*,⁶⁶ the

⁶¹ See note 59 *supra*.

⁶² See *Tague*, *supra* note 36, at 8-13.

⁶³ See *United States v. Brown*, No. 77-2106 (D.C. Cir. March 21, 1980); *Tyler v. Phelps*, 622 F.2d 172 (5th Cir. 1980).

⁶⁴ *Tyler v. Phelps*, 622 F.2d at 178.

⁶⁵ See *id.*; *United States v. Brown*, No. 77-2106, slip op. at 11 (D.C. Cir. March 21, 1980).

⁶⁶ 622 F.2d 172 (5th Cir. 1980).

United States Court of Appeals for the Fifth Circuit observed that, while an attorney's performance might not violate sixth amendment standards, his erroneous failure to object might satisfy the *Wainwright* cause requirement.⁶⁷ Similarly, in *United States v. Brown*,⁶⁸ the United States Court of Appeals for the District of Columbia Circuit stated that binding a defendant to the effects of his "generally competent" attorney's failure to present a substantial claim "would be a senseless penalty in most cases because most defendants lack the legal sophistication to monitor their attorney's performance."⁶⁹

The unreasonable error standard is consistent with the *Wainwright* decision.⁷⁰ It serves the interests of justice by allowing federal review of the underlying constitutional violation without requiring the petitioner to prove a second constitutional violation before asserting the first. Moreover, the proposed standard sufficiently accounts for the judicial interest in providing federal habeas corpus review without violating the principles of federal-state comity. Under the unreasonable error standard, the petitioner still must make a substantial showing of prejudice before the court may examine his underlying claim. Thus, the rule maintains the high degree of deference to state law that *Wainwright* requires.

Finally, the unreasonable error standard allows the federal court to take evidence on the issue of *Wainwright* cause without the burdensome and often futile exercise of exhausting state remedies for ineffective assistance of counsel. The interest in judicial economy is therefore served.

If this standard is adopted in the Fourth Circuit, then the *Downes* approach of requiring exhaustion should apply only when the petitioner asserts, as an independent claim, an allegation of constitutionally ineffective assistance of counsel. If the claim is of simple lawyer error, the court should take evidence on the lawyer's conduct and rule upon the issue of *Wainwright* cause.

III. CONCLUSION

The United States District Court for the Eastern District of Virginia employed a novel approach in *Washington v. Downes* when confronted with a federal habeas corpus petition that asserted attorney error to demonstrate *Wainwright* cause. The *Downes* court effectively transformed the petitioner's assertion of cause into a claim of constitutionally ineffective assistance of counsel and dismissed the claim because the petitioner had not exhausted her state habeas corpus remedies. The court

⁶⁷ See *id.* at 177-78.

⁶⁸ No. 77-2106 (D.C. Cir. March 21, 1980).

⁶⁹ *Id.* at 11.

⁷⁰ See *Supreme Court, 1976, supra* note 40, at 219-20.

thereby avoided determining the level of attorney error necessary to establish *Wainwright* cause.

This note has explored both the practical and theoretical implications of *Downes*, concluding that, in framing a standard for determining "cause" under *Wainwright v. Sykes*, courts should seek to implement the policies of comity, judicial efficiency, and justice. These policies militate in favor of adopting a *Wainwright* cause standard that focuses on the reasonableness of the attorney's advice that resulted in the petitioner's failure to adhere to the requirements of the state contemporaneous objection rule. This standard will further the interests of comity because a rigorous showing of prejudice will still be required. Second, judicial efficiency will be enhanced by allowing a petitioner to assert the error without a lengthy state habeas proceeding on a claim broader than the one he wishes to assert. Finally, the ends of justice will be better served by permitting the petitioner to assert an underlying constitutional claim without having first to establish a sixth amendment violation.

R.A.M.

OK

April 17, 1981 Conference
List 3, Sheet 5

No. 80-846

Motion of Respondent for
Appointment of Counsel

ROSE, Warden

v.

LUNDY

CA 6

Resp's counsel D. Shannon Smith, requests appointment as counsel for resp. On Feb. 23, the Court granted cert and granted resp leave to proceed ifp. Applicant was appointed by the CA 6 to represent resp on appeal. Applicant is a 1971 graduate of the Salmon P. Chase College of Law and a member of this Court's bar.

There is no response.

4/7/81

Schickele

PJC

Grant JAB

ROSE

vs.

LUNDY

Motion of respondent for appointment of counsel.

[illegible]

Reviewed 8/26 (I've read brief, 1 comm)

File

rhf 08/14/81
I We granted this CA6 habeas (§ 2254) case to resolve conflict as to whether a DC must dismiss ~~or~~ a H/C petition including some claims where state remedies have been exhausted & some not exhausted.

Five circuits hold it proper to consider the exhausted claims & simply dismiss the unexhausted ones.

Three circuits have no settled rule.

Two circuits (CA5 en banc & CA9) require dismissal of all claims where some are unexhausted.

Dick prefers majority rule subject to certain exceptions. Views it as compatible w/ language of 2254 & more flexible. But a principled decision can be written either way, p 12-14

II. The DC erroneously considered claims not presented in Resp's ~~complaint~~ petition & of course not considered by state courts. But ~~the~~ habeas did not abject. Procedural default

BENCH MEMORANDUM

TO: Mr. Justice Powell
FROM: Dick Fallon
DATE: August 14, 1981
RE: No. 80-846, Rose v. Lundy

III. Tenn. Ct. App's found errors at state trial were "harmless beyond reasonable doubt."
The DC ignored this finding. Dick would hold this is a finding of fact that a fed. ct. on H/C must accept. — We could dispose of this case on this ground.

Question Presented

The main question in this case is whether a habeas petitioner's failure to exhaust all his claims in state court should result in the dismissal even of those claims that he has exhausted under 28 U.S.C. § 2254. The case also involves potentially important questions about the "cause and prejudice"

Discuss this imp. case with Dick

See
Dick's
memo on
State's
Reply for

Intervention

doctrine and about the deference due to state court findings of "harmless error." Further issues are raised but should probably not be reached by this Court.

Following the briefs, this memo is divided into four sections. The sections vary greatly in length, the differences reflecting my judgment of the relative complexity and importance of the questions presented.

I. EXHAUSTION OF REMEDIES

In his federal habeas petition, respondent Lundy asserted four grounds for relief. He had previously presented two in the state courts, thus exhausting his state remedies with regard to those two claims. Lundy also sought habeas relief on the basis of two claims that he had not presented for adjudication by the courts of Tennessee. Lundy thus filed a "mixed" petition--a petition that included both "exhausted" and "unexhausted" claims.

Both the district court and the Sixth Circuit determined to exercise their habeas jurisdiction over Lundy's two exhausted claims. Neither purported to consider the unexhausted claims. Dismissal of the unexhausted claims was plainly dictated by the plain language of 28 U.S.C. § 2254; the circuits are unanimous that unexhausted claims should not ordinarily be considered. (The rule requiring exhaustion of state remedies has a number of exceptions. None is relevant here.)

DC & CA 6 exercised jurisdiction over the two "exhausted" claims & dismissed un-exhausted claims

The decision to review the exhausted claims was consistent with the view of a clear majority of the circuits.

Only two circuits currently require the dismissal of all claims in a mixed petition. There seem to be three general lines of approach. 1 Five circuits have held that, in the absence of special circumstances, district courts should routinely consider the exhausted claims included in a mixed petition. See Katz v. King, 627 F.2d 568, 574 (CA 1 1980); Levy v. McCann, 394 F.2d 402, 404 (CA2 1968); United States ex rel Boyance v. Myers, 372 F.2d 111, 112 (CA3 1967); Hewett v. North Carolina, 415 F.2d 1316, 1320 (CA4 1969); Triplett v. Wyrick, 549 F.2d 57, 59 (1977). 2 Three circuits have declared no rule, but have reviewed appeals from merits decisions on mixed petitions. See Meeks v. Jago, 548 F.2d 134 (CA6 1976), cert. denied, 434 U.S. 844 (1977); Brown v. Wisconsin State Dept. of Public Welfare, 457 F.2d 257 (CA7 1972); Smith v. Gaffney, 462 F.2d 663 (CA 10 1972). 3 Only two, the Fifth and the Ninth, require the dismissal of all questions in all mixed petitions. See Galtieri v. Wainright, 582 F.2d 358 (CA5 1978) (en banc); Gonzalez v. Stone, 546 F.2d 807 (CA 9 1976). The petitioner asks this Court to accept the restrictive view of the Fifth and Ninth Circuits. According to petitioner, § 2254 should be construed to require the dismissal of all mixed petitions.

