

FAIR PRESENTATION AND EXHAUSTION: THE SEARCH FOR IDENTICAL STANDARDS

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INTRODUCTION

The writ of habeas corpus has served throughout American history as an extraordinary remedy of last resort, allowing state and federal prisoners to challenge both their conviction and incarceration on constitutional grounds.¹ Indeed, the framers considered the writ's protection against arbitrary and unlawful incarceration to be so significant that, of all the civil liberties guaranteed by the Bill of Rights, only the right of habeas corpus was included in the Constitution itself.² While the writ has traditionally been used as a means of challenging criminal prosecution and sentences,³ the Supreme Court has frequently

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¹ See generally 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 5-20 (5th ed. 2005). A practical example of the writ's application can be seen in the exonerations pursued by the Innocence Project (IP), a non-profit New York-based law firm that focuses on exonerating wrongfully convicted prisoners using DNA evidence. The writ of habeas corpus enables the IP to request DNA testing years after a petitioner has been found guilty and exhausted all of their appeals of right. The motions filed by the IP (which were almost exclusively habeas petitions until states passed statutes specifically designed to allow defendants to seek DNA testing of old evidence) have resulted in 223 DNA exonerations since 1989. Two recently exonerated prisoners, James Giles and Charles Chatman, managed to vacate their convictions using the writ of habeas corpus. See <http://www.innocenceproject.org/news/Blog-Search.php?check=true&tag=19> (last visited Oct. 27, 2008). Another current example of the writ's use can be seen in the Guantanamo Bay cases as the international detainees have used the writ as the primary means to attack their detentions. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

² U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). Alexander Hamilton argued that the Writ of Habeas Corpus and the Ex Post Facto Clause of the Constitution protected liberty to such a degree that they eliminated any need for a Bill of Rights. See THE FEDERALIST NO. 84 (Alexander Hamilton), available at <http://www.constitution.org/fed/federa84.htm>.

³ See *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.").

described it as a “civil” remedy.⁴ Divergent interpretations of the writ’s proper scope and application have produced dichotomous rulings. While the Supreme Court has declared that the writ should be governed exclusively through statutory law,⁵ it has also described habeas law as an organic, evolving doctrine that focuses on judicial precedent and equitable relief.⁶

Essentially, the writ allows federal courts to assume an appellate relationship with state courts and enables petitioners to challenge state convictions in federal court.⁷ The appellate review afforded by the writ implicates federalism concerns and has therefore elicited pressure from both Congress and the Judiciary to restrict abuse or overuse of the writ.⁸ One of the first procedural restrictions placed on state prisoners seeking habeas relief was the requirement that petitioners exhaust⁹ their claims in state court before applying for federal review.¹⁰ The Supreme Court

⁴ See, e.g., *Cross v. Burke*, 146 U.S. 82, 88 (1892) (“It is well settled that a proceeding in habeas corpus is a civil, and not a criminal, proceeding.”).

⁵ See, e.g., *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) (“[T]he meaning of the term *habeas corpus* . . . may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given written by law.”); *Ex Parte McCordle*, 74 U.S. 506 (1868) (acknowledging that Congress has the power to withdraw the court’s jurisdiction to hear habeas petitions).

⁶ See *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977) (recognizing the Court’s “willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged”); *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945) (describing the right of habeas corpus as “a writ antecedent to statute . . . throwing its roots deep into the genius of our common law”); see also 1 HERTZ & LIEBMAN, *supra* note 1, at 15 (noting that the Supreme Court has looked to its own precedents and interpretations of the writ, “even in contexts over which, and during periods when, Congress has arguably sought to reassign control over the writ to itself”).

⁷ See 1 HERTZ & LIEBMAN, *supra* note 1, at 10 n.4 (“[A federal court’s function in habeas corpus proceedings is to] review errors in state criminal trials . . .” (emphasis omitted) (quoting *O’Neal v. McAninch*, 513 U.S. 432, 442 (1995))). It should be noted, however, that federal courts have no power to review convictions based on independent and adequate state grounds. See *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (“This court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.”).

⁸ Mindful of federalism concerns, the Court has occasionally characterized the writ as providing collateral review of state decisions rather than direct appellate review. See, e.g., *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) (“The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence.”); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) (“The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials.”). Despite the sometimes-competing labels attached to the federal review afforded by the writ, federal courts are, in fact, charged with overturning state court decisions which run contrary to the Supreme Court’s interpretation of federal constitutional rights.

