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THE EXHAUSTION RULE AND HABEAS CORPUS PROCEDURE: THE PLAIN STATEMENT SOLUTION — A LONG TIME COMING

I. INTRODUCTION

A. The Historical Context

The prisoner’s right to challenge the legality of his detention, habeas corpus, was established by the Romans.\(^1\) Literally translated, it means “you have the body”; Roman law required that “the individual must be publicly exhibited, that is produced,\(^2\)” and then judged. Common law habeas corpus can be traced to the Magna Carta which stated that “no freeman shall be seized, or imprisoned . . . excepting by the legal judgment of his peers, or by the laws of the land.”\(^8\) King John “broke the charter immediately afterwards,

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\(^2\) W. Church, supra note 1, at 3.

\(^3\) Id. The 29th section of the Magna Carta reads in full: “No free man shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; Nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land.” Church further notes that:

Prior to the signing of the charter of King John, however, other writs for liberating persons from prison on certain criminal charges were in existence. Glanvill, the earliest English law-writer, who composed his treatises in the reign of Henry II., 1154-1189, details the particulars of a writ called De odio et atia which was used for this purpose. Other ancient writs were devised for personal liberty, as particularly those called De homine replegiando and De manucaptione capienda. Subsequently to the signing of the great charter, all these gradually gave place to more summary and efficacious writ[s] of habeas corpus. This last-named writ, requiring a return of the body of the person imprisoned, and the cause of his detention, and hence anciently called Corpus cum causa, was in familiar use between subject and subject in the reign of Henry
[but nevertheless] it formed a basis for hundreds of years on which prisoners unlawfully confined could ground their demand for liberty.\textsuperscript{4}

In the United States, the right to habeas corpus is grounded in article I, section 9, clause 2 of the Constitution which states that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless in cases of rebellion or invasion the public safety may require it."\textsuperscript{6} In practice, the federal writ of habeas corpus subjects all detentions that violate the Constitution to federal judicial review.\textsuperscript{6}

VI., 1422-1461. It was apparently used as a means of relief from private restraint, and at that period it seems to have been familiar to and well understood by the judges. But its use by the subject against the crown has not been traced during the time of the Plantagenet dynasty; the earliest precedents known commencing with the reign of the Tudors, in the times of Henry VII., 1485-1509. From this time on, the use of the habeas corpus became more frequent, and before the act of 31 Car. II. it had become an admitted constitutional remedy — probably as early as the reign of Charles I., 1625-1649.

\textit{Id.} at 3-4.

4. \textit{Id.} at 3. Many historians judge the legal development of a society and/or the scope of that society's freedom by whether habeas corpus is or was an established right. See, e.g., 9 \textsc{Durant, The Story of Civilization} 105 (1965).

5. \textsc{U.S. Const. art. I, § 9, cl. 2.}


An application for post-conviction relief must be made in the county or district where the applicant was convicted [\textit{See e.g.,} 28 \textsc{U.S.C.} § 2255 (1982)]; an indigent applicant is entitled to the appointment of counsel [\textit{See e.g.,} \textsc{Unif. Post-Conviction Procedure Act} § 5 ("If the applicant is unable to pay court costs and expenses of representation, including stenographic, printing and legal services, these costs and expenses shall be made available to the applicant in the preparation of the application, in the trial court, and on review."); and, if needed, to a free transcript [\textit{See Bozeman v. United States, 354 F. Supp 1262 (1973)}]; there is no particular time within which the application must be made [\textit{See e.g.,} 28 \textsc{U.S.C.,} § 2255 (1982) ("[A] motion . . . for such relief may be made at any time . . . "); a ground for relief which was knowingly, voluntarily, and intelligently waived may not be asserted [\textit{See e.g.,} \textsc{Ariz. Ct. C.P.R., 32.2(a)(3)}]; the judge who presided at the original trial may be allowed to pass upon the application [\textit{See e.g.,} \textsc{Unif. Post-Conviction Procedure Act} § 7 ("The application shall be heard in, and before any judge of, the court in which the conviction took place . . . ")]; a hearing is necessary only if there exists a material issue of fact [\textit{See e.g.,} \textsc{28 U.S.C.} § 2255 (1982)]; if a hearing is held, the court may receive evidence in the form of affidavits, depositions, or oral testimony, the applicant has the burden of proof, and the court must make specific findings of fact and conclusions of law [\textit{See e.g.,} \textsc{28 U.S.C.} § 2255 (1982) ("Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be
The federal writ was originally available only to federal prisoners, but in 1867 it was extended to state prisoners. At present any constitutional violation may warrant a challenge, whereas only a lack served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. . . . "); the court may, but need not, allow the applicant to be present, [See e.g., 28 U.S.C. § 2255 (1982) ("A court may entertain and determine such motion without requiring the production of the prisoner at the hearing."); although it should allow him to be present if there exists a material issue of fact as to evidence in which he participated [See e.g., IDAHO CT. C.P.R., § 19-4907(b) ("The applicant should be produced at the hearing on a motion attacking a sentence when there are substantial issues of fact as to evidence in which he participated. The sentencing court has discretion to ascertain whether the claim is substantial before granting a full evidentiary hearing and requiring the applicant to be present.")]; all grounds for relief available to the applicant must be raised in his application, and any ground not so raised will be deemed waived and may not be the basis for a subsequent application unless the court finds a sufficient reason for the failure earlier to assert it [See e.g., UNIF. POST-CONVICTION ACT § 8 ("All grounds for relief available to an applicant under this Act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding, the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.")]; and an appeal may be taken from the court’s decision to the appropriate appellate court [See e.g., 28 U.S.C. § 2255 (1982) ("An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus. . . . ")].

