CONSTITUTIONAL LAW—A FEDERAL DISTRICT COURT MUST DISMISS IN ITS ENTIRETY A STATE PRISONER'S HABEAS CORPUS PETITION CONTAINING BOTH EXHAUSTED AND UNEXHAUSTED CLAIMS OF CONSTITUTIONAL VIOLATIONS. *Rose v. Lundy* (U.S. Sup. Ct. 1982).

Noah Lundy was convicted in a Tennessee state court on charges of rape and crime against nature.[1] He appealed to the Tennessee Court of Criminal Appeals,[2] which held that sufficient evidence existed to sustain the convictions.[3] After being denied review by the Tennessee Supreme Court[4] and subsequently filing an unsuccessful petition for relief in Knox County Criminal Court,[5] Noah Lundy applied for a federal writ of habeas corpus.[6]

The habeas petition alleged four specific constitutional violations,[7] two of which were never raised in the Tennessee state court system.[8] Acknowledging that Lundy had not exhausted his state remedies for some of the alleged constitutional violations, the district court nevertheless considered the claims[9] and concluded that Lundy's sixth amendment right to a fair trial had been violated.[10]

The Court of Appeals for the Sixth Circuit affirmed, rejecting the argument of Jim Rose, Warden of the Tennessee State Penitentiary, that the lower court should have dismissed the habeas petition because it included both exhausted and unexhausted claims.[11] The Supreme Court *held*, re-

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1. Rose v. Lundy, 102 S. Ct. 1198, 1199 (1982).
2. Lundy v. State, 521 S.W.2d 591 (Tenn. Ct. App. 1975).
3. *Id.*
4. Rose v. Lundy, 102 S. Ct. at 1199.
5. *Id.*
6. *Id.*
7. *Id.* at 1199. Lundy alleged four specific grounds for which he was entitled to relief:

> (1) That he had been denied the right to confrontation because the trial court limited the defense counsel's questioning of the victim; (2) that he had been denied the right to a fair trial because the prosecuting attorney stated that the respondent had a violent character; (3) that he had been denied the right to a fair trial because the prosecutor improperly remarked in his closing argument that the State's evidence was uncontradicted; and (4) that the trial judge improperly instructed the jury that every witness is presumed to swear the truth.

Id.

8. *Id.* at 1199. Because claims three and four were never raised in the Tennessee state court system, state remedies for these grounds were not exhausted. *Id.*
9. *Id.* at 1199-1200. While stating that it could not consider the unexhausted claims in a constitutional framework, the Court referred to the claims collaterally in an effort to assess the "atmosphere" of the trial. *Id.*
10. *Id.* at 1200.
11. Lundy v. Rose, 624 F.2d 1100 (6th Cir. 1980), *rev'd sub nom.* 102 S. Ct. 1198 (1982). The Sixth Circuit affirmed the district court in an unreported order. 102 S. Ct. at 1200.

versed and remanded to the district court.[12] In order to effectuate the policies underlying the habeas statute,[13] a district court must dismiss in its entirety a state prisoner's habeas corpus petition containing both unexhausted and exhuasted claims.[14] Following dismissal, the prisoner has the option of either returning to the state court system to exhaust all claims or, alternatively, amending or refiling the habeas petition with the district court, presenting to it only the exhausted claims. *Rose v. Lundy*, 102 S. Ct. 1198 (1982).

A state prisoner claiming unconstitutional incarceration may petition a federal court for habeas corpus relief.[15] A federal court will review the proceedings which resulted in incarceration in an effort to determine if the state violated any constitutional rights of the prisoner.[16] If the federal court determines that constitutional error was committed, it will order release of the prisoner.[17] Such an order obviously interferes with the criminal justice system of the state.[18]

In an effort to minimize such interference, federal courts developed and Congress later codified[19] the doctrine of exhaustion of state remedies.[20] With

