

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

No. 97-2048

SUPREME COURT OF THE UNITED STATES

*526 U.S. 838; 119 S. Ct. 1728; 144 L. Ed. 2d 1; 1999 U.S. LEXIS
4003; 67 U.S.L.W. 4389; 99 Cal. Daily Op. Service 4334; 99 Daily
Journal DAR 5528; 1999 Colo. J. C.A.R. 3247; 12 Fla. L. Weekly
Fed. S 304*

March 30, 1999, Argued
June 7, 1999, Decided

OPINION

JUSTICE O'CONNOR delivered the opinion of the Court.

Federal habeas relief is available to state prisoners only after they have exhausted their claims in state court. 28 U.S.C. §§ 2254(b)(1), (c) (1994 ed., Supp. III). In this case, we are asked to decide whether a state prisoner must present his claims to a state supreme court in a petition for [*840] discretionary review in order to satisfy the exhaustion requirement. We conclude that he must.

I

In 1977, respondent Darren Boerckel was tried in the Circuit Court of Montgomery County, Illinois, for the rape, burglary, and aggravated battery of an 87-year-old woman. The central evidence against him at trial was his written confession to the crimes, a confession admitted over Boerckel's objection. The jury convicted Boerckel on all three charges, and he was sentenced to serve 20 to 60 years' imprisonment on the rape charge, and shorter terms on the other two charges, with all sentences to be served concurrently.

Boerckel appealed his convictions to the Appellate Court of Illinois, raising several

issues. He argued, among other things, that his confession should have been suppressed because the confession was the fruit of an illegal arrest, because the confession was coerced, and because he had not knowingly and intelligently waived his rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). Boerckel also claimed that prosecutorial misconduct denied him a fair trial, that he had been denied discovery of exculpatory material held by the police, and that the evidence was insufficient to support his conviction. The Illinois Appellate Court, with one justice dissenting, rejected Boerckel's claims and affirmed his convictions and sentences. *People v. Boerckel*, 68 Ill. App. 3d 103, 385 N.E.2d 815, 24 Ill. Dec. 674 (1979).

Boerckel next filed a petition for leave to appeal to the Illinois Supreme Court. In this petition, he raised only three issues. Boerckel claimed first that his confession was the fruit of an unlawful arrest because, contrary to the Appellate Court's ruling, he *was* under arrest when he gave his confession. Boerckel also contended that he was denied a fair trial by prosecutorial misconduct and that he had been erroneously denied discovery of exculpatory material [*841] in the possession of the police. The Illinois Supreme Court denied the petition for leave to appeal, and this Court

denied Boerckel's subsequent petition for a writ of certiorari. 447 U.S. 911 (1980).

In 1994, Boerckel filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Central District of Illinois. The District Court appointed counsel for Boerckel, and Boerckel's counsel filed an amended petition in March 1995. The amended petition asked for relief on six grounds: (1) that Boerckel had not knowingly and intelligently waived his *Miranda* rights; (2) that his confession was not voluntary; (3) that the evidence against him was insufficient to sustain the conviction; (4) that his confession was the fruit of an illegal arrest; (5) that he received ineffective assistance of counsel at trial and on appeal; and (6) that his right to discovery of exculpatory material under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), was violated.

In an order dated November 15, 1995, the District Court found, as relevant here, that Boerckel had procedurally defaulted his first, second, and third claims by failing to include them in his petition for leave to appeal to the Illinois Supreme Court. No. 94-3258 (CD Ill.), pp. 4-10. Boerckel attempted to overcome the procedural defaults by presenting evidence that he fell within the "fundamental miscarriage of justice" exception to the procedural default rule. See *Coleman v. Thompson*, 501 U.S. 722, 750, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991). At a hearing on this issue, Boerckel argued that he was actually innocent of the offenses for which he had been convicted and he presented evidence that he claimed showed that two other men were responsible for the crimes. In a subsequent ruling, the District Court concluded that Boerckel had failed to satisfy the standards established in *Schlup v. Delo*,

513 U.S. 298, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995), for establishing the "fundamental miscarriage of justice" exception, and thus held that Boerckel could not overcome the procedural bars preventing review [*842] of his claims. No. 94-3258 (CD Ill., Oct. 28, 1996), pp. 14-15. After rejecting Boerckel's remaining claims for relief, the District Court denied his habeas petition. *Id.* at 18.