Although it ordinarily intended that a comprehensive post-conviction remedy be exclusive, broadening and displacing such remedies as habeas corpus and coram nobis, it is not intended that the new remedy be a substitute for routine post-trial motions or for appeal. Indeed, the traditional remedy of habeas corpus may still be available to test the legality of detentions as to which the new remedy would be inapplicable, inadequate, or ineffective." [See e.g., 28 U.S.C. § 2255 (1982)].
of state jurisdiction sufficed initially. Today, it is probably still fair to say, as the Supreme Court did in Frank v. Mangum in 1915, that it is the federal judiciary’s role “to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law.” As this comment will point out, however, recent decisions regarding the exhaustion rule and other aspects of habeas corpus procedure have cast a long shadow over that view.

B. The Exhaustion Rule

The Exhaustion Rule requires the “fair presentation” of a petitioner’s “claim” for habeas relief, absent extenuating circumstances, to the state courts prior to federal court presentation. The rule was developed to aid the federal and state courts in “cooperat[ing] as harmonious members of a judicial system.” As the number of petitions for habeas corpus relief increased over time, efficiency joined federal/state comity as an Exhaustion Rule goal. However, Exhaustion Rule application has met with difficulty. Two distinct problems hamper habeas corpus procedure: 1) imprecise standards of review, and 2) lack of communication between state and federal courts.

The first of those problems stems from the fact that the terms “fair presentation,” “claim” and “factual allegation” are used incon-

court lacked jurisdiction to render judgment or to impose sentence; (3) that the sentence was in excess of the maximum authorized by law; (4) that certain material facts not previously presented warrant vacation of the conviction or sentence; (5) that the sentence has expired; (6) that probation or parole was unlawfully revoked; (7) that a law which led to the applicant's conviction or sentence has been changed and the law as changed may be applied retroactively; and (8) that the applicant is otherwise unlawfully held in custody, or that the conviction or sentence is otherwise subject to collateral attack upon any ground heretofore available under writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy (See, e.g., 28 U.S.C. § 2255). But an ordinary error or irregularity in the course of trial, or a defense such as insanity, the statute of limitations, or former jeopardy may not be asserted as a ground for post-conviction relief. Indeed, no question going merely to the guilt or innocence of a defendant may be considered in a post-conviction proceeding.

Wharton & Torcia, supra note 6, § 647, at 390.
10. Ex parte Bridges, 4 F. Cas. 98, 106 (C.C.N.D. Ga. 1875) (No. 1862).
12. Id.
13. See infra notes 54-65 and accompanying text.
15. See infra notes 106-38 and accompanying text.
sistently. The most vivid example of that inconsistent application is the Fifth Circuit case of *Vela v. Estelle* and its appeal to the Supreme Court in *McKaskle v. Vela*.

In *Vela v. Estelle*, the petitioner presented the same claim and factual record at the state and federal levels. However, he enumerated several factual allegations in his federal petition that were not enumerated in his state petition. The Fifth Circuit found that the petitioner “fairly presented his claim” to the state courts. On appeal to the Supreme Court, *Vela* was denied certiorari, but not without strong disapproval by Justices O’Connor, Rehnquist and Chief Justice Burger. In her dissent, Justice O’Connor stated that the Fifth Circuit’s standard for “fair presentation” was incorrect. Her difference of opinion stems at least in part from the fact that the Fifth Circuit and the Supreme Court use different definitions for “claim” and “factual allegations.” As a result of the strong dissent in *Vela* and the denial of certiorari, the precise standard for “fair presentation” and the definitions of “claim” and “factual allegation” in the habeas corpus context remain unresolved.

The second problem plaguing habeas corpus procedure is that state court opinions rarely, if ever, explicitly state which of the petitioner’s claims were exhausted. Consequently, when the petitioner files his claim in federal court, that court must also determine whether the petitioner “fairly presented” his claims to the state courts. The inability to achieve the goals of comity and efficiency becomes apparent from the outset. The state court’s failure to communicate with the federal court in turn causes inefficient expenditure of federal judicial effort to determine the extent of the state court’s rulings.

C. A Proposal

The background section of this comment will discuss the procedural and substantive history of the Exhaustion Rule. Sections III and IV will specifically analyze the *Vela* question of whether the

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16. See infra notes 54-126 and accompanying text.
17. 708 F.2d 954 (5th Cir. 1983).
19. 708 F.2d 954 (5th Cir. 1983).
20. Id. at 957-59.
21. Id. at 957-58.
22. Id. at 960.
24. Id. at 1055-56.
25. See infra notes 80-117 and accompanying text.
existence of minor variations in factual pleadings satisfies fair presentation standards, and will conclude that the assumptions and conclusions of the Fifth Circuit's ruling in *Vela* should be maintained. Section IV will also define the proper standard for "fair presentation" and the terms "claim" and "factual allegations."

In sections V and VI, the author will propose a general reform of the Exhaustion Rule procedure that parallels the Supreme Court reform of United States Code Title 28, section 1257 enunciated in *Michigan v. Long*. Section 1257 is commonly referred to as the Independent State Ground doctrine. Prior to *Long*, the Supreme

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27. The doctrine of Independent State Ground generally states that if a state court decision is based upon independent and adequate state grounds the Supreme Court will not undertake to review the decision. If, however, the judgment is based on federal grounds, then the Supreme Court has jurisdiction to review the decision. The doctrine is a direct result of congressional failure to extend Supreme Court review of state court decisions on questions of state law. Professor Tribe notes that:

Because the Supreme Court is the final arbiter of its own jurisdiction, the issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which [the] Court is not bound by the decision of the state courts. In resolving this issue, the Court is engaged in accommodating state interests while always insuring that appropriate consideration will be given to the federal interests involved. Automatically precluding all Supreme Court review upon a state court's mere recital of procedural grounds would unacceptably endanger the vindication of important federal rights. The perspective from which the Supreme Court inquires into the 'adequacy' of state procedures which purport to bar its consideration of federal questions was stated in *Lawrence v. State Tax Commission of Mississippi*:

"[T]he Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis."


