

**Total Exhaustion of State Remedies in Habeas Corpus Proceedings: *Rose v. Lundy***<sup>1</sup> — Habeas corpus is a post-conviction remedy available to both federal and state prisoners.<sup>2</sup> The writ of habeas corpus is a judicial order to the warden or official responsible for the custody of the prisoner, ordering him to bring the prisoner before the court.<sup>3</sup> The habeas corpus proceeding is not an inquiry into the guilt or innocence of the prisoner, but rather a determination of whether he was convicted in violation of his constitutional rights.<sup>4</sup> If a court concludes that a prisoner is held in violation of either the Constitution, or the laws and treaties of the United States, the prisoner may be released or his sentence curtailed.<sup>5</sup>

This remedy originated at English common law<sup>6</sup> and is specifically provided for in the United States Constitution.<sup>7</sup> The scope of the writ is not defined in the Constitution,<sup>8</sup> but has developed at common law.<sup>9</sup> Since 1948, the federal habeas corpus process has been governed by statute.<sup>10</sup> The statute sets

<sup>1</sup> 102 S. Ct. 1198 (1982).

<sup>2</sup> 28 U.S.C. § 2241(c)(3) (1976). This section provides that federal habeas corpus relief is available to anyone convicted of a criminal offense in violation of the United States Constitution, or any law or treaty of the United States. *Id.*

Federal habeas corpus relief was first extended to state prisoners by the Judiciary Act of February 5, 1867, ch. 28 § 1, 14 Stat. 385-86, reprinted in *Fay v. Noia*, 372 U.S. 391, 441-45 (1963) (codified as amended 28 U.S.C. § 2241(c)(3) (1976)).

<sup>3</sup> There are several types of habeas corpus writs. The term "habeas corpus" unless otherwise specified refers to habeas corpus *ad subjiciendum*. *Stone v. Powell*, 428 U.S. 465, 475 n.6 (1976) (citing *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807)).

The writ *ad subjiciendum* is "directed to the person detaining another, and demanding him to produce the body of the prisoner, with the day and cause of his caption and detention, . . . to do, submit, and receive whatsoever the judge or court awarding such writ shall consider in that behalf." *Price v. Johnston*, 334 U.S. 266, 281 n.9 (citing 3 W. BLACKSTONE, COMMENTARIES \*131).

<sup>4</sup> See, e.g., *United States v. Hayman*, 342 U.S. 205, 211-12 (1952); *Darr v. Burford*, 339 U.S. 200, 203 (1950), overruled on other grounds, *Fay v. Noia*, 372 U.S. 391 (1963); *Bowen v. Johnston*, 306 U.S. 19, 23-24 (1939).

<sup>5</sup> See, e.g., *Preiser v. Rodriguez*, 411 U.S. 475, 494 (1973); *Fay v. Noia*, 372 U.S. 391, 401-02 (1963).

<sup>6</sup> For a thorough account of the development of the writ in England, see R. SHARPE, *THE LAW OF HABEAS CORPUS* (1976).

<sup>7</sup> U.S. CONST. art. I, § 9, cl. 2 provides that "[t]he 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." U.S. CONST. art. I, § 9, cl. 2.

<sup>8</sup> See *id.*

<sup>9</sup> The early developments of the writ are traced in *Hawk v. Olson*, 326 U.S. 271, 274-76 (1945). The extent of federal habeas corpus relief has changed dramatically over the years. What was once a truly extraordinary measure is now a commonly sought remedy. In *Braden v. 30th Judicial Circuit Court*, Justice Blackmun commented on the "extraordinary expansion of the concept of habeas corpus" during the second half of the 20th century, remarking that "we have come a long way from the traditional notions of the Great Writ." 410 U.S. 484, 510 (Blackmun, J., concurring).

For a recent and detailed history of developments in habeas corpus, see *Developments in the Law: Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970).

<sup>10</sup> Act of June 25, 1948, ch. 646, 62 Stat. 964-67 (codified at 28 U.S.C. §§ 2241-2255 (1976)).

out guidelines for both prisoners and federal judges as to the procedure to be followed in determining whether a writ will issue.<sup>11</sup> The first step in the habeas process is for a prisoner to present a petition to a federal judge.<sup>12</sup> The petition itself, however, must meet certain requirements before the judge may act upon it. Moreover, the procedural requirements differ, depending on whether the prisoner was convicted under federal or state law.<sup>13</sup> This casenote will address only the state prisoner's petition for federal habeas review. More specifically, it will focus on the statutory requirement that state prisoners must exhaust their claims in state court before petitioning the federal court for relief.<sup>14</sup>

This exhaustion doctrine is an example of the deference which federal courts have traditionally shown to the state courts.<sup>15</sup> Although the federal courts have jurisdiction to hear the state prisoner's claims of constitutional violation, they have nonetheless imposed restraints upon this power.<sup>16</sup> Where a proceeding involves federal review of state activity, the federal courts are cautious not to interfere unduly with state court proceedings.<sup>17</sup> This notion of federal-state comity<sup>18</sup> obviously applies to the petitions for habeas corpus of state prisoners. The requirement that state prisoners exhaust all of their state remedies before petitioning the federal court both allows the state courts every opportunity to correct constitutional error and minimizes federal intervention.<sup>19</sup>

Although the exhaustion doctrine has long been recognized as necessary to insure federal-state comity in habeas proceedings,<sup>20</sup> considerable debate has arisen as to whether exhaustion requirements must be strictly observed in all instances.<sup>21</sup> In particular, federal circuit courts have disagreed on how a federal

<sup>11</sup> *Id.*

<sup>12</sup> 28 U.S.C. § 2242 (1976).

<sup>13</sup> Compare 28 U.S.C. § 2254 (1976) (applies to state prisoners) with 28 U.S.C. § 2255 (1976) (applies to federal prisoners).

<sup>14</sup> 28 U.S.C. § 2254(b)-(c) (1976). Under the federal habeas corpus statute, a prisoner convicted under state law must exhaust all available state avenues of relief before proceeding to federal court to seek relief. See, e.g., *Picard v. Connor*, 404 U.S. 270, 276; *Ex parte Hawk*, 321 U.S. 114, 116-17 (1944) (per curiam).

<sup>15</sup> See, e.g., *Gonzales v. Stone*, 546 F.2d 807, 809 (1976); *Picard v. Connor*, 404 U.S. 270, 275 (1971).

<sup>16</sup> See, e.g., *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971); *Fay v. Noia*, 372 U.S. 391, 418-19 (1963).

<sup>17</sup> See, e.g., *Duckworth v. Serrano*, 102 S. Ct. 18, 19 (1981); *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 490-91 (1973); *Picard v. Connor*, 404 U.S. 270, 275-76 (1971); *Fay v. Noia*, 372 U.S. 391, 417-20 (1963); *Ex parte Hawk*, 321 U.S. 114, 116-17 (1944) (per curiam); *Ex parte Royall*, 117 U.S. 241, 251-53 (1886).

<sup>18</sup> See, e.g., *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Galtieri v. Wainwright*, 582 F.2d 348, 356 (5th Cir. 1978); *United States ex rel. Trantino v. Hatrack*, 563 F.2d 86, 96 (3d Cir. 1977), cert. denied, 435 U.S. 928 (1978); *Gonzales v. Stone*, 546 F.2d 807, 809 (9th Cir. 1976); *Miller v. Hall*, 536 F.2d 967, 968-69 (1st Cir. 1976); *Tyler v. Swenson*, 438 F.2d 611, 615 (8th Cir. 1973).

<sup>19</sup> See, e.g., *Rose v. Lundy*, 102 S. Ct. at 1201-02; *Ex parte Hawk*, 321 U.S. 114, 117 (1944); *Ex parte Royall*, 117 U.S. 241, 251 (1886).

<sup>20</sup> See cases cited *supra* note 17.