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12. Rose v. Lundy, 102 S. Ct. at 1205. Justice O'Connor wrote the opinion of the Court, except Part III-C. *Id.* at 1199. She was joined by Chief Justice Burger, and Justices Brennan, Marshall, Powell, and Rehnquist. *Id.* at 1199. Chief Justice Burger and Justices O'Connor, Powell, and Rehnquist joined in Part III-C, an unsigned portion of the opinion. *Id.* at 1204. Justice Blackmun filed an opinion concurring in the judgement. *Id.* at 1205. Justice Brennan filed an opinion concurring in part and dissenting in part, in which Justice Marshall joined. *Id.* at 1210. Justice White filed an opinion concurring in part and dissenting in part. *Id.* at 1213. Justice Stevens filed a dissenting opinion. *Id.* at 1213.

13. 28 U.S.C. §§ 2254(b)-(c) (1977). These subsections provide:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgement 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.
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> (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.

14. Rose v. Lundy, 102 S. Ct. at 1199. For cases limiting the nature of claims a federal court can review in a habeas proceeding *see* Stone v. Powell, 428 U.S. 465 (1976); Davis v. United States, 411 U.S. 233 (1973).

15. *E.g.*, Fay v. Noia, 372 U.S. 391, 417 (1963) (Respondent, serving life sentence for murder, sought habeas relief claiming his incarceration was unconstitutional because his confession, introduced into evidence at his trial, was coerced and therefore its introduction violated his rights under the fourteenth amendment).

16. *See id.* at 420-22.

17. *See id.* at 427 n.38.

18. *See Ex parte* Royall, 117 U.S. 241, 251-52 (1886) (Petitioner, who was charged with selling past-due coupons without a license and who was in custody of state officers pending trial, petitioned federal court for habeas corpus relief).

19. 28 U.S.C. §§ 2254(b)-(c) (1977).

20. *See Ex parte* Royall, 117 U.S. at 251.

limited exceptions,[21] the exhaustion doctrine prohibits a federal court from granting a state prisoner habeas corpus relief on the question presented if that prisoner has not exhausted all available remedies in the state court system.[22]

The Supreme Court in *Rose v. Lundy*[23] was asked to rule on the handling of a mixed habeas petition.[24] A mixed habeas petition is one that asserts claims previously exhausted in the state court system and claims that have not been exhausted in the courts of the state.[25] The habeas statute,[26] its legislative history[27] and pre-statutory case law upon which the statute was based[28] do not specifically address the handling of a mixed petition.[29] While the Fifth and Ninth Circuit Courts of Appeals previously accepted the total exhaustion rule,[30] a majority of the circuits have correctly interpreted subsections 2254(b) and (c) as allowing review of the exhausted claims in a mixed petition.[31]

In interpreting the habeas statute the Supreme Court relied primarily on the historical policy underlying the exhaustion doctrine.[32] As stated by the court in *Unexcelled Chemical Corp. v. United States*,[33] "[a]rguments of policy are relevant when for example a statute has a hiatus that must be

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21. 28 U.S.C. § 2254(b) allows a federal court to grant a habeas application on an unexhausted claim where the state lacks a remedy for the unexhausted claim or the remedy provided by the state is ineffective in protecting the prisoner's rights.

22. 28 U.S.C. § 2254(b).

23. 102 S. Ct. 1198 (1982).

24. *Id.* at 1199.

25. Galtieri v. Wainwright, 582 F.2d 348, 355 (5th Cir. 1978) (In petition for habeas relief, petitioner Galtieri asserted two unexhausted claims, evidence obtained by illegal wiretap and improperly constituted jury venire, along with two exhausted claims, deprivation of constitutional right to appeal and deprivation of requested favorable defense evidence).

26. 28 U.S.C. §§ 2254(b)-(c) (1977).

27. For a discussion of the legislative history of the habeas statute *see* Rose v. Lundy, 102 S. Ct. at 1202-03 n.10; S. REP. No. 1559, 80th Cong., 2d Sess. 10 (1948).