⁹ The exhaustion requirement essentially mandates that state courts be afforded an opportunity to hear a litigant’s habeas petition before a federal court will entertain the petition. A state prisoner must therefore “exhaust” his claims in state court before he can petition for relief in a federal court. See *infra* Part I.

¹⁰ See, e.g., *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986) (“The exhaustion doctrine seeks to

outlined the exhaustion doctrine decades before Congress made exhaustion a statutory requirement.¹¹ The Court based the exhaustion doctrine on principles of comity and federalism¹² and established that in a federal system, state courts should be afforded an opportunity to hear a petitioner's case before federal courts are called on to resolve the issue.¹³ The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) codifies the exhaustion requirement for state prisoners who wish to challenge their conviction in federal court.¹⁴

A petitioner must "fairly present"¹⁵ his claim to state courts before he has satisfied the exhaustion requirement.¹⁶ Fair presentation turns on whether the petitioner has presented the same operative facts and "controlling legal principles" to both state and federal courts.¹⁷ Fair presentation must be established via a two-part test—the petitioner must first present the same operative facts to every reviewing court and, secondly, must present the same legal theory to support his claim. While technically a test of two parts, judges have been primarily concerned with the second question of whether the petitioner properly

afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary.”). The exhaustion requirement presented in the habeas context is separate from the exhaustion requirement imposed on petitioners seeking to challenge the conditions of their confinement or seeking relief for incidents within prisons using § 1983, and such challenges are beyond the subject of this Note. The exhaustion requirement in § 1983 cases was revised by the Prisoner Litigation Reform Act (PLRA) of 1996 and it mandates, in pertinent part, that “[n]o action shall be brought with respect to prison conditions under section 1983 . . . until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a) (1996). Rather than implicating federalism and comity concerns, the PLRA exhaustion requirement is based on deference to prison administrators. The development of the exhaustion doctrine under the PLRA differs significantly from that found in the habeas context and, again, is not the subject of this Note. *See, e.g.*, *Porter v. Nussle*, 534 U.S. 516 (2002), *Booth v. Churner*, 532 U.S. 731 (2001).

¹¹ *Ex Parte Royall*, 117 U.S. 241, 251 (1886), was the Supreme Court's first pronouncement on the exhaustion requirement. Congress did not codify an exhaustion requirement until it passed the first version of the modern habeas statute—28 U.S.C. § 2254—in 1948.

¹² *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (“This exhaustion requirement is . . . grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights.”).

¹³ *See, e.g., Nadworny v. Fair*, 872 F.2d 1093 (1st Cir. 1989) (“The junction where federal habeas power intersects with state criminal processes is enswathed in a mutuality of respect between sovereigns. It is that principle of comity which underlies the federal courts' unwillingness to adjudicate too hastily matters of fundamental federal significance arising out of state prosecutions.”); *Rose v. Lundy*, 455 U.S. 509, 518-20 (1982).

¹⁴ 28 U.S.C. § 2254 (2006). In pertinent part, the statute requires that “the applicant has exhausted the remedies available in the courts of the State,” but that “[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.” *Id.* § 2254(b)-(c) (1996).

¹⁵ *Anderson v. Harless*, 459 U.S. 4, 6 (1982).

¹⁶ *Picard v. Connor*, 404 U.S. 270, 275 (1971) (“It has been settled since *Ex Parte Royall* that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus.” (citation omitted)).

¹⁷ *Id.* at 275-77.

appraised the state court of his legal theory.¹⁸ The second prong of the fair presentation test also serves as a significant procedural bar for habeas petitioners, particularly those who must file pro se petitions.¹⁹

In the context of petitioners' trying to raise a violation of *federal* constitutional rights, the Supreme Court has held that, in order to satisfy the exhaustion requirement, petitioners must have alerted the state courts to the federal nature of their claim.²⁰ Claims fail the exhaustion test if they fail to cite federal cases or are ambiguous as to whether they implicate state or federal constitutional protections.²¹ Pro se petitioners are often the victims of this procedural bar as their lack of education and legal training frequently results in confused, legally imprecise, handwritten claims.²²

The margin for error has thus narrowed for all petitioners seeking federal review. However, there is one area of the 'fair presentation' question that the Court has explicitly left open: Whether a petitioner who fails to quote federal law or the constitution has fairly presented his claim when the standards for determining the scope of the constitutional right are *identical* in both state and federal law.²³

This Note argues that identical standards may overcome a failure to identify a federal claim when the petitioner is a pro se litigant. So long as a state has found that any of its constitutional protections mirrors that of the federal constitution, the acceptance of some

¹⁸ See *McKaskle v. Vela*, 464 U.S. 1053, 1055 (1984) (O'Connor, J., dissenting from denial of certiorari) ("Of course, the state courts have the entire record, and thus the essential facts, before them in every constitutional case. But that is obviously beside the point. The exhaustion rule requires that the habeas petitioner . . . identify for the state courts' attention the constitutional claim alleged to be inherent in those facts."). In this petition for certiorari, the government was appealing the Fifth Circuit's finding that Mr. Vela had received ineffective assistance of counsel during his criminal trial. In particular, the government contested the Fifth Circuit's decision to consider allegations of error made by Mr. Vela that were not included within his previous habeas petitions to the Texas state courts.

