

STEVENS, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 97–2048

WILLIAM D. O’SULLIVAN, PETITIONER v.
DARREN BOERCKEL

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

[June 7, 1999]

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

The Court’s opinion confuses two analytically distinct judge-made rules: (1) the timing rule, first announced in *Ex parte Royall*, 117 U. S. 241 (1886), and later codified at 28 U. S. C. §2254(b)(1) (1994 ed., Supp. III), that requires a state prisoner to exhaust his state remedies before seeking a federal writ of habeas corpus; and (2) the waiver, or so-called procedural default, rule, applied in cases like *Francis v. Henderson*, 425 U. S. 536 (1976), that forecloses relief even when the petitioner has exhausted his remedies.

Properly phrased, the question presented by this case is not whether respondent’s claims were exhausted; they clearly were because no state remedy was available to him when he applied for the federal writ. The question is whether we should hold that his claims are procedurally defaulted and thereby place still another procedural hurdle in the path of applicants for federal relief who have given at least two state courts a fair opportunity to consider the merits of their constitutional claims. Before addressing that question, I shall briefly trace the history of the two separate doctrines that the Court has improperly commingled.

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I

“[T]he problem of waiver is separate from the question whether a state prisoner has exhausted state remedies.” *Engle v. Isaac*, 456 U. S. 107, 125–126, n. 28 (1982). The question of exhaustion “refers only to remedies still available at the time of the federal petition,” *ibid.*; it requires federal courts to ask whether an applicant for federal relief could still get the relief he seeks in the state system. If the applicant currently has a state avenue available for raising his claims, a federal court, in the interest of comity, must generally abstain from intervening. This time-honored rule has developed over several decades of cases, always with the goal of respecting the States’ interest in passing first on their prisoners’ constitutional claims in order to act as the primary guarantor of those prisoners’ federal rights, and always separate and apart from rules of waiver.

In *Ex parte Royall* this Court reviewed a federal trial judge’s decision dismissing for want of jurisdiction a state prisoner’s application for a writ of habeas corpus. The prisoner, who was awaiting trial on charges that he had violated a Virginia statute, alleged that the statute was unconstitutional. This Court held that the trial court had jurisdiction, but nevertheless concluded that as a matter of comity the court had “discretion, whether it will discharge him, upon habeas corpus, in advance of his trial in the court in which he is indicted.” 117 U. S., at 253. Moreover, we held that, even if the prisoner was convicted, the court still had discretion to await a decision by the highest court of the State.

We clarified this abstention principle in *Urquhart v. Brown*, 205 U. S. 179 (1907). We stated that the “exceptional cases in which a Federal court or judge may sometimes appropriately interfere by *habeas corpus* in advance of final action by the authorities of the State are those of great urgency,” *id.*, at 182, that involve the authority of

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the General Government. Apart from those rare cases presenting “exceptional circumstances of peculiar urgency,” see *United States ex rel. Kennedy v. Tyler*, 269 U. S. 13, 17 (1925), our early cases consistently applied the rule summarized in *Ex parte Hawk*, 321 U. S. 114, 116–117 (1944) (*per curiam*): “Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted.”

The 1948 statute changed neither that rule nor its exclusive emphasis on timing. In that year, “Congress codified the exhaustion doctrine in 28 U. S. C. §2254, citing *Ex parte Hawk* as correctly stating the principle of exhaustion.” *Rose v. Lundy*, 455 U. S. 509, 516 (1982). The statute as enacted provided that an application for a writ by a state prisoner “shall not be granted” unless the applicant has exhausted his state remedies and, as the amended statute still does today, further provided that the applicant shall not be deemed to have done so “if he has the right under the law of the State to raise, by any available procedure, the question presented.” 62 Stat. 967; 28 U. S. C. §2254(d) (1994 ed., Supp. III). We interpreted this statute in *Rose* as requiring “total exhaustion”— that is, as requiring federal courts to dismiss habeas petitions when any of the claims could still be brought in state court. 455 U. S., at 522. Conversely, of course, if no state procedure is available for raising any claims at the time a state prisoner applies for federal relief, the exhaustion requirement is satisfied.