The briefs deal with this important issue in a way that I find disappointing. Since Fay v. Noia, 372 U.S. 391, 415-420 (1963), this Court's habeas cases have echoed three policy concerns: (1) justice to the petitioner in the particular case—thus the repeated references to "the Great Writ" as the sacred

Briefs
not
strong

Policy
concern

guarantor of individual liberty; (2) comity--the policy of according respect to the states and their judicial systems; and (3) judicial economy--the concern to avoid piecemeal litigation and to achieve finality of criminal judgments. The briefs in this case tend merely to recite quotations endorsing the importance of one or another factor. They are weak, I think, in their evaluations of the case at hand. That is, they do not make clear the extent to which the various policy interests are specifically implicated in cases involving both exhausted and unexhausted claims.

*Briefs
Weak
on
policy
interests*

Because of your active role in the development of this area of the law, I assume your familiarity with the general arguments. Where possible, I shall attempt to focus either on matters not raised in the briefs or on concerns peculiar to "mixed" petitions.

Yes

A. The Statutory Background

This case arises under § 2254 of the judicial code. Section 2254(b) provides that the writ of habeas corpus is not available "unless it appears that the applicant has exhausted the remedies available" in state court. The exhaustion requirement is then defined in subsection (c): "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise ... "the question presented."

As suggested by the language emphasized, the plain language of the statute appears to require the exhaustion of

remedies regarding the question presented, not regarding all of the questions that a petitioner might present. In Stone v. Powell, 428 U.S. 465 (1976), Justice Brennan argued in dissent that the jurisdictional language of § 2254 was both clear and mandatory. He argued that it was improper for a federal court to exercise less than the full jurisdiction conferred by Congress. Your majority opinion held otherwise. An argument similar to Justice Brennan's can be made in this case. It would once again be forceful. Again, however, the plain language of the statute--although important--would not seem dispositive. Congress adopted the exhaustion requirement in 1948. The Reviser's notes state that its intent was to codify the existing doctrine, as articulated by the Supreme Court. The Court at that time had never entertained a mixed petition, nor tacitly approved the consideration of one by any lower federal court. Moreover, it is significant that few claims were cognizable on habeas in 1948. It is unlikely that Congress contemplated the present problem. Nor can conclusions be drawn from congressional reenactment. This Court has never before addressed the question presented. It did rule on the merits of a mixed petition in Gooding v. Wilson, 405 U.S. 518 (1972). In doing so, it noted the existence of an unexhausted claim. Id. at 519. In Francisco v. Gathright, 419 U.S. 59 (1974), however, the Court expressly reserved the issue. The Court in that case found other grounds on which to overturn the dismissal of an exhausted claim because of its joinder with an unexhausted one. Id. at 63-64.

*purpose
intent
exhaustion
requirement
in 2254
was to
"codify"
existing
doctrine.
At that
time this
Court
had
never
entertained
a mixed
petition*

*Q is
new
with
this
Court*

It is also significant that the Court--before 1948 as well as after--had held consistently that the exhaustion requirement was judicially self-imposed. It was "not one defining power but one which relates to the appropriate exercise of that power." Bowen v. Johnson, 306 U.S. 19, 27 (1938). This historical status may increase the Court's discretion to view § 2254 as delineating the minimum limits of the exhaustion doctrine, subject to further judicial adjustment.

Two other sources of guidance also seem relevant to the question of congressional intent. Rule 9(b) of the Rules Governing Section 2254 Cases in United States District Courts, 28 U.S.C.A. foll. § 2254, establishes the standards under which the district courts may dismiss a second or successive petition asserting new grounds for relief. That rule effectively codifies the decision of Sanders v. United States, 373 U.S. 1, 18 (1963). Sanders held that the district courts must entertain successive petitions unless that judge "finds that the failure of the petitioner to assert those grounds in a prior petition constituted abuse of the writ." (emphasis added). The Rules thus seem to contemplate cases in which a petitioner will bring successive petitions in which he asserts different grounds for relief. * This is at least consistent with the view that a petitioner could assert only his exhausted claims in one petition; he could then, on a later petition, assert new grounds not exhausted at the time of the original habeas action. If so, it would seem anomalous to penalize a

DCs
must
entertain
~~multiple~~
successive
petitions
- absent
"abuse
of the
writ"

* Does'nt this depend on whether the grounds were not known or reasonably could not have been known to the inmate?

petitioner for the pleading error of including unexhausted claims in the original petition.

In its brief, the State of Tennessee assumes that withdrawal of an unexhausted claim from a mixed petition "could very likely shut the federal habeas door altogether." Brief at 24. But the rules do not seem to contemplate this harsh result.

B. Factors to be Weighed

A balancing test assumes implicitly that "The rule of exhaustion is not one defining power but one which relates to the appropriate exercise of power." There would seem to be three important factors.

1. Interest of the Prisoner. At one level, the entire dispute can be seen as a disagreement about the importance properly to be attributed to this factor. The ultimate premise of Fay v. Noia is that no interest of the state can override the need for an immediate remedy for the violation of constitutional rights. Respondent asserts such an interest in this case. The State responds that its proposed exhaustion requirement would not bar any individual's access to habeas review; it would only regulate the timing.

2. Comity Interests of the States. In a federal system it frequently occurs that state and federal courts must rule on the same question. Friction is therefore inevitable. But the states have distinct interests in avoiding federal review of criminal convictions until state courts have ruled on all asserted grounds of error.

*what if a
factor is not
an error 7.?*

Extension of the exhaustion doctrine to mixed petitions would cause the prompt consideration of all federal claims in state court. This would arguably enhance the states' understanding of and hospitality toward federal claims. It would also enable state courts to declare controlling state precedents on matters of federal constitutional law. According to petitioner, decisions of the lower federal courts are not binding on Tennessee trial courts. See Bowman v. Henard, 547 S.W.2d 527, 530 (Tenn. 1977). A rule requiring full exhaustion would insure consideration of all state constitutional claims. It would also let the state courts determine all relevant questions of fact, at a time when memories are fresh. In addition, complete exhaustion would require definitive rulings on the state's procedural laws, leaving no doubt whether a claim should be barred from habeas review due to procedural default.

In assessing the state's interest in ruling on all claims prior to any federal action, it is important to note that seemingly unrelated claims may tend to merge in the process of judicial decision. The instant case provides an apt example. The district court purported not to rule on unexhausted claims of prosecutorial misconduct. In fact, however, the court did consider them as a part of its deliberations. It explained that "in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally."

Respondent answers that the state's interest is adequately protected by dismissal of the unexhausted claims. State courts

have already ruled on the others; and there is no need to consider the unexhausted claims if there is merit in an exhausted claim. Petitioner imagines a class of shrewd prison lawyers who orchestrate their successive claims to take maximum advantage of the system. But this is a phantom fear. The typical habeas petitioner acts in ignorance.

3. Judicial Economy. A requirement of complete exhaustion would promote judicial efficiency. Unless complete exhaustion is required, "a federal district court may be forced to review a state criminal court record not once, but two, three or four times." Miller v. Missouri, 394 F.Supp. 94, 102 (W.D. Mo. 1975).

Respondent attempts to minimize the significance of this consideration. First, only interrelated claims would ordinarily involve review of the same materials more than once. And most circuits seem to follow the Second in requiring the dismissal of interrelated claims in mixed petitions. Second, most petitioners will in fact consolidate their claims.

A different slant on this problem comes from Professor Shapiro, who did an empirical study of the habeas petitions filed in the U.S. District Court for Massachusetts during a three-year period. See Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321 (1973). Of the 257 petitions filed, only 34 came from prisoners who had previously sought federal habeas. Of these, only five "could be said to have sought reconsideration of matters disposed of on the merits before, or matters that could have been (and should have

been) joined in the prior pleading." Id. at 354. The demands of successive petitioners were thus relatively small. Perhaps more surprisingly, Professor Shapiro found that failure to exhaust state remedies resulted in dismissal of over half of all the petitions filed. From this he concluded that strict exhaustion requirements actually contributed to judicial inefficiency, by requiring successive trips through the state and federal courts. He therefore proposed abolition of the exhaustion requirement, at least in cases where judicial inspection showed a claim to be plainly frivolous. ?

In sum, Professor Shapiro's study suggests that the efficiency question requires a consideration of two classes of petitioners: the sadly inept as well as the the shrewd "sandbaggers" who loom so large in the concern of the State of Tennessee. The rule that works best for one class may not work best for the other--even in terms of judicial efficiency. Moreover, even with regard to the sandbaggers, it is unclear that a toughened exhaustion rule would work effectively.