28. *See ex parte* Hawk, 321 U.S. 114 (1944) (habeas relief denied to petitioner claiming deprivation of effective assistance of counsel and introduction by prosecuting attorney of perjured testimony because claims not previously exhausted in state court system); *Ex parte* Royall, 117 U.S. 241 (1886). *See supra* note 18.

29. 102 S. Ct. at 1202.

30. *See* Galtieri v. Wainwright, 582 F.2d at 355-60; Gonzales v. Stone, 546 F.2d 807, 808-10 (9th Cir. 1976).

31. Katz v. King, 627 F.2d 568, 574 (1st Cir. 1980); United States *ex rel.* Tratino v. Hatrack, 563 F.2d 86, 91-95 (3rd Cir. 1977), *cert. denied*, 435 U.S. 928 (1978); Cameron v. Fastoff, 543 F.2d 971, 976 (2d Cir. 1976); Meeks v. Jago, 548 F.2d 134, 137 (6th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977); Brown v. Wisconsin State Dep't of Public Welfare, 457 F.2d 257, 259 (7th Cir. 1972), *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 (10th Cir. 1969), *rev'd on other grounds*, 401 U.S. 560 (1971).

32. Rose v. Lundy, 102 S. Ct. at 1203.

33. 345 U.S. 59 (1953) (statutory language of Portal-to-Portal Act of 1947 subjecting causes of action brought under Walsh-Healey Act to two-year statute of limitations is clear).

filled or there are ambiguities in the legislative language that must be resolved."[34] Impliedly, where the statutory language is clear, arguments of policy become less relevant.

Subsection 2254(c) provides that a prisoner has not exhausted state remedies if any state procedure is available by which he can raise the question presented.[35] The language of the statute itself requires the exhaustion of questions, not of entire cases. This supports the propriety of reviewing the exhausted claims in a mixed petition. The Supreme Court stated in *Picard v. Connor*[36] that the exhaustion doctrine is satisfied once the federal *claim* is fairly presented to the state court.[37]

Admittedly, at the time of drafting the habeas statute, Congress probably never contemplated the problem of mixed petitions.[38] If Congress was uneasy with the statutory language in light of its implications for the handling of mixed petitions, it was free to amend the statute. Not having done so, it was not proper for the *Lundy* Court to merely discount the statutory language as ambiguous.[39]

The underlying policy of the exhaustion doctrine relied upon by the *Lundy* Court in requiring dismissal of a mixed petition was that of comity.[40] The principle of comity "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers and already cognizant of the litigation, have had an opportunity to pass upon the matter."[41] In our dual system of government, both federal and state courts decide federal constitutional issues.[42] Federal habeas corpus jurisdiction allows a lower federal court to overrule a decision made by the highest court of the state.[43] This necessarily causes undesirable

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34. *Id.* at 64.

35. 28 U.S.C. § 2254(c).

36. 404 U.S. 270 (1971). After seeking postconviction relief in the state court system, respondent petitioned the federal court for habeas relief. After the federal district court suggested grounds upon which habeas relief could be granted, the Commonwealth of Massachusetts asserted that respondent had failed to exhaust his state remedies on that particular ground of relief. *Id.*

37. *Id.* at 275.

38. 102 S. Ct. at 1202-03.

39. The Court acknowledged the "question presented" language of the statute, but went on to discount it as "too ambiguous to sustain the conclusion that Congress intended to either permit or prohibit review of mixed petitions." *Id.* at 1202.

40. *Id.* at 1203.

41. Darr v. Burford, 339 U.S. 200, 204 (1950) (The principle of comity usually requires a prisoner to petition the Supreme Court for certiorari prior to petitioning a federal district court for habeas relief). *Cf.* Fay v. Noia, 372 U.S. 391, 435-38 (1963) (Petitioning the Supreme Court for certiorari is no longer required).

42. *See* Wade v. Mayo, 334 U.S. 672, 679-80 (1948) (Petitioner's request for habeas relief was granted as federal district court found petitioner had been denied due process under the fourteenth amendment).