To be sure, the fact that a prisoner has failed to invoke an available state procedure may provide the basis for a conclusion that he has waived a claim. But the exhaustion inquiry focuses entirely on the availability of state proce-

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dures at the time when the federal court is asked to entertain a habeas petition. Our decision in *Moore v. Dempsey*, 261 U. S. 86 (1923), which was cited with approval in *Hawk*, 321 U. S., at 118, illustrates this principle. In that case, the Arkansas Supreme Court had rejected the petitioner's jury discrimination claim because he had asserted it in a motion for new trial that "came too late." 261 U. S., at 93. But, in holding that the Federal District Court should have entertained the claim, we obviously found that the state court's refusal to hear the claim on procedural grounds did not mean that the claim had not been exhausted. When we implicitly overruled *Moore* several years later in *Coleman v. Thompson*, 501 U. S. 722 (1991), we did so only on waiver grounds. We explicitly noted that "[a] habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." *Id.*, at 732.

Neither party argues that respondent currently has any state remedies available to him. The Court recognizes this circumstance, see *ante*, at 10, but still purports to analyze whether respondent has "exhausted [his] claims in state court." *Ante*, at 1, 4. Since I do not believe that this case raises an exhaustion issue, I turn to the subject of waiver.

II

In order to protect the integrity of our exhaustion rule, we have also crafted a separate waiver rule, or— as it is now commonly known— the procedural default doctrine. The purpose of this doctrine is to ensure that state prisoners not only become ineligible for state relief before raising their claims in federal court, but also that they give state courts a sufficient opportunity to decide those claims before doing so. If we allowed state prisoners to obtain federal review simply by letting the time run on adequate and accessible state remedies and then rushing into the

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federal system, the comity interests that animate the exhaustion rule could easily be thwarted. We therefore ask in federal habeas cases not only whether an applicant has exhausted his state remedies; we also ask how he has done so. This second inquiry forms the basis for our procedural default doctrine: A habeas petitioner who has concededly exhausted his state remedies must also have *properly* done so by giving the State a fair “opportunity to pass upon [his claims].” *Darr v. Burford*, 339 U. S. 200, 204 (1950). When a prisoner has deprived the state courts of such an opportunity, he has procedurally defaulted his claims and is ineligible for federal habeas relief save a showing of “cause and prejudice,” *Murray v. Carrier*, 477 U. S. 478, 485 (1986), or “‘a fundamental miscarriage of justice’” *id.*, at 495.

In the first of our modern procedural default cases, *Francis v. Henderson*, 425 U. S. 536 (1976), we held that a state prisoner had waived his right to challenge the composition of his grand jury because he had failed to comply with a state law requiring that such a challenge be made in advance of trial. Our opinion did not even mention the obvious fact that the petitioner had exhausted his state remedies; rather, it stressed the importance of requiring “‘prompt assertion of the right to challenge discriminatory practices in the make-up of a grand jury.’” *Id.*, at 541.

Similarly, in *Wainwright v. Sykes*, 433 U. S. 72 (1977), we held that the failure to object at trial to the admission of an inculpatory statement precluded a federal court from entertaining in a habeas proceeding the claim that the statement was involuntary. Our opinion correctly assumed that the petitioner had exhausted his state remedies. *Id.*, at 80–81. Our conclusion that waiver was appropriate rested largely on the importance of treating a trial as “the ‘main event,’ so to speak,” and making the necessary record “with respect to the constitutional claim when the recollections of witnesses are freshest, not years

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later in a federal habeas proceeding.” *Id.*, at 88, 90. In *Engle v. Isaac*, 456 U. S. 107 (1982), another case in which the prisoner had unquestionably exhausted his state remedies, see *id.*, at 125–126, n. 28, we held that a claimed constitutional defect in the trial judge’s instructions to the jury had been waived because the objection had not been raised at trial.

