The Burger Court Opinion Writing Database

Rose v. Lundy

455 U.S. 509 (1982)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

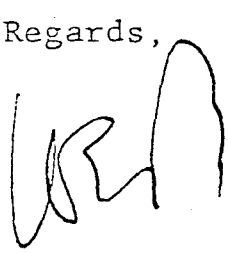
November 25, 1981

Re: No. 80-846 - Rose v. Lundy

Dear Sandra:

I join.

Regards,



Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 25, 1981

No. 80-846 -- Rose v. Lundy.

Dear Sandra,

Your circulation of November 23 presents problems for me, because it reaches questions that are not before us and that in my view we should not address. My difficulties focus upon your discussion, on pages 10-11, of the "abuse of the writ" dismissal procedure outlined in Rule 9(b). I think that it is unnecessary to reach this issue here, and in any event I cannot agree with your analysis.

As you recognize on page 10, Rule 9(b) adopts the "abuse of the writ" standard announced in Sanders v. United States, 373 U.S. 1 (1963). A correct construction of the Rule thus depends upon a proper intepretation of Sanders. In my view, your interpretation of the Sanders standard makes the dismissal of successive petitions far too easy. You quote from Sanders, id., at 18, for the premise that "if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, ... he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. ... Nothing in the traditions of habeas corpus require the federal courts to tolerate needless piecemeal litigation." From this you conclude, "Thus a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions." Pages 10-11.

I have difficulties both with the premise and with the conclusion. As to the premise, isn't your quotation from Sanders incomplete, in that it omits language

critically important to a proper interpretation of the Sanders standard? Where you placed your first ellipsis, didn't Sanders make it plain that its concern was with "a prisoner deliberately withhold[ing] one of two grounds" for relief "in the hope of being granted two hearings rather than one or for some other such reason"? Where you placed your second ellipsis, didn't Sanders note that waiver might also be inferred where "the prisoner deliberately abandons one of his grounds at the first hearing"? And immediately after the language you quote, didn't Sanders state that dismissal was appropriate for "collateral proceedings whose only purpose is to vex, harass, or delay"? Taken in context, the passage on which you rely thus made it clear, I thought, that dismissal for "abuse of the writ" is only appropriate when a prisoner was free to include all of his claims in his first petition, but knowingly and deliberately chose not to do so in order to get more than "one bite at the apple." Your elliptical exposition of Sanders, in contrast, would allow dismissal in a much broader class of cases than Sanders was intended to permit. I am unable to join that expansion of the Sanders principle.

My difficulty with your conclusion stems directly from my disagreement with the premise. You hypothesize a prisoner who presents a "mixed" habeas petition that is dismissed without any examination of its claims on the merits, and who later presents a second petition containing the previously unexhausted claims. You equate the position of such a respondent with that of the "abusive" prisoner discussed in the Sanders passage. But in my view, the position of your hypothetical prisoner is substantially different. If the habeas court refuses to entertain a "mixed" petition -- as it must under your holding -- then the prisoner's "abandonment" of his unexhausted claims cannot in any meaningful sense be termed "deliberate," as that term was used in Sanders. It isn't "abandonment": it is simply that the prisoner will not be permitted to proceed with his unexhausted claims. If he is to gain "speedy federal relief on his claims" -- to which he is entitled, as you recognize with your citation to Braden -- he must proceed only with his exhausted claims. Thus the prisoner in such a case has no "purpose to vex, harass, or delay," nor any "hope of being granted two hearings rather than one." I conclude that when a prisoner's original, "mixed" habeas petition is dismissed without any examination of its claims on the merits, and when the prisoner later brings a second petition based on

the previously unexhausted claims that had earlier been refused a hearing, then the remedy of dismissal for "abuse of the writ" should not be used against that second petition. This conclusion is to my mind inescapably compelled by Sanders.

