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Habeas Corpus--Much Ado about Very Little: The Total Exhauston Rule

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HABEAS CORPUS—MUCH ADO ABOUT VERY LITTLE: THE TOTAL EXHAUSTION RULE

Rose v. Lundy, 102 S. Ct. 1198 (1982).

I. INTRODUCTION

In *Rose v. Lundy*[1], the Supreme Court held that a federal district court must dismiss habeas corpus petitions containing any claims that have not been exhausted in state courts. Petitioners who submit habeas corpus petitions containing both exhausted and unexhausted claims either must return to the state courts to litigate their unexhausted claims or must amend their petitions to present only exhausted claims to the federal courts.[2] While adopting this rule of total exhaustion, the Court left unsettled the issue whether petitioners risk forfeiting the consideration of their claims if they follow the latter procedure. Four Justices supported the proposition that the deleted, unexhausted claims could be dismissed in a subsequent petition as an "abuse of the writ" under Habeas Corpus Rule 9(b).[3] Four Justices, however, argued that Rule 9(b) would not apply to deleted, unexhausted claims.[4]

The five opinions filed[5] in *Rose v. Lundy* reflect the strong disagreement among the Justices as to the proper treatment of the problem of piecemeal habeas corpus litigation. This Note examines the bases of this disagreement and concludes that the Court's solution to the problem—the adoption of the total exhaustion rule—fails significantly to advance the Court's goal of reducing piecemeal habeas corpus litigation and, in some cases, may delay even further federal review of meritorious claims.

II. BACKGROUND OF *ROSE V. LUNDY*

A jury found Noah Lundy guilty of committing rape and a crime against nature.[6] The Tennessee Court of Criminal Appeals affirmed

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1 102 S. Ct. 1198 (1982).

2 *Id.* at 1199.

3 *Id.* at 1204-05. Writing for the majority, Justice O'Connor was joined by Chief Justice Burger and Justices Powell and Rehnquist in supporting this view. *See infra* notes 16 & 41 and accompanying text.

4 Justices Blackmun, Brennan, Marshall, and White viewed Rule 9(b) inapplicable under the given circumstances. *See infra* notes 45-59 and accompanying text.

5 *See infra* note 17.

6 Lundy was sentenced to consecutive terms of 120 years on the rape charge and from five to fifteen years on the crime against nature charge. *Lundy*, 102 S. Ct. at 1199 n.1.

Lundy's conviction, holding that the prosecutor's remarks concerning the defendant's "violent nature" and the trial court's restriction of the defense counsel's cross-examination of the victim were harmless error in the context of the entire case.[7] After the Tennessee Supreme Court denied review, Lundy unsuccessfully petitioned a Tennessee county criminal court for post-conviction relief, this time claiming that his defense counsel had been incompetent.[8] Finally, Lundy petitioned a federal district court for a writ of habeas corpus.

Lundy asserted four grounds for relief in his habeas corpus petition: (1) the trial court's limitation of defense counsel's cross-examination of the victim denied Lundy his right to confrontation; (2) the prosecutor's comment that Lundy had a "violent nature" violated Lundy's right to a fair trial; (3) the prosecutor's remark in his closing statement that the state's evidence was uncontradicted violated Lundy's right to a fair trial; and (4) the trial court's instructions to the jury that every witness is presumed to swear an oath to tell the truth violated Lundy's right to due process. The district court recognized that since grounds three and four had not been presented to the state court, there had been no exhaustion of remedies for these two claims.[9] Although the court stated that it could not consider the two unexhausted claims "in the constitutional framework," the court nevertheless concluded that "in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally."[10] The district court, therefore, considered these unexhausted claims in reaching its conclusion that Lundy had been denied a fair trial.[11] It granted the petition for a writ of habeas corpus,[12]

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[7] Lundy v. State, 521 S.W.2d 591 (Tenn. Crim. App. 1974). The court also found the other assignments of error to be without merit. *Id.* at 594, 595. The defendant unsuccessfully challenged the following findings of the trial court: (1) the evidence supported a finding of forcible rape; (2) there was a separate intent to support each of the convictions; (3) the state had not asked impeaching questions of its own witness, an eye-witness to the crimes; (4) the admission of Lundy's statement as a confession was proper even if it did not constitute a full confession; (5) the use of a written report during the testimony of an officer who spoke with the victim immediately after the victim's escape did not render the evidence incompetent; and (6) the introduction into evidence of a statement made by an eye-witness shortly after the crimes did not constitute error.