On appeal, the Court of Appeals for the Seventh Circuit considered one question, namely, whether Boerckel had procedurally defaulted the first three claims in his habeas petition (whether he knowingly and intelligently waived his *Miranda* rights, whether his confession was voluntary, and whether the evidence was sufficient to support a verdict) by failing to raise those claims in his petition for leave to appeal to the Illinois Supreme Court. The Court of Appeals reversed the judgment of the District Court denying Boerckel's habeas petition and remanded for further proceedings. 135 F.3d 1194 (1998). The court concluded that Boerckel was not required to present his claims in a petition for discretionary review to the Illinois Supreme Court to satisfy the exhaustion requirement. 135 F.3d at 1199-1202. Thus, according to the Court of Appeals, Boerckel had not procedurally defaulted those claims. 135 F.3d at 1202.

We granted certiorari to resolve a conflict in the Courts of Appeals on this issue. 525 U.S. (1998). Compare *e.g.*, *Richardson v. Procnier*, 762 F.2d 429 (CA5 1985) (must file petition for discretionary review), with *Dolny v. Erickson*, 32 F.3d 381 (CA8 1994) (petition for discretionary review not required), cert. denied, 513 U.S. 1111, 130 L. Ed. 2d 786, 115 S. Ct. 902 (1995).

II

Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition. The exhaustion doctrine, first announced in *Ex parte Royall*, 117 U.S. 241, 29 L. Ed. 868, 6 S. Ct. 734 (1886), is now codified at 28 U.S.C. § 2254(b)(1) (1994 ed., Supp. III). This doctrine, however, raises a recurring question: What state remedies must a habeas petitioner [*843] invoke to satisfy the federal exhaustion requirement? See *Castille v. Peoples*, 489 U.S. 346, 349-350, 103 L. Ed. 2d 380, 109 S. Ct. 1056 (1989); *Wainwright v. Sykes*, 433 U.S. 72, 78, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977). The particular question posed by this case is whether a prisoner must seek review in a state court of last resort when that court has discretionary control over its docket.

Illinois law provides for a two-tiered appellate review process. Criminal defendants are tried in the local circuit courts, and although some criminal appeals (e.g., those in which the death penalty is imposed) are heard directly by the Supreme Court of Illinois, most criminal appeals are heard first by an intermediate appellate court, the Appellate Court of Illinois. Ill. Sup. Ct. Rule 603 (1998). A party may petition for leave to appeal a decision by the Appellate Court to the Illinois Supreme Court (with exceptions that are irrelevant here), but whether "such a petition will be granted is a matter of sound judicial discretion." Rule 315(a). See also Rule 612(b) (providing that Rule 315 governs criminal, as well as civil, appeals). Rule 315 elaborates on the exercise of this discretion as follows:

"The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed." Rule 315(a).

Boerckel's amended federal habeas petition raised three claims that he had not included in his petition for leave to appeal to the Illinois Supreme Court. To determine whether Boerckel was required to present those claims to the Illinois Supreme Court in order to exhaust his state [*844] remedies, we turn first to the language of the federal habeas statute. Section 2254(c) provides that a habeas petitioner "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." Although this language could be read to effectively foreclose habeas review by requiring a state prisoner to invoke *any possible* avenue of state court review, we have never interpreted the exhaustion requirement in such a restrictive fashion. See *Wilwording v. Swenson*, 404 U.S. 249, 249-250, 30 L. Ed. 2d 418, 92 S. Ct. 407 (1971) (*per curiam*). Thus, we have not interpreted the exhaustion doctrine to require prisoners to file repetitive petitions. See *Brown v. Allen*, 344 U.S. 443, 447, 97 L. Ed. 469, 73 S. Ct. 397 (1953) (holding that 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 have also held that state prisoners do not have to invoke extraordinary

remedies when those remedies are alternatives to the standard review process and where the state courts have not provided relief through those remedies in the past. See *Wilwording v. Swenson*, 404 U.S. at 249-250 (rejecting suggestion that state prisoner should have invoked "any of a number of possible alternatives to state habeas including 'a suit for injunction, a writ of prohibition, or mandamus or a declaratory judgment in the state courts,' or perhaps other relief under the State Administrative Procedure Act").