¹⁹ Pro se petitions often fall short of the exhaustion requirement because they are generally drafted by illiterate or poorly educated prisoners with no legal education. See 1 HERTZ & LIEBMAN, *supra* note 1, at 685 ("Legal assistance [for pro se litigants] often is critical to enable unsophisticated prisoners to recognize meritorious claims [and] draft the petition in a formally and substantively proper manner . . ."); *Slack v. McDaniel*, 529 U.S. 473 (2000) (recognizing that pro se petitioners have little legal acumen and can be easily trapped by procedural requirements).

²⁰ See, e.g., *Baldwin v. Reese*, 541 U.S. 27 (2004); *Duncan v. Henry*, 513 U.S. 364 (1995) (per curiam). The Supreme Court has stated that a petitioner need not cite "book and verse on the federal constitution" to fairly present a claim. *Duncan*, 513 U.S. at 365. Nevertheless, the court has recently affirmatively required that petitioners explicitly reference federal jurisprudence, cite to the U.S. Constitution or simply label the claim as "federal" to satisfy the fair presentation requirement. *Baldwin*, 541 U.S. at 28 ("A litigant can easily indicate his claim's federal law basis . . . by citing to the federal source of law on which he relies or simply labeling the claim 'federal.'").

²¹ *Picard*, 404 U.S. 270 (1971).

²² See *infra* Part II.

²³ *Baldwin*, 541 U.S. at 33 (suggesting that identical state and federal standards for adjudicating a constitutional violation may satisfy the fair presentation requirement).

ambiguity for pro se petitioners raising those claims is consistent with the Court's habeas jurisprudence. It is also consistent with Congress's intent in requiring that petitioners exhaust their federal claims in state court.²⁴

Part I of this Note outlines the policy concerns behind the exhaustion requirement and examines how various courts have interpreted the fair presentation requirements, with a specific focus on how the Court has addressed the potential for identical standards. Part II of this Note explains how federal courts have outlined more lenient standards for pro se litigants in a variety of legal forums, including criminal defendants who elect to represent themselves at trial and in section 1983 claims concerning prison conditions and incidents. This framework supports the contention that similarly permissive standards are appropriate in the context of habeas petitions.²⁵ Finally, Part III will examine what conditions must be met before the adjudication of a state-law issue can indeed be considered "identical" to its federal counterpart and what types of constitutional claims are most likely to merit this distinction, with an emphasis on claims of ineffective assistance of counsel.

I. EXHAUSTION, FAIR PRESENTATION, AND THE SEARCH FOR IDENTICAL STANDARDS

A. *Contours of the 'Fair Presentation' Cases*

Federal courts have expressed some confusion and uncertainty in trying to determine whether there are any circumstances in which state prisoners who failed to explicitly reference the Constitution or federal jurisprudence in state court might still have fairly presented their federal claims.²⁶ Four general situations have been outlined in which such a failure might not violate the exhaustion requirement, but these exceptions have been informal and some have been explicitly rejected by the Supreme Court.²⁷ A short review is in order.

²⁴ See, e.g., Larry Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393, 441 (1983) ("As Chief Justice Warren once reminded his colleagues, it is state remedies that are to be exhausted, not state prisoners.").

²⁵ See *infra* Part II.

²⁶ To satisfy the fair presentation requirement, litigants must merely properly *present* a federal claim. A state court's willingness to address the federal question has no bearing on the question of fair presentation. See, e.g., *Smith v. Digmon*, 434 U.S. 332, 333 (1978) (per curiam) ("It is too obvious to merit extended discussion that whether the exhaustion requirement of 28 U.S.C. § 2254(b) has been satisfied cannot turn on whether a state appellate court chooses to ignore . . . a federal constitutional claim squarely raised in petitioner's brief. . . .").