In *Coleman*, the Court extended our procedural default doctrine to state collateral appellate proceedings. The Court held that an inmate’s constitutional claims that he had advanced in a state habeas proceeding could not be entertained by a federal court because his appeal from the state trial court’s denial of collateral relief had been filed three days late. The Court, as I noted above, expressly stated that the exhaustion requirement had been satisfied because “there [were] no state remedies any longer ‘available’ to him.” *Id.*, at 732. But because the State had consistently and strictly applied its timing deadlines for filing such appellate briefs in this and other cases, we concluded that *Coleman* had effectively deprived the State of a fair opportunity to pass on his claims and thus had procedurally defaulted them.

On the other hand, we have continually recognized, as the Court essentially does again today, *ante*, at 5–6, that a state prisoner need not have invoked every conceivably “available” state remedy in order to avoid procedural default. As far back as *Brown v. Allen*, 344 U. S. 443, 447 (1953), we held that even when a State offers post-conviction procedures, a prisoner does not have “to ask the state for collateral relief, based on the same evidence and issues already decided by direct review.” We later held that prisoners who have exhausted state habeas procedures need not have requested in state courts an injunction, a writ of prohibition, mandamus relief, a declaratory judgment, or relief under the State Administrative Procedure Act, even if those procedures were technically avail-

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able. *Wilwording v. Swenson*, 404 U. S. 249 (1971) (*per curiam*). Federal courts also routinely and correctly hold that prisoners have exhausted their state remedies, and have *not* procedurally defaulted their claims, when those prisoners had the right under state law to file a petition for rehearing from the last adverse state-court decision and failed to do so.

The presence or absence of exhaustion, in sum, tells us nothing about whether a prisoner has defaulted his constitutional claims. Exhaustion is purely a rule of timing and has played no role in the series of waiver decisions that foreclosed challenges to the composition of the grand jury, evidentiary rulings at trial, instructions to the jury, and finally, counsel's inadvertent error in failing to file a timely appeal from a state court's denial of collateral relief. The Court's reasons for progressively expanding its procedural default doctrine were best explained in the cases that arose in a trial setting. By failing to raise their constitutional objections at trial, defendants truly impinge state courts' ability to correct, or even to make a record regarding the effect of, legal errors. See *Engle*, 456 U. S., at 128; *Wainwright*, 433 U. S., at 90. Though I found that reasoning unsatisfactory in the state postconviction context, see *Coleman*, 501 U. S., at 758 (Blackmun, J., joined by Marshall and STEVENS, JJ., dissenting), at least the Court did not make the analytical error that pervades its opinion today. It did not assume that there was any necessary connection between the question of exhaustion and the question of procedural default.

III

I come now to the real issue presented by this case: whether respondent's failure to include all six of his current claims in his petition for leave to appeal to the Illinois Supreme Court should result in his procedurally defaulting the three claims he did not raise.

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The Court barely answers this question. Even though no one contends that respondent currently has any state remedy available to him, the Court concentrates instead on exhaustion. It states that respondent has not exhausted his claims because he had “the right . . . to raise’ [his] claims through a petition for discretionary review in the [Illinois Supreme Court].” *Ante*, at 7 (quoting 28 U. S. C. §2254(c)). The Court adds to this that “the creation of a discretionary review system does not, without more, make review in the Illinois Supreme Court unavailable.” *Ante*, at 9. But, as the Court acknowledges almost immediately thereafter, the fact that “the time for filing [a petition to that court] has long past” most assuredly makes such review unavailable in this case. *Ante*, at 10. The Court then resolves this case’s core issue in a single sentence and two citations: “Thus, Boerckel’s failure to present three of his federal habeas claims to the Illinois Supreme Court in a timely fashion has resulted in a procedural default of those claims. *Coleman v. Thompson*, 501 U. S., at 731–732; *Engle v. Isaac*, 456 U. S. 107, 125–126, n. 28 (1982).” *Ibid*.