43. Desmond, *Federal Habeas Corpus Review of State Court Convictions: Proposal for Reform*, 9 UTAH L. REV. 18, 20-21 (1964).

conflict among state and federal systems of government.[44]

In an effort to minimize this conflict, federal courts invoke the principle of comity.[45] Comity, implemented in habeas proceedings through the exhaustion doctrine,[46] protects the role of the state in the enforcement of federal law[47] and prevents unnecessary interference with the administration of justice in the state court system.[48] The exhaustion doctrine prevents a federal court from intervening prematurely in a state criminal proceeding.[49] Allowing early intervention by the federal court would remove the federal question from the state court, thereby isolating the state court from the constitutional issue and hindering the state's understanding of the federal right being litigated.[50] A state judiciary previously involved in the litigation is given the first opportunity to rectify a constitutional violation.[51] Only after being denied relief by the highest court of a state does a prisoner have the option of petitioning a federal court for relief.[52] The principle of comity minimizes conflict between two systems of government similarly obligated to protect and enforce constitutional rights.[53]

Justice Blackmun, although concurring in the judgement, forcefully criticized the rationale advanced by the *Lundy* majority in justifying the total exhaustion rule.[54] As was noted by the *Lundy* Court, neither the language nor legislative history of subsections 2254(b) and (c) requires dismissal of a mixed petition.[55] Justice Blackmun correctly stated that these subsections do not require dismissal of a mixed petition in its entirety.[56] Rather, the statute requires a district court to dismiss those claims that were not previously exhausted in the state court system.[57]

The importance of the exhaustion doctrine and the significance of the principles underlying it were not disputed by Justice Blackmun.[58] Allowing

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44. *Ex parte* Royall, 117 U.S. at 251-52.

45. Fay v. Noia, 372 U.S. at 418-20.

46. Darr v. Burford, 339 U.S. at 204-05.

47. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 490-91 (1973). *See supra* text accompanying note 42.

48. *Id.*

49. *See* Darr v. Burford, 339 U.S. at 204-05.

50. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. at 490 (quoting Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1093-1103 (1970)).

51. Duckworth v. Serrano, 102 S. Ct. 18, 19 (1981) (per curiam) (Finding by circuit court of appeals that prisoner's constitutional right to effective assistance of counsel was "clearly violated" did not provide basis for ignoring the exhaustion doctrine). Darr v. Burford, 339 U.S. at 204-05.

52. *Cf.* Darr v. Burford, 339 U.S. at 204-05.

53. *Ex parte* Royall, 117 U.S. at 251.

54. 102 S. Ct. at 1205 (Blackmun, J., concurring).

55. *Id.* at 1202.

56. *Id.* at 1205-06 (Blackmun, J., concurring).

57. *Id.*

58. *Id.* at 1206.

a district court to consider the exhausted claims in a mixed petition is not inconsistent with and does not undermine the system's long-standing respect for the principle of comity.[59] The exhaustion requirements of subsections 2254(b) and (c) and the underlying policy of comity are satisfied once the highest state court has ruled upon the federal constitutional claim.[60]

The *Lundy* majority based its decision upon the assumption that a total exhaustion rule would be beneficial to federal-state comity.[61] A prisoner claiming violations of his constitutional rights would be encouraged to seek full relief from the state courts before applying for a federal writ of habeas corpus.[62] With more prisoners exhausting their claims in state court before proceeding to the federal system, state courts are given an opportunity to become more "familiar with and hospitable toward" federal constitutional issues.[63] Reviewing all of the prisoner's claims in a single proceeding benefits the federal court by providing it with a more complete factual record.[64] The prisoner benefits by receiving a thorough and more focused review.[65]

As Justice Blackmun correctly pointed out, a federal court will not consider a claim under the habeas statute unless it has been previously exhausted in the state court system.[66] Consequently, the state has had an opportunity to become familiar with the constitutional issues pertaining to the exhausted claim.[67] Further, an exhausted claim that has been fully litigated in the state court system is accompanied by a complete factual record.[68] Requiring exhaustion of separate claims that are not interrelated[69] will not provide the court hearing the habeas petition with a more complete set of facts relating to the exhausted claim.[70]