<sup>21</sup> Compare cases cited *infra* note 23 with cases cited *infra* note 28.

district court judge should handle a petition from a state prisoner which contains both some claims where all available state procedures have been exhausted and others where such procedures have not been exhausted. Such a petition has been commonly referred to as a "mixed petition."<sup>22</sup> A majority of the circuits adopted a rule requiring the judge to review the exhausted claims and dismiss the unexhausted claims in such a mixed petition.<sup>23</sup> The majority rule approved review of the exhausted claims in a mixed petition, reasoning that immediate review of those claims serves the prisoner's interest of swift determination of his claims, and, if the claims are meritorious, allows for a speedy release.<sup>24</sup> Moreover, the majority of the circuits argued, comity is preserved by dismissal of the unexhausted claims.<sup>25</sup> There is one noteworthy exception to the majority rule that exhausted claims in mixed petitions should be reviewed. The circuits following this rule would not review an exhausted claim in a mixed petition if that claim were related to an unexhausted claim.<sup>26</sup> The rationale behind this view is that if an unexhausted claim is germane to an issue raised by the exhausted one, it makes more sense to dismiss the exhausted claim so that the two can be coherently presented together.<sup>27</sup> In contrast to the majority rule, the minority rule required the complete dismissal of mixed petitions.<sup>28</sup> In this view, the preservation of federal-state comity required that federal courts refuse to hear even the exhausted claims in a mixed petition.<sup>29</sup> These circuits reasoned that the state has an interest in resolving the entire case before the federal system intervenes.<sup>30</sup>

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<sup>22</sup> See, e.g., *Galtieri v. Wainwright*, 582 F.2d 348, 355 (5th Cir. 1978).

<sup>23</sup> See, e.g., *Katz v. King*, 627 F.2d 568, 574 (1st Cir. 1980); *United States ex rel. Trantino v. Hatrack*, 563 F.2d 86, 95-96 n.20 (3d Cir. 1977), *cert. denied*, 435 U.S. 928 (1978); *Triplett v. Wyrick*, 549 F.2d 57, 59-60 (8th Cir. 1977); *Miller v. Hall*, 536 F.2d 967, 969 (1st Cir. 1976); *Cameron v. Fastoff*, 543 F.2d 971, 976 (2d Cir. 1976); *Tyler v. Swenson*, 483 F.2d 611, 614-15 (8th Cir. 1973); *Brown v. Wisconsin State Dep't of Public Welfare*, 457 F.2d 257, 259 (7th Cir.), *cert. denied*, 409 U.S. 862 (1972); *Hewett v. North Carolina*, 415 F.2d 1316, 1320 (4th Cir. 1969); *Whiteley v. Meacham*, 416 F.2d 36, 39-40 (10th Cir. 1969), *rev'd on other grounds*, 410 U.S. 560 (1971).

<sup>24</sup> See, e.g., *Miller v. Hall*, 536 F.2d 967, 968-70 (1st Cir. 1976); *United States ex rel. Levy v. McMann*, 394 F.2d 402, 404 (2d Cir. 1968); *United States ex rel. Bovance v. Myers*, 372 F.2d 111, 112 (3d Cir. 1967); *United States ex rel. Savino v. Flood*, 482 F. Supp. 228, 233 (E.D.N.Y. 1979).

<sup>25</sup> See cases cited *supra* note 23.

<sup>26</sup> See, e.g., *Miller v. Hall*, 536 F.2d 967, 969 (1st Cir. 1976); *Johnson v. United States District Court*, 519 F.2d 738, 740 (8th Cir. 1975); *United States ex rel. DeFlumer v. Mancusi*, 380 F.2d 1018, 1019 (2d Cir. 1967); *United States ex rel. Reid v. Dunham*, 481 F. Supp. 366, 368 (E.D.N.Y. 1979); *United States ex rel. Savino v. Flood*, 482 F. Supp. 228, 233 (E.D.N.Y. 1978); *Zemina v. Solem*, 438 F. Supp. 455, 460 (D.S.D. 1977).

<sup>27</sup> See, e.g., *Triplett v. Wyrick*, 549 F.2d 57, 59 (8th Cir. 1977); *United States ex rel. Martin v. McMann*, 348 F.2d 896, 898 (2d Cir. 1965); *United States ex rel. Savino v. Flood*, 482 F. Supp. 228, 232-34 (E.D.N.Y. 1979).

<sup>28</sup> See, e.g., *Galtieri v. Wainwright*, 582 F.2d 348, 355-56 (5th Cir. 1978); *James v. Reese*, 546 F.2d 325, 327 (9th Cir. 1976); *Gonzales v. Stone*, 546 F.2d 807, 808-10 (9th Cir. 1976); *Lamberti v. Wainwright*, 513 F.2d 277, 283-84 (5th Cir. 1974).

<sup>29</sup> See cases cited *supra* note 26.

<sup>30</sup> See *id.*

The Supreme Court of the United States resolved the conflict of how to treat mixed petitions in *Rose v. Lundy*.<sup>31</sup> Favoring the minority view, the Court announced a total exhaustion rule, requiring the dismissal of all mixed petitions.<sup>32</sup> According to the Court, this rule would further the purposes of the exhaustion doctrine without unreasonably impairing the prisoner's interest.<sup>33</sup>

The controversy in *Lundy* arose when Noah Lundy petitioned the United States District Court for the Middle District of Tennessee for federal habeas corpus relief, claiming that his conviction for rape in Tennessee state court was unconstitutional.<sup>34</sup> The petition set out four grounds for relief.<sup>35</sup> Despite the fact that two of the claims were not exhausted, the federal district court considered them collaterally in order to assess the entire trial atmosphere.<sup>36</sup> Reviewing the entire record, the federal district court concluded that the trial was infected by ten instances of prosecutorial misconduct.<sup>37</sup> Five of the instances which the court identified were not raised before the state court, nor were they raised in the prisoner's habeas petition.<sup>38</sup> Nevertheless, the district court considered all of the instances of prosecutorial misconduct in reaching their conclusion that petitioner Lundy did not have a fair trial.<sup>39</sup> The decision of the district court was upheld by the Court of Appeals for the Sixth Circuit, without comment.<sup>40</sup>

In *Rose v. Lundy*, the Supreme Court addressed the issue of whether a federal judge may properly consider a petition for habeas corpus when the petitioner has not exhausted all of his claims in state court.<sup>41</sup> The Court disagreed with the treatment of the habeas petition by the courts below, holding that federal district courts must dismiss all claims in mixed petitions.<sup>42</sup> When a mixed petition is rejected, the Court held, the petitioner has the choice of

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<sup>31</sup> 102 S. Ct. 1198 (1982).

<sup>32</sup> *Id.* at 1199.

<sup>33</sup> *Id.* at 1205.

<sup>34</sup> *Id.* at 1199. For the opinion of the state court, see *Lundy v. State*, 521 S.W.2d 591 (Tenn. Crim. App. 1974).

<sup>35</sup> 102 S. Ct. at 1199. The four grounds of the petition are set out by the Court:

(1) that the defendant was denied his right to confrontation because the trial court limited defense counsel's questioning of the witness;

(2) that defendant was denied his right to a fair trial because the prosecutor stated that defendant had a violent character;

(3) that defendant was denied his right to a fair trial because the prosecutor remarked improperly in his closing that the State's evidence was uncontroverted; and

(4) that the trial judge improperly instructed the jury that every witness is presumed to tell the truth.

*Id.*

<sup>36</sup> *Id.* at 1199-1200.

<sup>37</sup> *Id.* at 1200. The opinion of the Court sets out the ten instances of prosecutorial misconduct which the district court identified. *Id.* at 1200 n.3.

<sup>38</sup> *Id.* at 1200.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* See *Lundy v. Rose*, 624 F.2d 1100 (6th Cir. 1980).

<sup>41</sup> 102 S. Ct. at 1199.

<sup>42</sup> *Id.*

returning to state court to exhaust all of his claims or amending his petition to the federal court by deleting all unexhausted claims.<sup>43</sup>

Prior to the *Lundy* decision, only the Fifth and Ninth Circuits required dismissal of petitions containing both exhausted and unexhausted claims.<sup>44</sup> The Court's rule, however, goes beyond the limits of the exhaustion rule of the Fifth and Ninth Circuits. While these circuits found it preferable to dismiss mixed petitions in their entirety, they would review exhausted claims in mixed petitions if dismissal of the entire petition would seriously impair the prisoner's rights, such as when undue delay had occurred.<sup>45</sup> The Supreme Court seemingly rejected any such flexibility in the treatment of mixed petitions by requiring a "rigorously enforced total exhaustion rule".<sup>46</sup>

This casenote submits that the total exhaustion rule upsets the balance between the need for comity and the need to protect prisoners' rights. First, this casenote delineates the Court's reasoning in *Lundy*. It then argues that the total exhaustion rule is without support from either statutory language or language found in Supreme Court opinions. In fact, both the statute and the Court's past treatment of the exhaustion doctrine indicate that exhaustion is only required as to the issues to be decided by the federal court. Next, this casenote argues that the Court overestimated the effect that the total exhaustion rule will have on federal-state comity. It is submitted that the Court failed to consider circumstances in which the new rule may even be detrimental to federal-state relations. The Court also overestimated the effect which the rule would have on judicial efficiency in both state and federal courts. This casenote argues that the Court's rigid rule overlooks the recognized need for flexibility in the treatment of habeas petitions. Finally, this casenote concludes that the Court gave insufficient weight to the prisoner's interest, by focusing solely on the purposes underlying the exhaustion doctrine and not the fundamental purposes of the writ of habeas corpus, itself.