My analysis is so at odds with yours that I cannot join your opinion as it now stands. But I repeat that this whole issue seems quite distinct from the questions that we really must address in the case before us. Would you consider leaving for another day any discussion of the Rule 9(b) issue? I expect that to do so would entail deletion of the paragraph on pages 10-11, and substantial revision of the full paragraph on page 5.

Sincerely,

Bill

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 3, 1981

RE: No. 80-846 Rose v. Lundy

Dear Sandra:

Thank you for your response to my memorandum of November 25, and thank you particularly for your revisions addressed to my problems. I can join all of your proposed opinion except Part III C if you found it possible to add the following sentence at the end of the full paragraph at page 5:

> "This argument is addressed in Part C infra of this opinion."

I shall shortly circulate a dissent from Part III C.

Sincerely,

Justice O'Connor

cc: The Conference

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: 4 Dec 1981

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 80-846

JIM ROSE, WARDEN, PETITIONER v. NOAH HARRISON LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[December --, 1981]

JUSTICE BRENNAN, concurring in part and dissenting in part.

I join the Court's opinion except for Part III-C, from which I dissent. I agree with the Court's holding that the exhaustion requirement of 28 U.S.C. §2254(b)-(c) obliges a federal district court to dismiss, without consideration on the merits, a habeas

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: DEC 11

Recirculated: _____

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–846

JIM ROSE, WARDEN, PETITIONER *v.*
NOAH HARRISON LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[December ——, 1981]

JUSTICE BRENNAN, concurring in part and dissenting in part.

I join the Court's opinion except for Part III-C, from which I dissent. I agree with the Court's holding that the exhaustion requirement of 28 U. S. C. § 2254(b)-(c) obliges a federal district court to dismiss, without consideration on the merits, a habeas corpus petition from a state prisoner when that petition contains claims that have not been exhausted in the state courts, "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Ante*, at 1. But I dissent from the holding, in Part III-C, that a habeas petitioner must "risk forfeiture of his unexhausted claims in federal court" if he "decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims" in the face of the district court's refusal to consider his "mixed" petition. The issue of Rule 9(b)'s proper application to successive petitions brought as the result of our holding today is not before us—it was not among the questions presented by petitioner, nor was it briefed and argued by the parties. Therefore, the issue should not be addressed until we have a case presenting it. In any event, I disagree with the Court's proposed disposition of the issue. In my view, Rule 9(b) cannot be read to

Stylistic and technical changes only.

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: _____

Recirculated: 16 December 19

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–846

JIM ROSE, WARDEN, PETITIONER *v.*
NOAH HARRISON LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[December ——, 1981]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I join the Court's opinion except for Part III-C, from which I dissent. I agree with the Court's holding that the exhaustion requirement of 28 U. S. C. § 2254(b)-(c) obliges a federal district court to dismiss, without consideration on the merits, a habeas corpus petition from a state prisoner when that petition contains claims that have not been exhausted in the state courts, "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Ante*, at 1. But I dissent from the holding, in Part III-C, that a habeas petitioner must risk forfeiture of his unexhausted claims in federal court if he "decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims" in the face of the district court's refusal to consider his "mixed" petition. *Ante*, at 11. The issue of Rule 9(b)'s proper application to successive petitions brought as the result of our holding today is not before us—it was not among the questions presented by petitioner, nor was it briefed and argued by the parties. Therefore, the issue should not be addressed until we have a case presenting it. In any event, I disagree with the Court's proposed disposition of the issue. In my view, Rule 9(b) cannot be read to

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 5, 1981.

No. 80-846 -- Rose v. Lundy.