Justice Blackmun, however, foresaw a situation where the total exhaustion rule would be more destructive than supportive of federal-state com-

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59. *Id.*
60. Picard v. Connor, 404 U.S. 270, 275 (1971).
61. 102 S. Ct. at 1203.
62. *Id.*
63. *Id.*
64. *Id.* at 1203-04.
65. *Id.* at 1204.
66. *Id.* at 1206-07.
67. *Id.*
68. *Id.* at 1207.
69. Justice Blackmun noted that mixed petitions have been dismissed in their entirety where consideration of an exhausted claim is dependent upon resolution of an unexhausted claim. *Id.* at 1207 (citing Miller v. Hall, 536 F.2d 967, 969 (1st Cir. 1976) (no interrelationship between exhausted and unexhausted claims alleged in habeas petition)). *See also* United States *ex rel* McBride v. Fay, 370 F.2d 547, 548 (2d Cir. 1966) (Habeas petition properly dismissed where decision on exhausted claim, in which petitioner claimed he was denied a fair trial because prosecutor had reread confession of co-defendant to jury during deliberation, would necessarily be affected by unexhausted claim, in which petitioner alleged that admission of co-defendant's statement deprived him of his right of confrontation).
70. 370 F.2d at 548.

ity.[71] If a prisoner submits a habeas petition containing a meritorious exhausted claim and a meritless unexhausted claim, the total exhaustion rule would require dismissal of the petition.[72] The state courts would expend their judicial time and resources in ruling on the meritless claim.[73] The prisoner would then return to the federal system where the court would rule on the meritorious claim, paying little if any deference to the meritless one.[74] Such a procedure displays little respect for the state judiciary's time and resources.

A total exhaustion rule may also have a negative effect on the efficient use of the federal judiciary's time and resources.[75] A federal court presented with a habeas petition must determine if all of the claims presented to it have been previously exhausted in the state court system.[76] In a number of these cases, the court could reach a decision on the merits with minimal additional effort.[77] If the petition is dismissed due to the existence of unexhausted claims, it is quite probable that the prisoner will subsequently return to federal court.[78] The record will necessarily have to be reexamined and the exhausted claims considered once again.[79]

The *Lundy* majority further contended that a total exhaustion rule will reduce the amount of piecemeal habeas litigation.[80] Strict enforcement of the total exhaustion rule will encourage habeas prisoners to exhaust all claims in the state court system before turning to federal court for relief.[81] Justice Blackmun, however, pointed out that subsequent habeas petitions containing previously unexhausted constitutional claims cannot be dismissed unless the prisoner has abused the writ.[82] Justice Blackmun took the position that with or without the total exhaustion rule, subsequent habeas petitions will not be dismissed unless the "abuse of the writ" standard is met.[83]

The *Lundy* Court recognized that the primary interest of the prisoner is in receiving speedy relief on his claims.[84] The total exhaustion rule gives the

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71. 102 S. Ct. at 1207.
72. 102 S. Ct. at 1205.
73. 102 S. Ct. at 1207-08 (Blackmun, J., concurring).
74. *Id.*
75. *Id.* at 1208.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 1204.
81. *Id.* at 1203. The Court stated this proposition without explaining why the total exhaustion rule would encourage habeas prisoners to exhaust *all* claims in state court before turning to the federal system for relief. Part III-C of the opinion clarified the Court's reasoning. *Id.* *See infra* text accompanying notes 88-90.
82. *Id.* at 1209. *See infra* note 98.
83. Rose v. Lundy, 102 S. Ct. at 1209.
84. *Id.* at 1204 (citing Braden, 410 U.S. at 490).