²⁷ See *infra* notes 28-44 and accompanying text (outlining the development of four separate

The first situation in which an ambiguous habeas petition that quotes only state law might still fairly present a federal claim is when the petitioner relies on state cases employing federal constitutional analysis.²⁸ The second exception holds that asserting a state-law claim which is “essentially the same” as a federal constitutional claim is sufficient to satisfy the exhaustion requirement.²⁹ The Supreme Court has explicitly or implicitly rejected these two exceptions.³⁰ A third exception holds that making a claim in terms “so particular as to call to mind specific rights protected by the Constitution” is sufficient to exhaust the claim.³¹ The fourth formulation of these exceptions asks whether the petition outlines a “pattern of facts that is well within the mainstream of constitutional litigation.”³²

The vagueness of these exceptions foreshadows a struggle to determine whether a state habeas petition can fail to explicitly cite to federal jurisprudence while still fairly presenting a federal claim by virtue of outlining a claim which a state court should realize implicates a federal right. While the viability of these procedural exceptions has been uncertain for the last three decades, their applicability has been

exceptions to the fair presentation rule and the eventual rejection of most of them).

²⁸ 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 1078 (5th ed. 2005); see *Cotto v. Herbert*, 331 F.3d 217, 238 (2d Cir. 2003) (noting that petitioner fairly presented a federal claim when citing to a state law case that relied on federal case law in interpreting the “constitutional right of confrontation”); *Verdin v. O’Leary*, 972 F.2d 1467, 1478-81 (7th Cir. 1992) (stating that “state cases applying constitutional analysis or making reference to the Constitution” were sufficient to “fairly present” a federal due process claim). *But see* *Casey v. Moore*, 386 F.3d 896, 912 (9th Cir. 2004) (declining to follow *Verdin* and countering that “citation of a state decision dealing with both state and federal issues relevant to the claim . . . must be accompanied by some clear indication that the case involves federal issues.”).

²⁹ See, e.g., *Tamapua v. Shimoda*, 796 F.2d 261, 263 (9th Cir. 1986) (holding that a claim of insufficient evidence in state court was enough to fairly present a Fourteenth Amendment due process claim as the two claims are essentially the same, and noting that “Tamapua’s primary contention in the state court proceedings was that his conviction was based on insufficient evidence. Sufficiency of evidence to convict is a fundamental concern of the due process clause”).

³⁰ See *infra* notes 33-42 and accompanying text (explaining the rejection of the first two exceptions).

³¹ *Daye v. Attorney Gen.*, 696 F.2d 186, 194 (2d Cir. 1982); see also *Beam v. Paskett*, 3 F.3d 1301, 1305 (9th Cir. 1993) (holding that a litigant’s challenge of a state penalty statute as “unconstitutionally arbitrary” necessarily implicates the Eighth Amendment), *overruled by* *Lambright v. Stewart*, 191 F.3d 1181 (9th Cir. 1999). *But see* *Duncan v. Henry* 513 U.S. 364, 365-66 (1995) (per curiam) (holding that litigant’s assertion that admission of prejudicial testimony resulted in a “miscarriage of justice” was not sufficient to implicate a due process claim under the Fourteenth Amendment).

³² *Daye*, 696 F.2d at 194; see also *Ramirez v. Attorney Gen.*, 280 F.3d 87, 95-96 (2d Cir. 2001) (noting that petitioner’s assertions of ineffective assistance of counsel, notwithstanding its presentation purely in state-law terms, fairly presented a federal claim by referring to specific acts by his attorney and outlining the resulting prejudice to petitioner); *Duncan*, 513 U.S. at 365 (“[T]o state a federal due process claim it is not necessary to invoke ‘the talismanic phrase ‘due process of law’ or cite ‘book and verse on the federal constitution.’” (citations omitted)).

increasingly questioned since the Supreme Court decided *Duncan v. Henry* in 1995 and *Baldwin v. Reese* in 2004.³³ These two cases explicitly rejected the second exception and implicitly rejected the first.

In *Duncan*, the “essentially the same” exception recognized by some federal courts was explicitly rejected. Following a conviction for child molestation, the petitioner claimed that the admission of certain testimony was so prejudicial to his defense as to have resulted in a “miscarriage of justice.”³⁴ While the petitioner failed to cite to the Fourteenth Amendment or mention the words “due process” in his state court brief, the Ninth Circuit agreed that he had presented a federal claim since his state-law argument was “essentially the same” as a federal due process claim.³⁵ The Supreme Court reversed, holding that the petitioner’s claim of a “miscarriage of justice” could not have raised a due process violation since the state standard for determining a miscarriage of justice was no more than “somewhat similar,” and not “virtually identical” to, the standard for determining a violation under the Fourteenth Amendment.³⁶ *Duncan*’s holding closed a significant line of reasoning that federal courts had used to sidestep the exhaustion requirement in order to weigh in on the merits³⁷ of a claim.³⁸