As Judge Goldberg pointed out in dissenting from a Fifth Circuit case mandating dismissal of mixed petitions, "So long as a petitioner with both exhausted and unexhausted claims refrains from including the unexhausted claims in his petition, the petition cannot be dismissed....His second petition, asserting only newly exhausted grounds, likewise cannot be dismissed....A petitioner clever and sophisticated enough to understand and be influenced in his behavior by the majority's rule will also be clever and sophisticated enough to avoid its

effect. The specter which haunts the majority opinion proves in the end too elusive to grasp. Meanwhile, the unsophisticated petitioner who appends to his federal petition some new notion not previously presented to the state courts, is denied a federal hearing on the merits of his exhausted claim." Galtieri v. Wainright, 582 F.2d 348, 374 (CA 5 1978) (en banc) (Goldberg, J., joined by Tuttle, J., dissenting).

Judge Hill, concurring specially in Galtieri, also noted a problem deserving of attention: What to do in a case in which a district court does grant relief on a mixed petition? The Fifth Circuit determined it had little choice but to hear an appeal on the merits. It would be undesirable on various grounds to require a state court to hear unexhausted claims, knowing as it did that a federal court had ruled favorably on one of the exhausted grounds. The result, Judge Hill argued, was that "the majority does not promulgate a rule as we know it in law. It cannot be such a rule because ... the consequences [of a district court's failure or refusal to follow the "rule"] are not reversal but review on the merits I interpret the opinion of our Court as announcing a rule in the more colloquial use of that word; 'as a general rule' mixed petitions should be dismissed without prejudice.'" 582 F.2d at 365.

If this Court's decision should mandate dismissal of mixed petitions, the paradox propounded by Judge Hill ought somehow to be addressed.

C. General Conclusions

As the text of this discussion may have suggested, I do not believe that § 2254 should be held to require dismissal of mixed petitions in all cases. Your opinions in previous cases strongly suggest that you may well conclude otherwise. The decision in this case is obviously yours. I have felt free to develop the arguments with which I think you should reckon; but I surely do not regard them as intellectually irresistible. In concluding this section, I would^e beg your indulgence as I briefly develop my own view (which is much influenced by an excellent Note, Habeas Petitions with Exhausted and Unexhausted Claims: Speedy Release, Comity and Judicial Efficiency, 57 B.U. L. Rev. 864 (1977)):

*Dick's
view*

2. In general, the balance of policy considerations supports a literal construction of the statutory language. Exhaustion should be required only for "the question presented." This is sufficient to preserve the role of the state courts in enforcing federal law; federal courts would not grant relief on any claim that had not been raised in state proceedings. Moreover, for the reasons described above, no large efficiency loss would necessarily follow.

As the Second Circuit has recognized, federal courts should surely refuse to consider individually exhausted claims in certain circumstances. Most notably, they should decline to consider exhausted claims that are interrelated--either legally or factually--with unexhausted claims. Tennessee claims in this case that there is no clear rule for identifying interrelated claims. But three fairly clear categories of

cases actually do seem to have emerged in the lower federal courts: 1. those involving more than one claim of the same general constitutional right; 2. those in which two or more claims are based on the same allegations of fact; and 3. those that require an understanding of totality of the circumstances at trial (e.g., ineffective assistance of counsel). By refusing to rule on mixed petitions in such cases, federal courts can give state courts a fair opportunity to decide all aspects of each claim and to develop a full record.

Federal courts should also dismiss mixed petitions in cases involving unexhausted state constitutional claims. This limitation follows from the policy against unnecessary decisions of constitutional questions. Finally, a federal court should generally refuse to rule on mixed petitions brought prior to trial. Pretrial habeas intervention is especially disruptive of state criminal proceedings. Cf. Braden v. Thirtieth Judicial Circuit Court, 410 U.S. 484 (1973) (federal habeas relief appropriate to protect a state prisoner's right to a speedy trial).

In conclusion, I would note only that the proposed requirement of complete exhaustion is in one sense the more extreme solution: It denies any discretion to the lower federal courts to determine when the totality of factors tips in favor of action on a mixed petition. Lundy does not ask for a rule mandating a ruling on every exhausted claim in every mixed petition. His position thus accords, not only with the

CAS
view
denies
discretion
in DCS
& DAs

judgment of the majority of the circuits, but with the traditional view of habeas as governed by equitable principles.

II. THE SECOND QUESTION: "CAUSE AND PREJUDICE" BARRIER TO RELIEF

In his federal habeas petition, Lundy alleged that two specific instance of prosecutorial misconduct had deprived him of a fair trial. These claims were numbered in his petition as grounds for relief (2) and (3). The district court found that ground (3), a remark made by the prosecutor during his summation, had not been exhausted. Although its opinion is arguably self-contradictory on this point, the district court does not appear to have considered this claim.

The court's treatment of the second ground is puzzling. Lundy's habeas petition had generally alleged prosecutorial misconduct in violation of his constitutional rights. See JA 72. The recitation of "supporting facts," however, had alleged only one specific instance of prosecutorial misconduct. It involved remarks made during an effort to introduce evidence of Lundy's "violent character." Ignoring this limitation, the district court read this claim as a general allegation of prosecutorial misconduct. On this basis it proceeded to consider 19 separate acts of misconduct, only five of which had been either objected to or subsequently presented to the state supreme court.

The specific claim that Lundy asserted--based on remarks about his violent character--had been considered by the state

*Procedural
default*

19!

appellate court. It stated: "State's counsel made some remarks in the presence of the jury that were overly zealous in support of this incompetent line of proof, and in a different case could constitute prejudicial error....However, in the context of the undisputed facts of this case we hold any error to have been harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18."

DC considered issues not presented to it.
 The first question for this Court is what question it wishes to address. The district court seems plainly to have considered issues not presented to it. In doing so, it purported to find legal errors concerning which it gave the state no opportunity to defend its position. Moreover, had the petition raised those errors, various barriers might have been raised. These include the absence of exhaustion and the "cause and prejudice" rule concerning procedural defaults. The court of appeals seems vaguely to have been aware of the cause and prejudice difficulty. But it purported to dismiss this concern by noting that the Tennessee appeals court had considered several of the defaulted claims on the merits. The Sixth Circuit did not, however, consider that those particular claims had not even been repeated in the federal habeas petition. Finally, with regard to the claim the petition clearly had presented, neither the district court nor the court of appeals reckoned at all with the Tennessee court's "harmless error" finding.

As this summary suggests, the lower federal courts seem to have courted review--if not reversal--on a variety of grounds.

Q for us
is which
Q to
address

Careless
performance
of DC
precluded
answers
by State

in this case

Most are invoked in one or another of the briefs. The cert petition framed its second question as follows: "Whether habeas corpus relief was properly granted to respondent on the grounds of prosecutorial misconduct and an improper jury instruction where those issues were waived by the respondent's failure to demonstrate cause and prejudice for his procedural defaults." Plainly, however, the claim regarding at least one instance of alleged misconduct had not been waived. The Solicitor General argues that the district court must be assumed to have credited the Tennessee court's "harmless error" finding concerning this point. Thus, he reasons, relief must have been based largely on claims--which he identifies in the district court's opinion and in the record-- that Lundy had not properly preserved. In his view, the question is whether collateral relief is barred for these claims unless the "cause and prejudice" standard is satisfied.

At the outset, it seems clear that the district court's grant of relief on the basis of defaulted claims would be inconsistent with the "cause and prejudice" standard. Assuming the claims were not properly preserved in state court proceedings, Lundy obviously did not show cause for his default or prejudice therefrom. He could not have, because he did not raise the claims at all in his habeas petition.

DL ignored "cause & prejudice" standard

In my view, however, the district court's finding of prosecutorial misconduct does not raise a clear and simple "cause and prejudice" question. The Tennessee court had itself recognized one instance of prosecutorial misconduct but

characterized it as harmless. Lundy's claim for reversal of this finding was properly before the court and ripe for decision on the merits. Moreover, it was inextricably intertwined with the grant of relief based on claims not properly preserved. Thus, in its brief in this Court, the state of Tennessee now asserts that the question is whether habeas relief was proper "where the issues were either waived ... or were harmless beyond a reasonable doubt as found by the state courts." As this suggests, there is a remaining

question open for decision if the Court chooses to reach it. This question, which has been briefed by both parties, would involve the credit due to the Tennessee court's harmless error finding with regard to Lundy's claim (2). Was this finding of "harmless error," under § 2254(d) and Sumner v. Mata, No. 79-1601 (Jan. 21, 1981), entitled to a presumption of correctness?

