

2000

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Kirk J. Henderson

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Recommended Citation

Kirk J. Henderson, *Thanks, but No Thanks: State Supreme Courts' Attempts to Remove Themselves from the Federal Habeas Exhaustion Requirement*, 51 Case W. Res. L. Rev. 201 (2000)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol51/iss2/4>

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ARTICLE

THANKS, BUT NO THANKS: STATE SUPREME COURTS' ATTEMPTS TO REMOVE THEMSELVES FROM THE FEDERAL HABEAS EXHAUSTION REQUIREMENT

Kirk J. Henderson[†]

INTRODUCTION

A state prisoner who wants to file a federal habeas corpus petition must first exhaust his or her remedies in state court.¹ In the abstract, this is a simple enough concept. The details of what constitutes an exhausted claim, however, have been and continue to be unclear.

Prior to 1999, the federal circuits were split on whether the exhaustion requirement obligated prisoners to file for discretionary review in state supreme court.² The Supreme Court attempted to resolve this conflict in *O'Sullivan v. Boerckel*³ by holding that discretionary review is required to fulfill the exhaustion requirement. *O'Sullivan*, however, allowed for the possibility that discretionary review may not always be necessary. At least two state supreme courts prior to *O'Sullivan* and one since have tried to remove themselves from the exhaustion requirement. In an effort to conserve limited resources and to make the discretionary review system more

[†] Assistant Public Defender in the Appellate Division of the Law Office of the Public Defender of Allegheny County, Pittsburgh, Pennsylvania; Adjunct Professor of Law, University of Pittsburgh School of Law; B.A., Allegheny College; J.D., Vanderbilt University. The views expressed in this Article do not necessarily reflect the policies, opinions, or views of the Law Office of the Public Defender of Allegheny County or of any other member of that Office.

I would like to thank my fellow public defenders, especially those in the Appellate Division, for the years of advice, collaboration, and perseverance; Shelley Stark for sharing her expertise on habeas law; Barry Friedman for sparking my interest in habeas law a decade ago; and Kristin Henderson for support and encouragement while I wrote this Article.

¹ See 28 U.S.C. § 2254(b)(1) (Supp. IV 1998).

² Compare *Silverburg v. Evitts*, 993 F.2d 124, 126-27 (6th Cir. 1993) (requiring state supreme court discretionary review to exhaust a claim), *Jennison v. Goldsmith*, 940 F.2d 1308, 1311 (9th Cir. 1991) (same), *McNeeley v. Arave*, 842 F.2d 230, 231 (9th Cir. 1988) (per curiam) (same), and *Richardson v. Proconier*, 762 F.2d 429, 431-32 (5th Cir. 1985) (same), with *Boerckel v. O'Sullivan*, 135 F.3d 1194, 1199 (7th Cir. 1998) (holding that a claim is exhausted even if it was not presented on discretionary review to a state supreme court), *rev'd*, 526 U.S. 838 (1999), *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994) (same), and *Buck v. Green*, 743 F.2d 1567, 1569 (11th Cir. 1984).

³ 526 U.S. 838 (1999).

manageable, other supreme courts may try to follow the examples of these states. Four Justices in *O'Sullivan* took great pains to note that, in their opinion, the Court left this scenario an open question for later resolution. As federal courts try to resolve this question and as state supreme courts try to remove themselves from the exhaustion requirement, the policies underlying the exhaustion doctrine will have to be analyzed and the interests of the federal courts, the state court systems, and the state prisoners will have to be weighed to determine whether to allow state prisoners to bypass discretionary review when the state gives them that option.

This Article addresses this issue by examining those policies and balancing the interests. Part I examines the *O'Sullivan* decision—the majority, concurring, and dissenting opinions. Part II reviews the long but successful campaign of the Arizona Supreme Court to remove itself from the exhaustion requirement and analyzes the Pennsylvania Supreme Court's recent attempt to excuse itself from the exhaustion requirement. The Article then turns, in Part III, to the various considerations underlying the exhaustion doctrine and how these affect the interests of federal courts, state courts, and prisoners. Part IV argues that balancing these considerations leads to the conclusion that a state supreme court should be permitted to exclude its discretionary review from the exhaustion requirement when it makes an explicit statement that it does not want it to be included and when the state's own law defines an issue as finally litigated without supreme court discretionary review.

I. *O'SULLIVAN V. BOERCKEL*: SETTING A RULE OR CREATING AN EXCEPTION?

In 1999, the United States Supreme Court, in *O'Sullivan v. Boerckel*, addressed whether a state prisoner seeking federal habeas corpus relief must first petition for discretionary review in a state supreme court.⁴ The Court held that “state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process.”⁵ When the “established appellate review process” for a state includes the possibility of discretionary review in the state's supreme court, the prisoner must provide that court with the opportunity to hear the case, even when it is unlikely to grant review.⁶ The Court grounded its decision in the language of the federal habeas corpus statute and in its concerns about federal court comity with state courts.

⁴ See *id.* at 842-43.

⁵ *Id.* at 845.

⁶ See *id.* at 845-47.

Pursuant to the habeas statute, “[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.”⁷ Discretionary review in a state supreme court clearly is an “available procedure.”⁸ The Court acknowledged that Boerckel had no right to have the Illinois Supreme Court actually hear his case, but only a right to ask that court to take his case.⁹ Turning to the habeas statute, the Court stated that Boerckel “does have a ‘right . . . to raise’ his claims before that court. That is all § 2254(c) requires.”¹⁰ Because Boerckel had the right to raise his claims before the Illinois Supreme Court, the fact that he did not have a right to have those claims reviewed by the court was immaterial.¹¹

The Court, however, based its decision more firmly on notions of comity,¹² which requires federal courts to give the state courts “one full opportunity” to review the conviction.¹³ The Court said that the “one full opportunity” requirement is justified “[b]ecause the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts.”¹⁴ Illinois’s “established, normal appellate review procedure” consists of a two-tiered system where a

⁷ 28 U.S.C. § 2254(c) (1994).

⁸ *O’Sullivan*, 526 U.S. at 845. Discretionary review in the Illinois Supreme Court, the procedure in question in *O’Sullivan*, is not an alternative to the standard review process, but instead “is a normal, simple, and established part of the State’s appellate review process.” *Id.* The Court distinguished cases where it held that a petitioner need not pursue “alternatives to the standard review process . . . where the state courts have not provided relief through those remedies in the past.” *Id.* at 844 (citing *Wilwording v. Swenson*, 404 U.S. 249, 249-50 (1971) (per curiam)). In *Wilwording*, the Court reversed the Eighth Circuit, which had held that a prisoner must file “any of a number of possible alternatives to state habeas including ‘a suit for injunction, a writ of prohibition, or mandamus or a declaratory judgment in the state courts,’ or perhaps other relief under the State Administrative Procedure Act.” *Wilwording v. Swenson*, 404 U.S. at 249-50 (quoting *Wilwording v. Swenson*, 439 F.2d 1331, 1336 (8th Cir. 1971)). The *O’Sullivan* Court also noted that prisoners need not file repetitive petitions even though this is an “available procedure.” *O’Sullivan*, 526 U.S. at 844 (citing *Brown v. Allen*, 344 U.S. 443, 447 (1953)).

⁹ See *O’Sullivan*, 526 U.S. at 845.

¹⁰ *Id.*

¹¹ See *id.*

¹² The Court summarized its comity jurisprudence:

State courts, like federal courts, are obliged to enforce federal law. Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief. This rule of comity reduces friction between the state and federal court systems by avoiding the “unseem[li]ness” of a federal district court’s overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance.

Id. at 844-45 (alteration in original) (citations omitted).

¹³ *Id.* at 845.

¹⁴ *Id.*

defendant can first appeal to the Appellate Court of Illinois and then seek discretionary review in the Illinois Supreme Court.¹⁵ In these circumstances, the Court said, “[c]omity . . . dictates that Boerckel use the State’s established appellate review procedures before he presents his claims to a federal court.”¹⁶

The established appellate review procedures in Illinois call for the supreme court to grant review only in certain cases.¹⁷ The *O’Sullivan* Court did not accept the proposition that the Illinois rule governing the exercise of discretionary review sufficiently delineated what claims would be considered.¹⁸ Instead, the Court reasoned that a better reading of the rule was that the Illinois Supreme Court had limited resources and would use those resources only on “questions of broad significance.”¹⁹ The Illinois Supreme Court, in other words, could still decide on a case-by-case basis whether to hear any criminal case presented to it and thus review was not “unavailable.”²⁰ Therefore, the Court concluded, “[b]y requiring state prisoners to give the Illinois Supreme Court the opportunity to resolve constitutional errors in the first instance, the rule we announce today serves the comity interests that drive the exhaustion doctrine.”²¹

The majority did concede that the “one full opportunity” rule could actually be contrary to the comity interests that form the basis for the exhaustion doctrine.²² Requiring petitions for discretionary review in state supreme courts of every criminal case that could be headed to federal court may create an “unwelcome burden” on the state supreme courts.²³ The Court emphasized that the *O’Sullivan* decision does not mean that any specific state remedy must be pursued when a state has provided that a particular remedy is unavailable.²⁴ If the state makes a procedure unavailable, the federal courts must honor that rule.²⁵ The Court concluded by stating that “the

¹⁵ See *id.* at 843.

¹⁶ *Id.* at 845.

¹⁷ See *id.* at 843. An Illinois Supreme Court rule provides the following guidelines for the court to use when exercising its discretion:

The following, while neither controlling nor fully measuring the court’s discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court’s supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.

ILL. SUP. CT. R. 315(a).

¹⁸ See *O’Sullivan*, 526 U.S. at 845-46.

¹⁹ *Id.* at 846.

²⁰ See *id.*

²¹ *Id.*

²² See *id.* at 847.

²³ *Id.*

²⁴ See *id.*

²⁵ See *id.*

creation of a discretionary review system does not, without more, make review in the Illinois Supreme Court unavailable."²⁶ The Court did not elaborate, however, on what makes a procedure "unavailable" or what "more" is required to make discretionary review "unavailable."

In a concurring opinion, Justice Souter noted that the Court left open the possibility that a clear statement by a state could remove discretionary review from the exhaustion requirement.²⁷ Justice Souter speculated as to "whether we should construe the exhaustion doctrine to force a State, in effect, to rule on discretionary review applications when the State has made it plain that it does not wish to require such applications before its petitioners may seek federal habeas relief."²⁸ Relying more on notions of comity than a strict reading of the habeas statute, Justice Souter argued that the Court was leaving open the possibility that a prisoner could skip an available state remedy if the state has "identified the procedure as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion."²⁹

Justices Stevens, Ginsburg, and Breyer dissented on the grounds that Boerckel could have proceeded in federal court without application to the Illinois Supreme Court.³⁰ Justice Breyer's dissent, like Justice Souter's concurrence, commented that the majority left open the possibility that a state may deem its procedures exhausted without the application for discretionary review in the state supreme court.³¹ Relying upon the comity underpinnings of the exhaustion doctrine, Justice Breyer asked, "[i]f the State does not want the prisoner to seek discretionary state review (or if it does not care), why should that failure matter to federal habeas law?"³² Discretionary supreme court review procedures imply that states with such procedures only want

²⁶ *Id.* at 848.

²⁷ *See id.* at 849-50 (Souter, J., concurring).

²⁸ *Id.* at 849. As an example of how a state might be able to do this, Justice Souter referred to an order of the South Carolina Supreme Court, which disavowed the need for a litigant to seek discretionary review in the state supreme court for purposes of exhausting the claim in federal court. *Id.* (quoting *Re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 471 S.E.2d 454 (S.C. 1990)). *See infra* note 83 for the text of the order.