Dear Harry,

I read with great interest your concurrence in "the referenced case" -- especially your remarks, pages 9-10, on the issue of whether a "mixed" petition should be dismissed by the district court and resubmitted by the petitioner with the unexhausted claims removed, or whether the district court itself should simply dismiss the unexhausted claims from the petition. You are quite right, I think, to wonder "what all the fuss is about." While my view on this point may be somewhat formalistic, I still believe that the approach that Sandra takes in the first part of her opinion -- which gives the procedural option to the habeas petitioner rather than to the district court -- maintains an important symbolic distinction without creating any significant burden on the district court. In any event, I am gratified to see from Byron's circulation that we will apparently have five votes for our shared view on the more practically significant point in this case: that the habeas petitioner is not to be limited to a single filing in the district court by an unjustifiably broad application of the "abuse of the writ" standard. Although I will await John's writing, I may simply append a footnote to my opinion, noting that there is a Court to reject Sandra's novel interpretation of the "abuse of the writ" doctrine.

Sincerely,

Bill

Justice Blackmun

Brennan 81

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 1, 1982

RE: No. 80-846 Rose v. Lundy:

Dear Sandra:

I am making the necessary changes in my concurring and dissenting opinion to refer to your opinion as an opinion for the plurality on Part III C. I don't think the printer will hold you up from announcing this on Wednesday.

Sincerely,

Justice O'Connor

cc: The Conference

Changes brought out
2. marked.

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: _____

Recirculated: 2 March 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–846

JIM ROSE, WARDEN, PETITIONER *v.*
NOAH HARRISON LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March 3, 1982]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I join the opinion of the Court (Parts I, II, III-A, III-B, and IV, *ante*), but I do not join in the opinion of the plurality (Part III-C, *ante*). I agree with the Court's holding that the exhaustion requirement of 28 U. S. C. §2254(b)-(c) obliges a federal district court to dismiss, without consideration on the merits, a habeas corpus petition from a state prisoner when that petition contains claims that have not been exhausted in the state courts, "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Ante*, at 1. But I disagree with the plurality's view, in Part III-C, that a habeas petitioner must "risk forfeiting consideration of his unexhausted claims in federal court" if he "decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims" in the face of the district court's refusal to consider his "mixed" petition. *Ante*, at 12. The issue of Rule 9(b)'s proper application to successive petitions brought as the result of our decision today is not before us—it was not among the questions presented by petitioner, nor was it briefed and argued by the parties. Therefore, the issue should not be addressed until we have a case presenting it. In any event,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 24, 1981

Re: No. 80-846 -- Rose v. Lundy

Dear Sandra,

I shall await Harry's writing.

Sincerely,

Byron

Justice O'Connor

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

Circulated: 1/5/82

Recirculated: _____

No. 80-846, Rose v. Lundy

Justice White, concurring in part and dissenting in part.

I agree with most of Justice Brennan's opinion; but like Justice Blackmun, I would not require a "mixed" petition to be dismissed in its entirety, with leave to resubmit the exhausted claims. The trial judge cannot rule on the unexhausted issues and should dismiss them. But he should rule on the exhausted claims unless they are intertwined with those he must dismiss or unless the habeas petitioner prefers to have his entire petition dismissed. In any event, if the judge rules on those issues that are ripe and dismisses those that are not, I would not tax the petitioner with abuse of the writ if he returns with the latter claims after seeking state relief.

To: The Chief Justice
Justice Brennan
✓Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

Circulated: 1/6/82

Recirculated: _____

Printed

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–846

JIM ROSE, WARDEN, PETITIONER *v.* NOAH HARRISON LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January ——, 1982]

JUSTICE WHITE, concurring in part and dissenting in part.

I agree with most of JUSTICE BRENNAN's opinion; but like JUSTICE BLACKMUN, I would not require a "mixed" petition to be dismissed in its entirety, with leave to resubmit the exhausted claims. The trial judge cannot rule on the unexhausted issues and should dismiss them. But he should rule on the exhausted claims unless they are intertwined with those he must dismiss or unless the habeas petitioner prefers to have his entire petition dismissed. In any event, if the judge rules on those issues that are ripe and dismisses those that are not, I would not tax the petitioner with abuse of the writ if he returns with the latter claims after seeking state relief.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 24, 1981

Re: No. 80-846 - Rose v. Lundy

Dear Sandra:

I await the dissent.