Section 2254(c) requires only that state prisoners give state courts a fair opportunity to act on their claims. See *Castille v. Peoples*, *supra*, at 351; *Picard v. Connor*, 404 U.S. 270, 275-276, 30 L. Ed. 2d 438, 92 S. Ct. 509 (1971). State courts, like federal courts, are obliged to enforce federal law. Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief. *Rose v. Lundy*, 455 U.S. 509, 515-516, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982); *Darr v. Burford*, 339 U.S. 200, 204, 94 L. Ed. 761, 70 S. Ct. 587 (1950). [*845] This rule of comity reduces friction between the state and federal court systems by avoiding the "unseemliness" of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance. 339 U.S. at 204. See also *Duckworth v. Serrano*, 454 U.S. 1, 3-4, 70 L. Ed. 2d 1, 102 S. Ct. 18 (1981) (*per curiam*); *Rose v. Lundy*, 455 U.S. at 515-516.

Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional

claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process. Here, Illinois's established, normal appellate review procedure is a two-tiered system. Comity, in these circumstances, dictates that Boerckel use the State's established appellate review procedures before he presents his claims to a federal court. Unlike the extraordinary procedures that we found unnecessary in *Brown v. Allen* and *Wilwording v. Swenson*, a petition for discretionary review in Illinois's Supreme Court is a normal, simple, and established part of the State's appellate review process. In the words of the statute, state prisoners have "the right . . . to raise" their claims through a petition for discretionary review in the state's highest court. § 2254(c). Granted, as Boerckel contends, Brief for Respondent 16, he has no right to *review* in the Illinois Supreme Court, but he does have a "right . . . to raise" his claims before that court. That is all § 2254(c) requires.

Boerckel contests this conclusion with two related arguments. His first argument is grounded in a stylized portrait of the Illinois appellate review process. According to Boerckel, Illinois's appellate review procedures make the intermediate appellate courts the primary focus of the system; all routine claims of error are directed to those courts. The Illinois Supreme Court, by contrast, serves only to answer [*846] "questions of broad significance." Brief for Respondent 4. Boerckel's view of Illinois's appellate review process derives from Ill. Sup. Ct. Rule 315(a) (1998). He reads this Rule to discourage the filing of petitions raising routine allegations of error and to

direct litigants to present only those claims that meet the criteria defined by the Rule. Rule 315(a), by its own terms, however, does not "control" or "measure" the Illinois Supreme Court's discretion. The Illinois Supreme Court is free to take cases that do not fall easily within the descriptions listed in the Rule. Moreover, even if we were to assume that the Rule discourages the filing of certain petitions, it is difficult to discern which cases fall into the "discouraged" category. In this case, for example, the parties disagree about whether, under the terms of Rule 315(a), Boerckel's claims should have been presented to the Illinois Supreme Court. Compare Brief for Respondent 5 with Reply Brief for Petitioner 5.

The better reading of Rule 315(a) is that the Illinois Supreme Court has the opportunity to *decide* which cases it will consider on the merits. The fact that Illinois has adopted a discretionary review system may reflect little more than that there are resource constraints on the Illinois Supreme Court's ability to hear every case that is presented to it. It may be that, given the necessity of a discretionary review system, the Rule allows the Illinois Supreme Court to expend its limited resources on "questions of broad significance." We cannot conclude from this Rule, however, that review in the Illinois Supreme Court is unavailable. By requiring state prisoners to give the Illinois Supreme Court the opportunity to resolve constitutional errors in the first instance, the rule we announce today serves the comity interests that drive the exhaustion doctrine.

Boerckel's second argument is related to his first. According to Boerckel, because the Illinois Supreme Court has announced (through Rule 315(a)) that it does not want to hear routine allegations of error, a rule

requiring state prisoners [*847] to file petitions for review with that court offends comity by inundating the Illinois Supreme Court with countless unwanted petitions. Brief for Respondent 8-14. See also *135 F.3d at 1201*. This point, of course, turns on Boerckel's interpretation of Rule 315(a), an interpretation that, as discussed above, we do not find persuasive. Nor is it clear that the rule we announce today will have the effect that Boerckel predicts. We do not know, for example, what percentage of Illinois state prisoners who eventually seek federal habeas relief decline, in the first instance, to seek review in the Illinois Supreme Court.