Tenn.'s
"harm-
less
error"
findings

presumed
to be
correct

I believe that it was. Under 28 U.S.C. § 2254(d), "a determination on the merits of a factual issue, made by a State court of competent jurisdiction ... evidenced by a written finding ... shall be presumed to be correct." Sumner held squarely that this provision extends to factual findings by state appellate courts (as well as trial courts). Id., slip op at 6. The only remaining question, then, is whether a finding of harmless error is a "factual" finding within the contemplation of § 2254(d).

Yes

The State of Tennessee asserts summarily that it was. But several federal district courts have held that "harmless error" findings require independent federal review. See, e.g.,

Application of Stecker, 271 F.Supp. 406, aff'd, 381 F.2d 379 (CA3), cert. denied, 389 U.S. 929 (1967). The implicit judgment is that this is a mixed question of law and fact, to which § 2254(d) does not apply.

Decisions of this Court are not especially helpful. The relevant line begins with Tonwsend v. Sain, 372 U.S. 293 (1963), the precursor of §2254. Townsend stated that the phrase "issues of fact" refers "to what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators.'" 372 U.S. at 309, n.6. Applying this formula, Neil v. Biggers, 409 U.S. 188 (1972) reversed a Sixth Circuit decision holding that pretrial identification procedures were fair under a "totality of the circumstances test." Over Justice Brennan's protest that the Court should not reverse a finding of fact, id. at 202 (Brennan, J., dissenting), the opinion termed the issue before it "'Not so much over the elemental facts as over the constitutional significance to be attached to them.'" Id. at 193 n.3. In Brewer v. Williams, 430 U.S. 387 (1977), the Court held that the question of waiver was not factual within the meaning of §2254(d). It was one that requires "the application of constitutional principles to the facts as found." Id. at 403. Your opinion in Cuyler v. Sullivan, 446 U.S. 335 (1980) held that "Findings about the roles of [two lawyers] in the defenses ... are [historical findings binding on the court]. But the holding that the lawyers who played those roles did not engage in multiple representation is a

Biggers

mixed determination of law and fact that requires the application of legal principles to the facts of this case." Id. at 342. Most recently, the Court held last Term in Sumner v. Mata, supra, that §2254(d) did bar an unexplained holding by the Ninth Circuit that a photographic identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable in-court misidentification." The opinion did not make clear, however, which of the the state court's underlying findings it found specifically entitled to deference and which it did not.

The "harmless error" question seems to me to be a question of fact: a question of what the jury would have done if certain events had or had not occurred. Accordingly, ^{Dick} I would hold that the district court erred in failing to give deference to the finding of the Tennessee court of criminal appeals. But I think that this is a relatively close question. It is significant, I think, that there are some constitutional errors that cannot be "harmless" as a matter of law. In this context, it is possible to regard "harmlessness"--or its conceptual opposite, which is "prejudice"--as a finding (necessarily erroneous) of law. On the whole, however, I think it more reasonable to regard this as the special, limiting case. Whether something would prejudice a jury is a question of fact.

Dick views as a finding of fact

III. RIGHT OF CONFRONTATION

Lundy's counsel attempted to impeach the rape victim through evidence of prior contradictory statements. He sought

to prove that her testimony concerning prior acts of unchastity did not fully reveal the extent of her sexual activity. The district court limited this line on a theory found erroneous by the Tennessee court of criminal appeals. That court found the error to be harmless. Its finding in this regard was not considered either by the district court or by the court of appeals.

The cert petition presents the question whether Lundy's constitutional right of confrontation was in fact abridged. I think, however, that this question should not be reached. The excluded testimony aimed at impeachment on a collateral rather than a central matter. Moreover, the victim's testimony was corroborated in nearly all respects by an eyewitness. As found by the Tennessee court, any error was therefore harmless.

If the Court does reach the constitutional question on the merits, it should hold that the right of confrontation was not in fact offended. The district court appears to have relied on Davis v. Alaska, 415 U.S. 308 (1974) for its conclusion. But the testimony here involved a collateral matter of doubtful importance. Davis, by contrast, dealt with a crucial witness's powerful motive to testify falsely against the accused. The weakness of the Sixth Amendment claim is suggested by subsequent legislative history. Tennessee has now adopted a law excluding evidence of the past sexual activity of rape victims. This law would exclude the very testimony Lundy wished to introduce. The Sixth Amendment challenge, if upheld

yes

in this case, would have implications for the constitutionality of this and similar laws.

IV. RIGHT TO AN EVIDENTIARY HEARING

The district court appears not to have consulted the entire trial record before its decision to grant habeas relief. Yet its grounds for decision plainly seem to require review of the entire transcript. Without a transcript, it could not properly determine whether the alleged constitutional violations were harmless beyond a reasonable doubt. The Tennessee appellate court had found that they were. Especially in this context, the action of the district court seems a needless affront to the state and its courts.

Yes

The State, however, did not file the entire transcript in its answer to Lundy's habeas petition. Nor did it move for an evidentiary hearing, or ask the district court for reconsideration. It sought a hearing for the first time in the court of appeals, where it asked for a remand. As a result, concerns of comity are intertwined with complex considerations of waiver and procedural default.

Both parties have treated this as a minor issue in the case. In my view, this question is too complicated and important for summary treatment. I would advise that the Court not reach the issue, as it need not if it should decide to reverse on any other ground.

SUMMARY

1. The main question in the case is whether 28 U.S.C. § 2254 requires exhaustion of all state claims before a federal court may entertain any of the claims on habeas. The statute requires exhaustion of "the question presented," not of all questions that might be presented. But the legislative history suggests that Congress may not have contemplated "successive" habeas petitions, much less meant to license them. The policy considerations point in different directions. The Court could responsibly decide either way.

2. The District Court considered claims that were not properly presented in Lundy's petition. This was clearly incompatible with the "cause and prejudice" test. Not having presented the claims, Lundy plainly could not have shown cause for his failure to do so, or resulting prejudice at trial.

3. The District Court also considered, without deference, errors held "harmless" by the Tennessee courts. This was error. A finding of "harmless error" is ordinarily a finding of fact. Such a finding is therefore entitled to deference from a federal court under Sumner v. Mata.

4. There was no violation of the right to confrontation in this case. The reliance on Davis v. Alaska was misplaced.

5. The question of the State's right to an evidentiary hearing need not and should not be reached on the facts of this

case. The question is too important to be considered as a subsidiary matter not well briefed by the parties.

See citations on next page.

October 6, 1981

TO: MR. JUSTICE POWELL
FROM: DICK FALLON
RE: Reply Brief in No. 80-846, Rose v. Lundy

Petitioners have filed a reply brief. I call it to your attention because it presents what I regard as the State's best arguments with admirable force and succinctness, somewhat as follows: *(This is persuasive)*

Federal habeas jurisdiction over state convictions exists only insofar as granted by Congress. Fitts v. McGhee, 172 U.S. 516 (1899). This basic doctrine was brushed aside in Fay v. Noia, 372 U.S. 391 (1963), which suggested that this Court's habeas power derived from the inherent nature of the writ. But this was error. See id. (Harlan, J. , dissenting).

Fay was wrong

After the codification of the exhaustion requirement in 1948, the habeas jurisdiction of federal courts was limited to exhausted claims. Although the statute requires exhaustion only regarding "the question presented," the Court had previously not entertained mixed petitions, and Congress intended not to expand but to define the limits on the then-existing jurisdiction.

The requirement of complete exhaustion accords with consistent federal policy, which Congress must have intended to further.

Toleration of mixed petitions produces an attitude that criminal convictions are never final and thus undermines both the educational and deterrent functions of the criminal law. See Bator, Finality and Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 452 (1963).

I agree

See My Burtamonte Op. &
~~at~~ citing John Harlan

Burtamonte 412 U.S. 218, 257
(also what I said in dissent
in ~~Leffkowitz~~ Leffkowitz, Newman
420 U.S. 283, 302

80-846 ROSE v. LUNDY

Argued 10/14/81

Zimmerman (Asst AG of Tenn)

Claimer 3 & 4 had never been considered in State Cts. Yet, Resp relied on them to buttress his claimer that had been exhausted.

Many of the references ~~to~~ by DC were to matters never presented in state cts.

Claim of prosecutorial misconduct relied on in fed ct. were not relied on ~~in~~ in state ct.

State courts must be given fair notice of ~~exactly~~ exactly the constitutional claimer relied upon.

Bryon asked about a case where ^{claimers} there are two entirely ~~separately~~ ^{separately} - one exhausted & one not - must fed ct. refrain from considering the exhausted claim. Counsel answered "yes".