In *Baldwin*, the petitioner argued that he had received “ineffective assistance of appellate counsel,” though he never mentioned the Sixth Amendment and only cited to Oregon state case law in his appeal to the Oregon Supreme Court.³⁹ The petitioner argued that he had fairly presented his federal claim because Oregon’s highest court could have

³³ While AEDPA did create several new procedural hurdles designed to limit the number of habeas petitions in federal court, AEDPA’s revision of the “fair presentation” and exhaustion requirements were “modest” and have little applicability for the purpose of this Note. See HERTZ & LIEBMAN, *supra* note 1, at 115. While AEDPA did mandate a one year statute of limitations for all habeas claims and prohibits successive petitions, perhaps the most significant revision involves the requirement that federal courts not overturn state court habeas adjudications unless the state decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.” 28 U.S.C. § 2254(d)(1) (2006).

³⁴ *Duncan*, 513 U.S. at 364. California’s Constitution uses the “miscarriage of justice” test to determine whether an error at trial was harmless or not. See CAL. CONST. art. VI, § 13 (“No judgment shall be set aside, or a new trial granted . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.”).

³⁵ *Henry v. Estelle*, 33 F.3d 1037, 1040 (9th Cir. 1993) (“[T]o state a federal due process claim . . . [a] petitioner need only make ‘essentially the same arguments’ before the state and federal courts to exhaust a claim.” (citations omitted)).

³⁶ *Duncan*, 513 U.S. at 366.

³⁷ See BLACK’S LAW DICTIONARY 1123 (8th ed. 2004) (defining judgment “on the merits” as “delivered after the court has heard and evaluated the evidence and the parties’ substantive arguments”). Thus, not dismissing on simply procedural grounds enables federal courts to consider the petitioner’s substantive constitutional claims.

³⁸ See, e.g., *Tamapua*, 796 F.2d at 263; *accord* *Nadworny v. Fair*, 872 F.2d 1093, 1099-1101 (1st Cir. 1989); *Evans v. Court of Common Pleas*, 959 F.2d 1227, 1231-33 (3d Cir. 1992); *Henry*, 33 F.3d at 1040-42.

³⁹ *Baldwin v. Reese*, 541 U.S. 27, 29-30 (2004).

read the lower court opinions, which would have alerted the court to the federal nature of the claim. The Supreme Court rejected Baldwin's argument.⁴⁰ The Court held for the first time that petitioners must explicitly cite to federal jurisprudence or the Constitution at the risk of not exhausting their claim.⁴¹ This holding implicitly rejected the previously recognized exception which allowed a petitioner to fairly present a federal claim by pointing to state-law cases employing constitutional analysis.⁴² While this harsh requirement may be merely dicta,⁴³ there is no doubt that few options remain for petitioners who fail to explicitly cite the Constitution or some federal cases in state court challenges.⁴⁴

With the demise of the "essentially the same" exception as well as the exception which allowed petitioners to cite only to state-law cases employing federal constitutional analysis,⁴⁵ the trend toward a stricter interpretation of the exhaustion requirement has undoubtedly closed avenues through which ambiguous claims could be considered fairly presented.⁴⁶ After *Duncan* and *Baldwin*, the only means by which an ambiguous or purely state-law driven petition can fairly present a federal claim is if a federal judge makes the subjective decision that the petitioner's brief "calls to mind specific rights protected by the

⁴⁰ *Id.* at 31 ("[T]o say that a petitioner 'fairly presents' a federal claim when an appellate judge can discover that claim only by reading lower court opinions in the case is to say that those judges *must* read the lower court opinions In our view, federal habeas corpus law does not impose such a requirement.").

⁴¹ *Id.* at 32 ("A litigant wishing to raise a federal issue can easily [do so] . . . by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'").

⁴² See *Casey v. Moore*, 386 F.3d 896, 912 (9th Cir. 2004) ("[C]itation of a state decision dealing with both state and federal issues relevant to the claim . . . must be accompanied by some clear indication that the case involves federal issues."); see also Douglas Y.S. Park & Zachary J. Kelton, *Fairly Presenting Federal Claims to the State Courts; Recent Developments in Preserving Federal Claims for Subsequent Federal Court Review*, 41 WILLAMETTE L. REV. 485, 496-497 (2005) ("[A]ttorneys should be wary about relying on cases based on state law to preserve federal claims for subsequent federal court review, even if the state and federal standards for resolving the claim appear to be identical.").