prisoner the option of returning to the state court system to exhaust all claims or amending or refiling the habeas petition with the district court, presenting only the exhausted claims.[85] The Court stated that a total exhaustion rule would not hinder the prisoner's interest in obtaining speedy relief because the prisoner is free to delete the unexhausted claims from his habeas petition.[86] The federal court can consider the exhausted claims and the prisoner may return to state court with the remaining claims.[87] The plurality, in a significant bit of dictum,[88] went on to state that by proceeding in this manner, the prisoner may risk forfeiting consideration of his unexhausted claims in federal court.[89] By seeking federal relief on his exhausted claims and knowingly foregoing the unexhausted claims, the prisoner risks dismissal of a subsequent habeas petition asserting those previously unexhausted claims.[90]

The exercise of either option is detrimental to the unwary *pro se* prisoner.[91] In order to expedite review and reduce costs, the prisoner will likely include all possible grounds for relief in his habeas petition.[92] If an unexhausted claim is submitted, under the total exhaustion rule the entire petition will be dismissed.[93] If the prisoner returns to state court to exhaust all claims, he incurs substantial delay in receiving a ruling on his exhausted claims.[94] If he amends or resubmits his habeas petition, deleting the unexhausted claims, he risks forever losing his right to receive federal relief on those claims.[95] Either the swiftness of the remedy of habeas corpus is sacrificed[96] or the availability of the writ as a remedy for all unconstitutional violations is foregone.[97]

The plurality relied upon Rule 9(b) to section 2254[98] which allows dismissal of subsequent habeas petitions where the court finds an abuse of the

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85. Rose v. Lundy, 102 S. Ct. at 1204.

86. *Id.*

87. *See id.* at 1204.

88. *Id.* at 1205. Part III-C is necessarily dictum as the issue of how to handle subsequent habeas petitions asserting the previously unexhausted claims was not before the Court. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1209 (Blackmun, J., concurring).

92. *Id.*

93. Rose v. Lundy, 102 S. Ct. at 1205.

94. *Id.* at 1208-09 (Blackmun, J., concurring).

95. *Id.* at 1205.

96. *Id.* at 1208-09.

97. *Id.*

98. 28 U.S.C. § 2254 Rule 9(b) provides:

> (b) Successive Petitions. 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 new grounds in a prior petition constituted an abuse of the writ.

writ.[99] The Advisory Committee Notes[100] following Rule 9(b) indicate that the rule incorporates the "abuse of the writ" standard set forth in *Sanders v. United States*.[101] A prisoner risks dismissal under Rule 9(b) where he "deliberately withholds one of two grounds for relief at the time of filing his first application, in the hope of being granted two hearings rather then one or for some other such reason."[102] The plurality interpreted the *Sanders* standard as possibly permitting dismissal of a subsequent habeas petition where a prisoner proceeds to federal court with his exhausted claims, "deliberately setting aside" his unexhausted claims.[103]

The Court in *Sanders v. United States*[104] articulated the standard a district court must apply in ruling on dismissal of successive habeas applications.[105] Charles Edward Sanders was convicted of robbing a federally insured bank.[106] After exhausting state remedies, Sanders petitioned for habeas corpus relief.[107] He alleged that the indictment filed against him was invalid,[108] that he was denied assistance of counsel,[109] and that the sentencing court had allowed him to be intimidated and coerced without the assistance of counsel.[110] Habeas relief was denied, with the court ruling that there were no facts within the record to support the granting of relief.[111]

Eight months later Sanders again petitioned the federal court for habeas relief.[112] In his second petition Sanders alleged mental incompetence to stand trial.[113] The district court denied Sanders' motion without affording him a hearing, stating that there was no apparent reason why Sanders had not raised the issue of mental incompetency at the time of filing his first habeas application.[114] The Ninth Circuit affirmed,[115] stating that at the time of filing his first motion the petitioner was aware of the facts upon which the second motion was based.[116] In the second motion, petitioner did not provide the court with any explanation for not asserting the new grounds in the