Jackson v. Va aggravates situation. Now that suppression of ev must be reviewed, it is easy for claimer to be commingled.

No Rule 9 bar in Tenn. A prisoner can file different claimer from time to time. Not this case.

Zimmerman (cont)

Sending IT back to State Cts. is not unfair. Claims are reviewed there, & then can return to Fed Cts after exhaustion.

Also is fair to State as it gives its courts to develop a full record on the Court. claims.

x x x

Exhaustion is a jurisdictional requirement.

Can't "divide a conviction" into segments - entire record & all claims should come up at same time.

Smith (Resp)

Two of 4 claims had been exhausted

(WHR supplanter statement by the DC - p 88 of Appendix - that he could consider the unexhausted claims to ~~extent~~ extent they bore on ~~the~~ exhausted claims.)

Consider DC should have ~~been~~ written up. differently

Read Smith's answer to WHR's question on this subject. He weakened his case

80-846 Rose v. Lundy

The principal decision relied upon by petitioner is Galtieri v. Wainwright, 582 F.2d 349 (1978), an en banc decision of CA5 in which a majority laid down a flat rule that a federal district court ^{must} ~~not~~ dismiss, without prejudice, a "mixed" petition for habeas corpus filed by a state prisoner which contains both exhausted and unexhausted claims.

I do not believe another Circuit Court has gone quite this far. At least this is what Judge Roney, who wrote the leading dissenting opinion said.

As I understand the dissent's position, it adopts what it calls a "flexible rule":

"I should leave it to the sound discretion of the District Judge to decide whether the efficiency of his office or the ends of justice are better served by considering exhausted claims asserted in a petition that also contains unexhausted claims. Subject to review only for abuse of discretion, the District Court is, of course, at liberty to dismiss for failure to exhaust all claims." (at p. 376).

Under the dissent's flexible rule, if the District Court considers exhausted claims on a mixed petition, and there is review by the Court of Appeals, it must "review any grant of habeas corpus relief on the merits" whether there also are unexhausted issues.

80-946 Rose v Lundy 12'14

Must all Habeas claims be exhausted in state court before resort to § 2254 on claims that are exhausted.

Sub-section (c) of 2254 defines exhaustion requirement in terms of "the Q presented":

This supports view that all ~~claims~~ ^{claims} need not be first exhausted.

But when 2254 was adopted (codification of exhaustion requirement) in '48, the courts had not previously entertained mixed petitions. Congress intended to define - not expand - existing juris.

Moreover:

1. Burdens fed cts
2. Undermines rehabilitation of convicted prisoners.

Bustamante

lfp/ss 10/14/81

80-846 Rose v. Lundy

The principal decision relied upon by petitioner is Galtieri v. Wainwright, 582 F.2d 349 (1978), an en banc decision of CA5 in which a majority laid down a flat rule that a federal district court must dismiss, without prejudice, a "mixed" petition for habeas corpus filed by a state prisoner which contains both exhausted and unexhausted claims.

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(at p. 376).

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Keep in File 80-846

Rose v Lundy

262

OCTOBER TERM, 1972

Bustamante

POWELL, J., concurring

412 U. S.

claim, the strength of the argument depending upon the nature of the claim, the manner of its treatment (if any) in the conviction proceedings, and the circumstances under which collateral litigation must be had."¹⁶

No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen.¹⁷

Nowhere should the merit of this view be more self-evident than in collateral attack on an allegedly unlawful search and seizure, where the petitioner often asks society to *redetermine* a claim with no relationship at all to the justness of his confinement. Professor Amsterdam has noted that "for reasons which are common to all search and seizure claims," he "would hold even a slight finality interest sufficient to deny the collateral remedy."¹⁸ But, in fact, a strong finality interest militates against allow-

¹⁶ Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 383-384 (1964). The article addresses the problem of collateral relief for federal prisoners, but its rationale applies forcefully to federal habeas for state prisoners as well.

¹⁷ Mr. Justice Harlan put it very well:

"Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Sanders v. United States*, 373 U. S. 1, 24-25 (1963) (dissenting opinion).

¹⁸ *Supra*, n. 16, at 388.

The Chief Justice

Reverse

Agree with CAS & CA9

Justice Brennan

Reverse

BRW's opinion in Duckworth is irrelevant
Exhaustion is required.

Agree with CAS & CA9. Revised

All claims that are filed must be
exhausted - unless it looks ~~unexhausted~~ ^{exhausted} claims.
Should revise the H/C form

A H/C petitioner dismisses his
unexhausted claims in DC, he can ~~not~~
file them if & when he has exhausted ~~all~~ ^{remedies}

Justice White

Reverse

But only because DC relied
on unexhausted claims

Justice Marshall

Parr

Will agree with no general rule
Wants to see what is written

Justice Blackmun

Re Affirm

Picard says exhaustion is junior,
but does not say what ~~constitutes~~
constitutes exhaustion.

Fed Ct's should pass on exhausted
claims,

Cert. all except the prosecutorial
misconduct issues

Justice Powell

Reverse

See my notes.

I agree generally with
my understanding of ~~W & B's~~
W & B's position

Justice Rehnquist

Reverie

Could join WJB, CD & LFP
but may write separately.
~~the~~

Justice Stevens

Reverie on merits

Agree with State Court on
ground that alleged errors
were harmless.

DC did not err by reviewing entire
record.

On exhaustion, DC may send case
back to state cts. But if DC identifies
a valid claim, it should try them.

Justice O'Connor

Reverie

Where exhausted & unexhausted
claims are co-mingled - as here -
this is wrong.

Can also go along with WJB's
view.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: **NOV 23 1981**

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 80-846

**JIM ROSE, WARDEN, PETITIONER v. NOAH
HARRISON LUNDY**

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

[November —, 1981]

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case we consider whether the exhaustion rule in 28 U. S. C. § 2254(b)-(c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims would further the purposes underlying the habeas statute, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

I

Following a jury trial, respondent Noah Lundy was convicted on charges of rape and crime against nature, and sentenced to the Tennessee State Penitentiary.¹ After the Tennessee Court of Criminal Appeals affirmed the convictions and the Tennessee Supreme Court denied review, the respondent filed an unsuccessful petition for post-conviction relief in the Knox County Criminal Court.

¹The court sentenced the respondent to consecutive terms of 120 years on the rape charge and from five to 15 years on the crime against nature charge.

Reviewed

L.F.P.

*Good
opinion*

*adopting
the "total
exhaustion"
requirement*

Join

The respondent subsequently filed a petition in federal District Court for a writ of habeas corpus under 28 U. S. C. § 2254, alleging four grounds for relief: (1) that he had been denied the right to confrontation because the trial court limited the defense counsel's questioning of the victim; (2) that he had been denied the right to a fair trial because the prosecuting attorney stated that the respondent had a violent character; (3) that he had been denied the right to a fair trial because the prosecutor improperly remarked in his closing argument that the State's evidence was uncontradicted; and (4) that the trial judge improperly instructed the jury that every witness is presumed to swear the truth. After reviewing the state court records, however, the District Court concluded that it could not consider claims three and four "in the constitutional framework" because the respondent had not exhausted his state remedies for those grounds. The court nevertheless stated that "in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally."²

Apparently in an effort to assess the "atmosphere" of the trial, the District Court reviewed the state trial transcript and identified 10 instances of prosecutorial misconduct, only five of which the respondent had raised before the state courts.³ In addition, although purportedly not ruling on the

²The Tennessee Criminal Court of Appeals had ruled specifically on grounds one and two, holding that although the trial court erred in restricting cross examination of the victim and the prosecuting attorney improperly alluded to the respondent's violent nature, the respondent was not prejudiced by these errors. *Lundy v. State*, 521 S.W. 2d 591, 595-596 (Tenn. Crim. App. 1974).

³In particular, the District Court found that the prosecutor improperly:

(1) misrepresented that the defense attorney was guilty of illegal and unethical misconduct in interviewing the victim before trial.

(2) "testified" that the victim was telling the truth on the stand.

(3) stated his view of the proper method for the defense attorney to interview the victim.

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respondent's fourth ground for relief—that the state trial judge improperly charged that “every witness is presumed to swear the truth”—the court nonetheless held that the jury instruction, coupled with both the restriction of counsel's cross examination of the victim and the prosecutor's “personal testimony” on the weight of the State's evidence, see n. 3, *supra*, violated the respondent's right to fair trial. In conclusion, the District Court stated:

Also, subject to the question of exhaustion of state remedies, where there is added to the trial atmosphere the comment of the Attorney General that the only story presented to the jury was by the state's witnesses there is such mixture of violations that one cannot be separated from and considered independently of the others.