### I. THE COURT'S REASONING

The *Lundy* Court reached its decision that mixed petitions should be dismissed by a federal district court by examining both the history and language of the federal habeas corpus statute, and the policies underlying the

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<sup>43</sup> *Id.*

<sup>44</sup> See cases cited *supra* note 28.

<sup>45</sup> See, e.g., *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir. 1981) (where district court mistakenly hears exhausted claims in mixed petition, appellate court may address those claims); *Galtieri v. Wainwright*, 582 F.2d 348, 360-61 (5th Cir. 1978) (Court of Appeals may hear exhausted claims, even if there are unexhausted claims outstanding where district court mistakenly considered exhausted claims); *Gonzales v. Stone*, 546 F.2d 807, 810 (9th Cir. 1976) (dictum) (undue delay or reasonable explanation for failure to exhaust may allow consideration for exhausted claims, despite existence of unexhausted claims in mixed petitions); *West v. Louisiana*, 478 F.2d 1026, 1034-35 (5th Cir. 1973) (mixed petition reviewed even though all claims were not exhausted when there was undue delay).

<sup>46</sup> 102 S. Ct. at 1203.

exhaustion doctrine.<sup>47</sup> The Court found little guidance on how to handle mixed petitions from either the statute or the case law which preceded the statute.<sup>48</sup> In particular, the Court noted that there is no specific reference to mixed petitions in the statute on exhaustion.<sup>49</sup> The statute rather, only provides that: "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."<sup>50</sup> The Court reasoned that this language is "too ambiguous" to merit any conclusion about Congress' opinion on the proper disposition of mixed petitions.<sup>51</sup> An examination of the legislative history of the statute was equally fruitless from the Court's point of view.<sup>52</sup> The Court concluded, therefore, that Congress most likely had never considered the issue of mixed petitions.<sup>53</sup>

The lack of either clear statutory language, Supreme Court authority, or congressional directive on mixed petitions led the Court to examine the policies underlying the exhaustion doctrine.<sup>54</sup> The Court noted that from the late nineteenth century, the exhaustion doctrine was defined as one of comity, necessary to preserve harmony between the federal and state judicial systems.<sup>55</sup> More recently, the Court pointed out in *Duckworth v. Serrano*, that the purpose of the exhaustion doctrine is to "minimize friction" between the two systems of government.<sup>56</sup> Considering the issue of mixed petitions in light of the policy expressed in these earlier decisions, the Court determined that to allow federal review on mixed petitions would undermine the standards of comity that the exhaustion doctrine was designed to protect.<sup>57</sup> According to the Court, a "rigorously enforced total exhaustion rule" would instead further the goals of the doctrine.<sup>58</sup> As a result of such a rule, the Court predicted, prisoners will seek to raise all of their constitutional claims of error in state court before approaching the federal courts.<sup>59</sup> Consequently, the Court recognized that the state courts would have more opportunities to decide federal constitutional issues and would "become increasingly familiar and hospitable" toward such claims.<sup>60</sup>

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<sup>47</sup> *Id.* at 1201-03.

<sup>48</sup> *Id.* at 1212. The Court noted that mixed petitions appear to be a relatively new phenomenon. *Id.* at 1202-03 & n.11 (citing Note, *Habeas Petitions with Exhausted and Unexhausted Claims: Speedy Release, Comity and Judicial Efficiency*, 57 B.U. L. REV. 864, 867 n.30 (1977)).

<sup>49</sup> 102 S. Ct. at 1202.

<sup>50</sup> 28 U.S.C. § 2254(c) (1976).

<sup>51</sup> 102 S. Ct. at 1202.

<sup>52</sup> *Id.* at 1202-03.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1203.

<sup>55</sup> *Id.* (quoting *Ex parte Royall*, 117 U.S. 241, 251 (1886)).

<sup>56</sup> 102 S. Ct. at 1203 (quoting *Duckworth v. Serrano*, 102 S. Ct. 18, 19 (1981)).

<sup>57</sup> 102 S. Ct. at 1202.

<sup>58</sup> *Id.* at 1203-04.

<sup>59</sup> *Id.* at 1203.

<sup>60</sup> *Id.*

In addition to the promotion of comity and the benefits that the state courts would derive from the total exhaustion rule, the Court reasoned that the rule would also benefit the federal court system.<sup>61</sup> The Court explained that exhaustion of all claims in state court would provide the district court judge with a more complete factual record for review.<sup>62</sup> The Court apparently concluded that the record would be more complete since all issues in a petitioner's case would be resolved as opposed to only some of his claims being resolved. A completely exhausted record, the Court explained, would not only reduce piecemeal litigation, but also would afford the prisoner a more thorough review.<sup>63</sup> Moreover, the Court predicted that federal judges would save time as a result of the total exhaustion rule, since automatic dismissal of mixed petitions would eliminate the step of deciding whether there are exhausted and unexhausted claims which are interrelated.<sup>64</sup>

Finally, the Court considered the effect of the dismissal of mixed petitions on the prisoner.<sup>65</sup> The Court identified the prisoner's interest as "speedy relief of his federal claims."<sup>66</sup> The Court did not elaborate on this point, however, saying only that a "total exhaustion rule will not impair that interest since [the prisoner] can always amend the petition to delete unexhausted claims, rather than return to state court to exhaust all of his claims."<sup>67</sup>

Four justices joined Justice O'Connor's opinion espousing a total exhaustion rule.<sup>68</sup> While two justices joined the opinion in its entirety, two justices prevented a majority on one aspect of the total exhaustion rule as Justice O'Connor defined it.<sup>69</sup> According to the Court, the total exhaustion rule gives the prisoner two options if a judge dismisses his petition because it is "mixed": 1) the petitioner can return to state court and exhaust his unexhausted claims or 2) the petitioner can delete his unexhausted claims and proceed to federal court with only his exhausted claims.<sup>70</sup> Justice O'Connor and those justices who joined her opinion in its entirety, would impose a further restriction on the petitioner who chose the latter option. These justices concluded that the unex-

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<sup>61</sup> *Id.* at 1203-04.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1204.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1204-05.

<sup>66</sup> *Id.* at 1204.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1198. Justice O'Connor's opinion was joined in part by Justices Rehnquist, Brennan, Marshall, and Powell. *Id.*

<sup>69</sup> *Id.* at 1210. (Brennan, J., concurring in part and dissenting in part). Justices Marshall and Brennan dissented from the majority opinion on the issue of whether a prisoner who chose to delete his unexhausted claims would risk forfeiting those claims under the abuse of the writ standard of Rule 9(b). *Id.*

Justice White wrote a separate opinion concurring with Justice Brennan on the effect of Rule 9(b) on the unexhausted claims in mixed petitions. *Id.* at 1213 (White, J., concurring in part and dissenting in part). Justice White, however, disagreed with the majority about adopting a total exhaustion rule. *Id.*

<sup>70</sup> 102 S. Ct. at 1199.

hausted claims, once deleted from the petition, might never be properly considered in federal court, regardless of whether they were subsequently exhausted.<sup>71</sup> The members of the Court who supported this view relied on Rule 9(b) under Section 2254.<sup>72</sup> Justice O'Connor noted that Rule 9(b) seeks to avoid abuse of the habeas corpus writ.<sup>73</sup> In her view, the state prisoner who presents a mixed petition and then chooses to delete his exhausted claims and go forward, runs the risk of being charged with abusing the writ if he later presents the claims he deleted in a petition for federal review.<sup>74</sup> Justice Brennan, joined by Justice Marshall, agreed with the total exhaustion rule, but adamantly refuted the implication that Rule 9(b) applies to the prisoner who chooses to amend this mixed petition to include only exhausted claims.<sup>75</sup> Justice Brennan supported his position with language from Rule 9(b), its legislative history, and *Sanders v. United States*,<sup>76</sup> the Supreme Court case that announced the "abuse of the writ" standard, cited by Justice O'Connor.<sup>77</sup>

As Justice Brennan pointed out, the *Sanders* Court held that "[I]f 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 . . . he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground."<sup>78</sup> Justice Brennan argued that in Rule 9(b), Congress went beyond the standard of the *Sanders* case by requiring that the behavior of the prisoner must be "abusive" before a successive petition may be dismissed without consideration.<sup>79</sup> According to Justice Brennan, "abusive" meant "knowingly and deliberately" withholding claims in order to get more than one opportunity for federal review.<sup>80</sup> Because the total exhaustion rule requires a prisoner who presents a mixed petition to return to state court to exhaust all of his remedies or to delete his unexhausted claims and proceed only with his exhausted claims,<sup>81</sup> Justice Brennan argued that a petitioner's choice to follow the latter route cannot be considered a deliberate withholding within the meaning of Rule 9(b).<sup>82</sup>

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<sup>71</sup> *Id.* at 1204-05.