Sincerely,

T.M.

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 14, 1981

Re: No. 80-846 - Rose v. Lundy

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 24, 19

Re: No. 80-846 - Rose v. Lundy

Dear Sandra:

As you will have surmised, I shall be writing a dissent in this case in due course.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Blackmun

Circulated: JAN 4 '82

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–846

JIM ROSE, WARDEN, PETITIONER *v.*
NOAH HARRISON LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January ——, 1982]

JUSTICE BLACKMUN, concurring in the judgment.

The important issue before the Court in this case is whether the conservative "total exhaustion" rule espoused now by two Courts of Appeals, the Fifth and the Ninth Circuits, see *ante*, at 4, n. 5, is required by 28 U. S. C. §§ 2254(b) and (c), or whether the approach adopted by eight other Courts of Appeals—that a district court may review the *exhausted* claims of a mixed petition—is the proper interpretation of the statute. On this basic issue, I firmly agree with the majority of the Courts of Appeals.

I do not dispute the value of comity when it is applicable and productive of harmony between state and federal courts, nor do I deny the principle of exhaustion that §§ 2254(b) and (c) so clearly embrace. What troubles me is that the "total exhaustion" rule, now adopted by this Court, can be read into the statute, as the Court concedes, *ante*, at 8, only by sheer force; that it operates as a trap for the uneducated and indigent *pro se* prisoner-applicant; that it delays the resolution of claims that are not frivolous; and that it tends to increase, rather than to alleviate, the caseload burdens on both state and federal courts. To use the old expression, the Court's ruling seems to me to "throw the baby out with the bathwater."

Although purporting to rely on the policies upon which the

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Blackmun

Circulated: _____

Recirculated: FEB 1 3 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-846

JIM ROSE, WARDEN, PETITIONER *v.*
NOAH HARRISON LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[February ——, 1982]

JUSTICE BLACKMUN, concurring in the judgment.

The important issue before the Court in this case is whether the conservative "total exhaustion" rule espoused now by two Courts of Appeals, the Fifth and the Ninth Circuits, see *ante*, at 4, n. 5, is required by 28 U. S. C. §§ 2254(b) and (c), or whether the approach adopted by eight other Courts of Appeals—that a district court may review the *exhausted* claims of a mixed petition—is the proper interpretation of the statute. On this basic issue, I firmly agree with the majority of the Courts of Appeals.

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Although purporting to rely on the policies upon which the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

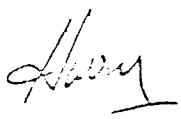
March 1, 1982

Re: No. 80-846 - Rose v. Lundy

Dear Sandra:

The additions to your fourth draft makes it necessary for me, in my opinion, to change page references to your opinion. I am, in addition, making some other short revisions necessitated by your fourth draft. These have gone to the printer and, I hope, will not hold you up in your announcement of the case.

Sincerely,



Justice O'Connor

cc: The Conference

pp 3,4,7,9,10

The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

Justice Blackmun

Circulated: _____

Recirculated: 3-3-82

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–846

JIM ROSE, WARDEN, PETITIONER *v.*
NOAH HARRISON LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March 3, 1982]

JUSTICE BLACKMUN, concurring in the judgment.

The important issue before the Court in this case is whether the conservative "total exhaustion" rule espoused now by two Courts of Appeals, the Fifth and the Ninth Circuits, see *ante*, at 4, n. 5, is required by 28 U. S. C. §§ 2254(b) and (c), or whether the approach adopted by eight other Courts of Appeals—that a district court may review the *exhausted* claims of a mixed petition—is the proper interpretation of the statute. On this basic issue, I firmly agree with the majority of the Courts of Appeals.