In many cases, however — especially if the independence and not the adequacy of the state ground is at stake — the actual inquiry, although it may be difficult, does not turn on the application of principles of great moment: it may not be clear from the state court opinion whether the state court saw federal and state law as independently supporting its decision, or rather took federal law to be controlling and simply referred to state cases for additional support or illustration.

*Id.* at 121.

Prior to the decision in *Long*, the Supreme Court, at least in Justice O'Connor's view, made "ad hoc" jurisdictional grants or "vacation and continuance for clarification." See infra note 134 and accompanying text. After *Long* the Supreme Court required a "plain statement" from the state court delineating the basis of its decision. See infra notes 131-37 and accompa-
Court would not review state court decisions resting on state law so long as federally protected interests were not threatened and even if the basis of the state court decision needed clarification, the Court would decline jurisdiction. Section 1257 jurisdictional issues are similar to Exhaustion Rule issues in that state court action predicates federal court action. The Long court confronted a similar problem to that of the Vela court. Due to the absence of a definitive state court statement regarding the basis, either state or federal, of its decision, the federal court was simply not certain of that legal foundation. After Long, the Supreme Court required a “plain statement” by the state courts indicating the basis of their decision. This comment will, by analogy, propose that the state courts should be required to define the parameters of their rulings in habeas corpus proceedings as well. In other words, the exhausted claims should be clearly indicated. In that way federal/state comity and judicial efficiency will be enhanced by eliminating the need for federal review of state exhaustion questions.

II. BACKGROUND OF THE EXHAUSTION RULE

A. The Procedural History

The early history of the Exhaustion Rule is dominated by procedural considerations. The focus was when, and if, exhaustion of state remedies, would be required. Initially, the Supreme Court delineated a very flexible standard. Over time, however, the “discretionary” animus of court decisions changed to a rigid “total Exhaustion” Rule.

The traditional starting point for discussing the Exhaustion Rule is the seminal Supreme Court case of Ex parte Royall. First presented to a district court, the case was dismissed for lack of jurisdiction. On review, the Supreme Court held that the district court’s jurisdictional holding was erroneous. Instead, the Court found con-
current state and federal jurisdiction. The Court then queried whether the habeas corpus statute "imperatively require[d] the circuit court . . . to wrest the petitioner from the custody of the state officers in advance of his trial in state court?" The Court held that the "public good" required initial claim presentation at the state level. Citing two earlier Court decisions, the Court delineated the policy of federal/state comity. Federal "forbearance" should prevail in order "to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and the Union, so that they may cooperate as harmonious members of a judicial system. . . ."

In addition to the comity policy, a discretionary standard was inaugurated. A federal court could grant jurisdiction prior to state exhaustion in two instances. First, "special circumstances requiring immediate action" are grounds for non-exhaustion. Second, the Supreme Court retained jurisdiction during the state appellate process.

Unlike the comity policy, the Royall standard of flexibility did not withstand the test of time. Three subsequent Supreme Court cases mandated state court exhaustion prior to federal review, absent extenuating circumstances. The last of those decisions, Ex parte

34. Id. at 251-52.
35. Id. at 251.
36.

We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear these cases summarily, and thereupon to dispose of the party as law and justice require does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between our courts equally bound to guard and protect rights secured by the constitution.

Id.

37. Covell v. Heyman, 111 U.S. 176, 182 (1884) (As in Taylor the defendant in Covell instituted an action for replevin. The jurisdictional issue arose because the defendant sought to invalidate an attachment proceeding based on an alleged improper jurisdictional grant); Taylor 61 U.S. at 595.
38. 117 U.S. 241, 252 (1886) (citing Taylor, 61 U.S. at 595).
40. Id. See also Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873).
41. United States ex rel. Kennedy v. Tyler, 269 U.S. 13 (1925) (Petitioner made his initial claim to a federal district court alleging a right to non-exhaustion for extenuating cir-
Hawk,\textsuperscript{42} refashioned the Exhaustion Rule with a sense of finality:

Only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted [will the court entertain a hearing]. . . . [I]t is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only "in rare cases where exceptional circumstances of peculiar urgency are shown to exist."\textsuperscript{43}

Unlike the \textit{Royall} decision, there is no mention in \textit{Hawke} of federal court intervention in the state appellate process.

Congress took the next step in the procedural history of the Exhaustion Rule by codifying \textit{Hawk}. United States Code Title 28, section 2254 (b) and (c)\textsuperscript{44} is "declaratory of existing law as affirmed by the Supreme Court."\textsuperscript{45} In other words, Congress would not allow the federal courts to interrupt the state appellate process either. The transition from the flexibility of \textit{Royall} to a more rigid rule was nearly complete.

The next major habeas corpus procedural determination came forty years later. In \textit{Rose v. Lundy},\textsuperscript{46} the Supreme Court considered a "mixed petition," a petition containing claims that were presented

\textsuperscript{42} 321 U.S. 114 (1944).
\textsuperscript{43} Id. at 117 (citations omitted). \textit{See also} Fay v. Noia, 372 U.S. 391 (1963). The exhaustion requirement refers only to a failure to exhaust state remedies still open to the applicant at the time he files the application.
\textsuperscript{44} 28 U.S.C. § 2254 (1948) provides in pertinent part:

(b) An 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, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

\textit{Id.}

\textsuperscript{45} Id.
\textsuperscript{46} 455 U.S. 509 (1982).
to the lower court, and claims that were not. The Supreme Court dismissed the petition, refusing to review the exhausted and unexhausted claims alike.\(^{47}\) Prior to that decision, most courts either reviewed the entire petition or dismissed only the non-exhausted claims.\(^{48}\)

The plurality decision in *Rose* by Justice O'Connor sought to "protect the state court's role in enforcement of federal law and prevent disruption of state judicial proceedings."\(^{49}\) The decision also highlighted two principle effects that would be maintained. First, state courts would retain the initial opportunity to review all claims of constitutional error,\(^{50}\) and an "equally important" second effect, that claims would "more often be accompanied by a complete factual record to aid the Federal courts in their review."\(^{51}\) Justice O'Connor referred to that outlined process as "total exhaustion."\(^{52}\) The transition was now complete. Originally, federal/state "harmony" required initial state presentation and federal court discretion. The *Rose* decision extinguished that flexibility. Federal/state comity and efficiency now mandated, not merely suggested, total exhaustion. In sum, the spirit of *Royall* is nowhere to be found in *Rose*.

