University of Arkansas at Little Rock Law Review

Volume 6 | Issue 1 Article 3

1983

Criminal Procedure—Adoption of a Total Exhaustion Rule for Mixed Writs of Habeas Corpus

Jeannette A. Robertson

CRIMINAL PROCEDURE—ADOPTION OF A TOTAL EXHAUSTION RULE FOR MIXED WRITS OF HABEAS CORPUS. *Rose v. Lundy*, 102 S. Ct. 1198 (1982).

Noah Lundy's convictions on charges of rape and crime against nature were affirmed by the Tennessee Court of Criminal Appeals[1] and were denied review by the Tennessee Supreme Court. Following an unsuccessful petition in a state court for post-conviction relief, Lundy filed a petition in the United States District Court for the Middle District of Tennessee for a writ of habeas corpus pursuant to chapter twenty-eight of the United States Code section 2254.[2] The respondent petitioned for relief on four grounds: (1) that he had been denied the right to confrontation because the trial court limited the defense counsel's questioning of the victim; (2) that he had been denied the right to a fair trial because the prosecuting attorney stated in court that the respondent had a violent character; (3) that he had been denied the right to a fair trial because the prosecutor improperly remarked in his closing argument that the state's evidence was uncontradicted; and (4) that the trial judge improperly instructed the jury that every witness is presumed to tell the truth. The United States District Court concluded from a review of the state court records that claims three and four could not be considered in the constitutional sense because the respondent had not exhausted his state remedies for those grounds.[3] Nevertheless, the district court granted the writ after "assessing the atmosphere of the

1. Lundy v. State, 521 S.W.2d 591 (Tenn. Crim. App. 1974).

2. 28 U.S.C. § 2254 (1976 & Supp. III 1979) provides in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(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.

3. The Tennessee Criminal Court of Appeals ruled specifically on grounds one and two and held that although the trial court had erred, the respondent had not been prejudiced by the errors. Claims three and four were not presented to the Tennessee Criminal Court of

cause taken as a whole" and referred to claims three and four as collateral to numbers one and two.[4] The district court issued the writ as a result of what the court called "flagrant prosecutorial misconduct" in conjunction with the limitation of cross-examination of the victim.

The Sixth Circuit Court of Appeals affirmed the district court's ruling that the respondent's constitutional rights had been seriously impaired and rejected the state's argument that the petition should have been dismissed because both exhausted and unexhausted claims were presented.[5]

The United States Supreme Court granted certiorari and reversed and remanded the case, holding that a petition for a writ of habeas corpus filed under chapter twenty-eight of the United States Code section 2254 must be dismissed by a federal district court when it contains both exhausted and unexhausted claims. Rose v. Lundy, 102 S. Ct. 1198 (1982).

Most modern legal historians agree that the origin of the writ of habeas corpus pre-dates the Magna Carta.[6] The first habeas corpus order was issued in 1199 A.D., sixteen years before the Magna Carta, and directed the production of a named person before the court at Westminster.[7] The scope of a writ of habeas corpus remained confined to the narrow purpose of ensuring the appearance of parties before the English courts until the end of the fourteenth century.[8]

During the next three centuries, the scope of the writ was expanded as a result of the power struggle between the common law courts, other judicial bodies, and the sovereign.[9] The expanded writ

---

Appeals; therefore, they would be considered unexhausted since a state remedy was still available on these claims. Lundy v. State, 521 S.W.2d 591, 595-96 (Tenn. Crim. App. 1974).

4. The district court identified, considered, and cited ten instances of prosecutorial misconduct, only five of which the respondent raised before the state courts. Rose v. Lundy, 102 S. Ct. 1198, 1200 (1982).

5. Rose v. Lundy, 102 S. Ct. 1198, 1200 (1982) (citing Rose v. Lundy, 624 F.2d 1100 (6th Cir. 1980)) (an unreported case).

6. *See, e.g.*, Cohen, *Some Considerations on the Origins of Habeas Corpus*, 16 CAN. BAR R. 92, 94-95 (1938); D. MEADOR, HABEAS CORPUS AND MAGNA CARTA, DUALISM OF POWER AND LIBERTY, 5-6 (1966).

