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Harris v. Reed: A New Look at Federal Habeas Jurisdiction over State Petitioners

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COMMENTS

HARRIS V. REED: A NEW LOOK AT FEDERAL HABEAS JURISDICTION OVER STATE PETITIONERS

INTRODUCTION

Federal courts cannot exercise habeas corpus jurisdiction over state prisoners whose convictions rest on adequate[1] and independent[2] state procedural grounds.[3] State judges, however, often fail to state clearly the basis of their decisions.[4] Ambiguous state court decisions frequently occur where a petitioner presents a federal claim and the state court's opinion addresses both federal and state issues. Moreover, state courts often render judgment without issuing an opinion.[5] On direct[6] or habeas[7] re-

1. A state law is adequate when it provides a constitutionally sufficient basis on which to render judgment. *See* Matasar & Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 Colum. L. Rev. 1291, 1292 n.2 (1986). For a discussion of the process by which courts determine adequacy, see *infra* notes 99-104 and accompanying text.

2. A state law is independent where a court can apply and construe it without reference to federal principles. *See* Enterprise Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917); *see, e.g.*, Michigan v. Chesternut, 486 U.S. 567, 571 n.3 (1988) (state ground not independent where state court felt bound by fourth amendment in construing its law); Ake v. Oklahoma, 470 U.S. 68, 75 (1985) ("when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law . . . ."); Delaware v. Prouse, 440 U.S. 648, 653 (1979) (state ground not independent because state court felt compelled by federal principles to construe state law as it did). For a discussion of methods used to determine whether state procedural grounds are adequate and independent, see *infra* notes 95-104 and accompanying text.

3. *See* Wainwright v. Sykes, 433 U.S. 72, 81-82 (1977). A petitioner who can, however, demonstrate cause for noncompliance with the procedural rule and actual prejudice will obtain access to a federal habeas forum. *See id.* at 87. For a discussion of the adequate and independent state grounds doctrine and the cause and prejudice test, see *infra* notes 21-35 and accompanying text.

Federal courts have power to address the merits of claims that are procedurally barred in state court. They do not exercise this power, however, out of respect for the state system. *See* Smith v. Murray, 477 U.S. 527, 533 (1986); *infra* note 26.

4. *See* Harris v. Reed, 109 S. Ct. 1038, 1041-42 (1989); Michigan v. Long, 463 U.S. 1032, 1038-39 (1983). For a discussion of ambiguous decisions, see Note, *Applying* Wainwright v. Sykes *to State Alternative Holdings and Summary Affirmances*, 53 Fordham L. Rev. 1357, 1360-63 & nn. 18-32 (1985); *infra* notes 128-142 and accompanying text.

5. *See* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice & Procedure § 4032, at 769 (1977).

6. On direct review, which encompasses all appellate proceedings, a superior court examines whether a lower court properly decided issues of law. *See* L. Yackle, Postconviction Remedies § 1, at 1 (1981); *see also* 4 C.J.S. Appeal & Error § 17, at 91 (1957) (discussing appellate review). The superior court's inquiry is limited to those issues tried in the lower court. *See* 4 C.J.S. Appeal & Error § 17, at 91 (1957); *see also* Note, *State Criminal Procedure and Federal Habeas Corpus*, 80 Harv. L. Rev. 422, 426-27 (1966) (contrasting direct and habeas review).

7. A defendant uses habeas corpus after having exhausted appellate procedures. It is not an appeal but a collateral suit. *See* Mackey v. United States, 401 U.S. 667, 682-83 (1971); United States v. Theodorou, 576 F. Supp. 1007, 1009 (N.D. Ill. 1983). Habeas

view, federal courts must struggle to divine whether state courts have relied on state or federal grounds in reaching their decision.[8]

Prior to 1989, federal courts interpreted ambiguous state court decisions in one of three ways. Some courts demanded explicit reliance on the state ground before they would decline jurisdiction.[9] Others determined the basis of the state court's decision on a case-by-case basis.[10] A third group of courts presumed reliance on a state procedural ground if the state court so much as mentioned such an issue.[11]

Recently, in *Harris v. Reed*,[12] the Supreme Court attempted to eliminate this confusion in the habeas context.[13] *Harris* held that where the last state tribunal to render judgment in a case failed to articulate the basis of its decision, federal courts should presume reliance on federal grounds and exercise jurisdiction.[14] Therefore, a state prisoner's procedural default[15] will bar access to a federal habeas forum only if the state court's opinion plainly indicates reliance on a state rule.[16]

Part I of this Comment explores the background of federal habeas jurisdiction over state prisoners. This section includes a discussion of the adequate and independent state grounds doctrine and the cause and prejudice test. Part II discusses the *Harris* decision itself. Part III addresses the majority's goals and argues that *Harris* will not achieve these objectives. Part IV discusses probable effects of the decision and demonstrates

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corpus is independent of the proceedings by which petitioner was convicted. *See* 39 C.J.S. Habeas Corpus § 3, at 463 (1976). Prisoners use habeas corpus to challenge the legality of confinement, not to contest errors in lower courts. *See id.* at 462.

8. *See* Harris v. Reed, 109 S. Ct. 1038, 1041-42 (1989); Michigan v. Long, 463 U.S. 1032, 1038-39 (1983).

9. *See, e.g.*, Bruni v. Lewis, 847 F.2d 561, 563 (9th Cir.) (exercising jurisdiction because state court addressed procedural default and merits), *cert. denied*, 109 S. Ct. 403 (1988); Bradford v. Stone, 594 F.2d 1294, 1296 n.2 (9th Cir. 1979) (same).

10. *See, e.g.*, Wesselman v. Seabold, 834 F.2d 99, 101 (6th Cir. 1987) (analysis of state law revealed that Kentucky applied procedural default rule to bar petitioner's claim), *cert. denied*, 485 U.S. 1024 (1988); Morishita v. Morris, 702 F.2d 207, 209 (10th Cir. 1983) (analysis of Utah Supreme Court's opinion revealed that state court relied on merits, not procedural default); Darden v. Wainwright, 699 F.2d 1031, 1034 n.4 (11th Cir. 1983) (exercising jurisdiction because Florida Supreme Court extensively analyzed merits while addressing procedural default only in footnote), *cert. denied*, 467 U.S. 1230 (1984), *cert. granted and vacated*, 469 U.S. 1202 (1985); Dietz v. Solem, 640 F.2d 126, 132 (8th Cir. 1981) (finding reliance on procedural default after analysis of state court opinion).

11. *See* Bond v. Fulcomer, 864 F.2d 306, 310-11 (3d Cir. 1989); Bridge v. Lynaugh, 860 F.2d 162, 163 (5th Cir. 1988), *vacated*, 863 F.2d 370 (5th Cir. 1989); Davis v. Lansing, 851 F.2d 72, 75 (2d Cir. 1988); Goins v. Lane, 787 F.2d 248, 251 (7th Cir.), *cert. denied*, 479 U.S. 846 (1986); Davis v. Allsbrooks, 778 F.2d 168, 176 (4th Cir. 1985); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 440 (3d Cir. 1982).

12. 109 S. Ct. 1038 (1989).

13. *See id.* at 1041.

14. *See id.* at 1045.

15. A procedural default occurs where a criminal defendant fails to comply with a state procedural rule. A state court will address the merits, if at all, only as an alternative holding. *See* Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315, 1316 (1961).

16. *See Harris*, 109 S. Ct. at 1044.

that *Harris* will either eviscerate the cause and prejudice test or compel changes in state court opinion writing.

I. BACKGROUND

Habeas corpus is a traditional method of challenging imprisonment;[17] it is not part of the original criminal proceeding, nor is it concerned fundamentally with the determination of guilt or innocence. Its primary inquiry is into the conviction process.[18] The usual remedy available to prisoners who successfully attack their convictions is release from custody.[19] Criminal defendants, however, are not automatically entitled to federal habeas forums. Congress authorized federal courts to exercise habeas jurisdiction over state prisoners where the applicant is in custody, presents a federal question and has exhausted all state remedies.[20]

The exercise of federal habeas jurisdiction over state prisoners is further limited by the adequate and independent state grounds doctrine.[21] This doctrine immunizes from federal habeas review state decisions resting on adequate and independent state grounds, absent a showing of

17. *See generally* W. Duker, A Constitutional History of Habeas Corpus (1980) (historical analysis of federal habeas corpus and state prisoners); L. Yackle, *supra* note 6, §§ 1, 15-20 (development of rules governing federal habeas jurisdiction over state prisoners); Note, *Federal Habeas Corpus Review of State Forfeitures Resulting from Assigned Counsel's Refusal to Raise Issues on Appeal*, 52 Fordham L. Rev. 850, 850-52 & nn. 1-3 (1984) (scope of federal habeas jurisdiction over state prisoners).

18. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151-57 (1970); Note, *supra* note 6, at 422-24; 39 C.J.S. Habeas Corpus § 6 (1976); *see also* Jackson v. Virginia, 443 U.S. 307, 313-24 (1979) (federal habeas courts must consider whether sufficient evidence existed for jury to find guilt beyond reasonable doubt).

19. *See* Hill v. Johnson, 539 F.2d 439, 440 (5th Cir. 1976); Kelly v. Wingo, 313 F. Supp. 1059, 1060 (W.D. Ky. 1970); L. Yackle, *supra* note 6, § 3, at 4-5.

20. *See* 28 U.S.C. § 2254 (1982).

In pertinent part, section 2254(a) provides that federal courts "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." *Id.*

Section 2254(b) further provides that "[a]n application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." *Id.*

Section 2254(c) provides in pertinent part that "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." *Id.* For a discussion of the exhaustion requirement, see *infra* notes 86, 105-112 and accompanying text.

At the time of its enactment, the statute codified existing common-law doctrines. *See* Sanders v. United States, 373 U.S. 1, 11 (1963); *see, e.g., Ex parte* Hawk, 321 U.S. 114, 116-17 (1944) (reaffirming common-law exhaustion requirement); Waley v. Johnson, 316 U.S. 101, 105 (1942) (federal habeas jurisdiction "extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused"); L. Yackle, *supra* note 6, § 19, at 90.

21. *See* Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1130, 1147 (1986).

cause and prejudice.[22]

Traditionally, the adequate and independent state grounds doctrine has applied to habeas petitions.[23] The Supreme Court's 1963 decision in *Fay v. Noia*,[24] however, represented a temporary departure from strict application of the doctrine in habeas cases.[25] Under *Noia*, the presence of an adequate and independent state ground did not bar state prisoners from federal habeas forums.[26] Federal courts, however, could deny habeas applications of defendants whose strategic decisions resulted in their procedural defaults.[27] Fourteen years later, *Wainwright v. Sykes*[28] effectively overruled *Noia* by prohibiting the exercise of federal habeas jurisdiction where petitioner's conviction rested on adequate and independent state grounds.[29] But petitioner could still obtain habeas review upon a showing of cause for the default and consequent prejudice.[30]

22. *See* Smith v. Murray, 477 U.S. 527, 533 (1986); Murray v. Carrier, 477 U.S. 478, 484-85 (1986); Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935). For a discussion of how courts determine adequacy and independence, see *infra* notes 95-104 and accompanying text. For a discussion of the cause and prejudice test, see *infra* note 30.

23. Originally, the doctrine limited the Supreme Court's power to review state court decisions on direct appeal. *See* California v. Freeman, 109 S. Ct. 854, 856 (1989); Michigan v. Long, 463 U.S. 1032, 1038 n.4 (1983); Herb v. Pitcairn, 324 U.S. 117, 125 (1945); *Fox Film*, 296 U.S. at 210; Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 636 (1874).

The Court later expanded its application to the federal habeas arena. *See* Henry v. Mississippi, 379 U.S. 443, 446-47 (1965); Bramble v. Heinze, 350 U.S. 899, 899 (1955) (per curiam); Brown v. Allen, 344 U.S. 443, 458 (1953); Williams v. Kaiser, 323 U.S. 471, 477-78 (1945); *Ex parte* Spencer, 228 U.S. 652, 658-60 (1913).

24. 372 U.S. 391 (1963).

25. *See id.* at 438. *Noia* is representative of the Court's jurisprudence in the federal habeas area at that time. Other decisions of this period also fostered greater merits review of state prisoners' claims in federal habeas cases. *See, e.g.*, Sanders v. United States, 373 U.S. 1, 15-29 (1963) (circumstances in which federal habeas courts may grant successive habeas applications); Townsend v. Sain, 372 U.S. 293, 310-12 (1963) (circumstances in which federal habeas courts must hold evidentiary hearings).

26. *See Noia*, 372 U.S. at 437. The Court justified this action by stating that prior use of the doctrine had "rarely, if ever" been predicated on a lack of power, but rather, had been based on deference to the state system. *See id.* at 425. The Court has consistently affirmed this notion. *See* Smith v. Murray, 477 U.S. 527, 533 (1986); Reed v. Ross, 468 U.S. 1, 9 (1984); Wainwright v. Sykes, 433 U.S. 72, 84 (1977).

27. This is the "deliberate by-pass" exception. *See* Humphrey v. Cady, 405 U.S. 504, 517 (1972) (only petitioner, not counsel, can deliberately by-pass state procedural rule); *Noia*, 372 U.S. at 439 (only " 'an intentional relinquishment . . . of a known right or privilege' " constitutes deliberate by-pass) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

28. 433 U.S. 72 (1977).

29. *See id.* at 87-88.

30. *See* Smith v. Murray, 477 U.S. 527, 533 (1986). *See generally* Francis v. Henderson, 425 U.S. 536, 542 (1976) (first applying cause and prejudice standard to exercise of federal habeas jurisdiction); Fed. R. Crim. P. 12(b)(2) (court may excuse waiver where cause shown). The Court refused to give precise content to the cause and prejudice test. *See Sykes*, 433 U.S. at 90-91; *see also* Reed v. Ross, 468 U.S. 1, 13 (1984) (rationale for not specifically defining test). However, one can cull examples of cause from the Court's decisions. *See, e.g.*, Smith v. Murray, 477 U.S. 527, 536 (1986) (failure to raise claim not reasonably available to counsel because of legal novelty constitutes cause); Murray v.

Sykes remains the governing standard in federal habeas cases.[31]

Several rationales have been advanced for adhering to the adequate and independent state grounds doctrine. One is that use of the doctrine avoids advisory opinions.[32] One commentator has suggested that the Court employs the doctrine to maintain the integrity of state procedural laws.[33] Some courts and commentators have suggested that federal courts exhibit disrespect for the state judiciary by granting either direct or habeas review of cases involving adequate and independent state

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Carrier, 477 U.S. 478, 488 (1986) (ineffective assistance of counsel constitutes cause); Reed v. Ross, 468 U.S. 1, 14 (1984) (failure to raise legally novel claim constitutes cause); Brown v. Allen, 344 U.S. 443, 485-86 (1953) (court may excuse procedural default where interference by officials makes compliance with procedural rule impracticable).

The Court has also addressed prejudice. *See, e.g., Carrier*, 477 U.S. at 494 (prejudice results from fundamental unfairness); United States v. Frady, 456 U.S. 152, 169 (1982) (prejudice results when error by itself infects entire proceeding and violates due process).

There are rare instances where a state prisoner may gain access to a federal habeas forum despite the existence of adequate and independent state grounds and no showing of cause and prejudice. One such instance occurs where the petitioner will be the " 'victim[] of a fundamental miscarriage of justice' " without federal adjudication of the claim. *See Carrier*, 477 U.S. at 495 (quoting Engle v. Isaac, 456 U.S. 107, 135 (1982)); *Sykes*, 433 U.S. at 90-91; *see also* Dugger v. Adams, 109 S. Ct. 1211, 1219 (1989) (" 'substantial' showing 'that the alleged error undermined the accuracy of the guilt or sentencing determination' " is a fundamental miscarriage of justice) (Blackmun, J., dissenting) (quoting *Smith v. Murray*, 477 U.S. at 539); *Smith v. Murray*, 477 U.S. at 546-50 (Stevens, J., dissenting) (barring petitioner from federal habeas forum because of minor procedural default in capital case could be fundamentally unfair). A fundamental miscarriage of justice occurs where one is "actually innocent." *See Smith v. Murray*, 477 U.S. at 537 (quoting *Carrier*, 477 U.S. at 496).

For an explanation of the cause and prejudice standard and fundamental miscarriage of justice test, see Marcus, *Federal Habeas Corpus After State Court Default: A Definition of Cause and Prejudice*, 53 Fordham L. Rev. 663 (1985); Rosenberg, *Jettisoning* Fay v. Noia*: Procedural Defaults By Reasonably Incompetent Counsel*, 62 Minn. L. Rev. 341, 397-406 (1978); Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work to Do*, 31 Stan. L. Rev. 1, 19-46, 56-67 (1978); Comment, *The Supreme Court Defines the* Wainwright v. Sykes *"Cause" and "Prejudice" Standard*, 19 Wake Forest L. Rev. 441 (1983); Comment, *The Federal Courts: Habeas Corpus and Recent Meanings of Cause and Prejudice*, 10 Am. J. Crim. L. 215 (1982).

31. *See* Dugger v. Adams, 109 S. Ct. 1211, 1215 (1989).