**B. The Substantive History of the Exhaustion Rule**

In contrast to the early history of the Exhaustion Rule which focused on procedural issues, recent Exhaustion Rule history is dominated by substantive questions. Most procedural questions were answered. Unless and until state presentation was made, the petitioner could not avail himself of federal jurisdiction absent extenuating circumstances.\(^{53}\) The next logical question is what constitutes state presentation.

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47. Id. at 522.

48. For circuit court cases formally upholding mixed petitions, see Miller v. Hall, 536 F.2d 967 (1st Cir. 1976); United States ex rel. Levy v. McMann, 394 F.2d 402 (2d Cir. 1968); United States ex rel. Boyance v. Meyers, 372 F.2d 11 (3d Cir. 1967); Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969); Ware v. Gagnon, 659 F.2d 809 (7th Cir. 1981); Tyler v. Swenson, 483 F.2d 611 (8th Cir. 1973). But see Galtieri v. Wainwright, 582 F.2d 348, reh'g denied, 587 F.2d 508 (5th Cir. 1978) (en banc); Gonzales v. Stone, 546 F.2d 807 (9th Cir. 1976).

49. 455 U.S. at 518.

50. Id. at 518-19.

51. Id. at 519.

52. Id. at 522.

53. See supra notes 30-52 and accompanying text.
1. Elements of State Presentation

*Picard v. Conner* contains the standards most often cited for fair presentation. In *Picard*, the petitioner presented an invalid indictment claim at the state level. At the federal level, he changed his claim to "unconstitutional discrimination." The federal court ruled that because a completely new claim was introduced at the federal level, the fair presentation standard was not satisfied. That standard was characterized in four ways. The federal claim must be either "fairly presented," or the "substantial equivalent" of the state court claim. The state court must also have a "fair opportunity to consider the claim" or the "opportunity to apply [the same] controlling legal principles to the facts." The *Picard* court's holding indicated that presentation of a completely different claim to the federal courts does not constitute fair presentation. However, the court stated that in its view, fair presentation was possible "despite variations in the legal theory or factual allegations urged in its support."

The guidelines set out in *Picard* have proven difficult to apply. The courts have had the most difficulty in determining what the petitioner's claim is, as opposed to what facts are urged in its support. That difficulty is a result of imprecise definitions of "claim" and "factual allegation." Often the use of the terms claims and facts is not consistent from one case to the next. Therefore, in order to avoid the same confusion throughout the rest of this comment, claims will be termed "major premises" and factual allegations will be termed "minor premises."

In practical terms, the major premise (claim) at the state level in the *Picard* case was invalid indictment. The petitioner's minor premises (facts urged in support of the major premise) were improper identification process and failure to submit a judicial deter-

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56. 404 U.S. at 278.
57. Id.
58. Id. at 275.
59. Id. at 278.
60. Id. at 276.
61. Id. at 275 (citing Conner v. Picard, 434 F.2d at 674).
63. See infra notes 113-17 and accompanying text.
64. The problem of imprecise definitions for "claim" and "fact" in habeas corpus procedure is the same definitional problem confronted by courts concerned with the res judicata and pleading forms issue. See generally Green, Basic Civil Procedure (2d ed. 1979).
mination of criminality. At the federal level, only the major premise changed from invalid indictment to unconstitutional discrimination.

2. Four Variations

Habeas corpus procedure is complicated by the fact that petitions, as in Picard, are often changed between state and federal levels. If exact copies of petitions were presented at each level there would be few problems, if any. But expectations of photo-copy petitioning are impractical. Therefore, given that there are two elements to a petition, major and minor premises, a petition could be varied in four basic ways between the state and federal level. First, a new major premise could be included in the petition, as in Picard. Second, minor premises or factual allegations outside the state court record could be presented at the federal level. Third, the major premise could be enlarged or augmented, and fourth, minor premises or factual allegations contained in the state court record could be pled for the first time at the federal level. The balance of this comment is devoted to briefly sketching case law on the first three variations for point of reference and to broadly discussing the final variation.

a. New or Different Major Premises

Presentation of a new major premise at the federal level has met universal judicial disapproval. In Mayer v. Moeykens, an insufficient arrest warrant major premise was declared different from a lack of probable cause major premise. As a result, the petition was remanded. Likewise, the court in Turner v. Fair ruled that a sixth amendment confrontation clause major premise did not include the additional major premises that: 1) the proposed cross-examination

65. 434 F.2d at 674-75.
66. Id.
67. See infra notes 124-25 and accompanying text.
68. See infra note 74 and accompanying text.
69. See infra notes 75-79 and accompanying text.
70. See infra notes 80-139 and accompanying text.
73. 617 F.2d 7 (1st Cir. 1980).
would have impeached the witness; and 2) that the witness knew material information regarding the crime. In short, each major premise which a petitioner seeks to adjudicate must be initially presented at the state level.

b. New or Augmented Minor Premises

The second variation is the presentation at the federal level of minor premises outside the state court record. That situation arises more often than not because the petitioner has undertaken discovery subsequent to his state court presentation. District courts unanimously hold that when a "habeas corpus petitioner [who] has previously presented his claim to the state court, [then] presents additional facts to federal court which materially alter the claim or crucially affect its determination, the petitioner must present this evidence to state court before the federal court can entertain his petition."^74

In sum, federal jurisdiction will not be granted if the factual record presented at the federal level is materially different from that presented at the state level. Any material subsequent discovery by the petitioner must be presented at the state level first.

c. Enlarged or Augmented Major Premises

The first two variation categories involve wholesale changes in pleadings. The final two concern only minor changes. In general, a major premise is enlarged either by combining several minor premises into a single major premise or by claiming interrelation between major premises.