⁴³ See 2 HERTZ & LIEBMAN, *supra* note 28, at 1082 (asserting that the Court's statement must be dicta since such a bright line rule would essentially overrule *Duncan* and its assertion that petitioners need not cite "book and verse on the federal constitution." The authors argued that the court's language must be dicta because (1) it was announced in a per curiam decision with no thorough analysis and without claiming to overrule *Duncan* and, (2) the Court found the claim to be unexhausted on grounds other than the petitioner's failure to cite federal law or the Constitution).

⁴⁴ *Casey*, 386 F.3d at 912; *Baldwin*, 541 U.S. at 31-32.

⁴⁵ See, e.g., *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996) (suggesting that, while the majority opinion in *Duncan* never explicitly mentioned *Tamapua*, the decision effectively overruled *Tamapua* and the "essentially the same" exception since *Duncan* had expressly relied on *Tamapua* and the Supreme Court nevertheless denied relief).

⁴⁶ See generally Park & Kelton, *supra* note 42 (arguing that *Duncan* and *Baldwin* have significantly reduced the likelihood that a pro se petitioner can fairly present a federal claim when the petition does not explicitly cite to the constitution or federal jurisprudence).

constitution.⁴⁷ Similarly, an ambiguous petition might still fairly present a federal claim so long as it establishes a “pattern of facts that is well within the mainstream of constitutional litigation.”⁴⁸

There is, however, one other open avenue for satisfying the exhaustion requirement without explicitly citing to federal law: instances in which the standard for adjudicating a violation of the state and federal constitutional right is “virtually identical.”⁴⁹ The several federal circuits that have addressed the issue of identical standards and how they might affect the “fair presentation” analysis have not been consistent in determining when standards are “identical.” Nor have they been consistent in outlining the circumstances under which such identical standards would excuse a petitioner’s failure to cite to the U.S. Constitution or federal jurisprudence.

B. *Identical Standards and Exhaustion*

Five circuit courts of appeals have found that identical standards between state and federal constitutional provisions do, in certain situations, allow for state court exhaustion of a claim despite a failure to cite explicitly to the relevant federal right.⁵⁰ Notwithstanding this agreement, these courts have among themselves expressed varying opinions as to which situations such an exception might apply. *Nadworny v. Fair* was one of the first cases to address the issue and validate identical standards.⁵¹ The First Circuit’s reasoning in

⁴⁷ See *Daye v. Attorney Gen.*, 696 F.2d 186, 193 (2d Cir. 1982) (“The more specific the description of the right in question—*e.g.*, assistance of counsel, double jeopardy, self-incrimination—the more easily alerted a court will be to consider a constitutional constraint couched in similar specific terms.”) The court then distinguished such constitutionally loaded phrases with more general statements, such as claiming to have been deprived of a “fair trial.” *Id.*

⁴⁸ See *Ramirez v. Attorney Gen.*, 280 F.3d 87 (2d Cir. 2001).

⁴⁹ *Baldwin v. Reese*, 541 U.S. 27, 33-34 (2004) (considering Reese’s argument that identical standards might overcome a petitioner’s failure to cite to a specific right but ultimately leaving the question open, stating that “[t]he complex nature of Reese’s claim and its broad implications suggest that its consideration by the lower courts would help in its resolution”). The Court reaffirmed the possibility that identical standards might overcome a petitioner’s failure to cite to the Constitution or federal law in the slightly different context of a direct appeal to the Supreme Court from the Mississippi Supreme Court under 28 U.S.C. § 1257(a). *Id.* See also *Howell v. Mississippi*, 543 U.S. 440, 444 (2005) (per curiam) (“Petitioner also contends that he raised his federal claim by implication because the state-law rule on which he relied was ‘identical,’ . . . or ‘virtually identical,’ . . . to the constitutional rule [regarding lesser-included charges]. *Assuming, without deciding, that identical standards might overcome a petitioner’s failure to identify his claim as federal, Mississippi’s rule regarding lesser-included-offense instructions is not identical . . .*” (emphasis added)).

⁵⁰ See, *e.g.*, *Sanders v. Ryder*, 342 F.3d 991 (9th Cir. 2003); *Strogov v. Attorney Gen.*, 191 F.3d 188 (2d Cir. 1999); *Evans v. Court of Common Pleas*, 959 F.2d 1227 (3d Cir. 1992); *Verdin v. O’Leary*, 972 F.2d 1467 (7th Cir. 1992); *Nadworny v. Fair*, 872 F.2d 1093 (1st Cir. 1989).