I do not dispute the value of comity when it is applicable and productive of harmony between state and federal courts, nor do I deny the principle of exhaustion that §§ 2254(b) and (c) so clearly embrace. What troubles me is that the "total exhaustion" rule, now adopted by this Court, can be read into the statute, as the Court concedes, *ante*, at 8, only by sheer force; that it operates as a trap for the uneducated and indigent *pro se* prisoner-applicant; that it delays the resolution of claims that are not frivolous; and that it tends to increase, rather than to alleviate, the caseload burdens on both state and federal courts. To use the old expression, the Court's ruling seems to me to "throw the baby out with the bathwater."

Although purporting to rely on the policies upon which the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 24, 1981

80-846 Rose v. Lundy

Dear Sandra:

Please join me.

Sincerely,

L. Lewis

Justice O'Connor

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 25, 1981

Re: No. 80-846 Rose v. Lundy

Dear Sandra:

I am sure you realize by the Conference discussion and the letter which Bill Brennan has sent you today that you are "in the middle" where you will probably find yourself on more than one occasion. I was somewhat disappointed that your opinion did not place any more stringent requirements on the availability of habeas corpus to state prisoners than it did, but am willing to go along with it as it now stands. If it were to be changed to meet Bill Brennan's criticism, I could not join it and would write separately concurring in the judgment.

Sincerely,

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 10, 1981

Re: No. 80-846 Rose v. Lundy

Dear Sandra:

Please join me.

Sincerely,

WHR

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

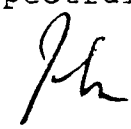
November 24, 1981

Re: No. 80-846, Rose v. Lundy

Dear Sandra:

As I suggested at conference, I am persuaded that the position taken in your opinion will increase rather than lessen the burdens on both state and federal judges. Accordingly, I will not be able to join your opinion. Since I anticipate that Harry will be writing in dissent -- he was the only vote to affirm -- I will await his reaction and then probably add a short statement of my reasons for believing the case was wrongly decided on the merits.

Respectfully,



Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 5, 1982

Re: 80-846 - Rose v. Lundy

Dear Sandra:

Although I agree with most of what Harry has written, I think I will add a few paragraphs to explain my slightly different views. I will try not to hold you up too long.

Respectfully,

/s/ J.P.S.

Justice O'Connor

Copies to the Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-846

JIM ROSE, WARDEN, PETITIONER *v.*
NOAH HARRISON LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[February ——, 1982]

JUSTICE STEVENS, dissenting.

This case raises important questions about the authority of federal judges. In my opinion the district judge properly exercised his statutory duty to consider the merits of the claims advanced by respondent that previously had been rejected by the Tennessee courts. The district judge exceeded, however, what I regard as proper restraints on the scope of collateral review of state court judgments. Ironically, instead of correcting his error, the Court today fashions a new rule of law that will merely delay the final disposition of this case and, as JUSTICE BLACKMUN demonstrates, impose unnecessary burdens on both state and federal judges.

An adequate explanation of my disapproval of the Court's adventure in unnecessary lawmaking requires some reference to the facts of this case and to my conception of the proper role of the writ of habeas corpus in the administration of justice in the United States.

I

Respondent was convicted in state court of rape and a crime against nature. The testimony of the victim was corroborated by another eyewitness who was present during the entire sadistic episode. The evidence of guilt is not merely sufficient; it is convincing. As is often the case in

0$0846J, 11/22/81, rev. Wilma

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: NOV 2 3 1981

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–846

JIM ROSE, WARDEN, PETITIONER *v.* NOAH HARRISON LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[November ——, 1981]

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case we consider whether the exhaustion rule in 28 U. S. C. § 2254 (b)–(c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims would further the purposes underlying the habeas statute, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

I

Following a jury trial, respondent Noah Lundy was convicted on charges of rape and crime against nature, and sentenced to the Tennessee State Penitentiary.[1] After the Tennessee Court of Criminal Appeals affirmed the convictions and the Tennessee Supreme Court denied review, the respondent filed an unsuccessful petition for post-conviction relief in the Knox County Criminal Court.