Federal courts have consistently denied jurisdiction to petitioners who have combined minor premises into a single major premise.^75 The courts hold that "presentation of factual data without the articulation of the substance or substantial equivalent of the legal argument thereby supported does not satisfy the exhaustion requirement."^76

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76. Williams v. Holbrook, 691 F.2d 3, 9 (1st Cir. 1982).
Petitioners claiming major premise interrelation have had mixed results. The decision in *Rose v. Lundy*\(^77\) overturned a district court decision which considered exhausted claims for relief intertwined and interrelated with unexhausted claims. The Supreme Court refused to set forth guidelines to distinguish interrelated premises, and held that "[r]equiring dismissal of petitions containing both exhausted and unexhausted claims will relieve the district courts of the difficult if not impossible task of deciding when claims are related, and will reduce the temptation to consider unexhausted claims."\(^78\)

The *Rose* holding appears to dictate dismissal of augmented major premises. Nevertheless, a federal district court held subsequent to *Rose* that where "[t]he two issues were so factually and logically related that the raising of the one afforded the state courts an opportunity to consider both, [the petition may stand]."\(^79\)

### III. *Vela v. Estelle* and Justice O'Connor's Dissent From Denial of Certiorari

The least settled variation of the four categories, and the one which gives rise to this comment, is the newly pled fact allegation. That situation arises when the petitioner raises minor premises at the federal level, extant in the state court record, but not specifically pled at the state level. *Vela v. Estelle*\(^80\) is an example of such variation. It also highlights the twin problems of imprecise definitions and ambiguous state court rulings.

#### A. The Facts of Vela

In *Vela v. Estelle*,\(^81\) the federal court was presented with an "ineffective assistance of counsel" claim, the same major premise presented to the state courts.\(^82\) The factual record was also identical at each level.\(^83\) However, the petitioner changed his pleadings at the federal level by augmenting his list of factual allegations in support

77. 455 U.S. 509 (1982).
78. *Id.* at 519.
79. *Williams*, 691 F.2d at 8 (referring to Fillippini v. Ristaino, 585 F.2d 1163 (1st Cir. 1978)). The *Williams* court declared that consideration of a claim that the petitioner had waived her constitutional rights of silence necessarily involved court consideration of the burden of proof of waiver, i.e., the related theory.
80. 708 F.2d 954 (5th Cir. 1983).
81. *Id.*
82. *Id.* at 960.
83. *Id.* at 957-58.
of his major premise. At the state court level, the minor premise list was: 1) failure to properly object to prejudicial character testimony, 2) failure to properly object to testimony, and 3) failure to properly object to the state's closing argument. At the federal level, the list was enlarged to include: 4) failure to properly prepare the defendant for a guilty plea, 5) failure to stipulate to evidence, and 6) inadequate summation performance.

The Fifth Circuit determined that the obligation of the state court was to carry out an independent analysis of the mixed fact and law claim (ineffective assistance of counsel) and determine whether by the totality of the circumstances, the assistance was effective. In other words, the minor premises urged by the petitioner were merely "highlights" of the claim to be considered by the state court in making its own analysis. If the state court fulfilled that role, which as a matter of comity should be assumed, then the federal court could consider the claim exhausted.

Recall that Picard defined "fair presentation" to include "variations in the legal theory or factual allegations urged in its support." It should also be recalled that Rose desired complete factual records for federal review. Perhaps with those cases in mind the Fifth Circuit in Vela held that where all minor premises alleging ineffective assistance at the federal level were contained in the state court record, the petitioner exhausted his state remedies.

It would appear that the Vela court complied with Rose by reviewing a complete factual record. The court also complied with Picard inasmuch as variations of the factual allegations urged in support of a major premise are allowed. Several cases have followed the

84. Id.
85. Id.
86. Id. at 959-60. For cases supporting the view that an ineffective assistance claim is a mixed question of fact and law, see Taylor v. Lombard, 606 F.2d 371 (2d Cir. 1979); Armstead v. Maggie, 720 F.2d 894 (5th Cir. 1983); United States ex rel. Shaw v. De Robertis, 755 F.2d 1279 (7th Cir. 1985). For cases supporting the view that a review of the entire record is necessary to determine if the assistance was effective in totality, see Washington v. Strickland, 693 F.2d 1243, 1250 (5th Cir. 1982); Nelson v. Estelle, 642 F.2d 903 (5th Cir. 1981); Payne v. Janasz, 711 F.2d 1305, 1310 (6th Cir. 1983); United States v. Raineri, 670 F.2d 702, 712 (7th Cir. 1982); United States ex rel. Kowal v. Attorney General, 550 F. Supp. 447, 455 (N.D. Ill. 1982); Pickens v. Lochart, 714 F.2d 1455, 1460 n.4 (8th Cir. 1982); Fuedler v. Goldsmith, 728 F.2d 1181 (9th Cir. 1983); United States v. Gibbs, 662 F.2d 728 (11th Cir. 1981); Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982).
87. 708 F.2d at 960.
88. Id.
89. See supra notes 54-62 and accompanying text.
90. See supra note 51 and accompanying text.
91. 708 F.2d at 960.
Vela standard of review, but not all courts concur. Prior to discussing that disagreement, however, the logic behind the Vela decision should be reviewed.