²⁹ *O'Sullivan*, 526 U.S. at 850 (Souter, J., concurring). Justice Souter followed this statement by concluding: "It is not obvious that either comity or precedent requires otherwise." *Id.*

³⁰ Justice Stevens wrote a dissent, joined by Justices Ginsburg and Breyer, criticizing the majority for confusing the doctrines of exhaustion and procedural default. After a lengthy discussion of these issues, Justice Stevens concluded that Boerckel had not procedurally defaulted his claim because he had pursued all of his issues through his appeal as of right to the intermediate appellate court in Illinois. *See id.* at 850-62 (Stevens, J., dissenting).

³¹ *See id.* at 864 (Breyer, J., dissenting) ("[A] federal habeas court should respect a State's desire that prisoners *not* file petitions for discretionary review, where the State has expressed that desire clearly.")

³² *Id.* at 862 (citing *Coleman v. Thompson*, 501 U.S. 722, 731-32, 751 (1991)) (emphasizing comity interest in federal habeas).

prisoners to seek discretionary review in unusual circumstances.³³ Statistics from state supreme courts also reflect that the supreme courts actually take very few cases on discretionary review.³⁴ Hence, these states either do not want a flood of petitions for discretionary review, or they must not care whether these defendants seek review in the supreme court. The dissenters did “see cause for optimism” in Justice Souter’s concurrence and suggested that, in light of *O’Sullivan*, a prisoner must now file for discretionary review unless a state clearly expresses its desire that this process is unnecessary.³⁵

O’Sullivan left open the question of whether and how a state could remove itself from the exhaustion requirement. To date, at least three states have clearly attempted to remove themselves from the requirement.³⁶ Arizona has been successful through the Ninth Circuit in accomplishing this task. One federal district court has reluctantly upheld Pennsylvania’s attempt,³⁷ and South Carolina’s effort has not yet been tested in court.

³³ See *id.* at 862-63 (citing examples from four states).

³⁴ See *id.* at 863 (citing statistics from 11 states).

³⁵ See *id.* at 864. Justice Breyer said that the majority’s approach creates a presumption that discretionary review must be sought, but that presumption can be overcome with a clear statement from the state that discretionary view is unnecessary. See *id.* Justice Breyer cited to South Carolina’s rule as such a clear statement. See *id.* (citing *Re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 471 S.E.2d 454 (S.C. 1990)); see also *infra* note 83. Justice Breyer, however, suggested that the presumption should be reversed: a state should be presumed not to want prisoners to seek discretionary review in every case for exhaustion purposes unless it makes a clear statement that it wants to be given the opportunity to hear each case. See *O’Sullivan*, 526 U.S. at 864 (Breyer, J., dissenting). At a minimum, Justice Breyer said that Justice Souter’s suggested presumption “would still help.” *Id.*

³⁶ A fourth state, Kentucky, potentially falls into this category. In *Freeman v. Commonwealth*, 697 S.W.2d 133, 134 (Ky. 1985), the Kentucky Supreme Court sanctioned an appellate public advocate for filing a motion for discretionary review in the supreme court that the court termed “patently groundless.” The attorney argued that he filed the motion “to preserve [his client’s] right to pursue a writ of habeas corpus in Federal Court after state remedies had been exhausted.” *Id.* The court responded, “[t]he decision of the Court of Appeals denying the [motion] was final state action, without a useless motion for discretionary review.” *Id.* The court concluded by offering legal advice for the state prisoner: “[T]here would be no legitimate reasons for Freeman to pursue this matter further in Federal Court. It would be a further waste of court time.” *Id.*

Given the posture of this case, whether this is a clear statement of the court’s desire to be removed from the exhaustion requirement is a determination that would have to be made by a federal court. How to determine what constitutes a sufficiently clear statement by a state that it does not want prisoners to seek discretionary review solely for exhaustion purposes is beyond the scope of this Article. Because the statements of Arizona, Pennsylvania, and South Carolina are unambiguous, they are the focus of this Article.

³⁷ See *Blasi v. Attorney Gen.*, 120 F. Supp. 2d 451 (M.D. Pa. 2000). The *Blasi* court generally found that Pennsylvania’s attempt to remove itself was contrary to the exhaustion requirement of the federal habeas statute, which is interpreted by the federal courts, not state courts. See *id.* at 468-69. The court questioned whether a state court has the authority to waive the exhaustion requirement. See *id.* at 469. Nonetheless, the court upheld Pennsylvania’s attempt because of the language of *O’Sullivan*, see *supra* Part I, and because of the Ninth Circuit’s opinion in *Swoopes v. Sublett*, 196 F.3d 1008 (9th Cir. 1999) (*per curiam*), *cert. denied*, 120 S. Ct. 1996 (2000); see *infra* notes 62-74 and accompanying text. The *Blasi* court did not discuss the other factors analyzed in the balance of this Article, see *infra* Part III.

II. THE ATTEMPTS OF STATE SUPREME COURTS TO REMOVE THEMSELVES FROM THE EXHAUSTION REQUIREMENT

Arizona's decade-long experience provides insight into how a federal court may rule on a state supreme court's attempts to remove itself from the federal habeas requirement. After initially rejecting Arizona's attempt, the Ninth Circuit changed its course after *O'Sullivan*. The Pennsylvania Supreme Court's recent pronouncement that it is exempt from the habeas exhaustion requirement will provide a backdrop to discuss the various factors that should be considered when a federal court considers this issue.

A. *The Arizona Supreme Court's Perseverance and the Ninth Circuit's Eventual Acquiescence*

The Ninth Circuit has been the only circuit court to deal with this issue since *O'Sullivan*. Prior to *O'Sullivan*, the Arizona Supreme Court and the Ninth Circuit were engaged in a turf battle over whether petitions for review in the supreme court were necessary to exhaust prisoner claims in state court. Despite its ambiguity, *O'Sullivan* has changed the landscape in the Ninth Circuit.

The battle began in 1989, when the Arizona Supreme Court held in *State v. Sandon*³⁸ that state remedies had been exhausted after review by the Arizona Court of Appeals. In that case, Sandon argued twelve issues in his appeal to the court of appeals, Arizona's intermediate appellate court.³⁹ He then filed a petition in the Arizona Supreme Court requesting review on only three of the twelve issues.⁴⁰ The supreme court declined to exercise its discretionary jurisdiction to hear the case.⁴¹ Next, Sandon filed a federal habeas corpus petition, which was dismissed without prejudice because the federal court determined that the eight issues raised had not been presented to the Arizona Supreme Court, and thus had not been exhausted in state court.⁴² Consequently, Sandon returned to state court to attempt to present those claims to the Arizona Supreme Court.⁴³

The Arizona Supreme Court noted that all defendants in Arizona have a state constitutional right to an appeal.⁴⁴ Only defendants who have received the death penalty or life imprisonment have a right to appeal to the supreme court; review in all other cases is at the court's

³⁸ 777 P.2d 220 (Ariz. 1989) (en banc).

³⁹ See *id.* at 220.

⁴⁰ See *id.* The court characterized Sandon's choice of issues as "selecting three issues that he believed merited our consideration, and that were most likely to result in a grant of review." *Id.*

⁴¹ See *id.*

⁴² See *id.* at 221.

⁴³ See *id.*

⁴⁴ See *id.* (citing ARIZ. CONST. art. 2, § 24).

discretion.⁴⁵ The court, clearly stating its views on what constitutes exhaustion in the Arizona courts, said, “[o]nce the defendant has been given the appeal to which he has a right, state remedies have been exhausted.”⁴⁶ The court therefore dismissed the petition.⁴⁷

Despite the views of the Arizona Supreme Court, two years later in *Jennison v. Goldsmith*,⁴⁸ the Ninth Circuit held that exhaustion of state remedies was a question of federal law and could not be made by the state court. Jennison had not presented his claims to the Arizona Supreme Court before filing a federal habeas corpus petition.⁴⁹ The federal district court dismissed the petition because it found Jennison’s failure to present those issues to the supreme court rendered them unexhausted.⁵⁰ Jennison argued that under *Sandon* and its predecessor *State v. Shattuck*,⁵¹ review in the Arizona Supreme Court was unnecessary for exhaustion purposes.

The Ninth Circuit lectured the Arizona Supreme Court on the meaning of exhaustion: “The Arizona Supreme Court has confused review as of right under state law with ‘the right under the law of the state to raise’ an issue within the meaning of the federal habeas statute.”⁵² Even though Jennison did not have a right to have the supreme court hear his case, he did have a right to present all of his issues to the supreme court for it to consider whether to hear any of those issues.⁵³ Under the plain language of the habeas statute, the Ninth Circuit held that Jennison had not exhausted his state remedies because he still had the right to ask the supreme court to hear his case.⁵⁴ The court distinguished its holding from a scenario where a

⁴⁵ *See id.*

⁴⁶ *Id.* (quoting *State v. Shattuck*, 684 P.2d 154, 157 (Ariz. 1984)). The court also stated that when counsel has followed the state’s procedures, “the case in the Arizona courts is over” after review in the Court of Appeals. *Id.* The court continued: “The issues decided by the Court of Appeals, even though they had not been presented to this Court in a petition for review, are no longer open to substantive review in this Court or in any other court in Arizona State remedies have been exhausted.” *Id.*

⁴⁷ *See id.*

⁴⁸ 940 F.2d 1308 (9th Cir. 1991) (per curiam).

⁴⁹ *See id.* at 1309.

⁵⁰ *See id.*

⁵¹ 684 P.2d 154 (Ariz. 1984). *Shattuck* concerned the role of counsel in appeals when counsel files a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), which outlined the process for appointed counsel to follow when he or she could not find a meritorious issue to raise on appeal.

⁵² *Jennison*, 940 F.2d at 1310 (quoting 28 U.S.C. § 2254 (1988)); *see supra* text accompanying note 7 (quoting language of § 2254(c)).

⁵³ *See Jennison*, 940 F.2d at 1310.

⁵⁴ *See id.* at 1311. The court also said that Arizona’s rule would streamline the habeas process and it would lighten the caseload of the Arizona Supreme Court, which has limited resources and cannot consider petitions of all merely seeking to exhaust state remedies. *See id.* The court rejected these concerns because of comity considerations (the Arizona Supreme Court has a duty to protect federal constitutional rights) and the scarce resources of the federal judiciary that may be conserved by requiring a petition to the supreme court before federal court intervention. *See id.*

state supreme court declares that it will never exercise its discretionary review or that it has limited its discretion to “clearly defined situations not present in the case submitted to the federal court.”⁵⁵ Because these distinctions were not present in Arizona, Jennison had not exhausted his state court remedies.⁵⁶

In 1998, the Arizona Supreme Court revisited the issue in *Moreno v. Gonzalez*.⁵⁷ The Ninth Circuit had certified several questions for the Arizona Supreme Court to consider, among them whether a petition for review in the supreme court is an “appeal” under the Arizona Rules of Criminal Procedure.⁵⁸ The Arizona Supreme Court held that review in that court “is discretionary, not an appeal.”⁵⁹ Citing to *Sandon* and *Shattuck*, the court said that “[o]nce a defendant has exercised his right to direct appeal, further review in this court should ‘not be sought as a matter of course.’”⁶⁰ The court said that despite the Ninth Circuit’s holding in *Jennison*, it “would not have encouraged discretionary filings” by defining review in the supreme court as being included as part of the appeal as of right.⁶¹

The Ninth Circuit still seemed unmoved by the repeated attempts of the Arizona Supreme Court to remove itself from the federal exhaustion requirement.⁶² *O’Sullivan*, however, forced the Ninth Circuit to revisit this issue and ultimately to reverse itself in *Swoopes v. Sublett*.⁶³ Swoopes sought to raise six issues in his federal habeas petition; the Ninth Circuit affirmed the district court’s finding that all but one of the claims were unexhausted in the Arizona courts and were procedurally defaulted.⁶⁴ The United States Supreme Court granted certiorari, reversed, and remanded for further consideration in light of *O’Sullivan*.⁶⁵

On remand the Ninth Circuit noted that review still was “available” in the Arizona Supreme Court on these claims and this, at first

⁵⁵ *Id.* at 1312 n.7.