[8] Joint Appendix to the Briefs Submitted by Petitioner and Respondent at 62, Rose v. Lundy, 102 S. Ct. 1198 (1982). The court concluded that Lundy's trial attorneys had performed up to the state standards and had used every legitimate tactic. *Id.* at 62-63. The court also noted that it was Lundy who increased his own term of imprisonment more than a hundred years by rejecting a plea bargain that his attorneys had arranged for him with the attorney general. The agreement had provided that if Lundy pleaded guilty to both crimes, he would have to serve only the minimum term for each crime and the sentences would run concurrently.

[9] *Id.* at 88.

[10] *Id.*

[11] The court found consideration of the unexhausted claims to be necessary because there was "such mixture of violations that one cannot be separated from and considered indepen-

and the United States Court of Appeals for the Sixth Circuit affirmed.[13] The Supreme Court reversed and remanded the case to the district court.

III. THE SUPREME COURT'S DECISION IN *ROSE V. LUNDY*

A. THE INTERESTS OF COMITY AND THE EFFICIENT ADMINISTRATION OF JUSTICE

In *Rose v. Lundy*, the Supreme Court adopted the total exhaustion rule favored by only two United States courts of appeal.[14] The total exhaustion rule requires a district court to dismiss habeas corpus petitions containing both unexhausted and exhausted claims. A state pris-

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dently of the others." *Id.* at 93. Interrelatedness of claims, however, has been a grounds for refusing to hear habeas corpus petitions in even those circuits which hear the exhausted claims in a mixed petition. *See infra* note 14.

[12] *Id.* at 94.

[13] *Id.* at 95-96. The sixth circuit concluded in its two-page order that the district court had ruled only on the two exhausted claims in Lundy's habeas petition. In its appeal to the court, the state had asked the sixth circuit to adopt the total exhaustion rule of the fifth and ninth circuits, which required district courts to dismiss all petitions for writs of habeas corpus where the petitions include claims which have not been exhausted in the state courts. The sixth circuit rejected the total exhaustion rule in a single sentence: "Such a rule has not found favor in the Sixth Circuit and this court declines to adopt it in the present case." *Id.* at 96. The court also rejected the state's arguments that the cause and prejudice rule insulated from habeas corpus review any constitutional errors which had occurred in Lundy's trial. The court concluded that the cause and prejudice rule of Wainwright v. Sykes, 433 U.S. 72 (1977) did not prevent habeas corpus review because the court found that "the state courts of Tennessee did not apply any Tennessee state contemporaneous objection rule with respect to such claims, but had proceeded to consider the same on the merits." Joint Appendix to Briefs Submitted by Petitioner and Respondent at 96.

[14] The courts of appeal were divided in their treatment of mixed habeas corpus petitions. The first, second, third, fourth, sixth, seventh, eighth, and tenth circuits considered the exhausted claims contained in a mixed petition on their merits and dismissed the unexhausted claims without prejudice. *See, e.g.*, Katz v. King, 627 F.2d 568 (1st Cir. 1980); United States *ex rel.* Trantino v. Hatrack, 563 F.2d 86 (3d Cir. 1977), *cert. denied.*, 435 U.S. 928 (1978); Meeks v. Jago, 548 F.2d 134 (6th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977); Cameron v. Fastoff, 543 F.2d 971 (2d Cir. 1976); Tyler v. Swenson, 483 F.2d 611 (8th Cir. 1973); Brown v. Wisconsin State Dep't of Welfare, 457 F.2d 257 (7th Cir.), *cert. denied*, 409 U.S. 862 (1972); Whiteley v. Meachem, 416 F.2d 36 (10th Cir. 1969), *rev'd on other grounds*, 401 U.S. 560 (1971); Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969). Thus, eight circuits took the position that "in the absence of unusual circumstances, District Courts should be required to consider those claims as to which the petitioner has exhausted his remedies even though he also raises unrelated or frivolous claims in his petition as to which he has not exhausted his remedies." *Tyler*, 483 F.2d at 614. If a mixed petition contains exhausted claims related to the unexhausted claims, however, the general rule is to dismiss the entire petition without considering the merits of any of the claims. *See, e.g.*, Miller v. Hall, 536 F.2d 967 (1st Cir. 1976); *Hewett*, 415 F.2d at 1320; Levy v. McMann, 394 F.2d 402 (2d Cir. 1968). The Supreme Court noted in *Lundy* that this is still the rule in all circuits. *See* 102 S. Ct. at 1204. Two circuits dismissed mixed petitions for habeas relief in their entirety, with neither the exhausted nor unexhausted claims being reviewed on their merits. *See* Galtieri v. Wainright, 582 F.2d 348 (5th Cir. 1978) (en banc); Gonzales v. Stone, 546 F.2d 807 (9th Cir. 1976). The ninth circuit first adopted the fifth circuit total exhaustion approach in 1976. *See Id.* at 809. The total exhaustion rule adopted by the Supreme Court in *Rose v. Lundy* appears to be more inflexible, however, than