7. *See* D. MEADOR, *supra* note 6, at 8.

8. Note, *Developments, Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1042 (1969-70).

9. *Id.* at 1042-45. The common-law courts were trying to expand their jurisdiction at the expense of the courts of Chancery, Admiralty and the Star Chamber. This resulted in the common-law courts acquiring the power to challenge the jurisdiction of the other three courts. By requiring a showing of probable cause for a confinement ordering by the sover-

then became a means through which one court could challenge the authority of another court to detain a person.[10] Challenges were based on either jurisdictional incompetency[11] or unlawful, nonjudicial confinement.[12]

The framers of the United States Constitution recognized the importance of the writ of habeas corpus by requiring that the privilege not be suspended, except in specific circumstances.[13] Congress first interpreted this privilege in the Judiciary Act of 1789[14] and empowered the federal courts to issue writs of habeas corpus but only for federal prisoners.[15] For more than a century the Supreme Court abided by the common law limitations placed on the scope of the writ by reviewing only those habeas corpus petitions of federal prisoners that contained challenges concerning either unlawful, nonjudicial detentions[16] or confinements by a court lacking competence in the matter.[17]

The scope of the writ of habeas corpus was finally expanded beyond common law limits in *Ex parte Siebold*,[18] in which the Court held that the constitutionality of the statute upon which a charge was based could be examined during a habeas corpus petition hearing, since an unconstitutional statute deprives the trial court of jurisdiction in the case.[19] A further expansion in the scope of the writ came when the federal courts were given jurisdiction to entertain habeas corpus petitions from state prisoners.[20] Finally, in *Waley v.*

---

eign, the common-law courts also won the battle to curtail the sovereign's limitless power to imprison subjects. *See also* 9 W. HOLDWORTH, A HISTORY OF ENGLISH LAW, 104, 109 (3d ed. 1944); D. MEADOR, *supra* note 6, at 9-11.

10. Note, *supra* note 8, at 1042.

11. *Id.*

12. D. MEADOR, *supra* note 6, at 20-25.

13. U.S. CONST. art. I, § 9, cl. 2 provides: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

14. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (codified at 28 U.S.C. §§ 2254-55 (1976)).

15. *Ex parte* Dorr, 44 U.S. (3 How.) 103 (1845).

16. *See, e.g.*, *Ex parte* Wells, 59 U.S. (18 How.) 307 (1855). The Court inquired into the validity of an executive action. A presidential pardon reducing the prisoner's death sentence on condition that the prisoner serve a life sentence, was held to be legal; therefore, the petition was denied.

17. *Ex parte* Kearney, 20 U.S. (7 Wheat.) 38 (1822) (writ not available where petitioner convicted by judgment of court of competent jurisdiction).

18. 100 U.S. 371 (1879).

19. *Id.* at 377.

20. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, (codified at 28 U.S.C. § 2241(c)(3) (1976)). 28 U.S.C. § 2241(c)(3) provides: "The writ of habeas corpus shall not extend to a

Johnston,[21] the Court rejected the artificial limitations placed on the scope of the writ by English common law courts and acknowledged that the writ was available to consider claims of constitutional error as well as questions of jurisdiction.[22] Congress codified this newly expanded writ of habeas corpus in 1948.[23]

Resolution of the issue of which types of constitutional questions of error were cognizable on federal habeas corpus review still remained for the courts to settle. This question was resolved for state prisoners in the landmark decision of *Brown v. Allen*,[24] in which the Court held that habeas corpus was unrestricted with respect to the constitutional questions which can be raised by state prisoners.[25] Not until sixteen years later did the Supreme Court in *Kaufman v. United States*[26] settle the question for federal prisoners by recognizing that all constitutional claims were cognizable under a habeas corpus proceeding. After the *Kaufman* decision, the Supreme Court adopted a more restrictive view concerning the constitutional claims which may be heard in federal habeas corpus petitions.[27] The restrictive view of the Court appears to be in response to a revived interest in federalism and comity, which requires due deference to state courts.[28]

As a result of the Supreme Court's increased response to the doctrines of federalism and comity, the federal courts were required to heed the basic principles of comity[29] when dealing with the deci-

---

prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States."