⁵⁶ *See id.* at 1312.

⁵⁷ 962 P.2d 205 (Ariz. 1998) (en banc).

⁵⁸ *See id.* at 206-07.

⁵⁹ *Id.* at 207.

⁶⁰ *Id.* at 207-08 (quoting ARIZ. R. CRIM. P. 31.19 cmt. to 1983 amend.). The court compared its discretionary review system to that of the United States Supreme Court. *See id.* at 208.

⁶¹ *Id.* at 208.

⁶² *See Swoopes v. Sublett*, No. 94-16033, 1998 WL 657711 (9th Cir. Sept. 3, 1998), *vacated*, 527 U.S. 1001 (1999), *on remand*, 196 F.3d 1008 (9th Cir. 1999) (per curiam), *cert. denied*, 120 S. Ct. 1996 (2000). In the initial *Swoopes* opinion, the Ninth Circuit, despite *Shattuck*, *Sandon*, and *Moreno*, found that Swoopes had not exhausted his state remedies when he failed to present his claim to the Arizona Supreme Court. *See id.* at *1.

⁶³ 196 F.3d 1008 (9th Cir. 1999) (per curiam), *cert. denied*, 120 S. Ct. 1996 (2000).

⁶⁴ *See id.* at 1008 n.1, 1008-09. Swoopes sought to raise these six issues in a variety of ways in Arizona courts. *See id.* at 1009. Relevant to this discussion, several claims were deemed to be unexhausted because they had not been presented to the Arizona Supreme Court. *See id.*

⁶⁵ *See Swoopes v. Sublett*, 527 U.S. 1001 (1999). The Court took this action one week after *O’Sullivan* was decided. *See id.*

blush, met the requirement of *O'Sullivan* that claims had to have been presented there first.⁶⁶ The Ninth Circuit, however, focused on the exhaustion exception announced in *O'Sullivan*. It turned to the Court's language that a remedy made unavailable by a state need not be exhausted,⁶⁷ though a system of discretionary review "without more" does not make review "unavailable."⁶⁸ In an attempt to discern the meaning of "without more," the Ninth Circuit turned to Justice Souter's concurrence and his suggestion that it means a state procedure identified by the state as being "outside [of] the standard review process and [that it] has plainly said . . . need not be sought for the purpose of exhaustion."⁶⁹ The court reasoned that Arizona had "plainly" characterized state supreme court review as outside of the standard review process in *Shattuck*, *Sandon*, and *Moreno*.⁷⁰ Because the Arizona Supreme Court had announced that discretionary review is unnecessary to exhaust state remedies, the court concluded that discretionary review "is a remedy that is 'unavailable' within the meaning of *O'Sullivan*."⁷¹ Noting that *O'Sullivan* requires a prisoner to "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process,"⁷² the Ninth Circuit credited the Arizona Supreme Court's assertion that its "complete round" does not include discretionary supreme court review.⁷³ Hence, *Jennison*'s inclusion of state supreme court review in its definition of exhaustion was overruled.⁷⁴

The Ninth Circuit has thus changed its position on the necessity of discretionary state supreme court review. Although it initially looked to the plain language of the habeas statute and found that "any available procedure" included discretionary review in a state supreme court, its new position is in line with Justice Souter's view that a state may explicitly remove a procedure from its standard review process and, hence, from the exhaustion requirement. The repeated declaration of the Arizona Supreme Court that its discretionary review is not

⁶⁶ See *Swoopes*, 196 F.3d at 1009-10 ("Although review before the Arizona Supreme Court is discretionary, it is 'available' under *O'Sullivan*; thus, at least facially, Arizona prisoners are not relieved of their duty to file an appeal with that court.").

⁶⁷ See *id.*

⁶⁸ *Id.* at 1009.

⁶⁹ *Id.* at 1009-10 (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 850 (1999) (Souter, J., concurring)).

⁷⁰ See *id.* at 1010.

⁷¹ *Id.*

⁷² *Id.* (quoting *O'Sullivan*, 526 U.S. at 845).

⁷³ See *id.* (citing *Moreno v. Gonzalez*, 962 P.2d 205, 207-08 (Ariz. 1998) (en banc)).

⁷⁴ See *id.* at 1011. The Ninth Circuit noted that *Jennison* was in accord with *O'Sullivan* to the extent that *Jennison* created a rule that the existence of a discretionary review procedure in and of itself does not render that procedure "unavailable." See *id.*

part of the state review procedures for habeas purposes has finally been accepted by the Ninth Circuit.

This decision by the Ninth Circuit, however, was far from a foregone conclusion. The court certainly could have read *O'Sullivan* to require state prisoners to file for discretionary review in the Arizona Supreme Court. Discretionary review before the supreme court still is "available," and *O'Sullivan* requires exhaustion of all "available" procedures that are part of a "complete round" of the state court system. Despite *Shattuck*, *Sandon*, and *Moreno*, discretionary review certainly could have been interpreted to be part of a complete round of the state system. Some defendants still raise federal constitutional issues when filing for review in the Arizona Supreme Court, and the court on discretionary review will decide federal constitutional issues.⁷⁵ For these prisoners, supreme court review is part of the "complete round" of Arizona's system.

The Ninth Circuit, consistent with *O'Sullivan*, could have held that an "unavailable" procedure would have to be literally unavailable for a particular prisoner or for particular unexhausted claims. This interpretation certainly can be supported by *O'Sullivan*, which requires "more" than the existence of a discretionary review system to render supreme court review unavailable.⁷⁶ A pronouncement by a state supreme court that it would prefer not to review claims merely for exhaustion purposes but would nonetheless consider these claims if presented with them does not make this procedure literally "unavailable."⁷⁷

Nonetheless, the Ninth Circuit eschewed a literal interpretation of "available" and instead focused on the comity rationale for the exhaustion requirement. More specifically, the court reasoned that

⁷⁵ See, e.g., *State v. Garcia-Contreras*, 953 P.2d 536, 538 (Ariz. 1998) (en banc) (holding, under the Fifth, Sixth, and Fourteenth Amendments to the federal Constitution, that a defendant has a right to be present at his or her own trial); *State v. Riggs*, 942 P.2d 1159, 1163 (Ariz. 1997) (en banc) (holding that the Sixth and Fourteenth Amendments to the federal Constitution guarantee the right to confront adverse witnesses).

⁷⁶ See *O'Sullivan*, 526 U.S. at 847-48; see also *supra* notes 24-26 and accompanying text for a discussion of this portion of *O'Sullivan*.

⁷⁷ Following this rationale, the Ninth Circuit could have reaffirmed its holding in *Jennison* in light of *O'Sullivan*. In *Jennison*, the court noted that discretionary supreme court review might be "unavailable" if the supreme court never exercised its discretion or if it articulated "clearly defined situations" when it would not exercise its discretion in the claims eventually presented to federal court. *Jennison v. Goldsmith*, 940 F.2d 1308, 1312 n.7 (1991) (per curiam). Because Arizona did not make the procedure literally unavailable, *O'Sullivan* could have been read as changing nothing in *Jennison*. Cf. *Swoopes v. Sublett*, 196 F.3d 1008, 1011 (9th Cir. 1999) ("Thus, to the extent that *Jennison* announced that the creation of a state discretionary review system does not itself make a remedy unavailable under federal habeas law, it is fully in accord with *O'Sullivan*.").

states should be permitted to regulate their criminal justice system with little direction from the federal courts.⁷⁸

The shift in Ninth Circuit law since *O'Sullivan* demonstrates the potential sea of change that *O'Sullivan* permits. Its holding points the direction for other state supreme courts to attempt to remove themselves from the exhaustion requirement.

B. The Pennsylvania Supreme Court's Attempt to Remove Itself from the Exhaustion Requirement

In the wake of *O'Sullivan*, the Pennsylvania Supreme Court issued an order expressing its view that supreme court discretionary review need not be sought to fulfill the exhaustion requirement for federal habeas corpus purposes.⁷⁹ In the first paragraph of the two-paragraph order, the court took judicial notice of the Pennsylvania process involving discretionary review before the Pennsylvania Supreme Court. The court stated:

we hereby recognize that the Superior Court of Pennsylvania reviews criminal as well as civil appeals. Further, review of a final order of the Superior Court is not a matter of right, but of sound judicial discretion, and an appeal to this Court will only be allowed when there are special and important reasons therefor. Further, we hereby recognize that criminal and post-conviction relief litigants have petitioned and do routinely petition this Court for allowance of appeal upon the Superior Court's denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus relief.⁸⁰

The court then indicated that neither defendants on direct appeal nor petitioners seeking post-conviction relief need to file a petition for allowance of appeal in the supreme court to exhaust Pennsylvania's

⁷⁸ The Ninth Circuit "[r]ecogniz[ed] that 'each state is entitled to formulate its own system of post-conviction relief, and ought to be able to administer that system free of federal interference.'" *Swoopes*, 196 F.3d at 1010 (quoting *Nino v. Galaza*, 183 F.3d 1003, 1007 (9th Cir. 1999)). This is a drastic change from *Jennison*, which held that "[p]etitioner's contention that the law of the state determines whether remedies are exhausted for federal habeas purposes is . . . misplaced. The state may prescribe what remedies are available to a prisoner . . . but federal law requires that any remedies made available by the state must be exhausted." *Jennison*, 940 F.2d at 1311 n.4.

⁷⁹ See *In re Exhaustion of State Remedies in Criminal and Post-Conviction Cases*, Order of the Sup. Ct. of Pa., Western District, No. 218 Jud. Admin., Docket No. 1 (May 9, 2000), reprinted in P.A. R. APP. P. 1114 publisher's note (West 2000) [hereinafter *Pennsylvania Exhaustion Order*].

⁸⁰ *Id.* (citation omitted).

remedies.⁸¹ A determination of a claim on the merits by the superior court suffices. The order continued:

In recognition of the above, we hereby declare that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing or allowance of appeal following an adverse decision by the Superior Court in order to be deemed to have exhausted all available state remedies respecting a claim of error. When a claim has been presented to the Superior Court, or to the Supreme Court of Pennsylvania, and relief has been denied in a final order, the litigant shall be deemed to have exhausted all available state remedies for purposes of federal habeas corpus relief.⁸²

This order, which is similar to both the South Carolina Supreme Court order cited in Justice Souter's concurrence and Justice Breyer's dissent in *O'Sullivan*⁸³ and the pronouncements of the Arizona Supreme Court, indicates the Pennsylvania Supreme Court's preference that it be removed from the state's exhaustion requirement. It does not make supreme court review technically "unavailable" for state prisoners or for specific claims but merely proclaims that, for purposes of federal habeas corpus, Pennsylvania's state court remedies are exhausted without discretionary review in the supreme court.