B. The Logic of Vela

The Fifth Circuit opinion in Vela is a throwback to the spirit of Royall, written without apparent deference to the Exhaustion Rule's recent restrictive history. The court declared that "[e]xhaustion is not a jurisdictional prerequisite, but derives from considerations of comity between the state and federal judicial systems . . . [and] [t]he rule that a state prisoner is required to exhaust his state remedies before he applies for federal habeas relief is not graven in stone." 94

Vela's federal petition contained "the three central errors urged in his state habeas petition," 95 and an additional series of lesser minor premises. After noting that difference, the court prefaced its analysis by recanting the familiar themes of Exhaustion Rule policy, initial state court presentation and minimal friction. 96

The next, and most important, aspect of the Fifth Circuit's analysis is that major premises and minor premises are defined as distinct entities. The court stated that the "exhaustion requirement is not satisfied if a petitioner presents new legal theories [major premises] or entirely new factual claims [minor premises] in his petition to the federal court." 97

In support thereof, the Vela court cited several cases where the state factual record was supplemented prior to federal presentation, and concluded that in those cases the "state remedies may not be considered exhausted." 98 However, in Vela the court found that:

[All] the instances of ineffective assistance alleged in Vela's

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92. Rodriguez v. McKaskle, 724 F.2d 463 (5th Cir.), cert. denied, 105 S. Ct. 520 (1984); Brand v. Lewis, 784 F.2d 1515 (11th Cir. 1986) (failure to enumerate all instances of attorney error does preclude appellate review); Willis v. Newsome, 771 F.2d 1515 (11th Cir. 1985) (per curiam) (petitioner exhausted his state remedies even though his appellate petition contained an additional allegation of ineffective assistance).


94. 708 F.2d at 958 (citing Felder v. Estelle, 693 F.2d 549 (5th Cir. 1982); Galtieri v. Wainwright, 582 F.2d 348, 354 (5th Cir. 1978); Minor v. Lucas, 697 F.2d 697 (5th Cir. 1983)).

95. 708 F.2d at 957.

96. Id. at 958.

97. Id.

98. Id. at 958-59 (citing Brown v. Estelle, 702 F.2d 494 (5th Cir. 1983)); see also Burns v. Estelle, 695 F.2d 847 (5th Cir. 1983); Hart v. Estelle, 634 F.2d 987 (5th Cir. 1981); Knoxson v. Estelle, 574 F.2d 1339 (5th Cir. 1978).
supplemental brief to this Court were contained in the trial record reviewed by the state habeas court when it denied Vela's original petition. This petition argued ineffective assistance on the basis of counsel's entire performance. The petition cited the entire record below, singling out for comment certain strikingly prejudicial errors. 99

In other words, minor premises should be considered mere "highlights" 100 which support a major premise. Further, in an ineffective assistance claim, the "counsel's performance is to be evaluated on the basis of 'the totality of the circumstances in the entire record.'" 101 In Vela both state and federal court opinions clearly indicate that the entire record was reviewed. 102 Therefore, the Fifth Circuit concluded that:

[Although Vela has highlighted in his brief to this Court a number of trial errors that were not specifically mentioned in his pro se state habeas petition, all of these errors support the same constitutional claim urged before the state court, and all were readily discernable from the review of the entire record which that court was obligated to carry out. 103

Summarily, the court determined that the alleged new facts were not new at all, and that its consideration of those same facts would not create friction between the federal and state courts. 104 Quite to the contrary, the court implied that friction would result if it dismissed the petition by stating that "[c]haracterizing these allegations as 'unexhausted claims' would require us to find that the state habeas court failed in its duty to evaluate counsel's performance on the basis of the record as a whole. This we are not willing to do." 105 However, at least three Supreme Court Justices were willing to find that the state court failed to evaluate the entire record. 106

C. Justice O'Connor's Dissent From Denial of Certiorari

The Vela fair presentation finding was appealed by the state of

99. 708 F.2d at 959 (emphasis original).
100. Id. at 960.
102. 708 F.2d at 959.
103. Id. at 960.
104. Id.
105. Id.
Texas to the Supreme Court but was denied certiorari. Justice O'Connor's dissent from that denial opens by stating that the consideration of factual allegations not specifically raised in the state court "undermines the policies" behind the exhaustion requirement. Citing the familiar concerns of comity, minimal friction between state and federal courts and fair presentation, Justice O'Connor concluded that pursuant to Rose, unspecified allegations cannot be considered as "fairly presented" and that state court evaluation "of the entire record cannot mean that the exhaustion requirement is satisfied."

In Rose v. Lundy we said that an exhausted claim could not be considered by a federal habeas court if the claim depended in part on another claim not raised in the state courts, even if the state courts, in rejecting the exhausted claim, had reviewed the entire record. The exhaustion rule requires that the substance of a federal habeas corpus claim first be presented to the state courts, Picard v. Conner, and the substance of an ineffective-assistance-of-counsel claim is identified by the list of alleged errors committed by counsel. Domaingue v. Butterworth.

Justice O'Connor concludes by stating that the "potential for interference with the relations of state and federal courts" requires that "unless state courts have been pointed to a particular error of counsel, a claim based upon that error is unexhausted."

D. Analysis

Justice O'Connor's dissent points out the two serious problems plaguing the transfer of jurisdiction from state to the federal level in habeas corpus procedure. First, there is no single fair presentation standard nor accepted definitions of major and minor premises. Second, it is often unclear from state court opinions which claims were exhausted.

Justice O'Connor's dissent almost uniformly confuses major premises for minor premises. The three leading cases she cites, Rose, Picard, and Domaingue, dealt with major premise questions. The Rose court dismissed a petition with exhausted and unexhausted ma-

107. Id.
108. Id. at 1054.
109. Id. at 1054-55.
110. Id. at 1055.
111. Id. (citations omitted).
112. Id.
The Picard court remanded a petition containing a different major premise than was presented at the state level. Neither of those cases is dispositive of the Vela question of whether minor premise variations based on identical state and federal records, satisfies fair presentation standards.