[1] The court sentenced the respondent to consecutive terms of 120 years on the rape charge and from five to 15 years on the crime against nature charge.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 1, 1981

No. 80-846 Rose v. Lundy

Dear Bill,

Thank you for your memo of November 25.

I have attached the second printed draft which quotes all of the applicable language from Sanders v. United States, 373 U.S. 1, 18 (1963). This may help with your concerns. The draft opinion merely notes that a criminal defendant runs a risk under Sanders when he fails to exhaust all his claims in state court.

I have reorganized the portion which is of concern to you in Part III C of the draft in order to facilitate your separate comments, if you deem it necessary.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: _____

2nd DRAFT

Recirculated: DEC 1 1981

SUPREME COURT OF THE UNITED STATES

No. 80-846

JIM ROSE, WARDEN, PETITIONER *v.* NOAH HARRISON LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[December ——, 1981]

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case we consider whether the exhaustion rule in 28 U. S. C. § 2254 (b)–(c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims would further the purposes underlying the habeas statute, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

I

Following a jury trial, respondent Noah Lundy was convicted on charges of rape and crime against nature, and sentenced to the Tennessee State Penitentiary.[1] After the Tennessee Court of Criminal Appeals affirmed the convictions and the Tennessee Supreme Court denied review, the respondent filed an unsuccessful petition for post-conviction relief in the Knox County Criminal Court.

[1] The court sentenced the respondent to consecutive terms of 120 years on the rape charge and from five to 15 years on the crime against nature charge.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 3, 1981

No. 80-846 Rose v. Lundy

Dear Bill,

In response to your memo of this date, I have sent to the printer the requested addition on page 5.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

pp. 5, 6,

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: _____

Recirculated: DEC 7 1981

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–846

JIM ROSE, WARDEN, PETITIONER *v.* NOAH HARRISON LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[December ——, 1981]

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case we consider whether the exhaustion rule in 28 U. S. C. § 2254 (b)–(c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims would further the purposes underlying the habeas statute, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

I

Following a jury trial, respondent Noah Lundy was convicted on charges of rape and crime against nature, and sentenced to the Tennessee State Penitentiary.[1] After the Tennessee Court of Criminal Appeals affirmed the convictions and the Tennessee Supreme Court denied review, the respondent filed an unsuccessful petition for post-conviction relief in the Knox County Criminal Court.

[1] The court sentenced the respondent to consecutive terms of 120 years on the rape charge and from five to 15 years on the crime against nature charge.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: FEB 8 1982

Recirculated: _____

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–846

JIM ROSE, WARDEN, PETITIONER *v.* NOAH HARRISON LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March 3, 1982]

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case we consider whether the exhaustion rule in 28 U. S. C. §§ 2254(b)–(c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statute, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

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Following a jury trial, respondent Noah Lundy was convicted on charges of rape and crime against nature, and sentenced to the Tennessee State Penitentiary.[1] After the Tennessee Court of Criminal Appeals affirmed the convictions and the Tennessee Supreme Court denied review, the respondent filed an unsuccessful petition for post-conviction relief in the Knox County Criminal Court.

The respondent subsequently filed a petition in federal Dis-

[1] The court sentenced the respondent to consecutive terms of 120 years on the rape charge and from five to 15 years on the crime against nature charge.

PP. 1, 8, 9, 11, 13

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: MAR 2 1982

Recirculated:

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-846

JIM ROSE, WARDEN, PETITIONER *v.* NOAH HARRISON LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March 3, 1982]

JUSTICE O'CONNOR delivered the opinion of the Court except as to Part III-C.

In this case we consider whether the exhaustion rule in 28 U. S. C. §§ 2254(b)–(c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statute, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

I

Following a jury trial, respondent Noah Lundy was convicted on charges of rape and crime against nature, and sentenced to the Tennessee State Penitentiary.[1] After the Tennessee Court of Criminal Appeals affirmed the convictions and the Tennessee Supreme Court denied review, the respondent filed an unsuccessful petition for post-conviction relief in the Knox County Criminal Court.