In Pennsylvania, defendants have a constitutional right to a direct appeal of a criminal conviction.⁸⁴ Review in the Pennsylvania Su-

⁸¹ *See id.*

⁸² *Id.*

⁸³ *See O'Sullivan v. Boerckel*, 526 U.S. 838, 847, 849, 864 (1999). In the two-paragraph order, the South Carolina Supreme Court took judicial notice of the state court appellate proceedings and then noted that, as far as it was concerned, a petition for review in the supreme court was unnecessary to exhaust South Carolina's remedies. *See Re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 471 S.E.2d 454 (S.C. 1990). That order reads as follows:

In 1979, the General Assembly created the South Carolina Court of Appeals for the purpose of reducing South Carolina's appellate backlog. The Court of Appeals reviews criminal as well as civil appeals, and this Court reviews its decisions by writ of certiorari only where special reasons justify the exercise of that power.

We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for writ of certiorari upon the Court of Appeals' denial of relief in order to exhaust all available state remedies. We therefore declare that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies. This order shall become effective immediately.

Id. (footnote omitted).

⁸⁴ *See PA. CONST.* art. V, § 9.

preme Court on most cases,⁸⁵ however, is at the court's discretion.⁸⁶ Comparing its discretion to that exercised by the United States Supreme Court in certiorari considerations,⁸⁷ the court has provided a list of nebulous criteria for deciding whether to grant allowance to appeal.⁸⁸ Nothing in these criteria provides any clear guidance about whether any particular issue may or may not be granted allowance to appeal or whether any particular defendant may be allowed to appeal to the supreme court.

Pennsylvania's post-conviction procedures allow a petitioner to file a petition in the trial court⁸⁹ and then an appeal to the superior court.⁹⁰ Review by the supreme court is discretionary.⁹¹ In post-conviction proceedings, a claim that already had been considered on direct appeal by the highest appellate court in which a defendant had a right to appeal is considered to have been "previously litigated."⁹²

⁸⁵ The court hears appeals as of right directly from the trial court in death penalty cases. See 42 PA. CONS. STAT. ANN. § 722(4) (West 1998); 42 PA. CONS. STAT. ANN. § 9711(h) (West 1998). On the other hand, the court does not have jurisdiction to hear appeals from superior court involving the discretionary aspect of a defendant's sentence. See 42 PA. CONS. STAT. ANN. § 9781(a) (West 1998).

⁸⁶ See PA. R. APP. P. 1114 ("[R]eview of a final order of the Superior Court . . . is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor."); see also *Commonwealth v. Byrd*, 657 A.2d 961, 962 (Pa. Super. Ct. 1995) (citing PA. R. APP. P. 1114).

⁸⁷ See PA. R. APP. P. 1114 note.

⁸⁸ See *id.* The court laid out criteria that, "while neither controlling nor fully measuring the discretion of the supreme court, indicate the character of the reasons which will be considered." *Id.* The criteria are (1) the issue is one of first impression in the supreme court; (2) the lower appellate court has decided a question "probably not in accord with applicable decisions" of either the Pennsylvania or the United States Supreme Courts; (3) the decision below conflicts with the other state appellate court on this same issue; (4) the supreme court must exercise its power to supervise the state courts to correct a decision of a lower court that "has so far departed from the accepted and usual course of judicial proceedings" that supreme court review is necessary; and (5) "the question involves an issue of immediate public importance" requiring the exercise of the court's "extraordinary jurisdiction." *Id.* The supreme court's internal operating procedures also list the first four reasons included in Rule 1114 and add an additional criterion that the issue involves the constitutionality of a state statute. PA. SUP. CT. INTERNAL OPERATING PROC. V(A).

⁸⁹ See 42 PA. CONS. STAT. ANN. § 9545(a) (1998) ("Original jurisdiction over a proceeding under this subchapter shall be in the court of common pleas."). See generally Post-Conviction Relief Act, 42 PA. CONS. STAT. ANN. §§ 9541-9546 (1998) (providing the sole post-conviction means of obtaining collateral relief for those innocent of the crimes for which they were convicted and those serving illegal sentences); PA. R. CRIM. P. 1500-1510 (enumerating rules governing the Post-Conviction Relief Act).

⁹⁰ See *Commonwealth v. Wells*, 719 A.2d 729, 731 (Pa. 1998) ("Appellant has a right of appeal if the PCRA court denies his petition."). Cf. *Commonwealth v. Albrecht*, 720 A.2d 693, 700 (Pa. 1998) ("After we recognized the existence, in this Commonwealth, of a right to effective post-conviction counsel, this court determined that counsel's deficient performance had, in effect, denied the petitioner the right of appeal guaranteed by Art. V, § 9 of the Pennsylvania Constitution.") (citing *Commonwealth v. Albert*, 561 A.2d 736, 738 (Pa. 1989)).

⁹¹ The exercise of discretion here is the same as that on direct appeal. See *supra* notes 86, 88. If the defendant is sentenced to death, however, the supreme court hears the post-conviction appeal instead of the superior court. See 42 PA. CONS. STAT. ANN. § 9546(d) (1998).

⁹² 42 PA. CONS. STAT. ANN. § 9544(a)(2) (1998); see also *Commonwealth v. Banks*, 656 A.2d 467, 469 (Pa. 1995) (discussing § 9544(a)(2)). On all but death penalty cases, the highest

These "previously litigated" claims may not be reheard in post-conviction proceedings.⁹³ For state-law purposes, therefore, a claim is final after the highest court to hear the case on its merits has ruled on it. Discretionary review in the supreme court is not necessary for a claim to be "previously litigated" and thus final in state court.⁹⁴

Thus, Pennsylvania offers defendants the right to twice have his or her case heard by superior court and to twice petition the supreme court for allowance to appeal. For state law purposes, individual issues, however, are final after one presentation to superior court and without having ever been presented to the supreme court. Therefore, if the Pennsylvania Exhaustion Order is given effect, presenting an issue once to superior court either on direct appeal or in a post-conviction posture will render the issue final for purposes of federal habeas review. The post-*O'Sullivan* question is whether federal courts will ultimately honor the Pennsylvania Exhaustion Order and other state courts' attempts to reach the same end.

III. THE INTERESTS OF FEDERAL COURTS, STATE COURTS, AND PRISONERS

Whether these and other attempts by state supreme courts to remove themselves from the federal habeas exhaustion loop will be honored in federal court is an open question.⁹⁵ In answering that

appellate court in which a defendant has a right to appeal is the superior court. See 42 PA. CONS. STAT. ANN. § 9711 (1998); PA. R. APP. P. 1114.

⁹³ See 42 PA. CONS. STAT. ANN. § 9543(a)(3) (1998) ("To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence . . . [t]hat the allegation of error has not been previously litigated . . ."); cf. *Commonwealth v. Albrecht*, 720 A.2d 693, 703 (Pa. 1998) ("The requirement that a claim for PCRA relief not be previously litigated would be rendered a nullity if this court could be compelled to revisit every issue decided on direct appeal upon the bald assertion that that decision was erroneous.").

⁹⁴ See *Commonwealth v. Bond*, 630 A.2d 1281, 1282 (Pa. Super. Ct. 1993). *Bond* held that claims raised in the post-conviction petition had been "discussed thoroughly" by superior court on direct appeal; "[t]he issues are therefore 'finally litigated' and not subject to further review." *Id.* Implicitly, no supreme court review was necessary for the claims to be "finally litigated." See also *Commonwealth v. Hutchins*, 760 A.2d 50, 54-55 (Pa. Super. Ct. 2000) (noting that even though the prisoner did not file a timely petition for allowance to appeal in the Pennsylvania Supreme Court, the issues raised on direct appeal to superior court were previously litigated and not open to review in a post-conviction posture).

⁹⁵ Four members of the *O'Sullivan* Court (Justice Souter concurring and the three dissenters) noted that the court left this question open. Justice Souter stated:

I understand the Court to have left open the question (not directly implicated by this case) whether we should construe the exhaustion doctrine to force a State, in effect, to rule on discretionary review applications when the State has made it plain that it does not wish to require such applications before its petitioners may seek federal habeas relief.

. . . .

[W]e leave open the possibility that a state prisoner is likewise free to skip a procedure even when a state court has occasionally employed it to provide relief, so long as the State has identified the procedure as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion.

question, several factors should be considered: whether the language of the federal habeas statute should be read to allow this exception to the exhaustion requirement; whether the policies behind the exhaustion requirement—especially the comity interests that underlie the doctrine—are being furthered or hindered by this rule; and how the various and sometimes competing interests of federal courts, state courts, and habeas prisoners balance in relation to each other.

A. *The Language and Interpretation of the Federal Habeas Corpus Statute*

The starting point in this analysis, of course, is the language of the habeas statute.⁹⁶ Federal courts, not state courts, control the interpretation and meaning of this statutory language.⁹⁷ Bold assertions like that of the Pennsylvania Supreme Court, that “the litigant shall be deemed to have exhausted all available state remedies for purposes of federal habeas corpus relief,”⁹⁸ are meaningless if the federal courts choose to ignore them. Prior to *O’Sullivan*, the Ninth Circuit did just this in ignoring the Arizona Supreme Court’s first attempt to remove itself from the exhaustion requirement.⁹⁹

The federal habeas statute clearly requires exhaustion of all available state remedies.¹⁰⁰ Application for discretionary review is an available state remedy.¹⁰¹ None of the state supreme courts that have tried to remove themselves from the exhaustion requirement have made discretionary review unavailable to those presenting federal constitutional claims that might be presented to a federal habeas court.¹⁰²

O’Sullivan v. Boerckel, 526 U.S. 838, 849-50 (1999) (Souter, J., concurring). See also *id.* at 864 (Breyer, J., dissenting) (noting that “the majority has left the matter open” as to whether Justice Souter’s approach should be adopted or even whether a presumption should be created that supreme court discretionary review is unnecessary unless a state declares that it wishes to have the opportunity to review claims before presentation to federal court).

⁹⁶ See, e.g., *Williams v. Taylor*, 529 U.S. 420, 429-30 (2000) (beginning its analysis by quoting and examining the language of the federal habeas statute).

⁹⁷ See, e.g., *Swoopes v. Sublett*, 196 F.3d 1008, 1011 (9th Cir. 1999) (per curiam) (“[T]he exhaustion doctrine is a matter of federal law . . .”), *cert. denied*, 120 S. Ct. 1996 (2000).

⁹⁸ *Pennsylvania Exhaustion Order*, *supra* note 79.

⁹⁹ See *supra* Part II.A.

¹⁰⁰ See 28 U.S.C. § 2254(c) (1994) (“An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.”).

¹⁰¹ See *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

¹⁰² See *State v. Sandon*, 777 P.2d 220, 221 (Ariz. 1989) (en banc) (finding that supreme court review is only mandatory in cases involving death penalty or life imprisonment, otherwise appeals are exhausted at the intermediate appellate court level); *Pennsylvania Exhaustion Order*, *supra* note 79 (stating that discretionary review is not unavailable but not necessary to exhaust state remedies); *Re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 471 S.E. 2d 454 (S.C. 1990) (holding that appeal to the South Carolina Supreme Court is not necessary to have exhausted all state remedies).

If federal courts are unwilling to find that discretionary review in a supreme court is "unavailable" simply because of the language of the habeas statute, the resolution of this open question is easy. The statute requires exhaustion of any remedy that a state prisoner has "the right . . . to raise."¹⁰³ As the *O'Sullivan* Court noted, a prisoner has the right to raise these issues in the state supreme court regardless of any right to have the issues actually heard.¹⁰⁴ Following the strict language of the habeas statute and the narrow holding of *O'Sullivan*, the state supreme court rules have no effect.