⁵¹ 872 F.2d 1093 (1st Cir. 1989). William Nadworny was convicted of second-degree murder

Nadworny is indicative of the dichotomous nature with which other circuits considered the issue. On the one hand, *Nadworny* stated clearly that, when a claim asserted under state law was essentially identical to the comparable federal claim, the federal claim should be considered fairly exhausted.⁵² Other circuits have affirmed this broad interpretation of the *Nadoworny* ruling, holding that, so long as the standards are identical, exhaustion cannot be a bar to the petitioner.⁵³

However, *Nadworny* can also be read more narrowly, as the First Circuit appeared to suggest that identical standards might fairly present a federal claim only so long as the terms used to present the claim had become deeply entrenched in the legal vernacular of that state.⁵⁴ Rather than focus only on determining whether the standards are identical between the state and federal Constitution,⁵⁵ the *Nadworny* court posed a less objective question: whether, in all probability, the terms used were so obvious that the state court judge was alerted to the federal nature of the claim.⁵⁶ Another formulation of this same question involves the determination of whether state courts should have recognized the reference to the federal claim.⁵⁷ Courts justify this

and sentenced to life in prison. He alleged several constitutional errors, including a sufficiency of the evidence claim. The First Circuit outlined various means by which a petitioner might fairly present a constitutional claim without explicitly citing to federal jurisprudence. The court stated that identical standards between the state and federal constitutions in regards to a specific claim might suffice to fairly present an otherwise ambiguous motion. *Id.* at 1099-1100.

⁵² *Id.* at 1099-1100.

⁵³ See *Scarpa v. Dubois*, 38 F.3d 1, 7 (1st Cir. 1994) (“[T]he sockdolager is that, as a general rule, presenting a state-law claim that is functionally identical to a federal-law claim suffices to effectuate fair presentment of the latter claim.”); accord *Strogov*, 191 F.3d at 192; see also *Peterson v. Lampert*, 319 F.3d 1153, 1160 (9th Cir. 2003) (en banc) (surveying other circuits which state that identical standards may fairly present a federal claim and suggesting that the Ninth Circuit may follow suit); *Sanders*, 342 F.3d at 999-1001 (noting that despite a failure to properly label the petitioner’s claim, the identical state and federal standards for adjudicating the claim were sufficient to fairly present the claim).

⁵⁴ The First Circuit identified two cases in which a petitioner’s federal claim had been fairly presented because the state and federal standards for adjudicating the claim were identical. The deciding factors were that these two cases referenced “bedrock concepts” and that “the likelihood that the state tribunal had been made aware of the claim’s federal quality was great.” *Nadworny*, 872 F.2d at 1100. The bedrock concepts were the requirements that guilt be proven beyond a reasonable doubt and the impermissibility of unduly suggestive photo spreads. *Id.*

⁵⁵ A state’s highest court is, of course, the final arbiter of that state’s constitution. See, e.g., *Murdock v. Memphis*, 87 U.S. 590, 636 (1874) (holding that federal courts should only intervene when “there has been no decision by the State court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the Federal question”); *State v. Coe*, 679 P.2d 353, 359 (Wash. 1984) (“[S]tate courts have a duty to independently interpret and apply their state constitutions that stems from the very nature of our federal system [T]he protection of the fundamental rights of Washington citizens was intended to be and remains a separate and important function of our state constitution”).

⁵⁶ *Nadworny*, 872 F.2d at 1101 (“To reiterate, the crux of the matter relates to [the] probability. . . . [of whether the petition would] in all likelihood alert a reasonable jurist to the existence of the federal question.”).

⁵⁷ See *Verdin v. O’Leary*, 972 F.2d 1467, 1476 (7th Cir. 1992) (“Here it seems appropriate to place the burden on the petitioner to demonstrate that the [state and federal standards were

restriction on the liberal use of an “identical standards” exception as a necessary rule to effectuate the policies underlying the principle of comity.⁵⁸

While courts have construed the identical standards exception both broadly and narrowly over the past two decades, the Supreme Court has reiterated that the question remains an open one.⁵⁹ This indicates a level of displeasure with the current formulation of the identical standards exception. Indeed, some legal commentators have opined that the Supreme Court will not accept the “identical standards” argument outlined by the various circuits as it is too much in conflict with the principles of comity and federalism.⁶⁰ It seems that the Court is still searching for the proper balance between formulating a clear test to determine whether identical standards might fairly present an ambiguous petition, and making sure not to abrogate the states’ prerogative to hear allegations of federal constitutional violations first.