oner who does submit a mixed petition to the federal court has the choice of either returning to state court to exhaust all of his claims or of amending the petition to present only exhausted claims to the federal court.[15] Justice O'Connor delivered the opinion of the sharply divided Court. Chief Justice Burger and Justices Powell and Rehnquist concurred in Part III-C of the opinion, in which Justice O'Connor argued that the "abuse of the writ" standard of Habeas Corpus Rule 9(b) would apply to unexhausted claims deleted from mixed petitions if these claims are presented in subsequent habeas corpus petitions. Five justices agreed with Justice O'Connor's adoption of the total exhaustion rule.[16] Justices Blackmun, White, and Stevens, however, believed that the Court should have rejected the total exhaustion rule in favor of the rule, followed by the majority of the courts of appeal, which permitted federal review of exhausted claims contained in a mixed petition.[17]

In deciding whether to adopt the total exhaustion rule,[18] Justice O'Connor first examined the history of the judicially created exhaustion doctrine[19] and its 1948 codification in section 2254 of the Judicial Code.[20] Because section 2254 does "not directly address the problems of mixed petitions . . . [and] in all likelihood Congress never thought of the problem,"[21] Justice O'Connor found it necessary to analyze the poli-

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the rule applied in the fifth and ninth circuits. *See* L. YACKLE, POST-CONVICTION REMEDIES 263-64 (1981).

The majority of circuits found it unnecessary to adopt the total exhaustion rule because comity is promoted if state courts have the first opportunity to hear claims before they are reviewed by the federal courts. *See Katz*, 627 F.2d at 573-74; *Tyler*, 483 F.2d at 615. These circuits viewed the total exhaustion rule as emphasizing the interest of judicial convenience at the expense of the state prisoner seeking habeas relief. The avoidance of piecemeal litigation

> must be balanced against the interests of the prisoner in obtaining prompt consideration of exhausted claims by the federal courts. In our view, justice requires that the balance must be struck in favor of the prisoners seeking relief. [citations omitted] We cannot let the convenience alone of the judiciary and governmental agencies postpone review by the federal courts.

Id. at 615.

[15] *Lundy*, 102 S. Ct. at 1199.

[16] Chief Justice Burger and Justices Rehnquist, Powell, Brennan, and Marshall joined in this part of Justice O'Connor's majority opinion.

[17] A total of five separate opinions were filed. In addition to the majority opinion, Justice Blackmun concurred in the judgment; Justice Brennan, joined by Justice Marshall, concurred in part and dissented in part; Justice White concurred in part and dissented in part; and Justice Stevens dissented.

[18] The state argued that comity would be furthered because the total exhaustion approach "gives the state courts the first opportunity to correct federal constitutional errors and minimizes federal interference and disruption of state judicial proceedings." 102 S. Ct. at 1201. The state also argued that the total exhaustion rule would reduce the amount of piecemeal habeas litigation. *Id.*

[19] *Id.* at 1201-02.

[20] Pub. L. No. 80-773, 62 Stat. 967 (codified at 28 U.S.C. § 2254 (1976)).

[21] 102 S. Ct. at 1202-03. One commentator has pointed out that "[a]t the time that section 2254 was enacted, neither Congress nor the Court was likely to have been aware of the

cies underlying the exhaustion doctrine.[22]

The "rule of exhaustion . . . is rooted in considerations of federal-state comity rather than in the essential nature of the writ or its purposes."[23] In *Ex parte Royall*,[24] the Supreme Court established the rule that if a state prisoner fails to exhaust state remedies before seeking federal habeas corpus relief, the prisoner's petition is subject to dismissal unless special circumstances require the immediate action of the federal court.[25] The purpose of this rule of exhaustion is to promote federal-state comity by "protect[ing] the state court's role in the enforcement of federal law and prevent[ing] the disruption of state judicial procedures."[26] In *Lundy* the Court concluded that federal-state comity would be promoted by a "rigorously enforced total exhaustion rule."[27] The total exhaustion rule would

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special problems of prisoners with exhausted and unexhausted claims. In 1948, few claims were cognizable on habeas . . . . Thus, in 1948, a prisoner probably would not have had both exhausted and unexhausted claims." Note, *Habeas Petitions with Exhausted and Unexhausted Claims: Speedy Release, Comity and Judicial Efficiency*, 57 B.U.L. REV. 864, 867 n.30 (1977), *cited in Lundy*, 102 S. Ct. at 1203 n.11.