The Supreme Court, however, has never strictly read the habeas statute to require every conceivable, and hence "available," state remedy when these remedies are ineffectual¹⁰⁵ or when they frustrate the ability to ever exhaust state court remedies.¹⁰⁶ The Court has repeatedly reiterated this principle in fairly broad terms.¹⁰⁷ The *O'Sullivan* Court, though holding that discretionary review was an available remedy that must be pursued, did say that "a discretionary review system does not, without more, make review . . . unavailable."¹⁰⁸ This language also seems to indicate a willingness to bend the definition of "available" if something "more" exists in the state's rules.

In Arizona, Pennsylvania, and South Carolina, the something "more" is the clear pronouncement that the state supreme courts do not want the opportunity to review cases before federal courts entertain federal habeas petitions. Because "available" sometimes can mean that technically available options can be bypassed, the habeas statute is not dispositive in this situation.¹⁰⁹ The proviso in *O'Sullivan* that a federal court must honor a state rule making a given

To make the procedure technically unavailable, the Pennsylvania Exhaustion Order, for example, could have said "we hereby declare that in all appeals from criminal convictions or post-conviction relief matters, this Court will not review claims that the conviction violated the United States Constitution." Had the court limited its jurisdiction in this way, a state prisoner would have exhausted his or her remedies by appealing to superior court not because the Pennsylvania Supreme Court said so, but because "there is an absence of available State corrective process." 28 U.S.C. §2254(b)(1)(B)(i) (Supp. IV 1998).

¹⁰³ 28 U.S.C. § 2254(c).

¹⁰⁴ See *O'Sullivan*, 526 U.S. at 845.

¹⁰⁵ See *Wilwording v. Swenson*, 404 U.S. 249, 249-50 (1971) (per curiam) (holding that petitioner exhausted available state remedies despite his failure to pursue alternate remedies to state habeas).

¹⁰⁶ See *Brown v. Allen*, 344 U.S. 443, 447 (1953) (holding that repetitive petitions containing arguments already decided in state courts are not necessary because the state procedures otherwise would be non-exhaustible).

¹⁰⁷ See, e.g., *O'Sullivan*, 526 U.S. at 844 ("Although this language [of §2254(c)] could be read to effectively foreclose habeas review by requiring a state prisoner to invoke *any possible* avenue of state court review, we have never interpreted the exhaustion requirement in such a restrictive fashion.") (citing *Wilwording*, 404 U.S. at 249-50).

¹⁰⁸ *Id.* at 848.

¹⁰⁹ See Charles F. Baird, *The Habeas Corpus Revolution: A New Role for State Courts?*, 27 ST. MARY'S L.J. 297, 299 (1996) ("The scope of the writ of habeas corpus has been defined more by judicial decision than by statute.") (citing *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977)).

procedure unavailable¹¹⁰ mandates a federal court inquiry when a state has created a rule that proclaims that a procedure is “unavailable.”

For example, the Pennsylvania Exhaustion Order says “a litigant shall not be required to petition for rehearing or allowance of appeal following an adverse decision by the Superior Court in order to be deemed to have exhausted all available state remedies respecting a claim of error.”¹¹¹ This is clearly an attempt to make the procedure not necessary for habeas corpus proceedings. It also still leaves discretionary review available for those who choose to seek it.¹¹² The question facing the federal courts is whether “not necessary” should be equated with “unavailable.”

Assuming that “available” is a flexible enough concept to allow exhaustion when something “more” exists in state rules, the focus of the inquiry should then turn to whether the exhaustion doctrine and the comity interests that underly it are served when a state supreme court attempts to remove its discretionary review from the exhaustion requirement. At least four Supreme Court Justices appear willing to look beyond the strict wording of the habeas statute and instead to decide the issue based upon the policies underlying the exhaustion doctrine and its comity concerns.¹¹³

B. *The Exhaustion Doctrine and Comity*

The primary reason for the creation of the exhaustion requirement was concerns over comity,¹¹⁴ which “teaches that one court

¹¹⁰ See *O’Sullivan*, 526 U.S. at 847-48.

¹¹¹ Pennsylvania Exhaustion Order, *supra* note 79.

¹¹² See *Blasi v. Attorney Gen.*, 120 F. Supp. 2d 451, 464-69 (M.D. Pa. 2000) (discussing that a petitioner may, but need not, seek discretionary review).

¹¹³ Concurring in *O’Sullivan*, Justice Souter commented that

I understand that we leave open the possibility that a state prisoner is likewise free to skip a procedure even when a state court has occasionally employed it to provide relief, so long as the State has identified the procedure as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion. It is not obvious that either comity or precedent requires otherwise.

O’Sullivan, 526 U.S. at 850 (Souter, J., concurring). In a dissent joined by Justices Ginsburg and Breyer, Justice Stevens stated: “I agree with Justice Souter . . . that a proper conception of comity obviously requires deference to such a policy [i.e., that states ‘do not wish the opportunity to review such claims before they pass into the federal system’].” *Id.* at 861-62 (Stevens, J., dissenting) (citation omitted). In a dissent joined by Justices Stevens and Ginsburg, Justice Breyer stated:

In my view, whether a state prisoner (who failed to seek discretionary review in a state supreme court) can seek federal habeas relief depends upon the State’s own preference. If the State does not want the prisoner to seek discretionary state review (or if it does not care), why should that failure matter to federal habeas law?

Id. at 862 (Breyer, J., dissenting) (citation omitted).

¹¹⁴ See *Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (“[The] exhaustion requirement is also grounded in principles of comity”); *Rose v. Lundy*, 455 U.S. 509, 515 (1982) (“[C]omity was the basis for the exhaustion doctrine”); see also LARRY W. YACKLE,

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."¹¹⁵ Comity avoids the "unseemly" result of having a federal court overturn a state conviction without first giving the state the opportunity to correct a constitutional violation,¹¹⁶ and this, in turn, "reduces the 'inevitable friction'" that results from the federal court overturning a state conviction.¹¹⁷

Comity also entails a "proper respect for state functions."¹¹⁸ This is embodied by a federal court respecting state procedural

POSTCONVICTION REMEDIES 236 (1981) ("The judicially-developed exhaustion doctrine is founded on the notion of 'comity' . . .").

The related concept of federalism is also sometimes discussed in habeas cases. See *Williams v. Taylor*, 529 U.S. 420, 436-37 (2000) (holding that the purpose of the Antiterrorism and Effective Death Penalty Act of 1996 "[is] to further the principles of comity, finality, and federalism"); *Coleman*, 501 U.S. at 726 ("This is a case about federalism."). Comity as part of the exhaustion doctrine, however, "express[es] federalism by deference to the sovereign interest of a state." Norlynn Blocker, Comment, *An Exercise in Comity: Exhaustion of State Remedies in Federal Habeas Corpus Proceedings*, 35 BAYLOR L. REV. 497, 506 (1983) (alteration in original) (quoting *Felder v. Estelle*, 693 F.2d 549, 554 (5th Cir. 1982)). Because of the interconnectedness and even interchangeability of these two concepts, this Article concentrates on the comity aspects of the exhaustion doctrine.

¹¹⁵ *Darr v. Burford*, 339 U.S. 200, 204 (1950), *overruled in part by* *Fay v. Noia*, 372 U.S. 391 (1963); see also *supra* note 12 (discussing the *O'Sullivan* Court's summary of its comity jurisprudence). Comity originally was a concept developed for international law and imported into habeas law in the nineteenth century. See YACKLE, *supra* note 114, at 236. In the international setting, comity suggests that the law of one sovereign nation should be given force within the dominion of another. See *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (stating that comity is one nation's recognition, within its own borders, of another nation's laws for the purpose of resolving international disputes).

This concept, however, does not entirely fit within a federal system. Because of the supremacy clause of the United States Constitution, U.S. CONST. art. VI, § 2, cl. 2, "federal law operates of its own force upon and within the states and does not depend upon the willingness of state authorities to accept it." YACKLE, *supra* note 114, at 236. Instead, comity in habeas cases represents "a view that the federal government should respect state proceedings in the same way that one nation would respect the judicial proceedings of another." Note, *The Federal Interest Approach to State Waiver of the Exhaustion Requirement in Federal Habeas Corpus*, 97 HARV. L. REV. 511, 513 (1983) (footnote omitted).

Consequently, as a policy decision to ease the workings of the federal system, the federal judiciary agreed to withhold its power to hear habeas cases until the states had been given an opportunity first to rule on the constitutional claims. See *Picard v. Connor*, 404 U.S. 270, 275 (1971) ("The exhaustion-of-state-remedies doctrine . . . reflects a policy of federal-state comity, 'an accommodation of our federal system designed to give the State the initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights.'" (footnote and citations omitted) (quoting *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971))). The Supreme Court first articulated the term "comity" in a habeas case in *Ex parte Royall*, 117 U.S. 241, 252 (1886). See *Wainwright v. Sykes*, 433 U.S. 72, 80 (1977).

¹¹⁶ See *Darr*, 339 U.S. at 204.

¹¹⁷ *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992) (quoting *Sumner v. Mata*, 449 U.S. 539, 550 (1981)).

¹¹⁸ *Younger v. Harris*, 401 U.S. 37, 44 (1971). *Younger* was not a habeas case, but instead concerned whether a federal court could restrain a state from continuing with an ongoing criminal prosecution. See *id.* at 40-41. The *Younger* Court based its decision largely on grounds of comity and federalism, however. See *id.* at 43-54 (discussing that principles of comity and federalism form the basis of the historic public policy against federal court intervention in state

rules.¹¹⁹ Further, comity advises the courts of one jurisdiction to give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect.¹²⁰

Thus, as a general statement, comity requires a state prisoner first to present his or her claims to state court before a federal court can consider the issue. In *O'Sullivan*, the Court, relying largely upon the doctrine of comity, determined that exhausting the claim in state court included a trip through the state supreme court.¹²¹ The post-*O'Sullivan* questions, though, are whether comity still requires presentation of issues to the state supreme court when that court has affirmatively stated that it does not want to be included in the exhaustion requirement and whether comity suggests that a federal court must honor the state's rule that discretionary review is unnecessary to exhaust the state's remedies.¹²²

If the comity doctrine is intended to protect a state from "unseemly" intervention that will cause friction between the federal and state systems, its principles are not served when a state supreme court does not care if a federal court intervenes without it first being given the opportunity to rule on the claims. A state could not be heard to complain that one of its prisoners did not file for discretionary review in the state supreme court when the state explicitly has said that it did not want this opportunity to review the claim.¹²³ No friction can result in this situation.¹²⁴

court proceedings); cf. Lawrence S. Hirsh, Note, *State Waiver of the Exhaustion Requirement in Habeas Corpus Cases*, 52 GEO. WASH. L. REV. 419, 425-27 (1984) (discussing how the *Younger* definition of comity has been used in habeas cases). Even though *Younger* was not a habeas case, it has been cited with favor in habeas cases. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 746 (1991); *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 491 (1973).

¹¹⁹ See *Coleman*, 501 U.S. at 726 ("[This case] concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus."); cf. *Williams v. Taylor*, 529 U.S. 420, 436 (2000) ("In keeping this delicate balance [between the states and federal courts], we have been careful . . . to safeguard the States' interest in the integrity of their criminal and collateral proceedings.")

¹²⁰ See *Rose v. Lundy*, 455 U.S. 509, 518 (1982).

¹²¹ See *O'Sullivan v. Boerckel*, 526 U.S. 838, 845-46 (1999). The Court required "one full opportunity" for the state to review the conviction, which includes presenting any claim to be raised in federal court first to the state supreme court. See *id.* at 845.

¹²² Justices Breyer, Ginsburg, Souter, and Stevens agreed that the Court left this question open. See *supra* note 95.

¹²³ Cf. *Ohio Bureau of Employment Serv. v. Hodory*, 431 U.S. 471, 480 (1977) ("If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system.")