32. *See* Uhler v. AFL-CIO, 468 U.S. 1310, 1311 (1984) (Rehnquist, J.); Henry v. Mississippi, 379 U.S. 443, 446-47 (1965); Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Westling, *Comment: Advisory Opinions and the "Constitutionally Required" Adequate and Independent State Grounds Doctrine*, 63 Tul. L. Rev. 379, 386-87 (1989); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1332-33 (1982).

The presence of an adequate and independent state ground implies that a federal court's conclusion on federal issues cannot affect the outcome of the case on remand. Once remanded, the state court could simply reinstate its original ruling by relying on the state ground. Invocation of the doctrine, which precludes the exercise of federal jurisdiction, thus prevents rendering advisory opinions. *See Herb*, 324 U.S. at 125-26; *see, e.g.*, People v. Class, 67 N.Y.2d 431, 433, 494 N.E.2d 444, 445, 503 N.Y.S.2d 313, 314 (1986) (per curiam) (United States Supreme Court rendered advisory opinion because upon reversing federal issues and remanding to New York Court of Appeals, New York court reinstated original ruling by relying solely on state grounds).

33. *See* Bice, Anderson *and the Adequate State Ground*, 45 S. Cal. L. Rev. 750, 765 (1972).

grounds.[34] Finally, Justice Kennedy has noted that the doctrine helps reduce the case load of the federal courts.[35]

II. *HARRIS V. REED*

A. *Procedural History*

Harris was convicted of murder after a three-day jury trial in the Circuit Court of Cook County, Illinois.[36] On direct appeal, the Appellate Court of Illinois rejected Harris's claim that the evidence was constitutionally insufficient to support the conviction.[37] This was the only argument that Harris's appointed counsel presented.[38]

Harris then petitioned for state post-conviction relief on the grounds of ineffective assistance of counsel. The court denied his petition,[39] holding that Harris was procedurally barred from presenting his ineffective assistance claim because he failed to preserve it on direct appeal.[40] Nevertheless, the court also addressed and rejected this claim on the merits.[41]

In deciding whether to exercise habeas jurisdiction over Harris's petition, the federal district court concluded that the Illinois appellate post-conviction court had excused Harris's waiver and actually dismissed the claim on the merits.[42] The district court therefore assumed jurisdiction and ordered an evidentiary hearing to assess the merits of the claim.[43] Ultimately, it dismissed Harris's petition.[44]

Harris appealed the district court's decision to the Court of Appeals for the Seventh Circuit,[45] which affirmed the judgment on jurisdictional

34. *See* Michigan v. Long, 463 U.S. 1032, 1040 (1983); Matasar & Bruch, *supra* note 1, at 1309-12; Sandalow, Henry v. Mississippi *and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 Sup. Ct. Rev. 187, 201 (1965) (federalism concerns, not advisory opinion rationale, underlie adequate and independent state grounds doctrine). *But see* Westling, *supra* note 32, at 386-87 (1989) (advisory opinion rationale is doctrine's basis).

35. *See* Harris v. Reed, 109 S. Ct. 1038, 1054 n.6 (1989) (Kennedy, J., dissenting); *cf.* Rose v. Mitchell, 443 U.S. 545, 584 (1979) (prisoner actions consume federal judiciary's time and energy). *But see The Supreme Court—Leading Cases*, 100 Harv. L. Rev. 100, 247 (1986) (habeas applications from state prisoners comprise small percentage of federal docket).

36. *See Harris*, 109 S. Ct. at 1040. Citation to the Supreme Court's opinion is necessary because the state trial court's opinion is unpublished.

37. *See* United States *ex rel.* Harris v. Reed, 608 F. Supp. 1369, 1373-74 (N.D. Ill. 1985), *aff'd*, Harris v. Reed, 822 F.2d 684, 687 (7th Cir. 1987), *rev'd*, 109 S. Ct. 1038, 1045 (1989); *see also* People v. Harris, 71 Ill. App. 3d 1113, 392 N.E.2d 1386 (1979) (the Appellate Court of Illinois affirmed Harris's conviction without opinion, and therefore, reference to federal decisions is helpful).

38. *See Harris*, 109 S. Ct. at 1039.

39. *See Harris*, 608 F. Supp. at 1377.

40. *See id.*

41. *See id.*

42. *See id.* at 1378.

43. *See id.* at 1385.

44. *See* Harris v. Reed, 822 F.2d 684, 685 (7th Cir. 1987), *rev'd*, 109 S. Ct. 1038 (1989).

45. *See id.* at 684.

grounds.[46] It concluded that the district court improperly exercised habeas jurisdiction, reasoning that the Illinois appellate post-conviction court had actually relied on the procedural bar.[47] It found that the state court addressed the merits only as an alternative holding.[48]

B. *The Supreme Court Decision*

The United States Supreme Court reversed the decision of the Seventh Circuit Court of Appeals.[49] The Court acknowledged the difficulty of ascertaining whether a state court relied on an adequate and independent ground where the state court rendered an ambiguous decision.[50] The Court had addressed this issue previously in the context of state litigants seeking direct review in the Supreme Court.[51] In *Michigan v. Long*,[52] the Court formulated the plain statement rule:[53]

> [w]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.[54]

The Court reasoned that because federal courts confront common jurisdictional dilemmas on habeas as well as direct review, it was appropri-

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46. *See id.* at 687.

47. *See id.*

48. *See id*; *see also supra* note 11 and accompanying text (Seventh Circuit's interpretation of ambiguous state court opinions prior to *Harris*).

49. *See* Harris v. Reed, 109 S. Ct. 1038, 1045 (1989).

50. *See id.* at 1042; *cf.* Martinez v. Harris, 675 F.2d 51, 54-55 (2d Cir.) (difficulties involved, prior to *Harris*, when federal court confronted ambiguous state court opinions), *cert. denied*, 459 U.S. 849 (1982); Washington v. Harris, 650 F.2d 447, 451-52 (2d Cir. 1981) (same), *cert. denied*, 455 U.S. 951 (1982).

51. *See* Michigan v. Long, 463 U.S. 1032 (1983). For a discussion of direct and collateral review, see *supra* notes 6-7.

52. 463 U.S. 1032 (1983).

53. The *Long* Court adopted the plain statement rule to demonstrate "respect for state courts, and . . . to avoid advisory opinions." *Long*, 463 U.S. at 1040; *see supra* note 32.

The *Long* Court believed that adoption of the plain statement rule exhibits respect for state procedural rules because federal courts no longer have to interpret them. *See Long*, 463 U.S. at 1041. Prior to *Long*, the Supreme Court on direct review had to construe state law to determine the basis for the state decision. *See infra* note 85. The plain statement rule eliminates this task and is therefore intended to be deferential. In reality, however, the plain statement rule greatly intrudes on the state judiciary's autonomy. *See* Harris v. Reed, 109 S. Ct. 1038, 1052-53 (1989) (Kennedy, J., dissenting); *supra* notes 9-11 and accompanying text. *See generally* Elison & NettikSimmons, *Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds*, 45 Mont. L. Rev. 177, 195-200 (1984) (explanation and critique of *Michigan v. Long* plain statement rule); Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of* Michigan v. Long, 59 Notre Dame L. Rev. 1118 (1984) (consequences of *Michigan v. Long*).

54. *Long*, 463 U.S. at 1040-41.

ate to apply the *Long* plain statement rule in the habeas arena.[55] Under *Harris*, "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar."[56]

The majority believed that its decision would resolve a disagreement among the circuits and foster judicial efficiency.[57] The Court also believed that adopting the plain statement rule would reduce the need to construe state law,[58] further promoting judicial efficiency.[59]

Concurring in the result,[60] Justice Stevens stated that "the concerns that prevented me from joining the majority opinion in *Michigan v. Long* are not present in [habeas] case[s]."[61] Specifically, Justice Stevens contended that the rule in *Long* "expanded this Court's review of cases in which state courts had overprotected their respective citizens."[62] Justice Stevens believed that review of this sort is seldom appropriate.[63] However, because federal habeas cases address a prisoner's claim that his federal rights have been violated, Justice Stevens agreed that a presumption of jurisdiction in ambiguous cases is appropriate.[64]

Justice O'Connor also concurred in the result.[65] She stressed that while the majority simultaneously applied the "miscarriage of justice" test[66] and the cause and prejudice standard, the latter alone is operative.[67] She added that the law requiring petitioners to exhaust state remedies prior to federal habeas adjudication was unaffected by the plain statement rule.[68]

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55. *See Harris*, 109 S. Ct. at 1043 ("Faced with a common problem, we adopt a common solution.").

56. *Id.*

57. *See id.* at 1041; *supra* notes 9-11 and accompanying text (discussing division among circuits).

58. *See* Harris v. Reed, 109 S. Ct. 1038, 1044 (1989).

59. *See id.*; Michigan v. Long, 463 U.S. 1032, 1041 (1983). *Harris* will improve judicial economy inconsequentially. *See infra* note 85.