Justice O'Connor also states that *Domaingue v. Butterworth* stands for the proposition that "the substance of an ineffective-assistance-of-counsel claim is identified by the list of alleged errors committed by counsel." Nowhere in *Domaingue* is that even intimated. Additionally, the *Domaingue* petition was dismissed because it depended "in large measure on factual allegations outside the record on direct appeal to state courts," i.e. new facts, not because minor premises were newly pled at the federal level. *Domaingue* is simply not dispositive of the Vela question. As a result, the Vela question remains unanswered. More importantly, Justice O'Connor's continuing disagreement with the Fifth Circuit over the proper standard for fair presentation and definitions of claim and factual allegation leaves those issues unresolved.

IV. ON INEFFICIENCY AND COMITY

A. A Question of Policy

1. The Proper Definitions

Exhaustion Rule policy has been dominated by two concerns: federal/state comity and judicial economy. The set standard for fair presentation and definitions of claim and factual allegation, as well as the disposition of the Vela question, should depend upon how the Supreme Court views the policies of comity and efficiency.

2. Judicial Efficiency

Three parties are directly interested in the efficiency of habeas corpus cases: the state and federal judges hearing the petition, the prosecutor seeking a conviction, and the petitioner in search of his freedom. If, as Justice O'Connor claims in her dissent, "[i]neffective-assistance-of-counsel claims are becoming as much a

113. *Rose*, 455 U.S. at 510. See *supra* notes 77-78 and accompanying text.
114. See *supra* notes 55-65 and accompanying text.
115. 641 F.2d 8 (9th Cir. 1981).
117. 641 F.2d at 13.
part of state and federal habeas corpus proceedings as the bailiff's call to order in those courts,” then the ultimate concern of the judges who hear those cases must be efficiency. Or, as stated by Justice Stevens, it must be the “authority . . . to administer their calendars effectively.” It makes little sense to have those judges dismiss a valid claim because of minor variations in the pleadings. In *Rose*, Justice Stevens' dissenting opinion decried the dismissal of the petition (containing additional major premises), stating that the case was “destined to return to the federal District Court and the Court of Appeals . . . [and that] the additional proceedings that the Court requires before considering the merits will be totally unproductive.”

Justice Stevens felt that even if the additional claim was frivolous, the remainder of the petition would find its way back to the same federal court that dismissed the mixed petition, thereby wasting the time of each court along the way back. If that argument is of any merit, dismissing the *Vela* petition would be a complete waste of prosecutorial and judicial resources. Carried to its logical extreme, Justice O'Connor's dissent would require the dismissal of a federal petition containing one hundred and one minor premises because that same petition contained only one hundred premises at the state level. Would not the state court hear the additional allegation (a fact it probably considered when it reviewed the entire record initially) and rule the same as it had before. As a result, the petitioner would again find himself in federal court, wasting time and taxpayer dollars. Under Justice O'Connor's guidelines, federal jurisdiction would be granted only upon submission of a photocopy of the state petitions. Further, as the *Vela* Court pointed out, dismissal of petitions on trivial grounds could hamper, not enhance, federal/state comity.

As far as the petitioner is concerned, Justice O'Connor's guidelines probably produce endless and "needless procedural hurdles," rather than the right to a speedy trial. Justice Stevens' dissent in *Rose* points out that many petitions are filed pro se, and later changed by an attorney at the appellate level. As a matter of practicality, the Court cannot expect identical petitioning. According to

119. 464 U.S. at 1056.
120. *Rose*, 455 U.S. at 546 (Stevens, J., dissenting).
121. Id.
122. See supra note 105 and accompanying text.
124. Id. at 546 n.15.
Justice Stevens, "[g]iven the ambiguity of many habeas corpus applications filed by pro se applicants, such differing appraisals should not be uncommon." There results enormous potential for disagreement at each court level over whether the Exhaustion Rule was satisfied.

In summation, it simply does not follow that the dismissal of a petition, due to the addition of a previously reviewed allegation, is efficient. In fact, it is patently inefficient. Therefore, the definition of fair presentation should not exclude minor premise variation, as in Vela, at the federal level. Further, the definition of claims should be legal theory as suggested by the Vela court. The definition of factual allegations as the minor premises urged in support of the claim should also be used as suggested by the Vela court. Those definitions support the dismissal of the presentation on new claims at the federal level as in Rose. They also avoid Justice O'Connor's confusion in her dissent and ultimately support the decision not to dismiss minor variations in factual pleadings. The new found clarity those definitions provide would enhance federal/state comity.

3. The Need for Clarity

The solution to problematic imprecise state court opinions should be directed by comity and efficiency policy concerns as well. Unfortunately, few cases discuss the need for state court clarity regarding exhaustion. Justice O'Connor time and again calls for "fair presentation" but declines to acknowledge that the state court ruling on Vela's petition all but stated that fair presentation was made. Justice Blackmun's concurrence in Rose decried the state court's failure to "specify[ly] which allegations of prosecutorial misconduct it considered."

In each case addressed thus far, the federal courts spent endless hours attempting to determine whether state court exhaustion was

125. Id.
126. If a prisoner used such a standard to reach the federal court prematurely, and thereby avoided an unfavorable state court, his petition would be subject to HABEAS CORPUS RULE 9(b) which provides that:
   A second or successive petition may be dismissed if the judge finds that it failed to allege new or different grounds for relief and the prior determination was on the merits or, if the new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.
127. See supra notes 81-105 and accompanying text.
128. Id.
129. 455 U.S. at 532.
effected. It is manifest that the state courts could end those inquiries by simply stating which major premises and/or minor premises were exhausted. Thus, federal courts would no longer need to inquire into whether exhaustion occurred, unless a gross dereliction is apparent. The Exhaustion Rule's efficiency and comity policy concerns would be best served if prior to granting jurisdiction, the federal courts required a "plain statement" from state courts that delineates the parameters of their rulings. The recent Supreme Court case of Michigan v. Long supports such a solution.