22 *Lundy*, 102 S. Ct. at 1203.

23 *Developments in the Law: Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1094 (1970). [hereinafter cited as *Developments in the Law*.] *See also Lundy*, 102 S. Ct. at 1203. Since the exhaustion rule is not a jurisdictional limitation on the powers of the federal courts, Fay v. Noia, 372 U.S. 391, 420 (1963), the federal courts retain discretion to decide whether to observe the exhaustion requirement. *See Lundy*, 102 S. Ct. at 1203, (quoting Darr v. Burford, 339 U.S. 200, 204 (1950)); Galtieri v. Wainright, 582 F.2d 348, 354 (5th Cir. 1978); L. YACKLE, *supra* note 14, at 239. In *Lundy*, the state argued in its brief, however, that the exhaustion rule is a jurisdictional requirement. *See Lundy*, 102 S. Ct. at 1202. Some federal courts may be treating the total exhaustion rule adopted in *Lundy* as a jurisdictional bar. *See, e.g.*, Vann v. Duckworth, No. 81-2590 (7th Cir. April 28, 1982).

24 117 U.S. 241, 252 (1886). *See also Lundy*, 102 S. Ct. at 1202. A state prisoner could seek federal relief directly, however, if there were no state remedy or if the state remedy were inadequate. *See* Moore v. Dempsey, 261 U.S. 86 (1923). These exemptions from the exhaustion rule have been codified in 28 U.S.C. § 2254(b) (1976). *See infra* note 25.

25 *See Lundy*, 102 S. Ct. at 1201-02. In 1948 Congress codified the exhaustion rule in 28 U.S.C. § 2254(b)-(c) as part of the revision of the Judicial Code. *Lundy*, 102 S. Ct. at 1202 & n.10. Section 2254 provides:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254 (b)(c) (1976). Congress intended § 2254 to be declarative of prior case law. Irwin v. Dowd, 359 U.S. 394, 405 (1959); H.R. REP. NO. 38, 80th Cong., 1st Sess A 180 (1947). The rule in 28 U.S.C. § 2254 (b)-(c) has remained unchanged since its original codification. *Developments in the Law*, *supra* note 23, at 1094 n.3.

26 *Lundy*, 102 S. Ct. at 1203 (citing Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 490-91 (1973)).

27 102 S. Ct. at 1203.

> encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error. As the number of prisoners who exhaust all of their federal claims increases, state courts may become increasingly familiar with and hospitable toward federal constitutional issues.[28]

Justice Blackmun disputed the Court's finding that the history and policies of the exhaustion doctrine supported a rule requiring total exhaustion.[29] He argued that the interests of federal-state comity do not require a total exhaustion rule; a less rigid rule that required the dismissal of unexhausted grounds for relief while permitting a ruling on the merits of all unrelated exhausted claims would serve comity just as well. State courts under either rule would have the first opportunity to rule on every constitutional claim before it received federal scrutiny.[30] In fact, Justice Blackmun argued, the total exhaustion rule adopted by the majority might harm federal-state comity because it requires state courts to consider frivolous, unexhausted claims before a federal court may consider a serious, exhausted ground for relief. In remitting a habeas petition with frivolous claims to state court, the federal courts would demonstrate little respect for state courts and would burden state judicial calendars.[31]

In addition to comity, Justice O'Connor set forth a second interest to support the adoption of the total exhaustion rule. She argued that the total exhaustion rule promotes the efficient administration of the federal judicial system. The federal courts would have the advantage of a more complete factual record in more cases if petitioners first exhausted all federal claims.[32] Adherence to a rule of total exhaustion also would relieve district courts of the difficult task of deciding whether exhausted or unexhausted claims in a mixed petition are interrelated, and would reduce the temptation of district courts to consider unexhausted claims.

Justice Blackmun disputed the Court's conclusion that a rule of total exhaustion would benefit the interests of federal judicial administration. First, he believed that federal district courts are presented with a

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[28] *Id.*

[29] *Id.* at 1206-07 (Blackmun, J., concurring in the judgment). Justice Blackmun commented: "Although purporting to rely on the policies upon which the exhaustion requirement is based, the Court uses that doctrine as 'a blunderbuss to shatter the attempt at litigation of constitutional claims without regard to the purposes that underlie the doctrine and that called it into existence.'" *Id.* at 1205-06 (Blackmun, J., concurring in the judgment) (quoting Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 490 (1973)).