60. *See Harris*, 109 S. Ct. at 1045-46.

61. *See id.* at 1046.

62. *Id.* at 1045. The *Long* presumption indicates over-protection because Justice Stevens assumes that the state is appealing a state court decision that broadly construed federal rights. *See id.* at 1045 (Stevens, J., concurring); Michigan v. Long, 463 U.S. 1032, 1067-68 (1983) (Stevens, J., dissenting).

63. *See* Harris v. Reed, 109 S. Ct. 1038, 1045 (1989) (Stevens, J., concurring). Justice Stevens maintained that federal courts on direct review should primarily secure federal rights and not question all state court decisions "involving overly expansive interpretations of federally protected rights." *Id.* (Stevens, J., concurring).

64. *See id.* at 1046 (Stevens, J., concurring).

65. *See* Harris v. Reed, 109 S. Ct. 1038, 1046 (1989).

66. *See supra* note 30.

67. *See Harris*, 109 S. Ct. at 1048; *supra* note 30.

68. *See Harris*, 109 S. Ct. at 1046 (O'Connor, J., concurring). Hence, a federal court must still examine state law to determine whether the petitioner, upon presenting a claim for the first time in habeas application, has exhausted state remedies. *See generally* Davis v. Armontrout, No. 88-1194 (W.D. Mo. Aug. 16, 1989) (LEXIS, Genfed library, Dist file) (explaining Justice O'Connor's concurrence); Littlejohn v. Higgins, No. 88-0641

Justice Kennedy, dissenting from the opinion,[69] stated that "it is most unreasonable to adopt a rule that assumes either that state courts routinely invoke exceptions to their procedural bars without saying so, or that those courts are in the habit of disregarding their own rules."[70] He asserted that if the majority desired a bright-line rule in these cases, it should make the opposite assumption.[71] Refusing jurisdiction, Justice Kennedy reasoned, reflects a more reasonable presumption that the state court applied its rule.[72]

Justice Kennedy added that applying the plain statement rule to habeas cases will not significantly reduce the federal courts' need to examine state law[73] because the doctrines of adequacy and exhaustion still compel a thorough examination of state law.[74] Furthermore, Justice Kennedy predicted that state judges would not plainly indicate reliance on a state procedural rule because they may be unfamiliar with the intricacies of federal habeas procedure.[75] This would compel federal courts to exercise habeas jurisdiction in a larger number of cases, further swelling the federal docket.[76] Finally, Justice Kennedy asserted that the decision burdened states' legitimate interest in finality and undermined their right to punish defendants.[77]

(W.D. Mo. May 4, 1989) (LEXIS, Genfed library, Dist file) (same); *infra* note 86 (exhaustion principle).

While federal courts can exercise jurisdiction when there is no plain statement, they may not presume that a newly presented claim is exhausted. *See Harris*, 109 S. Ct. at 1046 (O'Connor, J., concurring). Justice O'Connor reasoned that a state court cannot rely on a state procedural rule where petitioner has never presented the claim to the state judiciary. *See id.* The majority, in a footnote, adopted Justice O'Connor's position. *See id.* at 1043 n.9; *see also* Parker v. Dugger, 876 F.2d 1470, 1477-78 (11th Cir. 1989) (refusing jurisdiction because petitioner never presented claim to state courts).

69. *See Harris*, 109 S. Ct. at 1048.

70. *Id.* at 1050; *see also* Peterson v. Scully, No. 89-2202 (2d Cir. Feb. 7, 1990) (LEXIS, Genfed library, Cir file) ("the state argues [that] to hold that the Appellate Division reached the merits would amount to a declaration that the court was unaware of [the procedural] rule and committed an error of elementary state law.").

71. *See* Harris v. Reed, 109 S. Ct 1038, 1051 (1989).

72. *See id.* (Kennedy, J., dissenting). In addition, Justice Kennedy noted that federal courts are empowered to hear the habeas applications in question but refuse to do so because of comity and federalism. *See id.* at 1052. Therefore, "any determination that a state court did not intend to rely on a procedural default must be made with the same deference to the State's sovereignty that motivates our willingness to honor its procedural rules in the first place." *Id.* at 1053.

73. *See id.* at 1051 (Kennedy, J., dissenting).

74. *See id.* at 1051, 1055 (Kennedy, J., dissenting).

75. *See id.* at 1053-54 (Kennedy, J., dissenting).

76. *See id.* at 1054 n.6 (Kennedy, J., dissenting).

77. *See id.* at 1053 (Kennedy, J., dissenting). Justice Kennedy also found that *Harris* and Engle v. Isaac, 456 U.S. 107 (1982), express contradictory principles. *See* Harris v. Reed, 109 S. Ct. 1038, 1055 (1989). In *Engle*, the Court held that where petitioner first presents a claim in his federal habeas petition, a federal habeas court must examine state law to determine whether he has exhausted all state remedies. *See id.* at 1055.

Therefore, *Engle* compels construction of state law in the exhaustion area. *See Harris*, 109 S. Ct. at 1046-47 (O'Connor, J., concurring). The majority in *Harris*, however, assumes forgiveness of procedural defaults and prohibits an examination of state law to

III. *HARRIS V. REED* WILL NOT ACHIEVE ITS STATED GOALS

A. *Providing Guidance to the Circuits in Construing Ambiguous State Court Decisions*

Admittedly, *Harris* will provide some guidance to lower federal courts in construing ambiguous state decisions.[78] The decision, however, may well provoke further confusion concerning the interpretation of the plain statement rule, leading courts to dispute determinations of ambiguity.[79] Some will require literal plain statements, while others will be satisfied with mere efforts at clarity before refusing jurisdiction.[80] For instance, the Court of Appeals for the Ninth Circuit found a plain statement from the tone of a state court opinion.[81] Yet the state court addressed the merits and never expressed clearly its reliance on a procedural bar.[82] Similarly, the Eleventh Circuit refused to exercise jurisdiction even where the state court opinion addressed the merits.[83] In contrast, the Court of Appeals for the Fourth Circuit exercised jurisdiction because the state court did not issue a plain statement, despite its belief that Virginia intended to hold petitioner's claim procedurally barred.[84] Even if *Harris* does provide guidance in some areas, this sort of confusion can now infect habeas decisions. *Harris* may well substitute one kind of confusion for another.

B. *Judicial Efficiency*

Harris will not substantially promote judicial economy. The decision will eliminate the need to construe state procedural rules in making a *Sykes* jurisdictional decision.[85] The doctrines of adequacy, independence

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determine the accuracy of this assumption. *See id.* at 1056 (Kennedy, J., dissenting). Justice Kennedy does not believe that these principles are reconcilable. *See id.*

78. Lower federal courts now know how to construe ambiguous opinions. *See supra* notes 9-11 and accompanying text. Under *Harris*, an ambiguous decision will not bar federal habeas review. *See Harris*, 109 S. Ct. at 1043-44.

79. *See* Baker, *The Ambiguous Independent and Adequate State Ground in Criminal Cases: Federalism Along a Mobius Strip*, 19 Ga. L. Rev. 799, 810 (1985).

80. *See, e.g.*, Waye v. Townley, 884 F.2d 762, 764 (4th Cir.) (refusing to exercise jurisdiction because lower state court held claim procedurally barred, even though Virginia Supreme Court affirmed without opinion), *cert. denied*, 110 S. Ct. 29 (1989); Fierro v. Lynaugh, 879 F.2d 1276, 1281 (5th Cir. 1989) (even though Texas Supreme Court addressed merits, Fifth Circuit found plain statement where state court declared that "[n]othing is presented for review").

81. *See* Anselmo v. Sumner, 882 F.2d 431, 434 (9th Cir. 1989).

82. *See id.* at 434.

83. *See* Richardson v. Thigpen, 883 F.2d 895, 898 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 17 (1989); Pelmer v. White, 877 F.2d 1518, 1520 (11th Cir. 1989).

84. *See* Evans v. Thompson, 881 F.2d 117, 123 n.2 (4th Cir. 1989); *see also* Nieto v. Sullivan, 879 F.2d 743, 746-47 & n.2 (10th Cir.) (despite procedural default, court exercised jurisdiction because New Mexico Court of Appeals addressed merits of petitioner's constitutional claim and did not plainly indicate reliance on default), *cert. denied*, 110 S. Ct. 373 (1989).