¹²⁴ The solution suggested by Justice Breyer's *O'Sullivan* dissent—that state supreme court review is unnecessary for exhaustion purposes unless the state has affirmatively indicated that it wanted the opportunity to review the claims—falls short on this count. See *O'Sullivan*, 526 U.S. at 862-64 (Breyer, J., dissenting). Comity still requires that the state supreme court be given an opportunity to pass on the claim before a prisoner can turn to federal court unless the court has made an affirmative statement that discretionary review is unnecessary. That a supreme court exercises its discretion infrequently does not mean that it is insensitive to federal court intervention when it may have corrected the problem if it had been presented with it first.

Not only is comity not furthered in this situation, its principles may actually be hindered. The *O'Sullivan* majority implicitly recognized this. The Court said that "[the petitioner] may be correct that the increased, unwelcome burden on state supreme courts disserves the comity interests underlying the exhaustion doctrine."¹²⁵ The Court then allowed that a state rule making a remedy unavailable must be honored by a federal court.¹²⁶ In other words, the states may relieve this "unwelcome burden" by creating a rule that a particular procedure is "unavailable."¹²⁷ In this situation, comity would suggest that the rule be followed.¹²⁸

If comity, then, is understood to mean that federal courts should respect a state court's rule that it is satisfied with its opportunity to review a conviction without discretionary review, federal courts should respect that state court's wish to be removed from the exhaustion requirement. Also, comity is not frustrated when a state declares that it does not care if a federal court intervenes without discretionary supreme court review.

C. Full and Fair Opportunity for a State to Consider a Fairly Presented Claim

The *O'Sullivan* Court noted that the habeas statute and the exhaustion doctrine require the prisoner to give the state courts a "full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts."¹²⁹ The Court then determined that "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."¹³⁰ The Supreme Court has repeatedly held that claims must be "fairly presented" to state courts and that states must be given a full and fair opportunity to resolve the issue before the prisoner can resort to a federal court.¹³¹

See id. at 845-46 (arguing that "comity interests that drive the exhaustion doctrine" are served by giving the state courts "one complete round" of established review, which includes discretionary supreme court review).

¹²⁵ *Id.* at 847. In an earlier case, Justice Blackmun similarly wondered whether comity was served by forcing state court review of meritless claims solely for the sake of exhaustion. In his concurrence in *Rose v. Lundy*, Justice Blackmun said this policy "appears more destructive than solicitous of federal-state comity." *Rose v. Lundy*, 455 U.S. 509, 525 (1982) (Blackmun, J., concurring).

¹²⁶ *See O'Sullivan*, 526 U.S. at 847-48.

¹²⁷ Whether a particular rule makes the procedure "unavailable" within the meaning of the habeas statute also must be addressed by the federal court. *See supra* Part III.A.

¹²⁸ *See O'Sullivan*, 526 U.S. at 847-48.

¹²⁹ *Id.* at 845.

¹³⁰ *Id.*

¹³¹ *See Picard v. Connor*, 404 U.S. 270, 275 (1971) ("[O]nce the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied."); *see also Duncan v.*

The reason for this requirement is that it gives the state the first opportunity to rule on the issue.¹³² This furthers the exhaustion doctrine and its comity concerns.¹³³ Once the state courts have had a full and fair opportunity to consider a fairly presented claim, the claim is exhausted and comity is not offended by federal court review.

The *O'Sullivan* Court held that the exhaustion doctrine required discretionary review through the state supreme court for a full and fair opportunity to resolve the claims.¹³⁴ When a state supreme court tries to remove itself from the exhaustion requirement, however, the question becomes whether discretionary review is still necessary for the state to be given a full and fair opportunity to review the claim.¹³⁵

If a state supreme court has explicitly attempted to excuse itself from the exhaustion requirement, the federal court should ask whether the existing state procedures without discretionary review can be deemed to be a "full and fair opportunity" for the state to review the claims. If the state supreme court believes that discretionary review is not necessary, that court must believe that the state's courts have had a full and fair opportunity to rule on the claim. Further evidence of whether the state has had a full and fair opportunity would be provided if the state's own procedures define an issue to be finally litigated without discretionary review by the supreme court.¹³⁶ If the state has taken these two steps, it has, in effect, "identified the procedure as outside the standard review process."¹³⁷ This should lead to the conclusion that the state has had a full and fair opportunity to review the claims.

The next question is whether submitting a claim only to the intermediate appellate court "fairly presents" the claim to the state

Henry, 513 U.S. 364, 365 (1995) (per curiam) ("[E]xhaustion of state remedies requires that petitioners 'fairly present[] federal claims to the state courts in order to give the State the 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights.'" (second alteration in original) (some internal quotation marks omitted in original) (citing *Picard*, 404 U.S. at 275); *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam) ("[T]he habeas petitioner must have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim.") (citations omitted); cf. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992) ("Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits.") (citing *Picard*, 404 U.S. at 275); *Castille v. Peoples*, 489 U.S. 346, 351 (1989) (holding that presenting an issue for the first and only time in state supreme court discretionary review is not "fair presentation").

¹³² See *Picard*, 404 U.S. at 275 (noting that the exhaustion doctrine requires that the state should have the initial opportunity to rule upon the issues).

¹³³ See *id.* (noting that this "reflects a policy of federal-state comity").

¹³⁴ See *O'Sullivan*, 526 U.S. at 845-46.

¹³⁵ Several members of the Court agreed that *O'Sullivan* left this question open. See *supra* note 95.

¹³⁶ See *supra* notes 92-94 and accompanying text.

¹³⁷ *O'Sullivan*, 526 U.S. at 850 (Souter, J., concurring); see also *id.* at 845 (requiring that a prisoner "invok[e] one complete round of the State's established appellate review process").

courts.¹³⁸ The Supreme Court has said that offering a claim for the first and only time in a petition for discretionary review with the state supreme court is not a fair presentation.¹³⁹ This is because the claim will be considered on its merits only when, in that case, "there are special and important reasons therefor."¹⁴⁰ When a state intermediate appellate court has considered a claim on its merits in an appeal and when the state supreme court has indicated that discretionary review is not necessary, presenting the claim only to the intermediate appellate court should be sufficient for the claim to be "fairly presented" to the state court.

If the state supreme court has not affirmatively stated that its review is unnecessary for exhaustion purposes or if the state's procedures otherwise require discretionary review before a claim is considered to be final, the state has not had a full and fair opportunity to review the claim without discretionary review. In this situation, nothing has removed discretionary review from the state's standard review process and discretionary review still is part of the "one complete round of the State's established appellate review process" required by *O'Sullivan*.¹⁴¹

D. A State Supreme Court's Role as the Supervisor of the Development of Federal Constitutional Law Within the State

Allowing state supreme courts to remove themselves from the exhaustion requirement could have the effect of removing supreme courts from their role to supervise the development of law within their states.¹⁴² If every prisoner on appeal chose to bypass the state supreme court and to proceed directly to federal court, this could be a potential concern.

Not every prisoner, however, will choose this route. Most prisoners with a strong or novel constitutional claim will not bypass an opportunity for relief in the state supreme court,¹⁴³ especially when

¹³⁸ If a claim has been "fairly presented" to the state courts, the exhaustion requirement has been satisfied. See *Picard v. Connor*, 404 U.S. 270, 275 (1971).

¹³⁹ See *Castille v. Peoples*, 489 U.S. 346, 351 (1988).

¹⁴⁰ *Id.* (quoting PA. R. APP. P. 1114).

¹⁴¹ *O'Sullivan*, 526 U.S. at 845.

¹⁴² See Laura S. Schnell, Comment, *State Waiver and Forfeiture of the Exhaustion Requirement in Habeas Corpus Actions*, 50 U. CHI. L. REV. 354, 365 (1983) ("[T]he exhaustion requirement allows state high courts to supervise their lower courts and create a coherent body of state law and state interpretation of constitutional law.").

¹⁴³ See R. Stephen Painter, Jr., Note, *O'Sullivan v. Boerckel and the Default of State Prisoners' Federal Claims: Comity or Tragedy?*, 78 N.C. L. REV. 1604, 1635 (2000) (explaining the reasons that a prisoner would pursue relief in state supreme court); see also *Wainwright v. Sykes*, 433 U.S. 72, 103 (1977) (Brennan, J., dissenting) ("In the ordinary case, litigants simply have no incentive to slight the state tribunal, since constitutional adjudication of the state and federal levels are not mutually exclusive."). Peter Sessions has argued:

that relief would be delivered more quickly than by a trip through federal court, and when relief is granted more often on direct review rather than in a habeas proceeding.¹⁴⁴ Furthermore, with the federal courts erecting procedural bars to relief in state courts, the state court has become the best hope for relief for a state prisoner.¹⁴⁵ Prisoners with garden-variety constitutional claims may choose not to present those claims to the supreme court. The supreme court, though, would accept few of these cases in any event.¹⁴⁶

Furthermore, a federal habeas court is not permitted to create a new rule of constitutional law.¹⁴⁷ If a prisoner is seeking to change a principle of constitutional law, he or she must pursue that claim in state courts or in the United States Supreme Court on direct review from a state court judgment. Moreover, a novel claim like this is precisely the kind of claim on which a state supreme court would be more likely to grant review. Prisoners in this position will thus continue to seek review in the state supreme courts.

Prisoners who have a realistic chance of being granted discretionary review will likely file with the state supreme court and therefore that court will continue to supervise the development of federal

[D]efendants and their attorneys know full well that objections made at trial and on direct appeal are far more likely to succeed than those made in a federal habeas corpus petition. The sandbag theory not only presupposes that defendants and their attorneys willingly adopt extremely risky legal strategies when less risky alternatives are available, but it also presupposes that defendants are willing to spend several years in prison to test those strategies. These assumptions simply are not tenable.

Peter Sessions, *Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners*, 70 S. CAL. L. REV. 1513, 1546 (1997) (footnote omitted).

¹⁴⁴ See Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 894 (1984) (discussing the infrequency with which relief is granted in federal habeas proceedings).

¹⁴⁵ See Baird, *supra* note 109, at 338 (discussing the limitations placed on federal judges when dealing with state prisoners).

¹⁴⁶ Supreme courts with discretionary review typically accept cases with broad application or novel issues, not garden-variety constitutional claims. See *infra* note 157 and accompanying text; see also ROBERT L. STERN, *APPELLATE PRACTICE IN THE UNITED STATES* § 6.7(c), at 156-59 (2d ed. 1989) (collecting standards of review for granting discretionary review from various states' highest courts).

¹⁴⁷ The relevant portion of the habeas statute reads:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States

28 U.S.C. § 2254(d)(1) (Supp. IV 1998); see also *Teague v. Lane*, 489 U.S. 288, 310, (1989) (stating that new constitutional rules of criminal procedure will not be announced or applied on collateral review); *Williams v. Taylor*, 529 U.S. 362, 380 (2000) (noting that § 2254(d)(1) codifies the rule of *Teague v. Lane*).

constitutional law in virtually the same manner as now.¹⁴⁸ Allowing a prisoner to skip supreme court discretionary review—especially when most of those prisoners skipping will have virtually no chance of being granted review—will have little, if any, impact on a state's development of federal constitutional issues.