21. 316 U.S. 101 (1942).

22. *Id.* at 104-05. The Court in *Waley* stated that use of the writ extended beyond questions of jurisdiction to include questions concerning the violation of a prisoner's constitutional rights.

23. 28 U.S.C. § 2255 (1976) provides a statutory right to petition for a writ of habeas corpus to federal prisoners. 28 U.S.C. § 2254 (1976) provides a statutory right to petition for a writ of habeas corpus to state prisoners.

24. 344 U.S. 443 (1953).

25. *Id.*

26. 394 U.S. 217 (1969).

27. *See, e.g.*, United States v. Frady, 102 S. Ct. 1584 (1982); Engle v. Issac, 102 S. Ct. 1558 (1982); Sumner v. Mata, 449 U.S. 539 (1981); Stone v. Powell, 428 U.S. 465 (1976); Reynolds, *Sumner v. Mata: Twilight's Last Gleaming for Federal Habeas Corpus Review of State Court Convictions? Speculations on the Future of the Great Writ*, 4 UALR L.J. 289 (1981).

28. *See, e.g.*, Sumner v. Mata, 449 U.S. 539 (1981). The Supreme Court stated that the interests of federalism were recognized by Congress in enacting 28 U.S.C. § 2254(d) (1976) which requires deference by federal courts to determinations of all state courts. *E.g.* W. DUCKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS, 181 (1980). *E.g.* Reynolds, *supra* note 27.

29. There are three basic principles which the doctrine of comity preserves. First, it

sions of state courts.[30] The increased respect for comity by the federal courts favored the development of the exhaustion doctrine by generally requiring the dismissal of a petition containing constitutional claims that had not been exhausted at the state level.[31]

The exhaustion doctrine was first enunciated in *Ex parte Royall*,[32] in which the Court stated that in giving due deference to the principles of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act, thereby exhausting the claim.[33] The Court justified adoption of the exhaustion doctrine by noting that the public good requires that the relationship between the federal and state courts be undisturbed by unnecessary conflict since both courts are "equally bound to guard and protect rights secured by the Constitution."[34] The Court also stated that the principle of comity is "a principle of right and of law and therefore, of necessity."[35] The Supreme Court reaffirmed that the concept of comity was the basis for the exhaustion doctrine in *Ex parte Hawk*.[36] In 1948 Congress codified the exhaustion doctrine in chapter twenty-eight of the United States Code section 2254.[37] Although the precepts of comity are the most important reason for the existence of the exhaustion doctrine, some Supreme Court decisions have indicated that judicial convenience,[38] as well as prompt relief for and preservation of the

---

preserves the role of state courts in enforcing and applying federal law. Second, it maintains the supervisory function of state appellate courts. Finally, it limits federal interference with pending state proceedings. Note, *Habeas Petitions with Exhausted and Unexhausted Claims; Speedy Release, Comity and Judicial Efficiency*, 57 B.U.L. REV. 864, 872-73 (1977).

30. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 17 (1978).

31. Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973) (in which the Court stated that "[t]he exhaustion doctrine is a judicially crafted instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement' "). *Id.* at 490.

32. 117 U.S. 241 (1886).

33. *Id.* at 252.

34. *Id.* at 251.

35. *Id.*

36. 321 U.S. 114 (1944). The Court pointed out that numerous cases in which a writ of habeas corpus had been denied were grounded on the controlling principle that federal courts will interfere with the administration of justice only when exceptional circumstances of peculiar urgency are shown to exist. *Id.* at 117.

37. *See supra* note 2 for text of statute. *See also* Fay v. Noia, 372 U.S. 391 (1963) (pointing out that Congress considered section 2254 to exemplify the exhaustion rule from *Ex parte* Hawk, 321 U.S. 114 (1944), and to declare the existing law). 372 U.S. at 434-35.

38. Gusik v. Schilder, 340 U.S. 128 (1950) (if an available procedure has not been exhausted, then any interference by the federal courts would be needless.). In Wade v. Mayo, 334 U.S. 672 (1948), the Court pointed out that "any other rule would visit upon the federal

prisoner's claims,[39] also serve as alternative bases for the exhaustion doctrine.