We acknowledge that the rule we announce today -- requiring state prisoners to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State -- has the *potential* to increase the number of filings in state supreme courts. We also recognize that this increased burden may be unwelcome in some state courts because the courts do not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court. See, *e.g.*, *In re Exhaustion of State Remedies in Criminal and Postconviction Relief Cases*, 321 S.C. 563, 471 S.E.2d 454 (1990); see also *State v. Sandon*, 161 Ariz. 157, 777 P.2d 220 (1989). Under these circumstances, Boerckel may be correct that the increased, unwelcome burden on state supreme courts disserves the comity interests underlying the exhaustion doctrine. In this regard, we note that nothing in our decision today requires the exhaustion of any specific state remedy when a State has provided that that remedy is unavailable. *Section 2254(c)*, in fact, directs federal courts to consider whether a habeas petitioner has "the right *under the law of the State to raise,*

by any available procedure, the question presented" (emphasis added). The exhaustion doctrine, in other words, turns on an inquiry into what procedures are "available" under state law. In sum, there is nothing in the exhaustion doctrine requiring federal courts [*848] to ignore a state law or rule providing that a given procedure is not available. We hold today only that the creation of a discretionary review system does not, without more, make review in the Illinois Supreme Court unavailable.

Boerckel's amended federal habeas petition raised three claims that he had pressed before the Appellate Court of Illinois, but that he had not included in his petition for leave to appeal to the Illinois Supreme Court. There is no dispute that this state court remedy -- a petition for leave to appeal to the Illinois Supreme Court -- is no longer available to Boerckel; the time for filing such a petition has long past. See Ill. Sup. Ct. Rule 315(b). 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. See *Coleman v. Thompson*, 501 U.S. at 731-732; *Engle v. Isaac*, 456 U.S. 107, 125-126, n. 28, 71 L. Ed. 2d 783, 102 S. Ct. 1558 (1982).

We do not disagree with JUSTICE STEVENS' general description of the law of exhaustion and procedural default. Specifically, we do not disagree with his description of the interplay of these two doctrines. *Post*, at 4-5. As JUSTICE STEVENS notes, a prisoner could evade the exhaustion requirement -- and thereby undercut the values that it serves -- by "letting the time run" on state remedies. *Post*, at 4. To avoid this result, and thus "protect the integrity" of the federal exhaustion rule, *ibid.*

we ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts, see *post*, at 4-5. Our disagreement with JUSTICE STEVENS in this case turns on our differing answers to this last question: Whether a prisoner who fails to present his claims in a petition for discretionary review to a state court of last resort has *properly* presented his claims to the state courts. Because we answer this question "no," we conclude that Boerckel has procedurally defaulted his claims. [*849] Accordingly, the judgment of the Court of Appeals for the Seventh Circuit is reversed.

It is so ordered.

CONCUR

JUSTICE SOUTER, concurring.

I agree with the Court's strict holding that "the creation of a discretionary review system does not, without more, make review in the Illinois Supreme Court unavailable" for purposes of federal habeas exhaustion. *Ante*, at 9-10. I understand the Court to have left open the question (not directly implicated by this case) whether we should construe the exhaustion doctrine to force a State, in effect, to rule on discretionary review applications when the State has made it plain that it does not wish to require such applications before its petitioners may seek federal habeas relief. The Supreme Court of South Carolina, for example, has declared:

"In all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the

claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies." *In re Exhaustion of State Remedies in Criminal and Postconviction Relief Cases*, 321 S.C. 563, 471 S.E.2d 454 (1990).

The Court is clear that "nothing in the exhaustion doctrine requires federal courts to ignore a State law or rule providing that a given procedure is not available." *Ante*, at 9. Its citation of *In re Exhaustion of State Remedies*, for the proposition that the increased burden on state courts may be unwelcome, should not be read to suggest something more: that however plainly a State may speak its [*850] highest court must be subjected to constant applications for a form of discretionary review that the State wishes to reserve for truly extraordinary cases, or else be forced to eliminate that kind of discretionary review.

In construing the exhaustion requirement,"we have . . . held that state prisoners do not have to invoke extraordinary remedies when those remedies are alternatives to the standard review process and where the state courts have not provided relief through those remedies in the past." *Ante*, at 6 (citing *Wilwording v. Swenson*, 404 U.S. 249, 249-250, 30 L. Ed. 2d 418, 92 S. Ct. 407 (1971) (*per curiam*)). I understand that we leave open the possibility that a state prisoner is likewise free to skip a procedure even when a state court has occasionally employed it to provide relief, so long as the State has identified the procedure as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion. It is not obvious that either comity or precedent requires otherwise.