<sup>72</sup> 28 U.S.C. § 2254, Rules Governing Section 2254 Cases, Rule 9(b) (1976). 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.

*Id.*

<sup>73</sup> 102 S. Ct. at 1204. For the text of Rule 9(b), see *supra* note 72.

<sup>74</sup> 102 S. Ct. at 1204.

<sup>75</sup> *Id.* at 1210-11.

<sup>76</sup> *Id.* at 1211 (citing *Sanders v. United States*, 373 U.S. 1 (1963)).

<sup>77</sup> 102 S. Ct. at 1204.

<sup>78</sup> *Id.* (quoting *Sanders v. United States*, 373 U.S. at 18).

<sup>79</sup> 102 S. Ct. at 1211.

<sup>80</sup> *Id.* at 1212.

<sup>81</sup> *Id.* at 1199.

<sup>82</sup> *Id.* at 1213.

Justice Blackmun filed an opinion, rejecting the total exhaustion rule.<sup>83</sup> While agreeing with the majority that Section 2254 was silent on the issue of mixed petitions,<sup>84</sup> Justice Blackmun asserted that the total exhaustion rule could be "read into the statute only by force."<sup>85</sup> Moreover, according to the Justice, precedent suggested that the exhausted claims in mixed petitions should be reviewed.<sup>86</sup> He noted that former Supreme Court decisions did not mandate that state courts be given every opportunity to address a prisoner's claim before federal review was proper.<sup>87</sup>

Justice Blackmun agreed with the majority that federal-state comity is the fundamental purpose of the exhaustion doctrine.<sup>88</sup> He argued, however, that dismissal of unexhausted claims from mixed petitions adequately served that purpose.<sup>89</sup> Furthermore, Justice Blackmun anticipated that the Court's new rule would complicate the habeas corpus process. He argued that total exhaustion would produce delays, rather than promote efficiency.<sup>90</sup> A significant delay would result, in his opinion, from sending unexhausted claims that are frivolous back to state court for adjudication, when there are meritorious exhausted claims to be resolved.<sup>91</sup> Justice Blackmun also expressed concern about the effect which the new rule would have on prisoners.<sup>92</sup> Noting that many prisoners draft their own petitions,<sup>93</sup> the Justice pointed out that prisoners who filed mixed petitions might not understand their alternatives and the consequences of their choice.<sup>94</sup> He noted that if a prisoner chose to delete his unexhausted claims, the petitioner would have to start the process over, unless the federal judge took it upon himself to delete the claims.<sup>95</sup> If federal judges made a habit of deleting unexhausted claims for the prisoners, Justice Blackmun argued that there would be no difference between this option under the new rule and the rule which was formerly followed by a majority of the circuits.<sup>96</sup>

Justice Blackmun concurred in the Court's judgment because, consistent with the majority's ruling, he would have remanded the case to the district court.<sup>97</sup> Justice Blackmun, however, would have remanded the case so that the district court could have determined whether the exhausted claims in Lundy's petition were related to the unexhausted claims.<sup>98</sup> Presumably, Justice

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<sup>83</sup> *Id.* at 1205 (Blackmun, J., concurring in the judgment).

<sup>84</sup> *Id.* at 1206.

<sup>85</sup> *Id.* at 1205.

<sup>86</sup> *Id.* at 1206.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1205.

<sup>91</sup> *Id.* at 1207.

<sup>92</sup> *Id.* at 1209-10.

<sup>93</sup> *Id.* at 1208-09.

<sup>94</sup> *Id.* at 1209-10.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1209.

<sup>97</sup> *Id.* at 1210.

<sup>98</sup> *Id.*

Blackmun agreed with the rule of the majority of circuits prior to the *Lundy* decision — that while exhausted claims in mixed petitions should ordinarily be reviewed, exhausted claims which are related to unexhausted claims should be dismissed.<sup>99</sup>

Justice Stevens also filed an opinion, dissenting from the Court's total exhaustion rule.<sup>100</sup> According to Justice Stevens, federal judges should have broad discretion as to whether to dismiss a mixed petition entirely or to hear the exhausted claims in the petition.<sup>101</sup> If the exhausted claims are of a serious nature, he argued, it makes no sense to delay the resolution of those claims.<sup>102</sup> On the other hand, if the unexhausted claims indicate serious constitutional error, Justice Stevens would require the petition to be dismissed so that the state court could resolve their errors.<sup>103</sup> Justice Stevens argued further that the "true office" of the writ should determine the disposition of a prisoner's petition.<sup>104</sup> He identified the "true office" of the writ as a guarantee of freedom from "fundamental unfairness" with respect to an individual's constitutional rights.<sup>105</sup> According to Justice Stevens, federal judges should assess the seriousness of a prisoner's exhausted claims in light of this guarantee, rather than according to the procedural history of the petitioner's claims.<sup>106</sup>

Clearly several views exist among the justices as to whether federal courts should be allowed to review the exhausted claims in mixed petitions. The majority opinion held exhausted claims in mixed petitions may not be reviewed, unless all other claims are exhausted or the prisoner avoids a mixed petition situation by deleting his unexhausted claims from the petition. The members of the Court who disagreed with the total exhaustion rule would ordinarily allow exhausted claims in mixed petitions to be reviewed. Although the majority argued that the new rule would promote federal-state comity, decrease the burden on the federal courts, and leave the prisoner's rights unimpaired, Justice Blackmun and Justice Stevens argued for a variety of reasons that there is little merit to the Court's conclusions. The following sections will analyze the Court's approach to mixed petitions and the validity of its reasoning as to the benefits which the new rule would produce.

## II. INTERPRETING SECTION 2254

This section addresses the Court's interpretation of the exhaustion requirement as set out in Section 2254(c). Although all courts apparently have agreed that the statute does not specifically address mixed petitions, this section

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<sup>99</sup> See cases cited *supra* notes 23 & 24.

<sup>100</sup> 102 S. Ct. at 1213 (Stevens, J., dissenting).

<sup>101</sup> *Id.* at 1217.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1218.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1219-20.

points out that most of the circuit courts found some language in the statute to support their position that a petition need not contain only exhausted claims before federal review is proper. This section also discusses Supreme Court cases which these circuits have relied on to further justify this interpretation of Section 2254(c).

The *Lundy* Court began its analysis of the mixed petition dilemma with an inquiry into the language and legislative history of Section 2254(b)-(c), which addresses the requirement that state prisoners exhaust state remedies before filing petitions in federal court.<sup>107</sup> The Court, however, found no evidence that Congress had given any consideration to the issue of mixed petitions.<sup>108</sup> As the Court recognized, the language in the statute refers only to exhaustion of "the question presented" and does not indicate whether "the question presented" should be read to apply to all claims in the petition, taken as a whole, or to each claim individually within the petition.<sup>109</sup> The interpretation of the *Lundy* Court is that the term "the question presented" refers to the entire petition. Consequently, to fulfill the statutory requirement of exhaustion, every claim in the petition would have to be exhausted; otherwise, the petition would have to be dismissed. Although finding nothing in the language or legislative history of the statute to support a requirement that all claims in a petition for federal review must be exhausted, the majority opinion argued that there was nothing to prohibit such an interpretation.<sup>110</sup> In so concluding, the Court rejected the statutory interpretation followed by a majority of the circuit courts.<sup>111</sup> These circuits read "the question presented" in its narrowest sense to mean the individual claim in the petition.<sup>112</sup> According to this interpretation, a federal judge would look at each constitutional claim in the petition, applying the requirement of exhaustion to each one. Consequently, according to the circuit courts adopting this view, any claim in the petition which was exhausted satisfied the statutory requirement and could be heard.<sup>113</sup>

Neither approach to interpreting the statute is clearly satisfactory. The *Lundy* Court's approach is to dismiss any search for literal meaning and proceed immediately to the policies underlying the statute.<sup>114</sup> On the other hand, the approach of the majority of the circuits, reading the "question presented" to imply that Congress intended exhausted claims in mixed petitions to be considered seems to be overreaching if based only on the ambiguous statutory language. The latter interpretation does, however, find support in other sources which the *Lundy* Court apparently overlooked.