[30] *Id.* at 1206-07 (Blackmun, J., concurring in the judgment). Justice Blackmun found the Court's efforts to preserve the state courts' role "somewhat patronizing." *Id.* at 1206 (Blackmun, J., concurring in the judgment).

[31] *Id.* at 1207 (Blackmun, J., concurring in the judgment).

[32] *Id.* at 1203-04.

complete factual record relating to a particular claim; but even if a record is inadequate, the court can dismiss the entire habeas corpus petition pending resolution of the unexhausted claims in state court.[33] Second, he noted that the federal courts have not encountered difficulty in distinguishing between related and unrelated claims.[34] Justice Blackmun argued that instead of promoting the efficient administration of the federal judicial system, the total exhaustion rule would require duplicative examination of the records—the first time to determine whether claims have been exhausted, and the second time to review exhausted claims that the court had previously dismissed. Justice Blackmun argued that in many cases the federal district court could, with only "negligible additional effort," decide claims on their merits after the first review.[35]

B. THE COURT'S FOCUS ON PIECEMEAL HABEAS CORPUS LITIGATION

A major source of disagreement among the Justices in *Lundy* involved another aspect of judicial efficiency: the reduction of piecemeal habeas corpus litigation.[36] As the Court noted in *Sanders v. United States*: "Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay."[37] In *Lundy* the Justices disagreed as to whether the total exhaustion rule would be effective in reducing piecemeal habeas corpus litigation.

Justice O'Connor argued for the majority that the requirement of total exhaustion would reduce the piecemeal litigation of habeas corpus claims, encouraging prisoners "to exhaust all of their claims in state court and to present the federal court with a single habeas petition."[38] In Section III-C of her opinion, Justice O'Connor suggested that the total exhaustion rule be applied in conjunction with the "abuse of the writ" standard: the prisoner who proceeds only with his exhausted claims and deliberately sets aside his unexhausted claims would risk dismissal of subsequent federal petitions under the "abuse of the writ" standard of Habeas Corpus Rule 9(b).[39] Four justices disagreed with Justice O'Connor's application of Rule 9(b) to unexhausted claims deleted in response to the total exhaustion requirement.[40]

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[33] *Id.* at 1207 (Blackmun, J., concurring in the judgment).

[34] *Id.* (Blackmun, J., concurring in the judgment).

[35] *Id.* at 1208. (Blackmun, J., concurring in the judgment).

[36] *See id.* at 1204; Stone v. Powell, 428 U.S. 465 (1976); Francis v. Henderson, 425 U.S. 536 (1976).

[37] 373 U.S. 1, 18 (1963).

[38] 102 S. Ct. at 1204.

[39] *Id.* at 1205.

[40] *See supra* note 4.

The "abuse of the writ" standard is an integral part of the Court's rationale for adopting the total exhaustion doctrine; without it, the total exhaustion rule fails to accomplish the goal of reducing piecemeal habeas corpus litigation. If no sanctions exist for deleting the unexhausted claims, a prisoner who submits a mixed petition can simply delete the unexhausted claims and proceed in federal court with the exhausted claims. The total exhaustion rule then becomes the functional equivalent of the rule, adhered to by the majority of the courts of appeal, which simply allows the federal district court to ignore the unexhausted claims in a mixed petition and decide the merits of the exhausted claims.[41] The only interest served by a mechanical deletion of unexhausted claims would be the elimination of any temptation that district courts may have to consider these claims.[42]

In Section III-C, Justice O'Connor concluded that if a petitioner deletes unexhausted claims from a mixed petition pursuant to the total exhaustion rule, the petitioner risks dismissal of the deleted claims under Habeas Corpus Rule 9(b) if the claims are included in subsequent petitions.[43] Under Rule 9(b), a judge can dismiss a subsequent petition if it contains new and different grounds and if the prisoner's failure to assert these grounds in the previous petition constituted an "abuse of the writ."[44]

Rule 9(b) incorporates the judge-made principle, set forth in *Sanders v. United States*,[45] governing the abuse of the writ. In *Sanders* the Supreme Court held that a habeas corpus petitioner abuses the writ only when claims are deliberately omitted from one petition so that they can be included in a subsequent petition if the first petition fails to win the prisoner's release.[46]

Justice Brennan concurred in the Court's adoption of the total ex-

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[41] *See id.* at 1209 (Blackmun, J., concurring in the judgment).