85. For instance, in County Court v. Allen, 442 U.S. 140 (1979), the Court found that the New York Court of Appeals had not relied on a state procedural default. *See id.* at

and exhaustion,[86] however, compel lower federal courts to construe state procedural rules in other aspects of habeas cases.[87] In addition, *Harris* will force federal courts to adjudicate many more claims by state prisoners.[88] Thus, in practice the decision contributes little to judicial economy.[89] Indeed, federalism concerns demand that federal courts accurately assess whether the state court relied on a procedural default.[90] The Court ostensibly adopted the plain statement rule in deference to the state judiciary.[91] Yet the rule presumes that state courts do not rely on their procedural laws.[92] Far from demonstrating its avowed respect for the power and independence of state courts,[93] the *Harris* decision tramples federalism concerns while only marginally increasing efficiency.[94]

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153. In reaching this conclusion, the Court first examined many New York cases interpreting the law to determine whether it applied to petitioner's claim. *See id.* at 150-52 & nn. 8-9. The Court also analyzed the trial and appellate opinions to discern reliance on the default or the merits. *See id.* at 152-53; *see also* Peterson v. Scully, No. 89-2202 (2d Cir. Feb. 7, 1990) (LEXIS, Genfed Library, Cir file) ("[o]ur review of the Appellate Division's decision is made easier by the Supreme Court's recent pronouncement in *Harris v. Reed*") (citation omitted).

Harris eliminates only the need to perform a small portion of this analysis. Federal courts must still examine the lower court record, appellate briefs and state procedural rules in other aspects of habeas cases. *See infra* notes 86-107 and accompanying text.

86. Congress requires state prisoners to exhaust all state remedies before obtaining access to a federal habeas forum. *See* 28 U.S.C. § 2254 (b)-(c) (1982); *supra* note 20. Federal courts, however, will refuse to exercise jurisdiction only when petitioner has failed "to exhaust state remedies still open . . . at the time he files his application in federal court." Fay v. Noia, 372 U.S. 391, 435 (1963).

A petition for certiorari is not required to satisfy the exhaustion requirement. *See* County Court v. Allen, 442 U.S. 140, 149 n.7 (1979); *Noia*, 372 U.S. at 435-38; *cf.* Darr v. Burford, 339 U.S. 200, 217 (1950) (requiring a petition for certiorari before petitioner could be considered to have exhausted state remedies), *overruled*, Fay v. Noia, 372 U.S. 391, 435-36 (1963).

Comity is the rationale for the exhaustion requirement. *See* Castille v. Peoples, 109 S. Ct. 1056, 1059 (1989); Picard v. Connor, 404 U.S. 270, 275 (1971); Bowen v. Johnston, 306 U.S. 19, 27 (1939); Laubach, *Exhaustion of State Remedies as a Prerequisite to Federal Habeas Corpus: A Summary 1966-1971*, 7 Gonz. L. Rev. 34, 35-36 (1971). *But see* Meyer & Yackle, *Collateral Challenges to Criminal Convictions*, 21 U. Kan. L. Rev. 259, 288 n.119 (1973) (list of sources discussing other rationales for exhaustion). Exhaustion is not a jurisdictional requirement. *See Noia*, 372 U.S. at 419-20; *Darr*, 339 U.S. at 204-05.

87. *See* Harris v. Reed, 109 S. Ct. 1038, 1054-55 (1989) (Kennedy, J., dissenting); *infra* notes 95-116 and accompanying text.

88. *See infra* notes 113-116 and accompanying text.

89. *See* Anselmo v. Sumner, 882 F.2d 431, 433-34 (9th Cir. 1989).

90. *See Harris*, 109 S. Ct. at 1052-53 (Kennedy, J., dissenting).

91. *See* Michigan v. Long, 463 U.S. 1032, 1040 (1983).

92. *See supra* notes 70-72 and accompanying text.

93. *See* Harris v. Reed, 109 S. Ct. 1038, 1052-53 (1989) (Kennedy, J., dissenting); Robson & Mello, *Ariadne's Provisions: A "Clue of Thread" to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida's Death Penalty*, 76 Calif. L. Rev. 89, 122 & n.192 (1988).

94. *See Harris*, 109 S. Ct. at 1055 (Kennedy, J., dissenting) (because of adequacy, independence and exhaustion, "the majority's assessment of the marginal burdens imposed on federal courts by the need to construe those rules in [ambiguous habeas] cases . . . can only be described as extravagant"). The Court's decision in *Harris* intrudes on

1. Adequacy and Independence

The majority in *Harris* asserted that the decision would conserve judicial effort by eliminating the need to construe state law in deciding whether to exercise jurisdiction.[95] Even if a state court explicitly relies on a state procedural bar, however, lower federal courts must still determine whether the state law is truly adequate and independent.[96] This requires an evaluation of state procedural rules,[97] which may be inadequate for several reasons.[98] For instance, a state procedural bar is inadequate to preclude federal jurisdiction where federal law preempts the state rule.[99] Inconsistent[100] or novel[101] application of the rule also ren-

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state sovereignty because it compels state courts to write opinions. *See infra* notes 121-123 and accompanying text. *But see infra* notes 143-145 and accompanying text (state court may use one sentence statement of reliance rather than full opinion). Admittedly, opinion writing is beneficial and worthy of encouragement. *See* Marvell, *State Appellate Court Responses to Caseload Growth*, 72 Judicature 282, 287 (1988); *infra* notes 143-145 and accompanying text. The state judiciary, however, is currently deluged with cases. *See* Marvell, *supra*, at 282-83; *infra* note 140. By punishing state courts that do not write opinions, the Supreme Court has unjustifiably attempted to conserve federal judicial resources through coercing greater expenditure of state energy.

95. *See Harris*, 109 S. Ct. at 1044.

96. *See id.*; Robson & Mello, *supra* note 93, at 100; *infra* notes 97-103; *see, e.g.*, Russell v. Rolfs, No. 88-3936 (9th Cir. Jan. 9, 1990) (LEXIS, Genfed library, Cir file) (plain statement of reliance on procedural bar will not preclude exercise of jurisdiction where bar is inadequate). In *Russell*, the Washington state court adhered to the plain statement rule; the state court plainly indicated reliance on a state procedural rule. The Ninth Circuit Court of Appeals, however, found the rule inadequate, and thus could exercise jurisdiction.

97. *See, e.g.*, Reynolds v. Ellingsworth, 843 F.2d 712, 719-22 (3d Cir.) (examining many Delaware cases and statutes to determine adequacy of state rule), *cert. denied*, 109 S. Ct. 403 (1988); *infra* notes 99-104 and accompanying text (process by which courts determine adequacy).

98. *See* Brown v. Allen, 344 U.S. 443, 503 (1953) (Frankfurter, J., dissenting) (suggesting that state procedural rules not always sufficient to preclude exercise of federal habeas jurisdiction). *See generally* Matasar & Bruch, *supra* note 1, at 1383 (reasons for holding state ground inadequate); Meltzer, *supra* note 21, at 1137-40 (same).

99. *See* International Longshoremen's Ass'n v. Davis, 476 U.S. 380, 387-88 (1986); Kalb v. Feuerstein, 308 U.S. 433, 438-39 (1940).

100. *See* Johnson v. Mississippi, 486 U.S. 578, 587-89 (1988); Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982); Barr v. City of Columbia, 378 U.S. 146, 149 (1964); Coleman v. Saffle, 869 F.2d 1377, 1382-84 (10th Cir. 1989); Messer v. Florida, 834 F.2d 890, 892-93 (11th Cir. 1987).

For instance, in Coleman v. Saffle, 869 F.2d 1377 (10th Cir. 1989), the Court of Appeals for the Tenth Circuit examined an Oklahoma statute and case law. The Oklahoma courts alternatively enforced the rule, waived it, or required petitioner to satisfy newly invented standards. *See id.* at 1383. The Tenth Circuit concluded that the state court inconsistently applied the contemporaneous objection rule. *See id.*

101. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 457-58 (1958); *see, e.g.*, Allison v. Fulton-De Kalb Hosp. Auth., 449 U.S. 939, 941-42 (1980) (Brennan, J., dissenting) (application novel because state court's interpretation of procedural rule directly conflicted with state statute); Staub v. City of Baxley, 355 U.S. 313, 320 (1958) (rule "requir[ing] . . . an arid ritual of meaningless form" is novel); Spencer v. Kemp, 781 F.2d 1458, 1470-71 (11th Cir. 1986) (en banc) (analysis of state law revealed rule's application to facts was novel).

For instance, in NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964), the Court

ders it inadequate. Inadequacy is found where the state courts have discretion to waive the rule.[102] Finally, a state rule is adequate only if it serves a legitimate state interest.[103] Thus, because federal judges are still faced with the very significant task of assessing adequacy and independence, it seems that the Supreme Court has overestimated *Harris*'s impact on the need to construe state law.[104]

2. Exhaustion

The majority asserted that the plain statement rule reduces the need to examine state procedural law, appellate briefs and lower court records.[105] Lower federal courts, however, must still determine whether the petitioner has exhausted his state remedies.[106] This process requires federal courts to examine state law, lower court records and appellate briefs.[107] A claim is not exhausted until the petitioner fairly presents it to the state court[108] and has no further recourse to state remedies.[109] To determine whether the petitioner fairly presented his claim, federal courts must ex-

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held that failure to comply with the Alabama Rules of Court was an inadequate state ground. *See id.* at 296-97. Petitioner's brief was in almost perfect conformity with the rule. The Court found that "Alabama courts have not heretofore applied their rules . . . with the pointless severity shown here." *Id.* at 297.

