# SUPREME COURT OF THE UNITED STATES

No. 97–2048

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

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

[June 7, 1999]

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

In my view, whether a state prisoner (who failed 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 (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 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) (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 sug-

gests 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 See National Center for State Courts, unpublished data (June 1999) (available in file of Clerk of this Court).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 (1998) (SCALIA, J., dissenting) (complaining of "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 (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 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 Post-Conviction 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.