[42] *See infra* note 71 and accompanying text.

[43] *Id.* at 1204-05.

[44] Rule 9(b) provides:

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

28 U.S.C. § 2254 Rule 9(b)(1976).

[45] 373 U.S. 1 (1963). At issue in *Sanders* was federal habeas corpus relief for federal prisoners under 28 U.S.C. § 2255, rather than habeas corpus relief for state prisoners provided by 28 U.S.C. § 2254(b).

[46] In *Sanders* the Court stated:

> if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if . . . the prisoner deliberately abandons one of his grounds at the first hearing.

373 U.S. at 18, *quoted in Lundy*, 102 S. Ct. at 1205.

haustion rule in *Rose v. Lundy*,[47] but disagreed with the plurality's view that habeas corpus petitioners must risk forfeiting consideration of their unexhausted claims in federal court if they decide to proceed only with their exhausted claims. First, Justice Brennan argued that the issue of successive petitions under Rule 9(b) was not an issue in the *Lundy* case and therefore should not have been addressed by the Court.[48] More significantly, Justice Brennan accused the plurality of entirely misreading *Sanders*. He objected to the plurality's view that "deliberate abandonment" could be found when a prisoner is forced to delete his unexhausted claims in order to proceed in federal court when faced with a district court's refusal to consider a mixed petition.[49] According to Justice Brennan, if a court refuses to entertain a mixed petition, then a prisoner's abandonment cannot be termed "deliberate" in any meaningful sense:

> *Sanders* made it crystal clear that dismissal for "abuse of the writ" is *only* appropriate when a prisoner was free to include all of his claims in his first petition, but *knowingly* and *deliberately* chose not to do so in order to get more than "one bite at the apple."[50]

Justice Brennan concluded that unless factual considerations indicate actual abuse, a prisoner who deletes unexhausted claims from a mixed petition should not risk dismissal of those claims if they are subsequently exhausted and included in a second habeas corpus petition.[51]

Justice Blackmun, concurring only in the judgment, agreed with Justice Brennan that a prisoner would risk dismissal of subsequent habeas petitions for "abuse of the writ" only if the prisoner had deliberately chosen to withhold the claims.[52] He objected to the total exhaustion rule and its enforcement through Habeas Corpus Rule 9(b), however, because he believed that application of Rule 9(b) to claims deleted pursuant to the total exhaustion rule would undermine the rights of unsophisticated habeas corpus petitioners. The total exhaustion rule, Justice Blackmun feared, would not deter "the sophisticated habeas petitioner who understands, and wishes to circumvent, the rules of exhaustion," but instead would merely "serve to trap the unwary *pro se* prisoner who is not knowledgeable about the intricacies of the exhaustion doctrine and whose only aim is to secure a new trial or release from

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47 102 S. Ct. at 1210 (Brennan, J., concurring in part and dissenting in part).

48 *Id.* at 1211 (Brennan, J., concurring in part and dissenting in part).

49 *Id.* at 1212-13 (Brennan, J., concurring in part and dissenting in part).

50 *Id.* at 1212 (Brennan, J., concurring in part and dissenting in part).

51 *Id.* at 1213 (Brennan, J., concurring in part and dissenting in part).

52 *Id.* at 1209 (Blackmun J., concurring in in the judgment). Justice White, in a one paragraph opinion, stated, "I would not tax the petitioner with abuse of the writ if he returns with the . . . [dismissed, unexhausted] claims after seeking state relief." *Id.* at 1213 (White, J., concurring in part and dissenting in part).

prison."[53] Unsophisticated prisoners can be expected to consolidate all conceivable grounds for relief in an attempt to accelerate review and minimize costs.[54] If these prisoners unwittingly include unexhausted claims in their habeas corpus petitions, however, the rule of total exhaustion requires the dismissal of their mixed petitions. The unsophisticated habeas corpus petitioner then could be faced with having to go through the entire state and federal legal process before receiving a ruling on previously exhausted claims.[55] If the plurality's "abuse of the writ" standard were applied, these prisoners would not be able to resubmit subsequently exhausted claims without risking forfeiture under Rule 9(b).[56] Accordingly, the "trapped" unsophisticated prisoners are denied a swift remedy if their exhausted claims eventually prove meritorious.[57] Thus, Justice Blackmun argued that the total exhaustion rule, combined with the "abuse of the writ" standard, forces society to sacrifice either the swiftness or the availability of habeas corpus relief if prisoners must choose between undergoing the delay or forfeiting their unexhausted claims.[58]