102. *See* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 243-45 (1969) (Harlan, J., dissenting); Henry v. Mississippi, 379 U.S. 443, 449 n.5 (1965); Williams v. Georgia, 349 U.S. 375, 383, 389 (1955).

103. *See* Henry v. Mississippi, 379 U.S. 443, 447-48 (1965) (procedural rules not serving legitimate state interests should not "bar vindication of important federal rights"); *cf.* Smith v. Murray, 477 U.S. 527, 533 (1986) (procedural default only bars federal habeas jurisdiction if legitimate state ground exists).

In Allison v. Fulton-De Kalb Hosp. Auth., 449 U.S. 939, 942 (1980) (Brennan, J., dissenting), Justice Brennan stated that a Georgia law requiring that defendants present federal before state claims serves no legitimate state interest. *See id.* at 942-43. The Georgia rule failed to foster judicial economy. While acknowledging that the rule prevented defendants from awaiting favorable decisions in other cases, Justice Brennan reasoned that this rationale also applied to state claims. *See id.* Justice Brennan concluded that "the Georgia Supreme Court's procedural rule effects an unnecessary and irrational discrimination against federal constitutional claims." *Id.* at 943; *cf.* United States *ex rel.* Fulton v. Franzen, 659 F.2d 741, 744 (7th Cir. 1981) (Illinois contemporaneous objection rule served legitimate state interests of finality and speed), *cert. denied*, 455 U.S. 1023 (1982). *But see* Meltzer, *supra* note 21, at 1142-44 (courts find state interest illegitimate only when procedural rule substantially burdens assertion of federal rights).

104. Federal courts assess adequacy and independence only if a state court uses a plain statement. When the decision is ambiguous, federal courts simply exercise jurisdiction. *See* Harris v. Reed, 109 S. Ct. 1038, 1044 (1989). By exercising jurisdiction more frequently, however, federal judges must expend their resources in disposing of a larger docket. This frustrates the majority's attempt to foster judicial efficiency. *See infra* notes 113-116. *See generally*, Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84 (1959) (even thirty years ago, when Court's docket was half current size, Justices had little time for each case).

105. *See* Harris v. Reed, 109 S. Ct. 1038, 1044 (1989).

106. *See* 28 U.S.C. § 2254(b)-(c) (1982); *supra* notes 20, 86.

107. *See infra* notes 108-112 and accompanying text.

108. *See* Castille v. Peoples, 109 S. Ct. 1056, 1060 (1989) (citing Picard v. Connor, 404 U.S. 270, 275 (1971)). Exhaustion also requires that petitioner give the state courts a fair opportunity to adjudicate the claim. *See* Anderson v. Harless, 459 U.S. 4, 6 (1982) (per

amine the record and appellate briefs.[110] Federal habeas courts must then ascertain whether any state remedies remain available,[111] which requires an examination of state procedural rules.[112] The exhaustion process, therefore, casts further doubt on the majority's assertion that *Harris* will result in a meaningful conservation of judicial resources.

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curiam); Morgan v. Jackson, 869 F.2d 682, 684 (2d Cir.), *cert. denied*, 110 S. Ct. 284 (1989); White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988).

109. *See* Middleton v. Miles, No. 88 Civ. 6099 (S.D.N.Y. June 27, 1989) (LEXIS, Genfed library, Dist file) ("[T]he petitioner must show that he has utilized all available appellate procedures at the state level.").

110. *See* Peoples v. Fulcomer, 882 F.2d 828 (3d Cir. 1989). In *Fulcomer*, the Third Circuit "examined the record from the state court proceedings in the appendix submitted on this appeal, which includes the trial court opinion . . . , [petitioner's] Superior Court brief, and the unreported Superior Court opinion," and concluded that petitioner's ineffective assistance of counsel claim had not been fairly presented. *Id.* at 830-31.

In Daye v. Attorney General, 696 F.2d 186 (2d Cir. 1982) (en banc), *cert. denied*, 464 U.S. 1048 (1984), the court extensively analyzed appellate briefs and New York law to determine whether petitioner fairly presented his claim. The Second Circuit noted that the appellate brief referred to New York cases that addressed the issue in state constitutional terms. *See id.* at 193-94. Nonetheless, the Second Circuit held that, by referring to these cases, petitioner put New York courts on notice of his federal constitutional claim. *See id.*

111. *See supra* note 109 and accompanying text.

112. *See* Harris v. Reed, 109 S. Ct. 1038, 1054-55 (1989) (Kennedy, J., dissenting). For instance, in Peoples v. Fulcomer, 882 F.2d 828 (3d Cir. 1989), the court concluded that petitioner had not exhausted state remedies. *See id.* at 831. An analysis of Pennsylvania's procedural law indicated that petitioner's waiver barred his ineffective assistance of counsel claim in state court. Normally, a procedural default satisfies exhaustion. *See* Smith v. Digmon, 434 U.S. 332, 333-34 (1978); L. Yackle, *supra* note 6, § 53, at 235, § 60, at 253. The Third Circuit, however, believed that Pennsylvania courts would hear the case. It based this conclusion on a Pennsylvania policy preferring that state prisoners initially litigate post-conviction claims in its state courts. *See Fulcomer*, 882 F.2d at 832.

Other aspects of exhaustion also require federal courts to be familiar with state procedural rules. For instance, petitioners have exhausted state remedies where state appellate courts have discretion not to invoke the procedural rule. *See* White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988). Federal courts, therefore, must recognize rules providing for such discretion. *See, e.g.*, Davis v. Lansing, 851 F.2d 72, 75 (2d Cir. 1988) (petitioner's remedies not exhausted because Article 78 motion was improper vehicle for raising claim, which could still be raised on direct appeal); Hughes v. Stafford, 780 F.2d 1580, 1581 (11th Cir. 1986) (petitioner who did not seek certiorari in Georgia Supreme Court failed to exhaust state remedies, because that court must grant certiorari); Adail v. Wyrick, 671 F.2d 1218, 1219 (8th Cir. 1982) (state remedies exhausted despite petitioner's failure to move for transfer to Missouri Supreme Court, because that court's decision to grant motion is discretionary).

In addition, a petitioner need not pursue state remedies that are futile. *See* Castille v. Peoples, 109 S. Ct. 1056, 1059 (1989); Varnell v. Young, 839 F.2d 1245, 1247-48 (7th Cir. 1988). To recognize futility, federal courts must understand state procedural law. *See, e.g.*, United States *ex rel.* Tonaldi v. Elrod, 716 F.2d 431, 434 (7th Cir. 1983) (state remedies exhausted despite petitioner's failure to seek state post-conviction relief because Illinois law does not offer access to post-conviction forum after petitioner has directly appealed), *cert. denied sub nom.* Perri v. Lane, 484 U.S. 843 (1987); Seemiller v. Wyrick, 663 F.2d 805, 807 (8th Cir. 1981) (not futile for petitioner to seek state court review because state law could favor petitioner's argument); United States *ex rel.* Graham v. Mancusi, 457 F.2d 463, 467 (2d Cir. 1972) (goal of exhaustion requirement is to exhaust state remedies, not prisoner).

3. Increased Federal Docket Congestion

A final consequence of *Harris* is that many more prisoners will obtain access to federal court.[113] The resulting increase in the federal docket[114] will further tax an already over-burdened judiciary.[115] Having to adjudicate a significantly increased number of claims by state prisoners will hinder the promotion of judicial economy.[116] Moreover, the federal courts' burden of having to handle substantially more cases will offset any judicial efficiencies created by the *Harris* decision.

IV. POSSIBLE EFFECTS OF THE DECISION

A. *A Change in State Court Opinion Writing*

Through its decisions in *Michigan v. Long* and *Harris v. Reed*, the Court may have hoped to induce state judges to write more opinions, and to do so with greater clarity.[117] The Court's strict interpretation of the plain statement rule supports this theory.[118] By requiring literal plain statements before refusing to exercise jurisdiction, the Court has eased

113. *See infra* notes 146-151 and accompanying text.

114. *See* Harris v. Reed, 109 S. Ct. 1038, 1054 n.6 (1989) (Kennedy, J., dissenting).

115. *See* Michigan v. Long, 463 U.S. 1032, 1042 n.8 (1983); Hart, *supra* note 105, at 122-25; Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 Mercer L. Rev. 477, 478 (1988).