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99. 102 S. Ct. at 1204 (citing 28 U.S.C. § 2254).
100. 28 U.S.C. § 2254 Rule 9(b) (advisory committee note).
101. 373 U.S. 1, 18 (1963).
102. *Id.* at 18.
103. 102 S. Ct. at 1205. *See supra* note 88.
104. 373 U.S. 1 (1963).
105. *Id.*
106. *Id.* at 4.
107. *Id.*
108. *Id.* at 5.
109. *Id.*
110. *Id.*
111. *Id.* at 6.
112. *Id.* at 5.
113. *Id.*
114. *Id.* at 6.
115. Sanders v. United States, 297 F.2d 735 (1961).
116. 297 F.2d at 736-37.

first habeas application.[117]

The Supreme Court reversed, holding that Sanders should have been granted a hearing on his second habeas application.[118] A federal judge must consider claims within a subsequent habeas petition unless the prisoner has abused the writ.[119] The *Sanders* Court stated that a prisoner deliberately withholding or abandoning a claim for relief when filing his first habeas application may waive his right to a hearing on a successive application presenting the withheld or abandoned ground.[120] A federal court is not required "to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay."[121]

While Rule 9(b) may indicate a general congressional policy favoring resolution of all federal claims in a single habeas corpus proceeding, the Rule does not mandate it.[122] *Sanders*[123] did not require a prisoner to assert all grounds for relief in a single proceeding.[124] Rather, *Sanders* requires a federal court to review subsequent petitions absent a finding of abuse.[125]

The Court in *Wong Doo v. United States*[126] ruled that the prisoner had abused the writ of habeas corpus.[127] Petitioner, Wong Doo, asserted two grounds for habeas relief in his first habeas application.[128] He was granted a hearing at which he failed to produce any evidence in support of the second ground for relief.[129] Wong Doo subsequently filed a second habeas application, reasserting the second ground for relief.[130] The Supreme Court held that the petitioner's second petition, asserting the second ground, was properly dismissed for abuse of the writ.[131] Wong Doo had abandoned the second ground for relief at the hearing on his first habeas petition and could not now reassert it.[132]

As Justice Brennan pointed out, the *Lundy* plurality, in concluding as it did, clearly distorted the abuse of the writ standard set out in *Sanders*.[133]

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117. *Id.* at 737.
118. 373 U.S. at 6.
119. *Id.* at 17-18.
120. *Id.* at 18.
121. *Id.*
122. Galtieri v. Wainwright, 582 F.2d 348, 368 (5th Cir. 1978) (Goldberg, Circuit Judge, joined by Tuttle, Circuit Judge, dissenting).
123. 373 U.S. 1.
124. Galtieri v. Wainwright, 582 F.2d at 368.
125. *Id.*
126. 265 U.S. 239 (1924).
127. *Id.* at 241. The *Sanders* Court cited *Wong Doo* as an example of where the prisoner had abused the writ of habeas corpus. Sanders v. United States, 373 U.S. at 9.
128. Wong Doo, 265 U.S. at 239-40.
129. *Id.* at 240.
130. *Id.*
131. *Id.* at 241.
132. *Id.*
133. Rose v. Lundy, 102 S. Ct. at 1212.

The plurality mistakenly concluded that a prisoner who takes his exhausted claims to federal court, after having a mixed petition dismissed, *deliberately* withholds or abandons the unexhausted claims.[134] The conclusion of deliberateness in setting aside the unexhausted claims is truly erroneous.[135] If, due to the Court's ruling, the prisoner cannot include the unexhausted claims in the habeas petition without risking its dismissal, then the conclusion that the withholding was *deliberate* within the meaning of *Sanders* is unsupportable.[136] Further, the successive application cannot be regarded as piecemeal litigation brought for the purpose of harassment or delay.[137] The Court left no option for a prisoner desiring speedy relief on his exhausted claims but to file a successive application after seeking relief on his unexhausted claims in the state court system.[138]