DISSENT

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, 29 L. Ed. 868, 6 S. Ct. 734 (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, 48 L. Ed. 2d 149, 96 S. Ct. 1708 (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 [*851] 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.

* * * *

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 [*862] 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.

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

In my view, whether a state prisoner (whofailed to seek discretionary review in a state supreme court) can seek federal habeas relief depends upon the State's own preference. If the State does not want the prisoner to seek discretionary state review (or if it does not care), why should that failure

matter to federal habeas law? See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 731-732, 751, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) (emphasizing comity interest in federal habeas). Illinois's procedural rules, like similar rules in other States, suggest that the State does not want prisoners to seek discretionary state supreme court [*863] review except in unusual circumstances. See Ill. Sup. Ct. Rule 315(a) (1998); accord, e.g., Colo. Rule App. 49 (1998) (discretionary review granted "only when there are special and important reasons therefor"); Idaho Rule App. 118(b) (1999) (similar); Tenn. Rule App. Proc. 11(a) [***21] (1998) (similar). And JUSTICE STEVENS has explained how the majority's view of the matter will force upon state supreme courts many petitions for review that fall outside the scope of its discretionary review and which those courts would likely prefer not to handle. *Ante*, at 9.

The small number of cases actually reviewed by state courts with discretion over their dockets similarly suggests that States such as Illinois have no particular interest in requiring state prisoners to seek discretionary review in every case. In 1997, the latest year for which statistics are available, the Illinois Supreme Court granted review in only 33 of the 1,072 criminal petitions filed (3.1%). See National Center for State Courts, unpublished data (June 1999) (available in file of Clerk of this Court). Nor is Illinois unique among state courts of last resort employing discretionary review. See *ibid.* (in 1997, Virginia's Supreme Court granted 30 of 1,160 criminal petitions for review (2.6%); California granted 39 of 3,265 (1.2%); Georgia granted 11 of 189 (5.8%); Ohio granted 16 of 595 (2.7%); Connecticut granted 24 of 113 (21.2%); Louisiana granted 127 of 1,410 (9.0%); Minnesota granted 38 of 222 (17.1%); North Carolina granted 23 of 237 (9.7%);

Tennessee granted 41 of 549 (7.5%); Texas granted 111 of 1,677 (6.6%). On the majority's view, these courts must now consider additional petitions for review of criminal cases, which petitions will contain many claims raised only to preserve a right to pursue those claims in federal habeas proceedings. The result will add to the burdens of already over-burdened state courts and delay further a criminal process that is often criticized for too much delay. Cf. *Hohn v. United States*, 524 U.S. 236, 264, 141 L. Ed. 2d 242, 118 S. Ct. 1969 (1998) (SCALIA, J., dissenting) (complaining of [*864] "interminable delays in the execution of state . . . criminal sentences"). I do not believe such a result "demonstrates respect for the state courts." *Rose v. Lundy*, 455 U.S. 509, 525, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982) (Blackmun, J., concurring).

I nonetheless see cause for optimism. JUSTICE SOUTER's concurring opinion suggests that a federal habeas court should respect a State's desire that prisoners *not* file petitions for discretionary review, where the State has expressed the desire clearly. *Ante*, at 1-2. On that view, today's holding creates a

kind of presumption that a habeas petitioner [*1742] must raise a given claim in a petition for discretionary review in state court prior to raising that claim on federal habeas, but the State could rebut the presumption through state law clearly expressing a desire to the contrary. South Carolina has expressed that contrary preference. See *In re Exhaustion of State Remedies in Criminal and Postconviction Relief Cases*, 321 S.C. 563, 471 S.E.2d 454 (1990). Other States may do the same.

Even were I to take the majority's approach, however, I would reverse the presumption. I would presume, on the basis of Illinois's own rules and related statistics, and in the absence of any clear legal expression to the contrary, that Illinois does not mind if a state prisoner does not ask its Supreme Court for discretionary review prior to seeking habeas relief in federal court. But the presumption to which JUSTICE SOUTER refers would still help. And I write to emphasize the fact that the majority has left the matter open.