E. Finality of the Conviction or Quicker Relief for the Prisoner

Both the state and the prisoner have an interest in a quicker ultimate resolution of the case.¹⁴⁹ The state has an interest in securing the finality of its judgments.¹⁵⁰ This is expressed in both the desire to reach a final judgment that, absent extraordinary considerations, is no longer open to further review¹⁵¹ and one that is reached expeditiously.¹⁵² On the other hand, prisoners have an interest in receiving relief as quickly as possible.¹⁵³

Rather than being undercut, the principle of finality is advanced by skipping discretionary review by the state supreme court. A run through the state's direct appeal process, its post-conviction procedures, and federal habeas review will be completed months and conceivably years sooner without one, or more probably two, mandatory

¹⁴⁸ Cf. *supra* note 75 and accompanying text (noting that the Arizona Supreme Court accepts discretionary review on some cases even though it is of the opinion that state remedies are exhausted after consideration by the intermediate appellate court).

¹⁴⁹ See *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) ("Neither innocence nor just punishment can be vindicated until the final judgement is known."); *Sanders v. United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting) ("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 . . . on whether the prisoner can be restored to a useful place in the community.").

¹⁵⁰ See generally *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998) (detailing the state's interests in the finality of a judgment). But cf. *Lockhart v. Fretwell*, 506 U.S. 364, 373 (1993) ("A federal habeas petitioner has no interest in the finality of the state-court judgment under which he is incarcerated: Indeed, the very purpose of his habeas petition is to overturn that judgment.").

¹⁵¹ See *McCleskey*, 499 U.S. at 490-96 (requiring that, because of the importance of finality, a claim must be properly presented—that is, not procedurally defaulted—in state court to be considered in a federal habeas petition; if it has been defaulted, the federal court may only entertain a habeas petition in "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime").

¹⁵² Cf. *O'Sullivan v. Boerckel*, 526 U.S. 838, 863 (1999) (Breyer, J., dissenting) (arguing that requiring unwanted discretionary review in state supreme courts "will add to the burdens of already over-burdened state courts and delay further a criminal process that is often criticized for too much delay"); *Hohn v. United States*, 524 U.S. 236, 264-65 (1998) (Scalia, J., dissenting) (complaining about "interminable delays in the execution of state and federal criminal sentences . . . produced by various aspects of [the Supreme] Court's habeas corpus jurisprudence"). If speeding claims to and through federal court were the sole federal concern, however, the best way to achieve this would be to eliminate the exhaustion requirement altogether. See *Schnell*, *supra* note 142, at 369.

¹⁵³ See *Rose v. Lundy*, 455 U.S. 509, 520 (1982) ("The prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims."); *Sessions*, *supra* note 143, at 1546-47 ("Petitioners almost always want a speedy resolution to their claims; in some cases it may mean freedom from their incarceration.") (footnote omitted).

filings in the state supreme court. Also, a prisoner's capacity to file multiple habeas corpus petitions is unaffected by a state not requiring him or her to file a petition for discretionary review.

Another finality-related concern is that a retrial may become difficult or impossible if a federal court grants relief in the distant future because memories fade, witnesses disappear, and evidence is lost or destroyed.¹⁵⁴ Because federal habeas relief would be granted sooner without the added delay of discretionary review in the state supreme court, the effects of this problem are lessened.

A final finality-related consideration is that the writ of habeas corpus, by its very nature, upsets an otherwise final state court judgment.¹⁵⁵ Habeas law has developed to minimize this federal intervention and to allow it only when a state court first has had an opportunity to review a conviction.¹⁵⁶ When a state has defined its own procedures to declare a judgment final without supreme court review, and its supreme court has said that it does not want the opportunity to review a conviction before review in federal court, finality concerns are not implicated by federal review. In this situation, a federal court issuing the writ of habeas corpus is no more intrusive than if it issues the writ after discretionary review has been sought and denied.

F. Effective Appellate Advocacy in a Petition for Discretionary Review

Aside from the preceding considerations, requiring petitioners to raise all issues in the state supreme court does not reflect the way appellate law is or should be practiced. When the intermediate appellate court denies relief, the defendant must determine which issues are likely to catch the supreme court's attention. A court with discretionary jurisdiction is going to accept claims that have broader impact and that are not highly fact-sensitive. A defendant who is the victim of a bad opinion from the intermediate court on a garden-variety issue is

¹⁵⁴ See *McCleskey*, 499 U.S. at 491 (“[W]hen a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication.”) (internal quotation marks and citation omitted).

¹⁵⁵ See *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 7 (1992) (“The writ strikes at finality of a state criminal conviction, a matter of particular importance in a federal system.”); *McCleskey*, 499 U.S. at 491 (“To begin with, the writ strikes at finality.”).

¹⁵⁶ See *Painter*, *supra* note 143, at 1624. *Painter* argues:

The case law on exhaustion, then, reveals a doctrine of deference on the part of the federal district courts intended to serve federalism and comity interests. By deferring to state proceedings, the federal courts give the state courts the first chance to enforce federal law. The exhaustion requirement also prevents a single federal judge from interfering with the normal course of review of state criminal judgments.

Id.

unlikely to find solace in the supreme court.¹⁵⁷ More fundamentally, the issues decided by the intermediate court dictate how issues should be presented to the supreme court.

A recent Third Circuit habeas case, *Lines v. Larkins*,¹⁵⁸ demonstrates how this type of effective advocacy in state court can prove disastrous for a defendant trying to preserve issues for federal court. Lines raised several issues in Pennsylvania Superior Court.¹⁵⁹ Because he was a fugitive while his post-trial motions were pending, superior court held that "appellant has forever forfeited his right to appeal by electing to become a fugitive after post-trial procedures have begun."¹⁶⁰ In the petition for allowance to appeal to the Pennsylvania Supreme Court, Lines challenged the application of this fugitive-forfeiture rule by the superior court but did not present the court with any of the substantive issues that had not been decided by the superior court.¹⁶¹ The supreme court denied this petition.¹⁶² Because these claims had never been presented to the supreme court, they were not exhausted in state court.¹⁶³ By the time the claims were raised in federal court, they were procedurally barred in state court.¹⁶⁴ Consequently, the Third Circuit dismissed the habeas petition with prejudice.¹⁶⁵

The Pennsylvania case overturning the per se fugitive-forfeiture rule illustrates why Lines correctly petitioned for allowance to appeal on only that issue. In *Commonwealth v. Huff*,¹⁶⁶ Huff seemingly petitioned the supreme court for review on only the fugitive-forfeiture rule.¹⁶⁷ The court determined that post-trial flight by a defendant

¹⁵⁷ See, e.g., PA. R. APP. P. 1114; see also *supra* notes 86, 88 (setting out the Rule 1114 criteria); cf. *infra* note 170 (discussing the portion of Justice Stevens's dissent in *O'Sullivan* discussing the hallmarks of effective advocacy on petitions for discretionary review).

¹⁵⁸ 208 F.3d 153 (3d Cir. 2000), cert. denied, 121 S. Ct. 785 (2001).

¹⁵⁹ See *id.* at 155-56, 160.

¹⁶⁰ *Id.* at 156 (quoting *Commonwealth v. Lines*, 609 A.2d 832, 834 (Pa. Super. Ct. 1992)).

¹⁶¹ See *id.* at 157, 161. The Third Circuit noted that Lines *could* have included his claims in his petition for allowance to appeal even though he really wanted the supreme court to review the fugitive-forfeiture holding of the superior court and not these issues. See *id.* at 167, 167 n.21. Because Lines was seeking review of the superior court holding and could not seek review of claims not addressed by the superior court, the Third Circuit said that appellate counsel was not ineffective for failing to list those claims in his petition for allowance to appeal. See *id.* at 166-67. Thus, the Third Circuit said that Lines could have but should not have included these issues in his petition.

¹⁶² See *id.* at 157.

¹⁶³ See *id.* at 162.

¹⁶⁴ See *id.* at 165-66.

¹⁶⁵ See *id.* at 169.

¹⁶⁶ 658 A.2d 1340 (Pa. 1995).

¹⁶⁷ See *id.* at 1341 n.1, 1342. The supreme court said that it would not consider other claims that Huff tried to argue in the supreme court because they were not presented in his petition for allowance to appeal. Instead, the supreme court remanded to superior court for consideration of the issues it did not consider because of its application of the fugitive-forfeiture rule. See *id.*; see also G. RONALD DARLINGTON ET AL., PENNSYLVANIA APPELLATE PRACTICE §

should no longer provide a per se bar to consideration of all issues,¹⁶⁸ as happened to Lines. By raising only this issue before the supreme court in the petition for allowance to appeal, Huff risked not exhausting his remedies in state court. Rather than filing a petition laden with issues the supreme court could not and would not consider because the superior court had not considered them, Huff's more succinct petition caught the supreme court's attention and changed existing Pennsylvania law. As a result, his issues were considered on their merits. If Huff had included all of his issues in his petition for allowance to appeal, the issues may have been presented to the supreme court, but the cumbersome petition may have been lost in the multitude of petitions presented to the supreme court each year.¹⁶⁹

The exhaustion rules from Arizona, Pennsylvania, and South Carolina allow prisoners petitioning those states' supreme courts for discretionary review to present only those issues to the supreme court that have a realistic chance of being accepted.¹⁷⁰ This will increase the chance of being granted relief in state court for petitions filed in the state supreme court and, when this happens, fewer federal habeas petitions will be filed. It also saves the state supreme courts the burden of wading through multitudes of extra claims each year that have no realistic chance of being accepted by the court but that are filed only to fully exhaust state court remedies.¹⁷¹ Thus, this rule has the added benefit of potentially reducing the caseload of both federal and

1115:2 (2d ed. 1999) ("The Supreme Court will refuse to consider issues raised in appellant's brief that were not contained in appellant's petition for allowance of appeal.")

¹⁶⁸ See *Huff*, 658 A.2d at 1342 ("In short, appellant's flight from justice prior to sentencing had no significant effect on the appellate process.")

¹⁶⁹ Cf. *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring) ("It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.")

¹⁷⁰ An *O'Sullivan* dissent pointed this out. Justice Stevens said that the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail . . . is the hallmark of effective appellate advocacy." *O'Sullivan v. Boerckel*, 526 U.S. 838, 858 (1999) (Stevens, J., dissenting) (alteration in original) (citations omitted). Justice Stevens continued that this skill is even more necessary when seeking discretionary review because effective petitions contain only one or two issues and explain why the questions presented have sweeping importance or why they have divided or confused other courts. See *id.* Realistically, a defendant cannot file this kind of petition on every issue raised in the court below. See *id.*

¹⁷¹ See *State v. Sandon*, 777 P.2d 220, 220 (Ariz. 1989) (en banc) (implying that the Arizona Supreme Court lacks the resources to consider "large numbers of prisoner petitions seeking to exhaust state remedies"); Pennsylvania Exhaustion Order, *supra* note 79 (recognizing that prisoners routinely petition the Pennsylvania Supreme Court for allowance to appeal to exhaust state court remedies for federal habeas purposes); cf. *supra* note 54 (addressing the Ninth Circuit's recognition in *Jennison v. Goldsmith*, 940 F.2d 1308, 1311 (9th Cir. 1991) (per curiam), that allowing prisoners to skip discretionary review in the Arizona Supreme Court would lighten the caseload of the Arizona Supreme Court, which already had limited resources and could not have considered petitions of all those prisoners filing merely to preserve their federal habeas rights).

state courts.¹⁷² At a minimum, it will make the appellate process more manageable and more rational for attorneys and state prisoners trying to write effective petitions for discretionary review in state court and trying to determine whether they should even file these petitions when they have garden-variety claims.¹⁷³

G. *Guarding Against State Courts Taking a Mile from This Inch*

Allowing states by their own edict to remove themselves from the exhaustion requirement could lead some states to abuse this new-found autonomy, and this fear could cause the federal courts to rule that supreme courts cannot remove themselves from the exhaustion requirement. To reduce its appellate caseload, a state could create a rule that its courts should be excluded from the exhaustion requirement altogether. In other words, the state courts would entertain appeals, but, in the state's view, the appeal would not be a necessary prerequisite for federal habeas review. Or, more likely, a state could declare that post-conviction relief, while available, need not be sought prior to the initiation of a federal habeas petition. With state courts often giving short shrift to post-conviction petitions and with prisoners aware of this, prisoners may be tempted to skip the process altogether and file in federal court at the completion of a direct appeal. This would cause a dramatic reduction in the state court post-conviction and appellate caseloads.