A look at the legislative history of Rule 9(b) further supports Justice Brennan's position.[139] As originally proposed, Rule 9(b) gave a federal court discretion to dismiss a successive habeas application where the judge found that "the failure of the petitioner to assert those grounds in a prior petition was *not excusable.*"[140] The House Judiciary Committee found the "not excusable" language unacceptable in that it gave a judge too much discretion to dismiss a successive habeas petition.[141] The Committee recommended that the words "constituted an abuse of the writ" be used instead of "not excusable,"[142] and Rule 9(b) was passed in that form.[143]

The legislative history of Rule 9(b) itself indicates the concern of Congress for making readily available the remedy of habeas corpus to prisoners absent a finding of its abuse.[144] The plurality's interpretation of *Sanders* is unfortunate, even though it is dictum, because it indicates a dismal future for prisoners who choose to exercise their habeas corpus rights.[145]

Justice Stevens, in his dissenting opinion in *Lundy*, disagreed with both the total exhaustion rule espoused by the majority and the approach proposed by Justice Blackmun.[146] While the majority based its conclusion on the procedural history of the habeas claim,[147] Justice Stevens proposed a result that would depend primarily on the character of the constitutional

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134. *Id.* at 1213.
135. *See id.* at 1212.
136. *Id.* at 1213.
137. *Id.*
138. *Id.*
139. H.R. No. 94-1471, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 2478.
140. *Id.* at 8, *reprinted in* 1976 U.S. Code Cong. & Ad. News 2485.
141. *See id.* at 5, *reprinted in* 1976 U.S. Code Cong. & Ad. News 2482.
142. *See id.*, *reprinted in* 1976 U.S. Code Cong. & Ad. News 2482.
143. 28 U.S.C. § 2254 Rule 9(b).
144. *See* Rose v. Lundy, 102 S. Ct. at 1212.
145. *See id.* at 1209 (Blackmun, J., concurring).
146. *See id.* at 1213-17 (Stevens, J., dissenting).
147. *See supra* text accompanying note 14.

violation claimed.[148] A court would be given discretion as to the handling of a mixed petition.[149] Justice Stevens foresaw a situation where the presence of an unexhausted claim in a mixed petition should have no bearing on the federal court's consideration of the exhausted claim.[150] If the error alleged in an exhausted claim demonstrates that the prisoner's trial was fundamentally unfair, the court should grant relief.[151] Postponing relief until the prisoner proceeds back through the state court system to exhaust all claims promotes unnecessary delay.[152] Contrarily, if the exhausted claim is meritless and the unexhausted claim involves allegations of serious constitutional error, Justice Stevens proposed dismissal of the mixed petition in its entirety.[153] To consider the constitutionality of the meritless exhausted claim would only delay an ultimate ruling on the unexhausted meritorious claim.[154]

While Justice Stevens' opinion may disrupt the procedural safeguards of our judicial system, his recognition that the total exhaustion rule "demeans the high office of the great writ"[155] is significant. "It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world."[156] In interpreting subsections 2254(b) and (c) the *Lundy* Court was obligated to keep in mind the interests of state prisoners and the interests of our judicial system.[157] The prisoner is concerned with preserving the writ of habeas corpus as a swift remedy for all unconstitutional violations.[158] The judiciary has an interest in maintaining federal-state comity[159] and a certain level of judicial efficiency.[160] While the total exhaustion rule greatly hinders a prisoner's ability to obtain speedy relief on his claims, it accomplishes little in furthering federal-state comity or judicial efficiency. The holding of *Rose v. Lundy* is an unfortunate one for prisoners who depend upon the great writ of habeas corpus to speedily rectify unconstitutional imprisonment.

JoEllen J. Watts

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148. 102 S. Ct. at 1213-17 (Stevens, J., dissenting).
149. *Id.* at 1217.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 1219.
156. *Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1868).
157. *See* Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. at 490.
158. Braden, 410 U.S. 484, 490 (1973).
159. *See id.* at 490.
160. Rose v. Lundy, 102 S. Ct. at 1205.