In applying the exhaustion doctrine to the review of habeas corpus petitions, the federal district courts are compelled by section 2254[40] to classify the petitioner's claims as exhausted or unexhausted in order to determine whether a writ should be issued. Exhausted claims are defined in section 2254(b)[41] and unexhausted claims are defined in section 2254(c).[42] Dismissal of a petition for a writ of habeas corpus will occur if it contains unexhausted claims or constitutes an abuse of the writ.[43]

The difficult question of how to handle habeas corpus petitions that include both exhausted and unexhausted claims has led to two distinct rules.[44] Eight circuits, including the Eighth Circuit, have ruled that the district court should consider the exhausted claims in a mixed writ of habeas corpus and dismiss the unexhausted claims if the unexhausted claims are either unrelated to the exhausted claims

---

courts an impossible burden, forcing them to supervise countless state criminal proceedings in which deprivation of federal constitutional rights are [sic] alleged." *Id.* at 679-80.

39. Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973).

40. 28 U.S.C. § 2254(b) (1976) provides that a writ may not issue unless a petitioner's claims are exhausted. This necessitates a determination by the district court judge of whether the petitioner's claims are exhausted or unexhausted pursuant to 28 U.S.C. § 2254(c) (1976).

41. 28 U.S.C. § 2254(b) (1976) provides:

> 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.

42. 28 U.S.C. § 2254(c) (1976) provides: "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."

43. 28 U.S.C. § 2254(b) (1976); Rule 9(b) of 28 U.S.C. § 2254 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.

44. Miller v. Hall, 536 F.2d 967 (1st Cir. 1976). The court in *Miller* recognized that the federal circuits had two distinct rules. One rule, termed a rule of "total exhaustion", required all claims in a petition for a writ of habeas corpus to be exhausted. The second rule allowed a district court to consider the exhausted claims in a mixed writ of habeas corpus and dismiss any unexhausted claims if the unexhausted claims were either unrelated to the exhausted claims or frivolous.

or are frivolous.[45] The Fifth and the Ninth Circuit Courts of Appeals[46] have adopted a "total exhaustion" rule by requiring exhaustion of all claims raised in habeas petitions.

Under a rule of "total exhaustion" the federal district courts are required to dismiss all petitions containing exhausted and unexhausted claims.[47] Once the mixed writ is dismissed the petitioner has the choice of returning to state court to exhaust his claims or amending and resubmitting the habeas petition to present only exhausted claims to the district court.[48] The Supreme Court first reviewed the merits of an exhausted claim in a mixed writ of habeas corpus in *Gooding v. Wilson*.[49] The Court did not consider, per se, the question of total exhaustion.[50] Two years later the Supreme Court expressly reserved the question of whether section 2254 required total exhaustion of all claims in a mixed writ of habeas corpus in *Francisco v. Gathright*.[51] Finally in *Rose v. Lundy*,[52] the Supreme Court answered the question reserved in *Francisco* by adopting a rule of "total exhaustion" for mixed writs of habeas

45. First Circuit: Katz v. King, 627 F.2d 568 (1st Cir. 1980); Miller v. Hall, 536 F.2d 967 (1st Cir. 1976); Second Circuit: Cameron v. Fastoff, 543 F.2d 971 (2d Cir. 1976); Mercado v. Rockefeller, 502 F.2d 666 (2d Cir. 1974); United States *ex rel.* Sniffen v. Follette, 393 F.2d 726 (2d Cir. 1968): Third Circuit: United States *ex rel.* Tratino v. Hatrack, 563 F.2d 86 (3rd Cir. 1977), *cert. denied*, 435 U.S. 928 (1978); United States *ex rel.* Boyance v. Myers, 372 F.2d 111 (3rd Cir. 1967); Fourth Circuit: Hewett v. State, 415 F.2d 1316 (4th Cir. 1967); Sixth Circuit: Meeks v. Jago, 548 F.2d 134 (6th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977); Seventh Circuit: Brown v. Wisconsin State Dep't of Pub. Welfare, 457 F.2d 257 (7th Cir. 1972), *cert. denied*, 409 U.S. 862 (1972); United States *ex rel.* Kemp v. Pate, 359 F.2d 749 (7th Cir. 1966); Eighth Circuit: Triplett v. Wyrick, 549 F.2d 51 (8th Cir. 1977); Tyler v. Swenson, 483 F.2d 611 (8th Cir. 1973); Tenth Circuit: Whiteley v. Meacham, 416 F.2d 36 (10th Cir. 1969), *rev'd on other grounds*, 401 U.S. 560 (1971); Watson v. Patterson, 358 F.2d 297 (10th Cir.), *cert. denied*, 385 U.S. 876 (1966).

46. Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978); Gonzales v. Stone, 546 F.2d 807 (9th Cir. 1976); James v. Reese, 546 F.2d 325 (9th Cir. 1976) (per curiam); Green v. Beto, 460 F.2d 322 (5th Cir. 1972); Smith v. Cupp, 457 F.2d 1098 (9th Cir. 1972); Johnson v. Wainwright, 453 F.2d 385 (5th Cir. 1971).

47. 102 S. Ct. 1198, 1205 (1982).

48. *Id.* at 1204.

49. 405 U.S. 518 (1972).

50. The Court in *Gooding* addressed itself to the one exhausted claim, as did the district court, in the petitioner's mixed writ. This led the Court in Rose v. Lundy, 102 S. Ct. 1198, 1201 n.5, (1982), to point out that *Gooding* did not control the present case since the question of total exhaustion was not before the Court in *Gooding*.

51. 419 U.S. 59 (1974). The prisoner's petition raised the question of whether all his claims must be exhausted in a mixed writ before a hearing. The court stated it had no occasion to rule on this question since they had determined that the one "unexhausted" claim in the petition had in reality, been exhausted. *Id.* at 63-64.

52. 102 S. Ct. 1198 (1980).

corpus.[53]

To justify the adoption of a total exhaustion rule, Justice O'Connor, speaking for the majority, first pointed out that section 2254(c) was too ambiguous to sustain the conclusion that Congress had even indirectly addressed the problem raised by mixed habeas corpus petitions.[54] The Court pointed to the absence of any reference to mixed petitions in either the legislative history of section 2254 or pre-1948 cases an concluded that Congress had never considered the problem of mixed petitions.[55] Consequently, the Court, following a precedent established in previous decisions,[56] looked to the interests underlying section 2254 to resolve the ambiguities in the legislative language.[57] The Court noted that underlying section 2254 are three competing interests: (1) the state-federal interest in comity, (2) the courts' interest in judicial efficiency and (3) the prisoner's interest in preservation of an prompt relief for his claims.[58] These three interests, which the exhaustion doctrine attempts to balance, were examined and found by the majority of the Court in *Rose* to be protected by a rule of "total exhaustion."[59] In particular, the majority emphasized that the policy of state-federal comity was the primary interest which the exhaustion doctrine was designed to protect.[60]

The majority in *Rose* agreed that rigorous enforcement of a total exhaustion rule would result in three important benefits.[61] First,

---

53. *Id.* at 1204.

54. *Id.* at 1202.

55. *Id.* at 1202-03.

56. The Supreme Court had, in past decisions, endeavored to resolve ambiguities or omissions in statutory language by analyzing the pertinent underlying policies and interests. Philbrook v. Glodgett, 421 U.S. 707 (1975); United States v. Sisson, 399 U.S. 267 (1970); United States v. Bacto-Unidisk, 394 U.S. 784 (1969); Unexcelled Chem. Corp. v. United States, 345 U.S. 59 (1953).

57. 102 S. Ct. at 1203.

58. *Id.* at 1203-04.

59. *Id.*

60. *Id.* at 1203. *See also* Duckworth v. Serrano, 454 U.S. 1 (1981). The Court in *Duckworth* notes that the exhaustion doctrine minimizes the "friction between the federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of the prisoner's federal rights." *Id.* at 19. In Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973), the Court said the exhaustion doctrine was principally designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings. *Id.* at 490. In Darr v. Burford, 339 U.S. 200 (1950), the Court stated: "[I]t would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity for the state courts to correct a constitutional violation . . . . (A) solution was found in the doctrine of comity . . . ." *Id.* at 204; *See also Ex parte* Royall, 117 U.S. 241 (1886).