116. *See Harris*, 109 S. Ct. at 1053-54 (Kennedy, J., dissenting). Justice Kennedy asserted that state prisoners may flood state courts with successive habeas petitions in hopes of obtaining an ambiguous decision. *See id.* To the extent that this occurs, federal courts will have to exercise jurisdiction over greater numbers of state prisoners. *See id* at 1054 n.6. Furthermore, state justices will be hard pressed to improve their writing habits if they are deluged with habeas petitions.

117. *See* Baker, *supra* note 79, at 825-26 (1985); Matasar & Bruch, *supra* note 1, at 1376. In addition, the Court may have hoped the plain statement rule would reduce the frequency with which judges affirm without an opinion. *See infra* notes 127-134 and accompanying text. For an illustration of how a state court may plainly rely on a state ground, see O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 524, 523 N.E.2d 277, 278, 528 N.Y.S.2d 1, 2 (1988); People v. Alvarez, 70 N.Y.2d 375, 381, 515 N.E.2d 898, 901, 521 N.Y.S.2d 212, 215 (1987).

118. The Court has required explicit plain statements before refusing to exercise jurisdiction. *See, e.g.*, Pennsylvania v. Finley, 481 U.S. 551, 554, 559-60 (1987) (granting certiorari despite Justice Brennan's dissenting opinion that state court issued plain statement); New York v. P.J. Video, Inc., 475 U.S. 868, 872-73 n.4 (1986) (Court exercised jurisdiction notwithstanding state court opinion citing several New York cases and New York constitution); Delaware v. Van Arsdall, 475 U.S. 673, 678 n.3 (1986) (Court assumed jurisdiction due to lack of plain statement); New York v. Class, 475 U.S. 106, 109-10 (1986) (Court exercised jurisdiction because state court did not plainly indicate basis for decision); Florida v. Meyers, 466 U.S. 380, 381-82 (1984) (per curiam) (exercising jurisdiction due to lack of plain statement); *see also* Robson & Mello, *supra* note 93, at 121 (Court frequently exercises jurisdiction due to lack of plain statement).

Some members of the Court, however, have been more willing to accept inexact statements of reliance. *See, e.g., Finley*, 481 U.S. at 563 (Brennan, J., dissenting) (Court should refuse jurisdiction because state law not interwoven with federal law); *Van Arsdall*, 475 U.S. at 691 (Stevens, J., dissenting) (same); *Meyers*, 466 U.S. at 383 n.1 (Stevens, J., dissenting) (same).

access to federal forums.[119] Yet an opposite interpretation of the plain statement rule, obstructing access to federal forums, better serves judicial efficiency.[120]

One explanation for the Court's approach is that by permitting lower courts to exercise jurisdiction frequently, it can use the threat of reversal as a "stick" to persuade state courts to change their writing habits.[121] Alternatively, state courts, by adopting a more conscientious writing style, can immunize their decision from federal habeas review:[122] "the state court is given the opportunity for requiring deference to its plain statement. When that plain statement is lacking, dual federalism allows [federal courts] to treat the decision as within [their] domain."[123]

Despite this opportunity, state court judges will probably not adopt more conscientious writing habits.[124] Given their own crushing caseload,[125] inadequate assistance[126] and the repetitive nature of many of the cases that appear before them, it seems unrealistic to expect that state court judges will begin to produce precisely worded opinions. Even if they did attempt to write more opinions, ambiguity is simply impossible to eradicate.[127]

1. ANOs

An appellate decision affirming without an opinion ("ANO") is ambiguous because a federal habeas court cannot determine whether the deci-

119. *See supra* note 118 and accompanying text.

120. To the limited extent that the plain statement rule does foster judicial economy, it does so whether or not the Court exercises jurisdiction. Federal courts no longer have to expend effort on jurisdictional decisions. Yet adopting a presumption of jurisdiction grants more state prisoners access to federal courts, thus swelling the federal docket and expending judicial resources. *See supra* notes 113-116 and accompanying text.

121. *See, e.g.*, Pennsylvania v. Finley, 481 U.S. 551, 554 (1987) (Court disagreed about existence of plain statement and ultimately reversed state court decision after exercising jurisdiction).

122. *See* Baker, *supra* note 79, at 825-26. The Court may achieve at least partial success in this area. The New York Appellate Division's First Department changed its prior practice by instituting a policy of writing opinions for every disposition. *See* Parloff, *1st Dep't Pledges to Write Opinions for All Appeals*, Manhattan Law., Oct. 3, 1989—Oct. 9, 1989, at 4 (hereinafter Parloff I). *Harris* may well have been the impetus for such a change. *See* Parloff, *'Affirmed. No Opinion. All Concur.'*, Manhattan Law., Aug. 29, 1989—Sept. 11, 1989, at 19 (hereinafter Parloff II). The state court will preclude the possibility of reversal by issuing plain statements. Most state courts, however, will not match the First Department's example. *See infra* notes 121-145.

123. Baker, *supra* note 79, at 825-26.

124. *See infra* notes 128-145 and accompanying text.

125. *See infra* note 140.

126. *Cf.* Mahoney, *Law Clerks: For Better or Worse?*, 54 Brooklyn L. Rev. 321, 340-42 (1984) (law clerks needed to help handle caseload growth).

127. *See id. Compare* O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 524, 523 N.E.2d 277, 278, 528 N.Y.S.2d 1, 2 (1988) (clearly indicating reliance on adequate and independent state ground) *with* People v. Millan, 69 N.Y.2d 514, 522 n.7, 508 N.E.2d 903, 907 n.7, 516 N.Y.S.2d 168, 172 n.7 (1987) (relying on both federal and state grounds).

sion rests on federal or state grounds.[128] Judges frequently render ANOs.[129] For instance, in 1987, 92 percent of all criminal decisions and 98.5 percent of all criminal affirmances decided by the New York Appellate Division's First Judicial Department were rendered as ANOs.[130]

Indeed, a number of factors may lead judges to continue rendering ANOs:[131]

> The increases in case volume and difficulty have placed great pressure on the judiciary. Appellate judges have sought to reduce that pressure in a number of ways, one of the most common being to reduce the number of opinions that they publish. Doing so, it is believed, saves judges much valuable time because unpublished opinions require less judicial effort to prepare.[132]

Rendering a decision as an ANO saves more time than not publishing the opinion.[133] Other rationales include reduced costs in acquiring and storing legal materials as well as simplified legal research.[134] An ANO also insulates state court judges from criticism by the electorate.[135]

2. Ambiguous Opinions

When not using ANOs, state court judges will probably continue to write ambiguous opinions. By rendering ambiguous opinions, state judges can mitigate some political consequences of their decisions.[136] For example, judges can blame a politically unpopular or sensitive decision on federal requirements.[137]

Ambiguous state opinion writing will also continue because perfect

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128. *See* Robson & Mello, *supra* note 93, at 124; *see, e.g.*, Booker v. Lynaugh, 872 F.2d 100, 100-01 (5th Cir. 1989) (exercising jurisdiction because Texas Court of Criminal Appeals affirmed without opinion); Baum v. Leonardo, No. 88 Civ. 8171 (S.D.N.Y. July 24, 1989) (LEXIS, Genfed library, Dist file) (exercising jurisdiction because New York's Appellate Division affirmed without opinion).

129. *See* Marvell, *supra* note 94, at 288, 291.

130. *See Parloff II*, *supra* note 122, at 1. The 1st Department has stated that it will now write opinions in all cases. *See Parloff I*, *supra* note 122, at 4.

131. *See* Richman & Reynolds, *The Supreme Court Rules for the Reporting of Opinions: A Critique*, 46 Ohio St. L. J. 313, 313 (1985).

132. *Id.*

133. *Cf.* Marvell, *supra* note 94, at 287 (when opinion not available to public, attorneys, or other courts, judges can save time by writing less refined opinions); Weaver, *supra* note 115, at 479 (same).

134. *See* Richman & Reynolds, *supra* note 131, at 313.

135. *See id.* at 313-14. Even assuming that ANOs are not prevalent, state court judges will still insulate themselves from criticism by the electorate by writing ambiguous opinions. *See* Matasar & Bruch, *supra* note 1, at 1378.

136. *See* Matasar & Bruch, *supra* note 1, at 1379-80.

137. *See generally* Harris v. Reed, 109 S. Ct. 1038, 1045 (1989) (Stevens, J., concurring) (state judges frequently overprotect citizens); Bice, *supra* note 33, at 756-57 (discussing political motivation to write ambiguously); Matasar & Bruch, *supra* note 1, at 1378 ("A state judge who holds that state and federal law together compel an unpopular result runs quite a different political risk compared to a judge who holds squarely that state law gives greater rights than federal law."). Political motivation is also a rationale for a judge's use of ANOs. *See supra* note 135 and accompanying text.

clarity is difficult to achieve.[138] One commentator has noted that "[j]udicial expression in opinion writing generally has its own limits, [and] in difficult cases dealing with complex issues the intellectual process is peculiarly fleeting."[139] In addition, because the state court docket is so large,[140] judges cannot devote much time to careful writing.