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<sup>107</sup> *Id.* at 1201-02.

<sup>108</sup> *Id.* at 1202-03 & n.11.

<sup>109</sup> *Id.* at 1202.

<sup>110</sup> *Id.* at 1203.

<sup>111</sup> *Id.* See cases cited *infra* at note 112.

<sup>112</sup> See, e.g., *Miller v. Hall*, 536 F.2d 967, 969 (1st Cir. 1976); *Tyler v. Swenson*, 483 F.2d 611, 613-15 (8th Cir. 1973).

<sup>113</sup> See cases cited *supra* note 23.

<sup>114</sup> *Rose v. Lundy*, 102 S. Ct. 1198, 1203 (1982).

As Justice Blackmun mentioned in his concurring opinion, previous decisions of the Supreme Court indicate that concern for exhaustion has only extended to those claims which are to be reviewed by the federal court.<sup>115</sup> His position rejects the hypothesis of the Court that exhaustion must be considered as to the entire petition and supports the theory that exhaustion is only required as to the individual claims in the petition. Several circuit court opinions have also taken this position, citing Supreme Court opinions to support their interpretation of Section 2254(c), that exhausted claims in mixed petitions may be reviewed.<sup>116</sup> One Supreme Court case which lends support to this interpretation is *Picard v. Connor*.<sup>117</sup> In *Picard*, the Supreme Court referred alternately to "the constitutional claim" or "constitutional question,"<sup>118</sup> the "federal claim,"<sup>119</sup> and "the claim sought to be vindicated."<sup>120</sup> More specifically, the *Picard* Court stated, "once the federal claim has been fully and fairly presented to the state courts, the exhaustion requirement is satisfied."<sup>121</sup> This language suggests that the Court was only concerned that the claim before the federal court for review be exhausted. The Court made no reference to all claims or all claims in the petition.

Another case which circuit courts have relied on in support of reviewing exhausted claims in mixed petitions is *Gooding v. Wilson*.<sup>122</sup> The Supreme Court heard this case despite the fact that the habeas petition to the district court had presented both exhausted and unexhausted claims.<sup>123</sup> Noting that the district court had only considered the exhausted claim to be ripe for decision, the *Gooding* Court addressed only that claim.<sup>124</sup> The Court acknowledged that the petition for federal review had contained both exhausted and unexhausted claims,<sup>125</sup> but the opinion never mentioned that a mixed petition created problems in any way. The *Lundy* Court addressed the *Gooding* decision only in a footnote, stating that the case did not control in this situation because the issue of mixed petitions was not "before the Court" in *Gooding*.<sup>126</sup>

In *Gooding*, however, the Court noted that the federal district court reviewed the petitioner's exhausted claim and refused to hear his unexhausted claims.<sup>127</sup> The *Gooding* Court did not make further reference to the issue of exhausted or unexhausted claims, but proceeded to rule on the claim which the district court found to be exhausted. The *Gooding* Court's lack of comment on

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<sup>115</sup> *Id.* at 1206.

<sup>116</sup> See cases cited *supra* note 112.

<sup>117</sup> 404 U.S. 270 (1971).

<sup>118</sup> *Id.* at 272.

<sup>119</sup> *Id.* at 276.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 275.

<sup>122</sup> 405 U.S. 518 (1972).

<sup>123</sup> *Id.* at 519-20.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Rose v. Lundy*, 102 S. Ct. at 1201 n.5.

<sup>127</sup> *Gooding v. Wilson*, 405 U.S. 518, 519 (1972).

the issue suggests that, at the time of that decision, the Court did not require dismissal of mixed petitions, or at least that the review of exhausted claims while unexhausted claims were outstanding was not a concern of great magnitude.

Although the *Picard* and *Gooding* decisions can be read to indicate that the Court did not believe total exhaustion was necessary, it is also possible to read them as if the issue of mixed petitions had not surfaced yet. The Court first recognized the problem which mixed petitions raise in 1974, in *Francisco v. Gathright*.<sup>128</sup> The Court found it unnecessary to decide the mixed petition issue in that case, however, since the unexhausted claims at issue were treated as though they had been exhausted, as a result of an exception to the exhaustion doctrine, announced in an earlier case.<sup>129</sup> Even after *Francisco*, however, language in Supreme Court decisions continued to suggest that exhaustion was required only as to the individual claim to be reviewed by the federal court rather than as to the petition as a whole.<sup>130</sup>

In *Pitchess v. Davis*, for example, where the petitioner raised only one claim, the Court dismissed the petition for failure to exhaust.<sup>131</sup> In so doing, the Court interpreted the language in *Picard* to mean that "exhaustion of state remedies is required as prerequisite to the consideration of each claim sought to be presented in federal habeas."<sup>132</sup> As in the *Picard* decision, there is no indication that the Court viewed constitutional claims as being joined into one cause of action and, thus, dealt with alike. On the contrary, the language indicated that the Court viewed constitutional claims as separate from one another and that only the claim to be considered need be exhausted.<sup>133</sup>

The language concerning exhaustion of claims in *Picard* and *Pitchess* as well as the Court's silence on mixed petitions in *Gooding*, lends some support to the theory that district court judges may hear exhausted claims in mixed petitions. Arguably, however, these sources, like the language of Section 2254(c), are ambiguous with regard to mixed petitions. Since there is no specific indication by the Supreme Court prior to *Lundy* as to how federal district courts should treat a mixed petition, even a more thorough search than that conducted by the *Lundy* Court for the applicability of Section 2254(c) to mixed petitions, fails to conclusively resolve the issue of the proper response to the question. As the

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<sup>128</sup> 419 U.S. 59, 63-64 (1974) (per curiam).

<sup>129</sup> *Id.* In *Roberts v. LaVallee*, the Court held that when a state statute is found to be unconstitutional, subsequent to a prisoner's filing a federal habeas petition, the prisoner need not return to state court to seek relief. 389 U.S. 40 (1967) (per curiam). In *Francisco*, the Court relied on *Roberts*, holding that the petitioner did not have to return to state court to exhaust his claim, when the statute he was challenging as unconstitutional had been found unconstitutional after he filed for federal habeas relief. *Francisco v. Gathright*, 419 U.S. at 63-64.

<sup>130</sup> See, e.g., *Pitchess v. Davis*, 421 U.S. 482 (1975) (per curiam).

<sup>131</sup> 421 U.S. 482, 487 (1975) (per curiam).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

*Lundy* Court recognized, an inquiry into the policy considerations which underlie Section 2254(c) is necessary.<sup>134</sup>

### III. THE EXHAUSTION DOCTRINE: PROMOTION OF FEDERAL-STATE COMITY

The *Lundy* Court relied chiefly on the policies underlying the exhaustion doctrine in deciding how district court judges should handle mixed petitions.<sup>135</sup> The Court, in establishing these underlying policies, referred to *Ex Parte Royall*, one of the first cases to apply the exhaustion doctrine.<sup>136</sup> In *Royall*, the Court stated that when federal courts exercise their powers in matters involving state law, they should do so with deference to the state court so as not to create "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."<sup>137</sup> When state prisoners petition federal courts for review of constitutional error, this statement becomes highly relevant. Because federal review of state criminal convictions suggests interference with the state court system, the exhaustion doctrine was created to insure that the federal courts do not interfere unduly with the jurisdiction of the state courts.<sup>138</sup>

The *Lundy* Court reasoned that a rule which requires the dismissal of all petitions containing both exhausted and unexhausted claims will encourage prisoners to exhaust all of their claims in state court before petitioning for federal review.<sup>139</sup> In this way, state courts would have "the first opportunity to review all claims of constitutional error."<sup>140</sup> If prisoners all followed this course of action, federal courts would not review petitions until the state had fully decided a petitioner's entire case. Such a result seems on first impression to fulfill the goals of the exhaustion doctrine, inasmuch as there would be no federal interference until state litigation on all issues was final.

On closer examination it becomes apparent, however, that the total exhaustion rule established in *Lundy* does not necessarily yield this result. The rule allows a petitioner to exhaust all of his claims in state court or present only his exhausted claims to federal court.<sup>141</sup> If the prisoner does exhaust all of his claims in state court before petitioning the federal court, then comity is promoted because the state court has a chance to resolve the entire case before the federal system intervenes. If the prisoner chooses to proceed to federal court with only his exhausted claims, however, the possibility of state litigation on his unexhausted claims remains. In this respect, the total exhaustion rule does not

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<sup>134</sup> *Rose v. Lundy*, 102 S. Ct. at 1201-02.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 1203 (citing *Ex parte Royall*, 117 U.S. 241 (1886)).