C. JUSTICE STEVENS'S APPROACH

Justice Blackmun attributed the Court's misguided approach to its preoccupation with "the spectre of the sophisticated litigious prisoner intent upon a strategy of piecemeal litigation."[59] Justice Stevens, on the other hand, was concerned with the spectre of an ever-increasing volume of federal habeas corpus applications and with the Court's approach to dealing with this problem.[60]

Justice Stevens blamed the flood of habeas corpus litigation on federal judges, who have "construed their power to issue writs of habeas corpus as through it were tantamount to the authority of an appellate court considering a direct appeal from a trial court judgment."[61] He dissented from the Court's adoption of the total exhaustion rule on the ground that the rule merely added to the Court's arsenal of procedural rules designed to deal with this flood of habeas corpus litigation. Justice Stevens criticized the Court's decision as an "adventure in unnecessary lawmaking"[62] that could be avoided by confining the availability of the

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[53] *Id.* at 1209 (Blackmun, J., concurring in the judgment).
[54] *Id.* (Blackmun, J., concurring in the judgment).
[55] *See id.* at 1209-10 (Blackmun, J., concurring in the judgment).
[56] *Id.* at 1209 (Blackmun, J., concurring in the judgment).
[57] *See id.* at 1209-10 (Blackmun, J., concurring in the judgment).
[58] *Id.* (Blackmun, J., concurring in the judgment).
[59] *Id.* at 1209 (Blackmun, J., concurring in the judgment).
[60] *Id.* at 1213-20 (Stevens, J., dissenting).
[61] *Id.* at 1218 (Stevens, J., dissenting).
[62] *Id.* at 1214 (Stevens, J., dissenting).

writ to its proper role as a vehicle for correcting "errors that are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained."[63] If constitutional errors committed during trial fail to meet the high standard of "fundamental unfairness," habeas corpus relief should be denied.

Although he agreed with the Court's objective of curbing the volume of habeas corpus litigation, Justice Stevens believed that the total exhaustion rule "demeans the high office of the great writ."[64] The postponement of relief until the completion of another round of review in the state and federal judicial systems is "truly outrageous" if the trial actually was fundamentally unfair.[65] Finding that the total exhaustion doctrine treats claims of constitutional error as fungible,[66] Justice Stevens criticized the Court for conditioning the availability of habeas corpus relief upon the procedural history of a claim; instead, it should depend on the character of the alleged constitutional violation.[67]

IV. DISCUSSION AND ANALYSIS

The major flaw in the Court's decision in *Rose v. Lundy* is that it accomplishes little. The Court adopted a total exhaustion rule that requires a prisoner to submit only exhausted claims to a federal district court. Because a state prisoner is not required to exhaust all possible claims before seeking federal habeas corpus relief, the prisoner can easily circumvent the goals underlying the Court's adoption of the total exhaustion rule by submitting petitions containing only those claims which already have been exhausted. The Court's ruling in *Lundy* does not force petitioners to acknowledge that they have additional claims which they plan to submit in subsequent petitions if their first attempt at federal habeas corpus relief is unsuccessful. The lack of majority support for Justice O'Connor's suggestion that the "abuse of the writ" standard be applied to enforce the total exhaustion rule renders the rule ineffective.[68] If a prisoner submits a mixed petition, the unexhausted claims can simply be deleted and included in later petitions.

The efficacy of the total exhaustion rule in lessening the burden of habeas corpus litigation on the federal courts would not have been sig-

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63 *Id.* at 1216, 1218-19 (Stevens, J., dissenting).

64 *Id.* at 1219 (Stevens, J., dissenting).

65 *Id.* at 1217 (Stevens, J., dissenting).

66 *Id.* at 1216 (Stevens, J., dissenting).

67 *Id.* at 1218-19 (Stevens, J., dissenting).

68 Although only a plurality of the Court in *Lundy* supported the use of the "abuse of the writ" standard to support the total exhaustion rule, at least one circuit court has since applied the principle in conjunction with the total exhaustion rule. *See* Jones v. Hess, 681 F.2d 688, 695-96 (10th Cir. 1982).

nificantly enhanced, however, even if the application of the "abuse of the writ" standard had gained the support of a majority of the members of the Court. If unexhausted claims that had been deleted from a previous mixed petition were subject to dismissal as an "abuse of the writ" under Habeas Rule 9(b), as Justice O'Connor suggested they were, a petitioner who knew of the rule simply could withhold the unexhausted claims from the petition. As Justice Blackmun correctly pointed out, only unknowledgeable *pro se* petitioners would submit mixed petitions and thereby risk forfeiture under Habeas Corpus Rule 9(b).[69]