Indeed, empirical evidence following *Michigan v. Long* suggests that state courts may well continue writing ambiguous opinions.[141] After an examination of over five hundred state cases involving constitutional claims, one author concluded that state courts have failed to adhere to the plain statement rule.[142] It is unlikely that *Harris v. Reed* will do any more to inspire state courts to alter their habits than did *Michigan v. Long*.

3. One-Sentence Statements of Reliance

Moreover, state courts may write unambiguously without substantially changing their writing habits. State judges could plainly indicate the basis of their decision, and avoid federal habeas review, by using a one-sentence statement of reliance.[143] This practice rewards state courts without exacting further clarification in their writing. Moreover, by briefly indicating reliance, judges erect insurmountable obstacles to further litigation while also remaining unaccountable for their decisions.[144] Habeas corpus is a fundamental means of protecting a defendant's federal rights.[145] State courts should not be able to foreclose federal habeas review without addressing the petitioner's case in a lucid opinion. *Harris* enables state courts to accomplish this without requiring any change in their writing habits.

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138. *See* Baker, *supra* note 79, at 812; *cf.* Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 Harv. L. Rev. 1485, 1503-04 (1987) (plain statement rule will not necessarily foster clear opinion writing).

139. Baker, *supra* note 79, at 812.

140. The New York Appellate Division's First Judicial Department handled 2,910 cases in 1988. The Second Judicial Department disposed of 4,489 cases. *See Parloff II*, *supra* note 122, at 18. Through November 1989, the First Department decided 2,520 cases. During the same period, the Second Department handled 3,410 cases. *See* Milonas, *The Caseloads of Appellate Division Justices*, N.Y.L.J., Feb. 8, 1990, at 2.

141. *See* Note, *Fulfilling the Goals of* Michigan v. Long*: The State Court Reaction*, 56 Fordham L. Rev. 1041, 1042, 1068 (1988).

142. *See id.* at 1047, 1068.

143. *See* Harris v. Reed, 109 S. Ct. 1038, 1044-45 n.12 (1989).

144. *See* Richman & Reynolds, *supra* note 131, at 313-14; Robson & Mello, *supra* note 93, at 122. Using a short statement of reliance does not always deny state prisoners a federal habeas forum. Petitioners may still obtain federal review by claiming that the state procedural rule is not adequate and independent. *See supra* note 96 (Ninth Circuit exercised jurisdiction even though state court relied on state procedural rule because state rule not adequate). *See generally* Henry v. Mississippi, 379 U.S. 443, 447 (1965) (determining that adequacy and independence is federal question).

145. *See generally* L. Yackle, *supra* note 6, § 17 (origins of "great writ").

B. *Evisceration of the* Sykes *Cause and Prejudice Standard*

Prior to *Harris*, most circuits either assumed reliance on the state ground or attempted to interpret the state court's intention.[146] These approaches subjected a large percentage of petitioners to the cause and prejudice test because federal courts would find or presume reliance.[147] In contrast, *Harris* compels these federal courts to exercise habeas jurisdiction without requiring petitioner to demonstrate cause and prejudice. Only deliberate bypasses of state procedural rules will bar petitioners from federal court. This approach represents a return to the *Noia* standard,[148] and has been followed in many recent federal decisions.[149]

This effective return to *Noia* will most likely persist. Despite *Harris*, state judges will probably continue to render ambiguous decisions.[150] Furthermore, even if state courts attempt to indicate reliance explicitly, state prisoners will have greater access to federal post-conviction forums

146. *See supra* notes 9-11 and accompanying text.

147. *See* Matasar & Bruch, *supra* note 1, at 1376.

148. *See supra* notes 23-27 and accompanying text. *See generally* Matasar & Bruch, *supra* note 1, at 1379-80 (reasons for state courts not writing opinions). The commentators note that "for myriad reasons, state courts may choose not to clarify the grounds of their decisions. To the extent that there are many such cases, the approach of *Michigan v. Long* [and thus *Harris v. Reed*] could increase rather than reduce the number of cases subject to [federal adjudication]." Matasar & Bruch, *supra* note 1, at 1375-76.

149. *See, e.g.*, Peterson v. Scully, No. 89-2202 (2d Cir. Feb. 7, 1990) (LEXIS, Genfed library, Cir file) (court exercised jurisdiction because state court failed to even mention an obvious procedural default); Thompson v. Sowders, 887 F.2d 1088 (6th Cir. 1989) (exercising jurisdiction because state court failed to rely expressly on state procedural grounds); Edwards v. Butler, 882 F.2d 160, 165 (5th Cir. 1989) (exercising jurisdiction because state court failed to rely expressly on state procedural grounds); Evans v. Thompson, 881 F.2d 117, 123 n.2 (4th Cir. 1989) (court exercised jurisdiction because state court did not plainly indicate basis of decision, even though it felt Virginia intended to hold petitioner's claim procedurally barred), *Petition for cert. filed*, — U.S.L.W. — (U.S. Sep. 27, 1989) (No. 89-516); Nieto v. Sullivan, 879 F.2d 743, 746 (10th Cir.) (while petitioner failed to preserve claim for appeal, court exercised jurisdiction because New Mexico Court of Appeals addressed merits of petitioner's constitutional claim and did not plainly indicate reliance on default), *cert. denied*, 110 S. Ct. 373 (1989); Owens v. Treder, 873 F.2d 604, 610-12 (2d Cir. 1989) (same); Booker v. Lynaugh, 872 F.2d 100, 100-01 (5th Cir. 1989) (exercising jurisdiction because Texas Court of Criminal Appeals affirmed without opinion).

An examination of recent New York federal district court decisions reveals the extent to which petitioners will now have access to a federal habeas forum. *See, e.g.*, Flores v. Scully, No. 89 Civ. 1527 (S.D.N.Y. Oct. 12, 1989) (LEXIS, Genfed library, Dist file) (exercising habeas jurisdiction because the state court failed to clearly and expressly rely on state procedural grounds); Portalatin v. Hernandez, No. 87-3630 (E.D.N.Y. Sept. 1, 1989) (LEXIS, Genfed library, Dist file) (same); Fernandez v. Dalsheim, No. 88 Civ. 5705 (S.D.N.Y. Sept. 1, 1989) (LEXIS, Genfed library, Dist file) (same); Torres v. Sullivan, No. 89 Civ. 0254 (S.D.N.Y. Aug. 9, 1989) (LEXIS, Genfed Library, Dist file) (same); Martin v. Jones, No. 87 Civ. 3252 (S.D.N.Y. Aug. 4, 1989) (LEXIS, Genfed library, Dist file) (same); Baum v. Leonardo, No. 88 Civ. 8171 (S.D.N.Y. July 24, 1989) (LEXIS, Genfed library, Dist file) (same); Maxwell v. Smith, 722 F. Supp. 7, 8 (W.D.N.Y. 1989) (same); Fagon v. Bara, 717 F. Supp. 976, 986-87 (E.D.N.Y. 1989) (same); Lopez v. Scully, 716 F. Supp. 736, 739 (E.D.N.Y. 1989) (same); Quaratararo v. Mantello, 715 F. Supp. 449, 464-65 (E.D.N.Y.) (same), *aff'd*, 888 F.2d 126 (1989).

150. *See supra* notes 117-145 and accompanying text.

if those courts require plain statements. An analysis of Supreme Court cases construing the *Michigan v. Long* plain statement rule suggests that the Court requires a very clear statement of reliance before it will refuse to exercise jurisdiction.[151] Thus, even if state courts attempt to indicate that they relied on the state rule, petitioners will frequently obtain access to federal habeas forums without demonstrating cause and prejudice.

CONCLUSION

The majority in *Harris v. Reed* ostensibly adopted the plain statement rule to foster judicial economy and demonstrate respect for state procedural rules. It is unrealistic to assume, however, that the rule will significantly reduce the need to construe state law or examine lower court records and appellate briefs. In addition, the plain statement rule will eviscerate the cause and prejudice test. The resulting increase in the federal docket will offset whatever contribution *Harris* might make to judicial efficiency.

By exercising jurisdiction and thus threatening reversal, the Court may have hoped to induce changes in the state judiciary's writing practices. This endeavor will not succeed. Political pressures, a voluminous caseload and the inherent difficulty of writing unambiguously will prevent the state judiciary from altering its routines. The paramount danger is that state courts will circumvent *Harris* by issuing one-line plain statements. While unambiguous, this type of decision would frustrate the Court's objective. State courts will be able to deny plaintiffs a federal forum without a cogent explanation of their reasoning.

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151. *See supra* note 118 and accompanying text.