<sup>137</sup> *Ex parte Royall*, 117 U.S. at 251.

<sup>138</sup> See, e.g., *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 490-91 (1973); *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Fay v. Noia*, 372 U.S. 391, 415-20 (1963).

<sup>139</sup> 102 S. Ct. at 1203.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1199.

further comity in federal-state relations any more than the rule which the majority of the circuits espoused prior to the Court's decision.<sup>142</sup> These circuits would hear the exhausted claims and dismiss the unexhausted claims.<sup>143</sup> The only difference between the two approaches is that the total exhaustion rule requires the prisoner to amend his complaint while the rule previously followed by most circuits allowed the judge to dismiss the unexhausted claims. In either case, the result is the same; the petitioner's exhausted claims are heard and he is free to return to state court to resolve his unexhausted claims.<sup>144</sup> The benefit of the *Lundy* rule, then, is only obtained if the prisoner either exhausts all of his claims in state court, before ever submitting a petition to federal court, or after a mixed petition is dismissed, he chooses to return to state court to exhaust those claims rather than amend his petition. If the prisoner followed either of these two courses, comity would be preserved inasmuch as the state would have an opportunity to rule on all constitutional claims before the federal system intervened.

The consequences of the *Lundy* rule may be even more questionable in light of Supreme Court decisions which reject the idea that federal courts must show technical deference to state courts. When a prisoner's petition is dismissed because it contains unexhausted claims and he chooses not to amend it but to return to state court to exhaust all of his claims, a situation involving technical deference could arise. As the Supreme Court has recognized in several cases, technical deference by federal courts to state courts does not always promote comity.<sup>145</sup> For instance, in *Roberts v. LaVallee*,<sup>146</sup> the Supreme Court granted a writ of habeas corpus to a prisoner, even though he had an available state remedy to pursue.<sup>147</sup> In *Roberts*, an indigent petitioner had challenged the constitutionality of a New York state law which denied him a free transcript of a hearing at which the State's primary witness had testified.<sup>148</sup> The state courts denied relief.<sup>149</sup> By the time the prisoner sought federal habeas corpus relief, the New York Court of Appeals found the statute to be unconstitutional.<sup>150</sup> The federal district court dismissed the petition, ruling that due to the change in state law, the prisoner had an available state remedy to pursue.<sup>151</sup> The Court of Appeals for the Second Circuit affirmed the

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<sup>142</sup> See cases cited *supra* note 23.

<sup>143</sup> See *id.*

<sup>144</sup> *Rose v. Lundy*, 102 S. Ct. at 1199. If the rule as proposed by Justice O'Connor had obtained a majority, dismissal of a mixed petition would have made any of the claims included in that petition subject to the abuse of the writ standard of Rule 9(b) in any subsequent petition for federal habeas corpus review. *Id.* at 1204-05.

<sup>145</sup> See, e.g., *Francisco v. Gathright*, 419 U.S. 59 (1974); *Roberts v. LaVallee*, 389 U.S. 40 (1967).

<sup>146</sup> 389 U.S. 40 (1967).

<sup>147</sup> *Id.* at 41-42.

<sup>148</sup> *Id.* at 41.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

decision.<sup>152</sup> The Supreme Court, however, reversed.<sup>153</sup> Although the Court recognized that technically a state remedy was available to the prisoner, the Court found the claim to be exhausted for the purposes of federal review since more state litigation would only be "unnecessarily time-consuming and otherwise burdensome" to the state.<sup>154</sup> The Court stated further that there would be no "substantial state interest in ruling once again on the petitioner's case."<sup>155</sup> Apparently, the Supreme Court did not believe that technical deference to the state court would promote comity in this situation.

The Supreme Court reaffirmed the *Roberts* decision in *Francisco v. Gathright*.<sup>156</sup> In *Francisco*, the petitioner presented two claims of constitutional error to the district court.<sup>157</sup> One of the claims was that a Virginia statute was unconstitutional.<sup>158</sup> After the petitioner filed for federal habeas review, the state court found the statute to be unconstitutional.<sup>159</sup> Holding that *Roberts v. LaVallee*<sup>160</sup> controlled, the Supreme Court disagreed with the courts below that the claim of statutory unconstitutionality should be resubmitted to the state court.<sup>161</sup> Referring to both of these cases, the Court stated that "the policies served by the exhaustion requirement would not be furthered by requiring resubmission of the claims to the state courts."<sup>162</sup> The *Roberts* and *Francisco* cases were concerned with whether a constitutional claim should be resubmitted to state court, following a change in state law before federal review is proper.<sup>163</sup> The Court determined in these cases that technical deference to state courts does not always promote federal-state comity. After *Lundy*, mixed petitions may present a similar problem when a prisoner chooses to return to state court to exhaust his claims. When a prisoner's mixed petition contains meritorious claims which have been exhausted and frivolous claims which have not been exhausted, the total exhaustion rule requires dismissal. Consequently, the frivolous claims are sent back to the state court system, imposing an unnecessary and time-consuming burden on the state.<sup>164</sup> The rule previously followed by a majority of the circuits avoided this result; the frivolous claims would have been dismissed, and the meritorious claims reviewed.<sup>165</sup>

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 42.

<sup>154</sup> *Id.* at 43.

<sup>155</sup> *Id.*

<sup>156</sup> 419 U.S. 59 (1974).

<sup>157</sup> *Id.* at 60.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 60-61.

<sup>160</sup> 389 U.S. 40 (1967).

<sup>161</sup> *Francisco v. Gathright*, 419 U.S. at 62-63.

<sup>162</sup> *Id.* at 63.

<sup>163</sup> *Francisco v. Gathright*, 419 U.S. 59 (1974); *Roberts v. LaVallee*, 389 U.S. 40 (1967).

<sup>164</sup> This very problem was recognized by the Second Circuit in *United States ex rel. Levy v. McMann*, 394 F.2d 402, 404 (2d Cir. 1968) (unexhausted claim frivolous, therefore dismissal of mixed petition would waste both state's and prisoner's time).

<sup>165</sup> *Id.*

The *Lundy* Court's failure to consider a situation in which the state would be required to adjudicate frivolous claims suggests that the argument that the total exhaustion rule will further comity is not as strong as the Court's presentation purports. The *Lundy* Court argued that the total exhaustion rule would allow state courts to "become increasingly familiar with and hospitable toward federal constitutional issues."<sup>166</sup> Certainly, this objective will not be obtained if state courts are required to adjudicate frivolous claims, since such claims would not raise important constitutional questions.

As Justice Stevens observed in his dissent, the *Lundy* Court "assumes that the character of all claims alleged in habeas petitions is the same."<sup>167</sup> This assumption, however, is unreliable. In fact, claims of vastly different substantive merit and procedural history are brought under habeas corpus and thus, the total exhaustion rule will promote comity only in some situations. If the prisoner exhausts all of his claims before petitioning for federal review, the federal interference with state processes is minimal. Once the prisoner drafts a mixed petition, however, the effect of the rule is less clear. If the prisoner deletes his unexhausted claims and proceeds in federal court, the effect of the rule is the same as if the judge himself deleted the unexhausted claims.<sup>168</sup> If the prisoner returns to state court to exhaust his claims, the effect of the rule depends on the character of the petitioner's claims. If the unexhausted claims are frivolous, the rule works against comity, by imposing an unnecessary burden on state courts.

Consequently, the benefits of the total exhaustion rule in promoting federal-state comity are less significant than the *Lundy* Court indicated. The Court also asserted, however, that the new rule would be more efficient and less burdensome on the federal court system. The validity of this conclusion will be discussed in the following section.

#### IV. BENEFITS TO THE FEDERAL COURTS

The *Lundy* Court argued not only that the total exhaustion rule would benefit the state courts and promote comity in federal-state relations, but also that the rule would decrease the burden which habeas petitions from state courts impose on federal judges, thereby promoting judicial efficiency at the federal level.<sup>169</sup> According to the Court, efficiency would be promoted because federal judges would not have to distinguish between related and unrelated claims,<sup>170</sup> as the rule followed by a majority of the circuits required them to do.<sup>171</sup> The majority rule, prior to *Lundy*, was to dismiss even exhausted claims

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<sup>166</sup> *Rose v. Lundy*, 102 S. Ct. 1198, 1203 (1982).

<sup>167</sup> *Id.* at 1215-16.

<sup>168</sup> See *supra* notes 21-22 and accompanying text.

<sup>169</sup> 102 S. Ct. at 1203-04.