Such a result, however, would undermine many of the purposes for requiring claims to be first litigated in state court. Initial state court review allows states to correct errors,¹⁷⁴ which means a federal habeas petition will never be filed and the federal court, thus, will not become involved in the state court conviction. Initial state court review provides for development of a complete factual record before the case is considered in federal court.¹⁷⁵ Eliminating state court review in general will increase the federal court caseload.¹⁷⁶ Allowing

¹⁷² Cf. *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (Blackmun, J., concurring) (noting that the total exhaustion rule "tends to increase, rather than to alleviate, the caseload burdens on both state and federal courts").

¹⁷³ See William E. Hellerstein, *Filling in Some Pieces: The Supreme Court's Criminal Law Decisions in the 1998-1999 Term*, 16 *TOURO L. REV.* 305, 331 (2000) ("The more interesting question is whether the majority's opinion [in *O'Sullivan*] really serves the interests of comity and whether it has the unwelcome consequence of adding unnecessary complexity to the criminal appellate process, the shoals of which defense counsel must navigate.").

¹⁷⁴ See *O'Sullivan*, 526 U.S. at 845 (stating that a state court's right of first review allows the state a chance to correct its own federal constitutional violations).

¹⁷⁵ See *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Rose*, 455 U.S. at 519.

¹⁷⁶ See Note, *supra* note 115, at 523 ("Absent the exhaustion requirement, the federal courts could be called upon to serve as the primary vindicators of federal constitutional rights in all state criminal prosecutions. Were the federal courts to assume such a responsibility, the effect on the federal caseload could be catastrophic.") (footnotes omitted).

many defendants to skip state court review would hinder the development of the state court body of federal constitutional law.¹⁷⁷

An approach balancing the federal and state interests in exhaustion would prevent this situation. Federal habeas law should allow states to remove discretionary procedures from the habeas requirement, but still require a prisoner to exhaust all non-discretionary avenues of relief that are part of the "standard review process."¹⁷⁸ That would mean that a direct appeal must be pursued as far as a defendant can proceed as of right under state law. Likewise, a prisoner also must seek any post-conviction remedies as far as he or she can go as of right. Furthermore, federal law should reflect state law determinations of when a prisoner has completed his state remedies as of right.¹⁷⁹ In other words, the exhaustion requirement would apply to any standard state remedy in which a claim must be reviewed as of right and would exclude truly discretionary procedures that the state specifically has announced are not required for the exhaustion of state remedies.

This accommodation will protect federal court interests while allowing states some degree of docket control and resource allocation. It balances comity principles with federal court concerns without allowing the states to go too far.

IV. WEIGHING THE INTERESTS

In *O'Sullivan*, the Supreme Court simultaneously required discretionary state supreme court review of all claims before they can be considered in federal court and opened the door for state supreme courts explicitly to remove themselves from the exhaustion requirement. If a state has not made an explicit rule that discretionary review is unnecessary to exhaust state remedies, then *O'Sullivan* clearly requires that the request for discretionary review must be filed with the state supreme court. Several members of the *O'Sullivan* Court, however, also noted that the Court left open the possibility that a state could remove discretionary supreme court review from the exhaustion requirement in that state. A few states have walked through this open door with explicit statements that the state's remedies are exhausted

¹⁷⁷ See *Rose*, 455 U.S. at 519 ("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."). Making direct and collateral review optional would reduce the number of state court appeals raising federal constitutional issues. Unlike the situation discussed above that noted that removing the requirement for a state prisoner to seek state supreme court discretionary review would have little if any impact on a state's development of its body of constitutional law, see *supra* Part III.D, this policy would eliminate the state altogether from reviewing federal constitutional claims in many cases.

¹⁷⁸ See *supra* note 29 and accompanying text.

¹⁷⁹ See, e.g., *supra* notes 92-94 and accompanying text (detailing Pennsylvania's determination of when a claim is final for state law purposes).

without a prisoner filing for discretionary review in the state supreme court. States should be permitted to make this choice.

Because the Supreme Court has held that not every "available" remedy must be pursued to exhaust state remedies, the existence of a technically available remedy in state supreme court discretionary review should not end the analysis. The *O'Sullivan* Court added that a discretionary review system "without more" does not render a remedy unavailable. When a state has added "more," however, the federal court must honor its rule. A state supreme court's explicit declaration that a petition for discretionary review is unnecessary to exhaust state remedies should be sufficiently "more" to advance the analysis beyond the strict wording of the statute and to ask whether allowing such a procedure furthers the various principles of federal habeas law.

The key principle is whether the comity concerns underlying the exhaustion doctrine are promoted by allowing a state supreme court to remove itself from the exhaustion requirement. The *O'Sullivan* Court allowed that forcing a state to consider unwanted petitions for discretionary review might disserve the comity interests of the exhaustion doctrine. Furthermore, comity dictates that federal courts honor and give effect to state rules. If a state's own procedures define an issue as being final for state law purposes without discretionary review, and if the state has created an explicit rule that supreme court discretionary review is unnecessary for habeas purposes, federal courts should honor the state's rules.

Comity is also designed to reduce friction between the federal and state systems created when a federal court intervenes in a state conviction before a state court has had the opportunity to first rule on the allegations of error. If a state is satisfied that its procedures without discretionary review have allowed for adequate review of an issue, no additional friction can result from federal review. Contrarily, forcing a state supreme court to entertain unwanted petitions that have virtually no chance of success and that clog an already crowded docket disserves rather than promotes comity principles.

To properly exhaust state remedies, a prisoner should still have to raise the issue as far as he or she can pursue the claim as of right through the state's "established appellate review process" and its post-conviction procedures. If a state supreme court seeks to remove itself from the exhaustion requirement, the state must believe that review through the lower appellate court is adequate. In other words, the state has had a "full and fair opportunity" to review the claim without presentation to the supreme court. If a state believes it has been provided with a full and fair opportunity to review the claim, comity should dictate that the federal court honor this belief.

Allowing a state supreme court to remove itself from the exhaustion requirement will benefit the state without causing any detri-

mental effects to the state court system. From the state supreme court's perspective, the primary benefit, of course, is a reduced number of filings for discretionary review on garden-variety issues. A secondary benefit is that petitions for discretionary review can be better crafted to include only the issues likely to attract the court's attention without including less meritorious issues merely to preserve them for eventual federal habeas review.

In addition, removing discretionary review from the habeas requirement should not have much, if any, impact upon the body of state constitutional law. Prisoners with a strong or novel constitutional issue have two reasons to continue to petition the state supreme court for review even if they are not required to take this step. First, such a petition provides another opportunity for relief, which will be provided more quickly than relief for some future speculative federal court action. Second, novel constitutional claims cannot be decided by a federal habeas court. In other words, the body of law being decided by the supreme court should not be affected because self-selection by prisoners about which issues to file in the supreme court will probably closely resemble the cases accepted for review if all cases were presented for discretionary review. Furthermore, requiring review as far as the prisoner can go as of right still ensures that the lower appellate court in the state will continue to develop case law on federal constitutional law.

The prisoner also receives benefits with little, if any, negative consequences from not having to file for discretionary supreme court review. By not having to wait months for the supreme court to rule on the petition for discretionary review, the prisoner will be able to seek federal relief sooner. He or she also will be able to better present claims to the state supreme court in petitions for discretionary review, and this increases the chances that the court will take the case. Without this added level of technical pleading, the prisoner also is less likely to procedurally default a claim.

For a prisoner, the only possible disadvantage is that he or she is foregoing a potential opportunity for relief by skipping the state supreme court. If the prisoner has a strong or novel constitutional claim, he or she probably will not forego this opportunity for relief. A garden-variety issue not presented to a state supreme court, though, likely would not have been given review by the high court; a prisoner in this situation is in no worse of a position by not filing for discretionary review.

Allowing federal court review without a prisoner first presenting the claim to the state supreme court does little to alter the federal court interests in exhaustion. A state supreme court's *per curiam* order declining to hear the case does not create a further record in state court. Skipping discretionary review in the state supreme court al-

lows for quicker resolution of the case and promotes finality of the state court judgment. Federal court caseloads will remain virtually the same. A prisoner determined to file a habeas petition will not be more or less likely to file a habeas petition depending on whether he or she first had to request review in the state supreme court. Because state supreme courts hear so few cases on discretionary appeal and the prisoners do not always receive relief in those cases the courts do take, the impact on the federal court docket would be minimal. Furthermore, the ability to craft better petitions for discretionary review may cause the supreme courts to grant more of these petitions, which would offset any feared increase in federal court habeas filings.

The only potential “detriment” to the federal court would be that fewer prisoners would be likely to procedurally default because one less hurdle—and one fraught with potential for a prisoner to default a claim¹⁸⁰—would be erected for them to jump through in state court. This, however, cannot be a justification for requiring unwanted discretionary review in the state supreme court. First, the federal courts, as a policy matter, cannot be hoping to “create . . . procedural hurdle[s] on the path to federal habeas court.”¹⁸¹ Second, creating a system with increased procedural default does not reduce federal court caseload, but merely redirects the habeas court from a decision on the merits to a determination about the procedural aspect of the case.¹⁸² In either event, the federal court still must dispose of the habeas petition.

CONCLUSION

Allowing state supreme courts to remove themselves from the exhaustion requirement would open a dialogue between the federal and state courts. Rather than a federal court, in parental fashion, telling the state when it has provided enough review of state convictions, the states would have some input in defining what constitutes a “full and fair opportunity” for the state to review claims before federal court review. If a state explicitly says that it wants to remove discre-

¹⁸⁰ See *supra* notes 158-165 and accompanying text (discussing how a decision to argue waiver rather than the substantive issues not considered by the lower appellate court in the petition for discretionary review procedurally defaulted the substantive issues for federal court).

¹⁸¹ *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992) (noting that this is not the purpose of the exhaustion doctrine); see also *Picard v. Connor*, 404 U.S. 270, 281 (1971) (Douglas, J., dissenting) (expressing concern that the majority’s holding that a claim was not properly presented to the state court and, thus, was not exhausted “is symptomatic of this Court’s trend to sidestep all possible controversies so, as it hopes, to let them disappear”).

¹⁸² See Barry Friedman, *Failed Enterprise: The Supreme Court’s Habeas Reform*, 83 CAL. L. REV. 485, 541-43 (1995). Professor Friedman argues that the Supreme Court shifted the focus of the federal habeas court from “the familiar and often easy task of determining the merits of constitutional claims” to “wad[ing] through a morass of new, complicated, and ever-changing procedural rules.” *Id.* at 541-42. This new approach, he concludes, actually puts more strain on the entire system. See *id.* at 542-43.

tionary supreme court review from the exhaustion requirement, the federal court should allow the state to do this, but it should warn the state not to try to remove areas that are necessary to facilitate federal court review or that will cause a drastic increase in federal court caseloads. Comity suggests that the two systems respect the interests of each other in this manner. A state supreme court that is willing to live within these parameters should be permitted to say “thanks but no thanks” to the federal habeas requirement that discretionary supreme court review must be sought by a state prisoner to exhaust his or her state remedies.