Under the charge as given, the limitation of cross examination of the victim, and the flagrant prosecutorial misconduct this court is compelled to find that petitioner did

(4) misrepresented the law regarding interviewing government witnesses.

(5) misrepresented that the victim had a right for both private counsel and the prosecutor to be present when interviewed by the defense counsel.

(6) represented that because an attorney was not present, the defense counsel's conduct was inexcusable.

(7) represented that he could validly file a grievance with the Bar Association on the basis of the defense counsel's conduct.

(8) objected to defense counsel's cross examination of the victim.

(9) commented that the defendant had a violent nature.

(10) gave his personal evaluation of the State's proof.

The petitioner concedes that the state appellate court considered instances 1, 3, 4, 5, and 9, but states without contradiction that the defendant did not object to the prosecutor's statement that the victim was telling the truth (#2) or to any of the several instances where the prosecutor, in summation, gave his opinion on the weight of the evidence (#10). The petitioner also notes that the conduct identified in #6 and #7 did not occur in front of the jury, and that the conduct in #8, which was only an objection to cross examination, can hardly be labelled as misconduct.

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not receive a fair trial, his Sixth Amendment rights were violated and the jury poisoned by the prosecutorial misconduct.⁴

In short, the District Court considered several instances of prosecutorial misconduct never challenged in the state trial or appellate courts, or even raised in the respondent's habeas petition.

In an unreported order, the Sixth Circuit affirmed the judgment of the District Court, concluding that the court properly found that the respondent's constitutional rights had been "seriously impaired by the improper limitation of his counsel's cross-examination of the prosecutrix and by the prosecutorial misconduct." The court specifically rejected the State's argument that the District Court should have dismissed the petition because it included both exhausted and unexhausted claims.

II

The petitioner urges this Court to adopt a "total exhaustion" rule requiring district courts to dismiss every habeas corpus petition that contains both exhausted and unexhausted claims.⁵ The petitioner argues at length that such a

⁴The court granted the writ and ordered the respondent discharged from custody unless within 90 days the State initiated steps to bring a new trial.

⁵The Fifth and Ninth Circuits have adopted a "total exhaustion" rule. See *Galtieri v. Wainwright*, 582 F. 2d 348, 355-360 (CA5 1978) (en banc), and *Gonzales v. Stone*, 546 F. 2d 807, 808-810 (CA9 1976). A majority of the courts of appeals, however, have permitted the district courts to review the exhausted claims in a mixed petition. See, e. g., *Katz v. King*, 627 F. 2d 568, 574 (CA1 1980); *Cameron v. Fastoff*, 543 F. 2d 971, 976 (CA2 1976); *United States ex rel. Trantino v. Hatrack*, 563 F. 2d 86, 91-95 (CA3 1977), cert. denied, 435 U. S. 928 (1978); *Hewett v. North Carolina*, 415 F. 2d 1316, 1320 (CA4 1969); *Meeks v. Jago*, 548 F. 2d 134, 137 (CA6 1976), cert. denied, 434 U. S. 844 (1977); *Brown v. Wisconsin State Dep't of Public Welfare*, 457 F. 2d 257, 259 (CA7), cert. denied, 409 U. S. 862 (1972); *Tyler v. Swenson*, 483 F. 2d 611, 614 (CA8 1973); *Whiteley v.*

rule would further the policy of comity underlying the exhaustion doctrine because it would give the state courts the first opportunity to correct federal constitutional errors and would minimize federal interference and disruption of state judicial proceedings. The petitioner also believes that a total exhaustion rule would reduce the amount of piecemeal habeas litigation.

Under the petitioner's scheme, a district court would dismiss a petition containing both exhausted and unexhausted claims, giving the prisoner the choice of returning to state court to litigate his unexhausted claims, or of proceeding with only his exhausted claims in federal court. The petitioner believes that a prisoner would be reluctant to choose the latter route since a district court could, under Habeas Corpus Rule 9(b), 28 U. S. C. § 2254, dismiss subsequent federal habeas petitions as an abuse of the writ.⁶ In other words, if the petitioner amended the petition to delete the unexhausted claims or immediately refiled in federal court a petition alleging only his exhausted claims, he could lose the opportunity to litigate his presently unexhausted claims in federal court.

Meacham, 416 F. 2d 36, 39 (CA10 1969), *rev'd on other grounds*, 401 U. S. 560 (1971).

In *Gooding v. Wilson*, 405 U. S. 518 (1972), this Court reviewed the merits of an exhausted claim after expressly acknowledging that the prisoner had not exhausted his state remedies for all of the claims presented in his habeas petition. *Gooding* does not control the present case, however, since the question of total exhaustion was not before the Court. Two years later, in *Francisco v. Gathright*, 419 U. S. 59, 63-64 (1974) (*per curiam*), the Court expressly reserved the question of whether § 2254 requires total exhaustion of claims.

⁶ Rule 9(b) provides that:

A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

In order to evaluate the merits of the petitioner's arguments, we turn to the habeas statute, its legislative history, and the policies underlying the exhaustion doctrine.

III

A

The exhaustion doctrine existed long before its codification by Congress in 1948. In *Ex parte Royall*, 117 U. S. 241, 251 (1886), this Court wrote that as a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act:

The injunction to hear the case summarily, and thereupon "to dispose of the party as law and justice require" does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised 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.

Subsequent cases refined the principle that state remedies must be exhausted except in unusual circumstances. See, e. g., *United States, ex rel. Kennedy v. Tyler*, 269 U. S. 13, 17-19 (1925) (holding that the lower court should have dismissed the petition because none of the questions had been raised in the state courts. "In the regular and ordinary course of procedure, the power of the highest state court in respect of such questions should first be exhausted."). In *Ex parte Hawk*, 321 U. S. 114, 117 (1944), this Court reiterated that comity was the basis for the exhaustion doctrine: "it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the ad-

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ministration of justice in the state courts only 'in rare cases where exceptional circumstances of peculiar urgency are shown to exist.'"⁷ None of these cases, however, specifically applied the exhaustion doctrine to habeas petitions containing both exhausted and unexhausted claims.

In 1948, Congress codified the exhaustion doctrine in 28 U. S. C. § 2254, citing *Ex parte Hawk* as correctly stating the principle of exhaustion.⁸ Section 2254,⁹ however, does not directly address the problem of mixed petitions. To be sure, the provision states that a remedy is not exhausted if there exists a state procedure to raise "the question presented," but we believe this phrase to be too ambiguous to sustain the conclusion that Congress intended to either permit or prohibit review of mixed petitions. Because the legis-

⁷The Court also made clear, however, that the exhaustion doctrine does not bar relief where the state remedies are inadequate or fail to "afford a full and fair adjudication of the federal contentions raised." *Ex parte Hawk*, 321 U. S. 114, 118 (1944).

⁸The Reviser's Notes in the appendix of the House Report stated that: "This new section [§ 2254] is declaratory of existing law as affirmed by the Supreme Court. (See *Ex parte Hawk*, 1944, 64 S. Ct. 448, 321 U. S. 114, 88 L. Ed. 572.)." H.R. Rep. No. 308, 80th Cong., 1st Sess., A180 (1947). See also *Darr v. Burford*, 339 U. S. 200, 210 (1950) ("In § 2254 of the 1948 recodification of the Judicial Code, Congress gave legislative recognition to the *Hawk* rule for the exhaustion of remedies in the state courts and this Court."); *Brown v. Allen*, 344 U. S. 443, 447-450 (1953); *Fay v. Noia*, 372 U. S. 391, 434 (1963).

⁹Section 2254 in part provides:

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

lative history of § 2254, as well as the pre-1948 cases, contains no reference to the problem of mixed petitions,¹⁰ in all likelihood Congress never thought of the problem.¹¹ Consequently, we must analyze the policies underlying the statutory provision to determine its proper scope.

B

The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. See *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U. S. 484, 490-491 (1973).¹² Under our federal system, the

¹⁰ Section 2254 was one small part of a comprehensive revision of the Judicial Code. The original version of § 2254, as passed by the House, provided that:

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court or authority of a State officer shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is no adequate remedy available in such courts or that such courts have denied him a fair adjudication of the legality of his detention under the Constitution and laws of the United States.

The Senate amended the House bill, changing the House version of § 2254 to its present form. The Senate Report accompanying the bill states that one purpose of the amendment was "to substitute detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not sufficiently specific and precise, and its meaning should, therefore, be spelled out in more detail in the section as is done by the amendment." S. Rep. No. 1559, 80th Cong., 2d Sess., 10 (1948). The House accepted the Senate version of the Judicial Code without further amendment.