<sup>170</sup> *Id.*

<sup>171</sup> See *supra* note 26 and accompanying text.

if they were related to an unexhausted claim.<sup>172</sup> The total exhaustion rule, however, does not require any distinction between related and unrelated claims, since a petition with an unexhausted claim would automatically be dismissed.

Justice Blackmun argued, however, that the total exhaustion rule would work against judicial efficiency.<sup>173</sup> He reasoned that some preliminary assessment of the petition is necessary under either the total exhaustion rule or the rule previously followed by most of the circuits.<sup>174</sup> Under both rules, he asserted, federal judges at least have to determine whether claims have been exhausted or not<sup>175</sup> before they can take any action on the petition. Justice Blackmun argued that this preliminary review of the petition is, in some instances, sufficient for the district judge to dispose of an exhausted claim once and for all.<sup>176</sup> Thus, under the rule followed by a majority of the circuits, a federal judge in his preliminary review, could locate and dispose of a petitioner's claim which, though properly exhausted, was not deserving of any further review.<sup>177</sup> The total exhaustion rule, in contrast, requires that the entire petition be dismissed once any unexhausted claims are located, regardless of the nature of the exhausted claims.<sup>178</sup> For this reason, Justice Blackmun noted that, under the total exhaustion rule, the preliminary time which a federal judge must spend to determine whether a petition contains only exhausted claims, is time lost if there are any unexhausted claims in the petition.<sup>179</sup> Furthermore, if a mixed petition is dismissed, the exhausted claims, whether frivolous or meritorious, may be presented to the federal district court again either after the prisoner amends his petition in accordance with the total exhaustion rule, or after he exhausts his remaining state claims.<sup>180</sup> Consequently, under the *Lundy* rule, a mixed petition would never be completely disposed of as a result of the initial consideration by the federal court. For this reason, it is difficult to understand why the *Lundy* Court predicted that federal judges would save time under the new rule. Justice Blackmun's analysis seems largely correct that the Court's new rule will not decrease but may, in fact, increase the burden on federal judges.

The *Lundy* Court also argued that the total exhaustion rule would encourage state prisoners to exhaust all claims and, therefore, when the petition was ripe for federal habeas review, the federal judge would have a more complete factual record.<sup>181</sup> This assertion presumes, however, that petitioners

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<sup>172</sup> *See id.*

<sup>173</sup> 102 S. Ct. at 1208.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* This conclusion is apparently what Justice Blackmun was referring to.

<sup>178</sup> *Id.* at 1199.

<sup>179</sup> *Id.* at 1208.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 1203-04.

would comply with the rule. Again, the Court did not project what the impact would be on the federal court if the prisoner did not exhaust all of his claims in state court. If a prisoner chose to present only his exhausted claims to the federal district court, as the total exhaustion rule allows, the record that the federal judge would receive would be the same as that which he would receive under the rule followed by a majority of the circuits. In either case, the record would not be as complete as if the prisoner had exhausted all claims in state court. Moreover, in either case, the record may have been as complete as necessary to decide the exhausted issues. In any event, federal judges have always had discretion to summarily dismiss a petition or order the record to be expanded.<sup>182</sup> Any deficiencies in the record, therefore, could be corrected after the petition is presented to the federal court. The *Lundy* rule, then, adds little if anything to judicial efficiency in this respect.

Not only is the *Lundy* rule not necessary to insure a complete record, but the rule could also have a detrimental effect on the ability of the federal courts to understand when a given petition is ripe for federal review. As Justice Blackmun indicated, resolution on the merits may be more difficult if the record on the exhausted claims becomes stale as a result of the delay which ensues when the petitioner seeks to exhaust his unexhausted claims or waits for his amended petition to come up for review again.<sup>183</sup>

In sum, the Court's argument that benefits will inure to federal judges as a result of the total exhaustion rule, again ignores the substantive and procedural idiosyncracies of the habeas corpus process. Furthermore, the rule either overlooks or underestimates the ability of the federal judge to use his discretion in determining when a record is sufficiently developed for review and when a mixed petition should be dismissed or reviewed.

The *Lundy* Court apparently did not consider the adverse effects which the total exhaustion rule could have on judicial efficiency or for that matter on federal-state relations. The Court's oversight of the need for flexibility in dealing with habeas questions is unusual in light of the fact that it has often emphasized the need for such flexibility. One instance of the Court's recognition of the need for flexibility in applying the habeas statute on the question of exhaustion is the Court's ruling in *Brown v. Allen*.<sup>184</sup> An issue before the Court in that case was whether a prisoner must pursue any remedies which the state may offer beyond the normal appellate procedure before he is deemed to have exhausted state remedies within the meaning of Section 2254 of the habeas statute.<sup>185</sup> Section 2254(c) of the statute states that "an applicant may 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 pro-

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<sup>182</sup> 28 U.S.C. § 2254, Rules Governing Section 2254 Cases, Rule 7 (1976).

<sup>183</sup> 102 S. Ct. at 1208.

<sup>184</sup> 344 U.S. 443 (1953).

<sup>185</sup> *Id.* at 447.

cedure, the question presented."<sup>186</sup> In *Brown*, the Court construed this language to mean that the requirement of "all available state remedies" is met once the state supreme court has decided the prisoner's claim adversely to him and the Supreme Court of the United States has denied application for certiorari.<sup>187</sup> The *Brown* Court found it implausible that Congress would have intended that state prisoners make repetitious applications to state court.<sup>188</sup> The *Brown* Court did not read the exhaustion requirement literally to mean that a state prisoner must pursue *every* available state remedy.<sup>189</sup>

Moreover, the need for flexibility in dealing with habeas petitions and the impracticability of the Court's "rigorous" rule are evident from the experiences of the Fifth and Ninth Circuits. Although these two circuits have purported to follow a total exhaustion rule, both circuits have recognized the need to make exceptions to the requirement that all mixed petitions be dismissed.<sup>190</sup> In *Galtieri v. Wainwright*, the Fifth Circuit held that if a district court mistakenly considers the merits of an exhausted claim and there are unexhausted claims in the petition, the Court of Appeals may review the exhausted claim on the merits.<sup>191</sup> The Court of Appeals noted that the problem would only be further aggravated if they refused to review the exhausted claim.<sup>192</sup> The Court stated that, "Exceptions to the exhaustion doctrine have been developed judicially to cover situations where mechanical adherence would not further the goal of the exhaustion doctrine or would frustrate an overriding federal claim."<sup>193</sup>

Similarly, the Ninth Circuit, in *Gonzales v. Stone*, held that a district court must decline to consider any issues raised in a habeas petition until every issue has been exhausted.<sup>194</sup> In *Gonzales*, the court noted, however, that the rule is not inflexible, stating that if a prisoner has a reasonable explanation for failure to allege the unexhausted claims in earlier state proceedings, then consideration of fairness may require the court to examine the exhausted claims while refusing to hear the unexhausted claims.<sup>195</sup>

Thus, both the Supreme Court and the circuit courts have recognized the need for flexibility in resolving habeas questions. Even those circuits which have attempted to follow a total exhaustion rule have developed exceptions to their rule. The *Lundy* Court in construing the exhaustion requirement strictly appears to have overlooked both its own earlier holdings regarding flexibility in

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<sup>186</sup> 28 U.S.C. § 2254(c) (1976).

<sup>187</sup> *Brown v. Allen*, 344 U.S. at 447-49 & n.3.

<sup>188</sup> *Id.* at 448-49 & n.3.

<sup>189</sup> The requirements for exhaustion of state remedies were relaxed even further by the Supreme Court when the Court held that the exhaustion doctrine does not require a state prisoner to seek certiorari in the Supreme Court before seeking federal habeas corpus relief. *Fay v. Noia*, 372 U.S. 391, 398 (1963).

<sup>190</sup> See *supra* note 45 and accompanying text.

<sup>191</sup> 582 F.2d 348 (5th Cir. 1978).

<sup>192</sup> *Id.* at 362.

<sup>193</sup> *Id.* at 354.

<sup>194</sup> 546 F.2d 807, 810 (9th Cir. 1976).

<sup>195</sup> *Id.* at 809 (dictum).

dealing with habeas corpus proceedings and the practical problems which a rigid rule engenders. Furthermore, as the next section will suggest, the rigidity of the rule may have serious implications for the rights of the prisoner in contravention of the very purpose of the habeas corpus doctrine.