61. 102 S. Ct. at 1203-04.

the state courts would benefit by being given the initial opportunity to review all claims of constitutional error since a total exhaustion rule would encourage prisoners to seek full relief from the state courts before seeking relief at the federal level. Second, the benefit of increased familiarity by the state courts with federal constitutional issues would result from the increased numbers of prisoners who would decide to exhaust all their federal claims at the state level first. Finally, the total exhaustion of federal claims in state courts would foster more complete factual records which would benefit the federal courts in their review.[62]

Although major emphasis was placed on the ways in which a total exhaustion rule would benefit the state-federal interests in comity, the majority also explained that judicial interest in efficiency would be benefited. The benefit would result from a dismissal of all mixed writs, which would relieve the district courts of the difficult task of deciding when exhausted and unexhausted claims are related.[63] The Court stated that further benefits to judicial efficiency would be seen in a reduction of piecemeal litigation and a more focused and thorough review of habeas petitions since a total exhaustion rule would encourage habeas petitioners to exhaust all claims in state court and then present federal courts with a single habeas petition.[64]

A majority of the Court agreed that the prisoner's interest in obtaining prompt federal relief on his claims would not be impaired by a total exhaustion rule since the prisoner could amend his petition to delete unexhausted claims rather than return to state court to exhaust all claims.[65] The Justices disagreed on the issue of whether a prisoner's interest in preservation of all claims might be jeopardized under Rule 9(b) of chapter twenty-eight of the United States Code section 2254.[66] In a plurality opinion, Chief Justice Burger and Justices Rehnquist, Powell and O'Connor agreed that if a prisoner chose the option of amending his habeas petition as provided by a total exhaustion rule, he might risk forfeiting the deleted unexhausted claims under Rule 9(b).[67] The plurality pointed out

62. *Id.*

63. *Id.* at 1204. In the past, eight of the federal circuits were required by the precedents of prior interpretations of the exhaustion rule to determine whether claims in a mixed writ were related. If the unexhausted claims were found to be related to exhausted claims, the petition had to be dismissed. *See supra* note 38.

64. 102 S. Ct. at 1204.

65. *Id.*

66. Rule 9(b) is reprinted *supra* note 43.

67. 102 S. Ct. at 1204.

that Rule 9(b) incorporated the principle governing abuse of the writ as set forth in *Sanders v. United States*.[68] In *Sanders* the Court stated that:

> if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his 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. Nothing in the tradition 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.[69]

By classifying the prisoner's choice to amend his petition by deleting unexhausted claims as deliberate, the plurality reasoned that subsequent federal petitions containing the deleted claims might be dismissed as an abuse of the writ.[70]

Justices Brennan, White and Marshall dissented from the plurality's opinion that Rule 9(b) could be read to permit dismissal of any subsequent petitions by a prisoner which are based upon the previously deleted and unexhausted claims as abuse of the writ.[71] In their opinion, the issue of Rule 9(b)'s proper application to successive petitions should not have been addressed because it was not among the questions presented by the petitioner nor was the issue briefed and argued by the parties.[72] In any event, Justice Brennan refuted the plurality's proposed interpretation of Rule 9(b). The thrust of Justice Brennan's argument centers on the appropriate interpretation of the standard for dismissal of a writ for abuse as set forth in *Sanders*.[73] Justice Brennan stated that since a total exhaustion rule requires a mixed writ to be dismissed, the prisoner's abandonment of his unexhausted claims cannot be called deliberate since the prisoner is not permitted to proceed with his unexhausted claims in federal court.[74] If the prisoner is to gain prompt federal relief on

---

68. 373 U.S. 1 (1963).

69. *Id.* at 18.

70. 102 S. Ct. at 1204.

71. *Id.* at 1212.

72. *Id.* at 1211.