In 1966, Congress amended the § 2254 to add subsection (a) and redesignate the existing paragraphs as subsections (b) and (c). See Pub. L. No. 89-711, § 2 (c), 80 Stat. 1105.

¹¹ See Note, *Habeas Petitions with Exhausted and Unexhausted Claims: Speedy Release, Comity and Judicial Efficiency*, 57 B.U.L. Rev. 864, 867 n. 30 (1977) (suggesting that before 1948 habeas petitions did not contain multiple claims).

¹² See also *Developments, Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1094 (1970) (cited favorably in *Braden*).

federal and state "courts [are] equally bound to guard and protect rights secured by the Constitution." *Ex parte Royal*, *supra*, at 251. Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Darr v. Burford*, 339 U. S. 200, 204 (1950). See *Duckworth v. Serrano*, — U. S. — (1981) (*per curiam*) (noting that the exhaustion requirement "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights").

A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error. As the number of prisoners who exhaust all of their federal claims increases, state courts may become increasingly familiar with and hospitable toward federal constitutional issues. See *Braden v. 30th Judicial Circuit Court of Kentucky*, *supra*, at 490. Equally as important, fully exhausted federal claims will more often be accompanied by a complete factual record to aid the federal courts in their review. Cf. 28 U. S. C. § 2254(d) (requiring a federal court reviewing a habeas petition to presume as correct factual findings made by a state court).

7. The facts of the present case underscore the need for a rule encouraging exhaustion of all federal claims. In his opinion, the district court judge wrote that "there is such mixture of violations that one cannot be separated from and considered independently of the others." Because the two unexhausted claims for relief were intertwined with the exhausted ones,

the judge apparently considered all of the claims in ruling on the petition.¹⁸ Requiring dismissal of petitions containing both exhausted and unexhausted claims will relieve the district courts of the difficult if not impossible task of deciding when claims are related, and will reduce the temptation to consider unexhausted claims.

The prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims. See *Braden v. 30th Judicial Circuit Court of Kentucky*, *supra*, at 490. A total exhaustion rule will not impair that interest since he can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims. By invoking this procedure, however, the prisoner would risk forfeiting consideration of his unexhausted claims in federal court. Under 28 U. S. C. § 2254 Rule 9(b), a district court may dismiss subsequent petitions if it finds that "the failure of the petitioner to assert those [new] grounds in a prior petition constituted an abuse of the writ." See n. 6, *supra*. The Advisory Committee to the Rules notes that Rule 9(b) incorporates the judge-made principle governing the abuse of the writ set forth in *Sanders v. United States*, 373 U. S. 1, 18 (1963), where this Court stated that "if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application . . . he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. . . . Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation." See Advisory Committee Note to Habeas Corpus Rule 9(b), 28 U. S. C., p. 273. Thus a prisoner who decides to proceed only with his ex-

¹⁸ Unquestionably, the District Court erred to the extent it considered unexhausted claims in granting habeas relief. Rather than simply remanding the case for consideration of the exhausted claims alone, we reach the issue of whether the District Court should have entertained the mixed petition at all.

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hausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions.

In sum, because a total exhaustion rule promotes comity does and not unreasonably impair the prisoner's right to relief, we hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims.¹⁴ Accordingly, the judgment of the district court is reversed and the case remanded for proceedings consistent with this opinion.

It is so ordered.

¹⁴ Because of our disposition of this case, we do not reach the petitioner's claims that the grounds offered by the respondent do not merit habeas relief.

I've reviewed SOC opinion
carefully & agree that I

November 23, 1981

can join.

TO: MR. JUSTICE POWELL
FROM: DICK FALLON
RE: Rose v. Lundy, No. 80-846

Justice O'Connor has today circulated an opinion in this case. I think it handles the issue in a reasonable and acceptable way, and I recommend that you join it.

I call ^{three} ~~two~~ points to your attention.

(1) As I read the opinion, it is deliberately ambiguous about whether "complete exhaustion" is required by the jurisdictional command of Congress or represents an exercise of judicial self-restraint in the face of the uncertain legislative intent of § 2254. I think this is the only honest approach. But it does result in a "weaker" opinion than would a clear holding that the exhaustion rule is congressionally mandated. (On the other hand, it avoids an implicitly unqualified admission that the Court acted without jurisdiction when it decided Gooding v. Wilson, 405 U.S. 518 (1972).)

(2) The opinion very neatly handles a point raised implicitly by Justice Stevens's questions from the bench--the question what a federal judge should do when the only meritorious claims have been exhausted, but a petition includes unexhausted frivolous claims. The opinion makes it possible to invite

amendment to remove the frivolous claims from the petition. It makes clear the consequence: a possible bar to subsequent litigation of the claims excluded from the amended petition. But, by hypothesis, they were frivolous anyway. No injustice therefore results.

(3) The part of the opinion discussed in (2), supra, provides an implicit answer to the strongest arguments of the defendant/respondent--i.e., that the federal courts should act quickly on arguably meritorious petitions in order to avoid the injustice of wrongful imprisonment. I think this is probably sufficient, though I would have been slightly happier if the opinion confronted more directly the arguments on the other side. Section II begins "The petitioner urges this Court....," and the remainder of the opinion discusses the case from the petitioner's perspective. The views of the respondent are never met "head-on."


On balance, though, I think this a sound opinion, which--again--I think you should join.

yes

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 24, 1981

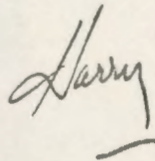


Re: No. 80-846 - Rose v. Lundy

Dear Sandra:

As you will have surmised, I shall be writing a dissent in this case in due course.

Sincerely,



Justice O'Connor

cc: The Conference

November 24, 1981

80-846 Rose v. Lundy

Dear Sandra:

Please join me.

Sincerely,

Justice O'Connor

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

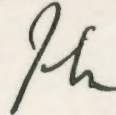
November 24, 1981

Re: No. 80-846, Rose v. Lundy

Dear Sandra:

As I suggested at conference, I am persuaded that the position taken in your opinion will increase rather than lessen the burdens on both state and federal judges. Accordingly, I will not be able to join your opinion. Since I anticipate that Harry will be writing in dissent -- he was the only vote to affirm -- I will await his reaction and then probably add a short statement of my reasons for believing the case was wrongly decided on the merits.

Respectfully,



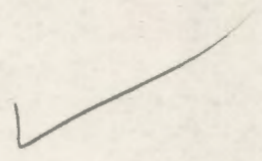
Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 24, 1981



Re: No. 80-846 - Rose v. Lundy

Dear Sandra:

I await the dissent.

Sincerely,

JM .

T.M.

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST


November 25, 1981

Re: No. 80-846 Rose v. Lundy

Dear Sandra:

I am sure you realize by the Conference discussion and the letter which Bill Brennan has sent you today that you are "in the middle" where you will probably find yourself on more than one occasion. I was somewhat disappointed that your opinion did not place any more stringent requirements on the availability of habeas corpus to state prisoners than it did, but am willing to go along with it as it now stands. If it were to be changed to meet Bill Brennan's criticism, I could not join it and would write separately concurring in the judgment.

Sincerely,



Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

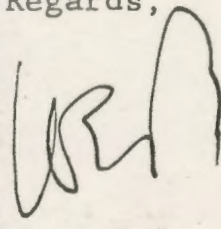
November 25, 1981

Re: No. 80-846 - Rose v. Lundy

Dear Sandra:

I join.

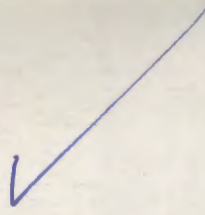
Regards,



Justice O'Connor

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Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 25, 1981

No. 80-846 -- Rose v. Lundy.

Dear Sandra,

Your circulation of November 23 presents problems for me, because it reaches questions that are not before us and that in my view we should not address. My difficulties focus upon your discussion, on pages 10-11, of the "abuse of the writ" dismissal procedure outlined in Rule 9(b). I think that it is unnecessary to reach this issue here, and in any event I cannot agree with your analysis.

As you recognize on page 10, Rule 9(b) adopts the "abuse of the writ" standard announced in Sanders v. United States, 373 U.S. 1 (1963). A correct construction of the Rule thus depends upon a proper interpretation of Sanders. In my view, your interpretation of the Sanders standard makes the dismissal of successive petitions far too easy. You quote from Sanders, id., at 18, for the premise that "if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, ... he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. ... Nothing in the traditions of habeas corpus require the federal courts to tolerate needless piecemeal litigation." From this you conclude, "Thus a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions." Pages 10-11.