## V. THE PRISONER'S INTEREST

The *Lundy* Court's failure to consider the variety of habeas petitions to the federal courts may be explained in part by the mode of analysis of the Court's opinion. At the very outset of its opinion, the Court justified the total exhaustion rule by stating that "a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statute."<sup>196</sup> In its analysis, however, the Court did not show how the purposes of the habeas statute are furthered, but rather how the purposes of the exhaustion doctrine are furthered. By focusing solely on those sections of the statute pertinent to exhaustion, the Court ignored the most fundamental purpose of the statute — to provide speedy relief to the prisoner.<sup>197</sup> Throughout the opinion, the Court overlooked the fact that the exhaustion doctrine is only part of the judicial response to state prisoners seeking federal habeas relief.

The Court, however, did not discuss the need to balance the concern for comity with the prisoner's right to relief. The Court cited *Braden v. 30th Judicial Circuit Court* to underscore the point that the exhaustion doctrine's purpose is to promote comity.<sup>198</sup> While the *Braden* Court did reaffirm this long-acknowledged principle, that Court also put the purpose of the exhaustion doctrine in its proper perspective. As the *Braden* Court noted, "The 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 confinement' ".<sup>199</sup>

The rigid rule of total exhaustion as proposed by the *Lundy* Court, contrary to former Supreme Court decisions, does not give sufficient consideration to the need to preserve the writ of habeas corpus as a swift and imperative remedy. The Supreme Court has recognized in the past that in order to effectuate this right, unnecessary procedural hurdles to habeas corpus relief must not be tolerated.<sup>200</sup> For example, in *Fay v. Noia*, the Court gave great weight to

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<sup>196</sup> *Rose v. Lundy*, 102 S. Ct. 1198, 1199 (1982).

<sup>197</sup> See, e.g., *Johnson v. Avery*, 393 U.S. 483, 485-86 (1969); *Carafas v. LaVallee*, 391 U.S. 234, 238-40 (1968); *Peyton v. Rowe*, 391 U.S. 54, 58-60 (1968); *Fay v. Noia*, 372 U.S. 391, 399-402 (1963); *Smith v. Bennett*, 365 U.S. 708, 712-13 (1961); *Bowen v. Johnston*, 306 U.S. 19, 26 (1939).

<sup>198</sup> 102 S. Ct. at 1203 (citing *Braden v. 30th Judicial Circuit*, 410 U.S. 484, 490-91 (1973)).

<sup>199</sup> 410 U.S. at 490 (quoting *Secretary of State for Home Affairs v. O'Brien* 1923, A.C. 603, 609 (H.L.)).

<sup>200</sup> See, e.g., *Peyton v. Rowe*, 391 U.S. 54, 63-64 (1968); *Fay v. Noia*, 372 U.S. 391, 435-36 (1963).

the prisoner's interest in striking down the requirement that state prisoners must seek certiorari in the Supreme Court before petitioning for federal relief.<sup>201</sup> Furthermore, the *Fay* Court held, "our decision today affects all procedural hurdles to the achievement of swift and imperative justice of habeas corpus. . . ."<sup>202</sup> Similarly, the Court struck down a ruling which held that prisoners held in custody may not attack future consecutive sentences.<sup>203</sup> The Court held in *Peyton v. Rowe*, that common sense dictates that prisoners seeking habeas corpus relief after exhausting state remedies must do so at the earliest time practicable.<sup>204</sup>

The *Lundy* Court gave little consideration to the prisoner's interest in federal habeas relief, despite the emphasis which prior decisions have accorded that interest. Both the *Peyton* and *Fay* decisions stressed the necessity to make federal habeas review readily available and accessible to the state prisoner. Moreover, it is ironic that the *Lundy* Court relied on *Braden v. 30th Judicial Circuit Court* to assert and define the power of the exhaustion doctrine, for the *Braden* Court cautioned that the exhaustion doctrine "cannot be used as a blunderbuss to shatter the attempt at litigation of constitutional claims without regard to the purpose that underlies the doctrine and called it into existence."<sup>205</sup>

Justice Blackmun and Justice Stevens agreed that the total exhaustion rule may impair the prisoner's rights.<sup>206</sup> Justice Blackmun noted that the prisoner's right to speedy relief is impaired if the prisoner must go back to state court to adjudicate unexhausted claims.<sup>207</sup> Moreover, he argued, the Court's rule assumed that all prisoners are litigious and are abusing the habeas corpus system to get more than one day in court.<sup>208</sup> In addition, Justice Blackmun maintained that many *pro se* petitioners may not be aware of the option to amend their petitions if dismissed because they are mixed.<sup>209</sup> A petitioner may have to depend on an instruction from the judge to amend his petition by deleting his unexhausted claims.<sup>210</sup> Even in this case, the petitioner still may have to wait in line again until his revised petition comes up again for review. Furthermore, if the petitioner is unaware of his option to amend the petition, he may waste time going back to state court to exhaust frivolous claims in state

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<sup>201</sup> *Fay v. Noia*, 372 U.S. 391, 400-02 (1963). Before the *Fay* decision, the Supreme Court had held that prisoners must seek certiorari in the Supreme Court of the United States before petitioning the federal courts for review, in order to satisfy the exhaustion requirement. *Darr v. Burford*, 399 U.S. 200 (1950), *overruled*, *Fay v. Noia*, 372 U.S. 391 (1963).

<sup>202</sup> *Fay v. Noia*, 372 U.S. at 435-36.

<sup>203</sup> *Peyton v. Rowe*, 391 U.S. 54 (1968).

<sup>204</sup> *Id.* at 63-64. This decision overruled *McNally v. Hill*, 293 U.S. 131 (1934).

<sup>205</sup> *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 490 (1973).

<sup>206</sup> 102 S. Ct. at 1208-09 (Blackmun, J., concurring in the judgment); *id.* at 1218-20 (Stevens, J., dissenting).

<sup>207</sup> 102 S. Ct. at 1209.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

court.<sup>211</sup> Justice Stevens argued that any delay in resolving a petitioner's exhausted claims because unexhausted claims had to undergo another round of review in state court would be "truly outrageous" if the exhausted claims were meritorious.<sup>212</sup>

Under the new rule, the prisoner himself must distinguish between exhausted and unexhausted claims in order to avoid having his petition dismissed. It is difficult to understand how the *Lundy* Court did not find this requirement to impair the prisoner's interest in light of the fact that the Court implied that distinguishing between claims is often a difficult and burdensome task for federal judges.<sup>213</sup> The burden which the judges sustained may merely be shifted to the prisoners under the new rule, as Justice Blackmun suggested.<sup>214</sup>

As noted above, the total exhaustion rule may jeopardize the basic function of habeas corpus. Since the rule is difficult for prisoners to understand, the delays which are inherent in the rule may involve even more needless delays. This problem is especially unfortunate if a prisoner has meritorious claims which are unnecessarily delayed, or, worse, abandoned. Although the Court's purpose may be to avoid frivolous and repetitious claims, the new rule does not accomplish that goal. The total exhaustion rule adheres to strict procedural requirements regardless of the nature of the prisoner's claim. As Justice Stevens suggested in his dissent, personal liberty may be sacrificed because of mere procedural hurdles.<sup>215</sup> If the Court had addressed the mixed petition issue with the purpose of habeas corpus in mind, balancing it against the interests of comity, it would probably have achieved a more flexible rule which would work less hardship on the prisoner's interests.

#### CONCLUSION

The way in which a mixed petition should be treated by a federal court is not addressed in the federal habeas corpus statute. Although earlier Supreme Court opinions are also ambiguous where mixed petitions are concerned, there are some cases which support the view that a federal district judge may properly review the exhausted claims in the petition. This approach is preferable to the total exhaustion rule because it can promote the interests of comity and the interests of the prisoner with greater flexibility. This flexibility is needed because the nature of the claims in one petition will vary from those in another. A flexible approach can adequately preserve the interest of comity in federal-state relations, since unexhausted claims will be dismissed. The rigidity of the total exhaustion rule will not always serve the purposes of comity because a

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 1217.

<sup>213</sup> *Id.* at 1204.

<sup>214</sup> *Id.* at 1209-10.

<sup>215</sup> *Id.* at 1218-20.

state court may have to spend time reviewing frivolous claims. A more flexible approach also allows the district court judge to use his time more efficiently, in many instances. The total exhaustion rule does not allow the judge to act on a mixed petition in any way, despite the possibility that his first review of the petition might allow resolution of claims. The total exhaustion rule will only promote comity and judicial efficiency if the state prisoner always exhausts all of his claims in state court before petitioning for federal review. Consequently, the rule imposes a burden on the prisoner. A prisoner who does not understand the rule and its consequences may waste his time and that of the state court exhausting frivolous claims. Moreover, by doing so, the prisoner's constitutional guarantee to a speedy determination as to the legality of his detention may be jeopardized.

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