I disagree that respondent has procedurally defaulted these three claims, and neither *Engle* nor *Coleman* suggests otherwise. The question we must ask is whether respondent has given the State a fair opportunity to pass on these claims. This Court has explained that the best way to determine the answer to this question is to “respect . . . state procedural rules” and to inquire whether the State has denied (or would deny) relief to the prisoner based on his failure to abide by any such rule. *Coleman*, 501 U. S., at 751. See also *Engle*, 456 U. S., at 129 (federal courts should avoid “undercutting the State’s ability to enforce its procedural rules”). Thus, we held in *Engle* that a prisoner defaults a claim by failing to follow a state rule requiring that it be raised at trial or on direct appeal. The Court in *Coleman* felt so strongly about “the impor-

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tant interests served by state procedural rules at every stage of the judicial process and the harm to the States that results when federal courts ignore these rules,” 501 U. S., at 749, that it imposed procedural default on a death-row inmate for filing his appellate brief in state postconviction review just three days after the State’s deadline.

Surely the Illinois Supreme Court’s discretionary review rule, and respondent’s attempt to follow it, are entitled to at least as much respect. It is reasonable to assume that the Illinois Supreme Court, like this Court, has established a discretionary review system in order to reserve its resources for issues of broad significance. Claims of violations of well-established constitutional rules, important as they may be to individual litigants, do not ordinarily present such issues.

Discretionary review rules not only provide an effective tool for apportioning limited resources, but they also foster more useful and effective advocacy. We have recognized on numerous occasions that the “process of ‘winnowing out weaker arguments on appeal and focusing on’ those more likely to prevail . . . is the hallmark of effective appellate advocacy.’ ” *Smith v. Murray*, 477 U. S. 527, 536 (1986) (quoting *Jones v. Barnes*, 463 U. S. 745, 751–752 (1983)). This maxim is even more germane regarding petitions for certiorari. The most helpful and persuasive petitions for certiorari to this Court usually present only one or two issues, and spend a considerable amount of time explaining why those questions of law have sweeping importance and have divided or confused other courts. Given the page limitations that we impose, a litigant cannot write such a petition if he decides, or is required, to raise every claim that might possibly warrant reversal in his particular case.

The Court of Appeals for the Seventh Circuit found that these same factors animate the Illinois Supreme Court’s

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discretionary review rule. See 135 F.3d 1194, 1200 (1998). It also pointed out that Illinois courts in state habeas proceedings dismiss claims like respondent's on res judicata— not waiver— grounds once they have been pressed at trial and on direct appeal; it makes no difference whether the prisoner has raised the claim in a petition for review to the Illinois Supreme Court. *Id.*, at 1199 (citing *Gomez v. Acevedo*, 106 F.3d 192, 195–196 (CA7 1997) (which cites in turn *People v. Coleman*, 168 Ill. 2d 509, 522–523, 660 N. E. 2d 919, 927 (1995))). The Illinois courts, in other words, are prepared to stand behind the merits of their decisions regarding constitutional criminal procedure once a trial court and an appellate court have passed on them. No state procedural ground independently supports such decisions, so federal courts do not undercut Illinois's procedural rules by reaching the merits of the constitutional claims resolved therein. See *Coleman*, 501 U. S., at 736–738.

We ordinarily defer to a federal court of appeals' interpretation of state-law questions. See *Bishop v. Wood*, 426 U. S. 341, 346–347 (1976). The Court today nevertheless refuses to conclude that the Illinois rule “discourages the filing of certain petitions” (or even certain claims in petitions), and surmises instead that the rule does nothing more than announce the State Supreme Court's desire to decide for itself which cases it will consider on the merits. *Ante*, at 8. This analysis strikes me as unsatisfactory. I would, consistent with the Seventh Circuit's view, read the Illinois rule as dissuading the filing of fact-intensive claims of error that fail to present any issue of broad significance. I would also deduce from the rule that Illinois prisoners need not present their claims in discretionary review petitions before raising them in federal court.