I have difficulties both with the premise and with the conclusion. As to the premise, isn't your quotation from Sanders incomplete, in that it omits language

critically important to a proper interpretation of the Sanders standard? Where you placed your first ellipsis, didn't Sanders make it plain that its concern was with "a prisoner deliberately withhold[ing] one of two grounds" for relief "in the hope of being granted two hearings rather than one or for some other such reason"? Where you placed your second ellipsis, didn't Sanders note that waiver might also be inferred where "the prisoner deliberately abandons one of his grounds at the first hearing"? And immediately after the language you quote, didn't Sanders state that dismissal was appropriate for "collateral proceedings whose only purpose is to vex, harass, or delay"? Taken in context, the passage on which you rely thus made it clear, I thought, that dismissal for "abuse of the writ" is only appropriate when a prisoner was free to include all of his claims in his first petition, but knowingly and deliberately chose not to do so in order to get more than "one bite at the apple." Your elliptical exposition of Sanders, in contrast, would allow dismissal in a much broader class of cases than Sanders was intended to permit. I am unable to join that expansion of the Sanders principle.

My difficulty with your conclusion stems directly from my disagreement with the premise. You hypothesize a prisoner who presents a "mixed" habeas petition that is dismissed without any examination of its claims on the merits, and who later presents a second petition containing the previously unexhausted claims. You equate the position of such a respondent with that of the "abusive" prisoner discussed in the Sanders passage. But in my view, the position of your hypothetical prisoner is substantially different. If the habeas court refuses to entertain a "mixed" petition -- as it must under your holding -- then the prisoner's "abandonment" of his unexhausted claims cannot in any meaningful sense be termed "deliberate," as that term was used in Sanders. It isn't "abandonment": it is simply that the prisoner will not be permitted to proceed with his unexhausted claims. If he is to gain "speedy federal relief on his claims" -- to which he is entitled, as you recognize with your citation to Braden -- he must proceed only with his exhausted claims. Thus the prisoner in such a case has no "purpose to vex, harass, or delay," nor any "hope of being granted two hearings rather than one." I conclude that when a prisoner's original, "mixed" habeas petition is dismissed without any examination of its claims on the merits, and when the prisoner later brings a second petition based on

the previously unexhausted claims that had earlier been refused a hearing, then the remedy of dismissal for "abuse of the writ" should not be used against that second petition. This conclusion is to my mind inescapably compelled by Sanders.

My analysis is so at odds with yours that I cannot join your opinion as it now stands. But I repeat that this whole issue seems quite distinct from the questions that we really must address in the case before us. Would you consider leaving for another day any discussion of the Rule 9(b) issue? I expect that to do so would entail deletion of the paragraph on pages 10-11, and substantial revision of the full paragraph on page 5.

Sincerely,

Buc

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

✓

December 1, 1981

No. 80-846 Rose v. Lundy

Dear Bill,

Thank you for your memo of November 25.

I have attached the second printed draft which quotes all of the applicable language from Sanders v. United States, 373 U.S. 1, 18 (1963). This may help with your concerns. The draft opinion merely notes that a criminal defendant runs a risk under Sanders when he fails to exhaust all his claims in state court.

I have reorganized the portion which is of concern to you in Part III C of the draft in order to facilitate your separate comments, if you deem it necessary.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 1, 1981

No. 80-846 Rose v. Lundy

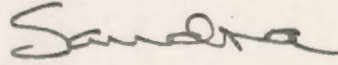
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Sincerely,



Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 3, 1981

✓

RE: No. 80-846 Rose v. Lundy

Dear Sandra:

Thank you for your response to my memorandum of November 25, and thank you particularly for your revisions addressed to my problems. I can join all of your proposed opinion except Part III C if you found it possible to add the following sentence at the end of the full paragraph at page 5:

"This argument is addressed in Part C infra of this opinion."

I shall shortly circulate a dissent from Part III C.

Sincerely,

Bill

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 3, 1981

No. 80-846 Rose v. Lundy

Dear Bill,

In response to your memo of this date, I
have sent to the printer the requested addition on
page 5.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

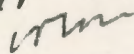
December 10, 1981

Re: No. 80-846 Rose v. Lundy

Dear Sandra:

Please join me.

Sincerely,



Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 14, 1981

Re: No. 80-846 - Rose v. Lundy

Dear Bill:

Please join me in your dissent.

Sincerely,

J.M.

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

✓

January 5, 1982

Re: 80-846 - Rose v. Lundy

Dear Sandra:

Although I agree with most of what Harry has written, I think I will add a few paragraphs to explain my slightly different views. I will try not to hold you up too long.

Respectfully,

J.P.

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 1, 1982

✓

RE: No. 80-846 Rose v. Lundy:

Dear Sandra:

I am making the necessary changes in my concurring and dissenting opinion to refer to your opinion as an opinion for the plurality on Part III C. I don't think the printer will hold you up from announcing this on Wednesday.

Sincerely,

Bud

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 4, 1982

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 80-846 Rose v. Lundy

No. 80-6902, Stedman v. Maynard.

This petition for certiorari is from the Tenth Circuit. Following his conviction in state court for murder, the petitioner filed a habeas petition under §2254 claiming that one of the witness' testimony included inadmissible hearsay. The District Court dismissed the petition holding that even if the testimony erroneously had been admitted, the error was harmless. Four months after that decision, the petitioner filed a second petition claiming that the prosecutor knowingly had used perjured testimony from the same witness. The District Court denied relief on two grounds. First, the court found that the petitioner had discovered evidence of the perjured testimony nearly a year before the court had dismissed the first petition (but two weeks after the petitioner had filed the first petition). The court reasoned that since the petitioner's failure to raise the perjury issue in the first petition was inexcusable, the second petition constituted an abuse of the writ. Second, the court found the allegations factually insufficient to support the perjury claim. The petitioner argues here that he could not have appended his second claim to the first petition because that claim had not yet been exhausted in state courts.

This case does not present a situation controlled directly by Rose since at no time did the petitioner submit a mixed petition. Whether or not the Rule 9(b) dismissal was proper, the case does not merit review because the perjury claim is frivolous. Thus, I recommend that the Court deny the petition.

Sincerely,

Sandra

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 4, 1982

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 80-846 Rose v. Lundy

No. 81-1038, Duckworth v. Cowell.

This petition for certiorari is from the Seventh Circuit. Following his conviction for first degree murder, the petitioner filed a petition for habeas corpus under §2254 making several claims, including that his counsel's conflict of interest violated his Sixth Amendment right to the effective assistance of counsel, and that his confession was involuntary. The court dismissed the other claims for failure to exhaust state remedies, but reached the merits of the conflict of interest and voluntariness claims, which had been exhausted in the state courts. On the merits, the court rejected the voluntariness claim, but found that the respondent's counsel suffered a conflict of interest in violation of the prisoner's Sixth Amendment rights. The Court of Appeals affirmed, finding that dual representation of a defendant and a prosecution witness was a per se violation of the Sixth Amendment (a holding that probably conflicts with Cuyler v. Sullivan, 446 U.S. 335, 348 (1980), which held that absent an objection at trial, a defendant must show that "an actual conflict of interest adversely affected his lawyer's performance"). The State, as petitioner before this Court, has not raised the exhaustion issue.

Because the petition in this case included both exhausted and unexhausted claims, I recommend that the Court grant the petition, vacate the opinion below and remand the case to the Seventh Circuit with instructions to remand the case to the District Court to dismiss the petition.

Sincerely,

Sandra

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 4, 1982

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 80-846 Rose v. Lundy

No. 81-5047, Rodriguez v. Harris.

This petition for certiorari is from the Second Circuit. Following his conviction in state court on several counts of murder and one of robbery, the petitioner filed a pro se petition for habeas corpus under §2254 alleging that statements taken from him on the night of his arrest were involuntary and that trial counsel was incompetent for failing to try to suppress the statements at the suppression hearing and at trial. A federal Magistrate reviewing the petition recommended that the first claim be rejected on the merits, and that the second claim be dismissed because it had not been exhausted. At that point, the petitioner moved for voluntary dismissal of the entire petition. The District Court denied the motion for voluntary dismissal and accepted the Magistrate's recommendation for the case. The Second Circuit affirmed the lower court judgment in full.

The issue presented, whether habeas petitions containing both exhausted and unexhausted claims should be dismissed, is the same issue as decided in Rose v. Lundy. I therefore recommend that the Court grant the petition, vacate the decision below and remand the case to the Second Circuit with instructions to remand the case to the District Court to dismiss the petition.

Sincerely,

Sandra

[illegible]