73. *Id.* at 1212. Justice Brennan interpreted the rule in *Sanders* to require dismissal for abuse of the writ only "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 of the apple' ". *Id.* (emphasis in original).

74. *Id.* at 1213.

his claims, then he must proceed only with his exhausted claims, and cannot therefore be said "to possess a 'purpose to vex, harass, or delay', nor any 'hope of being granted two hearings rather than one.' "[75]

Justice Stevens, in his dissent, rejected the majority's "total exhaustion" rule as mechanical. He suggested a more flexible rule that would allow federal judges to exercise discretion to determine whether the presence of an unexhausted claim in the habeas corpus petition would make it inappropriate to consider the merits of a properly pleaded exhausted claim.[76] Justice Stevens suggested that federal judges should use a standard which would base issuance of a writ primarily on the fundamental unfairness of the alleged constitutional violation and not on the procedural history underlying the claim.[77]

The precarious balance of the competing interests served by the exhaustion doctrine are in jeopardy after the decision in *Rose*. By adopting a strict total exhaustion rule, the Supreme Court has shifted the balance away from the prisoner's interests in preservation of and prompt relief for his claims and toward state-federal interests in comity and judicial efficiency. This rule shifts the balance by thwarting the prisoner's interest in prompt relief by requiring a return to the state courts on his unexhausted claims even if unrelated and more significant exhausted claims are present. The final shift away from the prisoner's interests may occur if the federal district courts decide to adopt the plurality's interpretation of Rule 9(b). The plurality has interpreted Rule 9(b) to mean that when used in conjunction with a strict total exhaustion rule, a prisoner, whose mixed writ is dismissed, will be forced to abandon one or the other of his interests since he must choose either to: (1) abandon his interest in prompt relief of his claims and return to the state courts to exhaust his claims; or (2) retain his interest in prompt relief by amending his petition to delete the unexhausted claims, thereby forfeiting consideration of the unexhausted claims by the "deliberate" deletion. Yet surely the balance should be tipped, if at all, in the opposite direction toward the prisoner's interest. As Mr. Chief Justice Chase stated, "The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defence of personal

75. *Id.*
76. *Id.* at 1217.
77. *Id.* at 1219.

freedom."[78]

While the scope of the writ of habeas corpus was expanding, it tipped the balance among prisoner, judicial and state-federal interests, in favor of the prisoner's interests. With an erosion of the scope of the writ by other Supreme Court cases[79] including *Rose*, a marked shift away from the prisoner's interests is apparent.

The question left unanswered is whether the Federal Circuit Courts of Appeal will attempt to halt the shift of the balance in the law away from prisoner's interests by choosing not to adopt the plurality's interpretion of Rule 9(b). If the federal circuit courts do decide to shift the balance even further from the prisoner's interests by adopting the plurality's interpretation of Rule 9(b), then the great writ of habeas corpus may no longer serve as the best defense of personal freedom.

Jeannette A. Robertson

78. *Ex parte* Yerger, 75 U.S. (8 Wall) 85, 95 (1868).

79. United States v. Frady, 102 S. Ct. 1584 (1982). The Court in *Frady* stated that a "plain error" standard was inappropriate for habeas review. The Court pointed out that the higher standard of cause and prejudice enunciated in Wainwright v. Sykes, 433 U.S. 72 (1977), was the appropriate test for habeas review on claims not raised at trial. *Id.* at 1593-94. In Engle v. Issac, 102 S. Ct. 1558 (1982), the Court held that a claim to which no objection had been made to at trial cannot be heard collaterally in federal court on a petition for a writ of habeas corpus unless the petitioner can show both cause and actual prejudice. *Id.* at 1572. In Sumner v. Mata, 449 U.S. 539 (1981), the Court classified a state court's due process determination as factual. The Court also stated that federal judges must give due deference to the factual findings of state courts unless error can be demonstrated by the petitioner through "convincing" evidence. *Id.* at 544-45, 550. In Stone v. Powell, 428 U.S. 465 (1976), the Court stated that an exception to granting a writ of habeas corpus would occur when the petition dealt with fourth amendment claims for which state courts provided an adequate opportunity to prosecute. *Id.* at 494.