V. MICHIGAN V. LONG, VELA AND JUSTICE O'CONNOR

A. The Parallel

In Michigan v. Long, the Supreme Court was faced with an identical problem in a separate area of federal judiciary procedure, United States Code Title 28, section 1257. Pursuant to that section, if a state court decision is based upon independent state grounds, the Supreme Court will not undertake to review the decision. If the judgment is based on federal grounds, then the Supreme Court has jurisdiction to review the decision.

In Long, the state court did not declare the grounds upon which it based its ruling. The parallel to the Exhaustion Rule dilemma is striking. The federal Court was not sure whether federal jurisdictional requirements were met.

According to the Long Court, the imprecise state court opinion

131. Id.
132. 28 U.S.C. § 1257 (1982) provides:

Final judgments or decrees rendered by the highest court of the State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purpose of this section, the term "highest court of the State" includes the District of Columbia Court of Appeals.

Id.

133. 463 U.S. at 1043-44.
and others like it have raised two concerns:

[1] [The] ad hoc method of dealing with cases that involve possible . . . independent state grounds is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved . . . [and] [2] [v]acation and continuance for clarification have . . . been unsatisfactory both because of the delay and decrease in efficiency of judicial administration.\(^\text{134}\)

Those concerns mirror the dual policy concerns of the Exhaustion Rule: comity and efficiency.

The Long court ultimately held that “[i]f the state court decision indicates clearly and expressly that it is . . . based on . . . independent grounds, we of course, will not undertake to review the decision.”\(^\text{135}\) Further, if the state court makes “clear by a plain statement” that the federal cases considered were used solely for guidance, then federal review will not be undertaken.\(^\text{136}\) If no statement is made, and the state ground is not “clear from the face of the opinion,” then the federal ground will be assumed.\(^\text{137}\) “In this way, both justice and judicial administration will be greatly improved.”\(^\text{138}\)

What is most astonishing about the Long opinion, other than the simplicity of its solution, is that Justice O'Connor wrote the opinion in direct contradiction to her dissent from denial of certiorari in Vela.

B. On Logical Consistency

The source of ambiguity in both Long and Vela is identical: imprecise state opinions. Resulting uncertainty, in turn, raises concerns regarding federal/state comity and judicial efficiency. In both cases, numerous judicial decisions have struggled to arrive at a definitive resolution.

In Long, the Supreme Court held that ambiguity would no longer be the order of the day. Furthermore, “vacation and continuance for clarification” was not the solution to resolving ambiguities.\(^\text{139}\) Instead, judicial efficiency and federal/state comity demand a “plain statement,” defining the parameters of state courts’

\(^{134}\) Id. at 1039-40 (emphasis added).

\(^{135}\) Id. at 1041 (emphasis added).

\(^{136}\) Id.

\(^{137}\) Id.

\(^{138}\) Id.

\(^{139}\) Id.
Justice O'Connor abandons that logic, however, with regard to the *Vela* question. Although the problem source and the effects thereof are the same, the solution apparently is not. In *Long*, the Court rejected the option of remanding the cases to the state court level. Nevertheless, Justice O'Connor advocates precisely that with regard to *Vela*. There is no obvious reason for that logical inconsistency. The solution to both problems should be the same.

VI. THE PROPOSAL

The solution to the problems affecting Exhaustion Rule procedure is exactly parallel to the *Long* solution. “If the state court decision indicates clearly and expressly” that X major premise and all minor premises in support thereof were exhausted, the federal court should not review that question (unless gross dereliction can be shown). If it “is not clear from the face of the opinion,” then the federal court should take a narrow view, adjudge only the premise upon which the state court reached the merits as exhausted, and dismiss the remainder of the petition.

A. Efficiency

State court declarations regarding exhaustion would be more efficient than federal court reviews. Only where challenged should federal courts address the question of whether state remedies were exhausted. State efficiency will be served, if and only if, the states exhaust the claim and clearly indicate which claim was exhausted. If the state court does not do that, it runs the risk of having to re-review the case after federal dismissal. Plainly stated, the state courts in most cases would be able to effect the outcome of the exhaustion issue in the federal courts. Therefore, they would have an incentive to fully exhaust the petitioner’s claim the first time around.

B. Comity

The proposed solution directly addresses the comity issue. The jurisdictional transfer from state to federal court will no longer be subject to uncertainty. The federal court will not be heavy-handed by either dismissing too many cases or reviewing too many cases. In fact, federal court action will be dictated in part by state court action. In sum, potential federal/state friction will be greatly reduced where
the rules are defined in advance.

VII. CONCLUSION

Habeas corpus procedure has a long, tangled history in the United States. Definitive answers have been less frequent than "ad hoc" decisions. The Vela question, of whether minor premise variations based on identical state and federal court records, however, offers an excellent opportunity to make a logically consistent resolution.

Federal/state comity and judicial efficiency concerns dominate habeas corpus procedure. Those concerns are frustrated by ambiguity. Ambiguous state court opinions and imprecise definitions of critical federal habeas corpus procedural terms can and should be resolved.

The proper standard of fair presentation should allow minor premise variation. The proper definition of claim should be major legal theory and the proper definition of factual allegations should be minor premises urged in support of a major legal theory.

Application of the Long solution to habeas corpus procedure is both logically consistent and efficient. A plain statement delineating the parameters of the state court holding will eliminate the need to review state decisions on the exhaustion issue in most cases. In turn, federal/state comity and judicial efficiency will be greatly enhanced.

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