[1] The court sentenced the respondent to consecutive terms of 120 years on the rape charge and from five to 15 years on the crime against nature charge.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 4, 1982

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 80-846 Rose v. Lundy

No. 80-6902, Stedman v. Maynard.

This petition for certiorari is from the Tenth Circuit. Following his conviction in state court for murder, the petitioner filed a habeas petition under §2254 claiming that one of the witness' testimony included inadmissible hearsay. The District Court dismissed the petition holding that even if the testimony erroneously had been admitted, the error was harmless. Four months after that decision, the petitioner filed a second petition claiming that the prosecutor knowingly had used perjured testimony from the same witness. The District Court denied relief on two grounds. First, the court found that the petitioner had discovered evidence of the perjured testimony nearly a year before the court had dismissed the first petition (but two weeks after the petitioner had filed the first petition). The court reasoned that since the petitioner's failure to raise the perjury issue in the first petition was inexcusable, the second petition constituted an abuse of the writ. Second, the court found the allegations factually insufficient to support the perjury claim. The petitioner argues here that he could not have appended his second claim to the first petition because that claim had not yet been exhausted in state courts.

This case does not present a situation controlled directly by Rose since at no time did the petitioner submit a mixed petition. Whether or not the Rule 9(b) dismissal was proper, the case does not merit review because the perjury claim is frivolous. Thus, I recommend that the Court deny the petition.

Sincerely,

Sandra

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 4, 1982

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 80-846 Rose v. Lundy

No. 81-1038, Duckworth v. Cowell.

This petition for certiorari is from the Seventh Circuit. Following his conviction for first degree murder, the petitioner filed a petition for habeas corpus under §2254 making several claims, including that his counsel's conflict of interest violated his Sixth Amendment right to the effective assistance of counsel, and that his confession was involuntary. The court dismissed the other claims for failure to exhaust state remedies, but reached the merits of the conflict of interest and voluntariness claims, which had been exhausted in the state courts. On the merits, the court rejected the voluntariness claim, but found that the respondent's counsel suffered a conflict of interest in violation of the prisoner's Sixth Amendment rights. The Court of Appeals affirmed, finding that dual representation of a defendant and a prosecution witness was a per se violation of the Sixth Amendment (a holding that probably conflicts with Cuyler v. Sullivan, 446 U.S. 335, 348 (1980), which held that absent an objection at trial, a defendant must show that "an actual conflict of interest adversely affected his lawyer's performance"). The State, as petitioner before this Court, has not raised the exhaustion issue.

Because the petition in this case included both exhausted and unexhausted claims, I recommend that the Court grant the petition, vacate the opinion below and remand the case to the Seventh Circuit with instructions to remand the case to the District Court to dismiss the petition.

Sincerely,

Sandra

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 4, 1982

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 80-846 Rose v. Lundy

No. 81-5047, Rodriguez v. Harris.

This petition for certiorari is from the Second Circuit. Following his conviction in state court on several counts of murder and one of robbery, the petitioner filed a pro se petition for habeas corpus under §2254 alleging that statements taken from him on the night of his arrest were involuntary and that trial counsel was incompetent for failing to try to suppress the statements at the suppression hearing and at trial. A federal Magistrate reviewing the petition recommended that the first claim be rejected on the merits, and that the second claim be dismissed because it had not been exhausted. At that point, the petitioner moved for voluntary dismissal of the entire petition. The District Court denied the motion for voluntary dismissal and accepted the Magistrate's recommendation for the case. The Second Circuit affirmed the lower court judgment in full.

The issue presented, whether habeas petitions containing both exhausted and unexhausted claims should be dismissed, is the same issue as decided in Rose v. Lundy. I therefore recommend that the Court grant the petition, vacate the decision below and remand the case to the Second Circuit with instructions to remand the case to the District Court to dismiss the petition.

Sincerely,

Sandra