One goal that the adoption of the total exhaustion rule will accomplish is the prevention of federal review of unexhausted claims in mixed petitions, especially in those instances where the unexhausted claims are so intertwined with exhausted claims that a federal district court feels compelled to consider both. In *Lundy* the district court that reviewed Lundy's petition for habeas corpus relief clearly violated the exhaustion rule of 28 U.S.C. § 2254 by considering unexhausted claims never even raised in the state courts.[70] The district court also may have violated the requirement, which exists in all circuits, that mixed petitions containing interrelated claims be dismissed.[71] The Court's requirement in *Lundy* that mixed petitions be dismissed in their entirety will remove the temptation of district courts to consider the unexhausted claims in reaching their decisions on the merits of habeas corpus petitions. When weighed against the burden created by repetitious court considerations of habeas corpus petitions and the prisoner's interest in obtaining speedy relief, this prophylactic rule does not appear to be justified.

The best solution to the problem of increased habeas corpus litigation may be Justice Stevens's approach. If federal courts were to confine federal habeas corpus relief to cases in which constitutional error rises to the level of fundamental unfairness,[72] the Supreme Court would not

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[69] Justice Blackmun also noted that "successive habeas pettions that meet the 'abuse of the writ' standard have always been subject to dismissal, irrespective of the Court's treatment of mixed petitions." *Lundy*, 102 S. Ct. at 1209. Section III-C of the majority opinion would have deemed deletion of an unexhausted claim from a mixed petition a "deliberate" abandonment of the claim making the application of Rule 9(b) more probable. *Id.* at 1205. Only prisoners who lacked competent advice of counsel would submit mixed petitions and risk subsequent forfeiture of claims. One doubts, however, the necessity of threatening all petitioners with the "abuse of the writ" standard. Commentators have suggested that few prisoners intentionally save claims in order to include them in later habeas corpus petitions, and that the "abuse of the writ" sanction is aimed only at "those few bored or vindictive prisoners whose intent is to harass, to attract attention, or simply to get out of prison for a day to testify in an evidentiary hearing." *Developments in the Law*, *supra* note 21, at 1153-54.

[70] *See Lundy*, 102 S. Ct. at 1200.

[71] *See supra* note 15. The district court indicated that the claims were interrelated. This could have served as grounds for reversal, but doubt exists as to whether the claims were in fact related. *See id.* at 1210 n.8.

[72] *See supra* notes 63 & 65 and accompanying text. Under a fundamental fairness ap-

need to use procedural devices, such as the total exhaustion rule, which result in delayed review of truly meritorious claims for federal habeas corpus relief.[73] By pursuing the goal of reducing habeas corpus litigation, however, the Court could be sacrificing an important check on state court errors that implicate constitutional rights.

V. CONCLUSION

The Court's adoption of the total exhaustion rule in *Rose v. Lundy* fails to accomplish the goal of significantly reducing piecemeal habeas corpus litigation. The majority erroneously believed that adoption of the total exhaustion rule would "encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition."[74] Although the Court's decision compels dismissal of mixed habeas corpus petitions, a state prisoner is still free to submit mixed petitions to the federal courts. Justice O'Connor proposed that petitioners who resubmit only the exhausted claims after their mixed petitions have been dismissed risk forfeiture of their unexhausted claims under the "abuse of the writ" standard. If this view had been adopted by more than a plurality of the Court, state prisoners would be deterred from filing mixed petitions. Even if a majority of the Court had supported the application of the "abuse of the writ" standard to the total exhaustion rule, however, the only consequences would have been to punish uninformed *pro se* petitioners unaware of the prohibition of mixed petitions. Without the "abuse of the writ" sanction proposed by Justice O'Connor, the Court's adoption of the total exhaustion rule accomplishes little; a prisoner who files a mixed petition has the option of simply deleting the unexhausted claims. Thus, Justice Blackmun was justified in concluding, "I fail to understand what all the fuss is about."[75]

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proach, however, it is not clear how severe the error would have to be, since Justice Stevens would also allow habeas corpus review of errors which infect "the integrity of the process by which . . . [the] judgment was obtained." *Lundy*, 102 S. Ct. at 1216 (Stevens, J., dissenting).

73 *See id.* at 1219-20 (Stevens, J., dissenting).

74 *Id.* at 1204.

75 *Id.* at 1209 (Blackmun, J., concurring in the judgment).