The Court's decision to the contrary is unwise. It will impose unnecessary burdens on habeas petitioners; it will delay the completion of litigation that is already more

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protracted than it should be; and, most ironically, it will undermine federalism by thwarting the interests of those state supreme courts that administer discretionary dockets. If, as the Court has repeatedly held, the purpose of our waiver doctrine is to cultivate comity by respecting state procedural rules, then I agree with the Court of Appeals that we should not create procedural obstacles when state prisoners follow those rules. In fact, I find these observations by the Court of Appeals far more persuasive than anything in today's opinion:

“Boerckel provided Illinois state courts with an opportunity to review the matter in his direct appeal. Federal courts do not snatch claims from state courts when they review claims not included in discretionary petitions to state supreme courts. Our refusal to bar Boerckel from habeas review is a recognition of the inequity of penalizing a petitioner for following the requirements a state imposes on its second tier of appellate review. Allowing petitioners to exercise the discretion provided them by the states in selecting claims to petition for leave to appeal does not offend comity.

“We also note that requiring petitioners to argue all of their claims to the state supreme court would turn federalism on its head. If a state has chosen a system that asks petitioners to be selective in deciding which claims to raise in a petition for leave to appeal to the state's highest court, we seriously question why this Court should require the petitioner to raise all claims to the state's highest court if he hopes to request habeas review. The exhaustion requirement of §2254 does not require such a result.

“Moreover, contrary to O'Sullivan's suggestion, this decision will not obliterate any opportunity for a state's highest court to protect federally secured rights

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because it will leave state prisoners with little incentive to petition state supreme courts.’ Respondent Br. at 19. It is difficult to imagine that this holding will induce attorneys and defendants in state government custody to withhold an appropriate claim in a petition for leave to appeal to the state’s highest court, knowing that it cannot hurt and could only potentially help their cause. O’Sullivan’s argument assumes a remarkably risk-prone group of defendants and attorneys, especially given the fact that ‘the success rate at trial and on appeal, while low, is greater than the success rate on habeas corpus.’ See Judith Resnik, *Tiers*, 57 S. Cal. L. Rev. 837, 894 (1984). We do not believe that it accurately predicts the effect our holding will have on the incentives to petition the Illinois Supreme Court.

“Finally, we reiterate our concern that ‘[t]reating an omission from a petition for a discretionary hearing as a conclusive bar to federal review under §2254 could create a trap for unrepresented prisoners, whose efforts to identify unsettled and important issues suitable for discretionary review would preclude review of errors under law already established.’ *Hogan* [v. *McBride*], 74 F. 3d [144,] 147 [(CA7 1996)].” 135 F. 3d, at 1201–1202.

The Court of Appeals, in effect, held that federal courts should respect state procedural rules regardless of whether applying them impedes access to federal habeas review or signals the availability of such relief. The Court today, on the other hand, admits that its decision may “disserv[e] . . . comity” and may cause an “unwelcome” influx of filings in state supreme courts. *Ante*, at 9. It takes no issue with the Court of Appeals’ finding that Illinois would not invoke an independent state procedural ground as an alternative basis for denying relief to prisoners in respon-

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dent's situation. The Court today nevertheless requires defendants in every criminal case in States like Illinois to present to the state supreme court every federal issue that the defendants think might possibly warrant some relief if brought in a future federal habeas petition.

Thankfully, the Court leaves open the possibility that state supreme courts with discretionary dockets may avoid a deluge of undesirable claims by making a plain statement— as Arizona and South Carolina have done, see *ante*, at 9— that they do not wish the opportunity to review such claims before they pass into the federal system. I agree with JUSTICE SOUTER, *ante*, at 2, that a proper conception of comity obviously requires deference to such a policy. But we should accord such deference under the procedural default doctrine, not by allowing state courts to construe for themselves the federal-law exhaustion requirement in §2254. No matter how plainly a state court has said that it does not want the opportunity to review certain claims, discretionary review was either “available” to a prisoner when he was in the state system or it was not. And when the prisoner arrives in federal court, either the time for seeking discretionary review has run or it has not. The key point is that federal courts should not find *procedural default* when a prisoner has relied on a state supreme court's explicit statement that criminal defendants need not present to it every claim that they might wish to assert as a ground for relief in federal habeas proceedings.

I see no compelling reason to require States that already have discretionary docket rules to take this additional step of expressly disavowing any desire to be presented with every such claim. In my view, it should be enough to avoid waiving a claim that a state prisoner in a State like Illinois raised that claim at trial and in his appeal as of right.

I respectfully dissent.