C. *Identical Standards and Pro Se Litigants*

The debate concerning identical standards and fair presentation has focused on the too-subjective question of whether a state court judge should have realized a federal constitutional right was being implicated. The petitioner’s circumstances have rarely entered the analysis. Specifically, courts had never considered whether the petitioner was a pro se litigant when discussing whether identical standards might overcome the petitioner’s ambiguous claim.⁶¹ *Sanders v. Ryder*⁶² was the first case to suggest that pro se litigants should be afforded more deference when they fail to cite specifically to federal jurisprudence yet still raise a claim that can be considered identical between the state and federal constitution.⁶³

identical]. In resolving the matter, the habeas court must determine whether, as a *pragmatic* matter, it is probable that the state tribunal was alerted to the federal quality of the claim.”); *Evans v. Court of Common Pleas*, 959 F.2d 1227, 1232 (3rd Cir. 1992) (“The appropriate focus . . . centers on the *likelihood* that the presentation in state court alerted that tribunal to the federal quality and approximate contours.” (quoting *Nadworny*, 872 F.2d at 1098)).

⁵⁸ *Nadworny*, 872 F.2d at 1101 (“It is for the petitioner to prove that, in spite of [the failure to cite to federal law or the Constitution], the state courts reached out for, or otherwise became alerted to, the federal issue. Comity considerations . . . render the instances in which we [search for identical standards] few indeed.”).

⁵⁹ *Baldwin v. Reese*, 541 U.S. 27, 33-34 (2004).

⁶⁰ *See Park & Kelton*, *supra* note 40, at 500 (“Furthermore, when the court finally resolves the issue, there are a number of reasons to believe that that the court will hold that citing to a state law does not properly preserve a federal question, even if the relevant state and federal standards are identical.”).

⁶¹ *See infra* notes 62-69 and accompanying text.

⁶² 342 F.3d 991 (9th Cir. 2003).

⁶³ *Id.* at 999 (“[F]or the purposes of exhaustion, pro se petitioners are held to a more lenient

In *Sanders*, the petitioner pled guilty to child molestation in Washington state, but claimed that he had been coerced into accepting the plea and that he had received ineffective assistance of counsel.⁶⁴ The petitioner's discretionary appeal to the Washington Supreme Court used the term "ineffective assistance of counsel" three times and he only cited to the Washington state constitution.⁶⁵ He did, however, cite to the Sixth Amendment and *Strickland v. Washington*⁶⁶ in supplementary filings. The Ninth Circuit held that, since the Washington Supreme Court followed the federal constitutional test for ineffective assistance of counsel claims, the petition should count as fairly presented.⁶⁷ In its discussion, the court expressly took note of the petitioner's pro se status and stated that the more lenient standards due pro se petitions suggested that his claim should count as fairly exhausted.⁶⁸ Ultimately, *Sanders* did not explicitly link the acceptance of identical standards to the petitioner's pro se status⁶⁹ and later cases interpreting *Sanders* have not focused on the petitioner's pro se status as the deciding factor.⁷⁰

Nevertheless, there is merit in suggesting that there should be a different standard for pro se and counseled litigants when assessing the validity of an ambiguous petition. The recognition in *Sanders* that "status may matter" finds support in both habeas corpus jurisprudence and other areas of law where the Supreme Court has indicated that pleadings should be liberally construed in favor of pro se litigants.⁷¹

standard that counseled petitioners. [T]he complete exhaustion rule is not to trap the unwary pro se prisoner. We disavowed language by an earlier three-judge panel suggesting that pro se and counseled petitions should be read in the same way and held to the same standard." (internal citations and quotation omitted)).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ 466 U.S. 668 (1984) (establishing a two prong test for determining whether an attorney's performance had been so ineffective as to violate the Sixth Amendment). For a more detailed discussion of the standards for adjudicating an ineffective assistance of counsel claim, see *infra* Part III.B.

⁶⁷ *Sanders*, 342 F.3d at 999-1001.

⁶⁸ *Id.* at 999. The Ninth Circuit distinguished *Sanders* from *Peterson v. Lampert*, 319 F.3d 1153 (9th Cir. 2003) (en banc), a case in which the Ninth Circuit rejected an identical standards exception to a petitioner under similar facts. The court noted that *Sanders* had filed pro se while Peterson's appeal was counseled. *Sanders*, 342 F.3d at 999.

⁶⁹ First, the Ninth Circuit pointed out that *Sanders*'s motion had invoked the phrase "ineffective assistance of counsel" and that "the right to effective assistance of counsel is identical under the United States Constitution and the Washington Constitution." *Id.* at 999-1000. Indeed, the court's discussion of the identical standards may only be dicta as *Sanders* did ultimately cite to the federal constitution: "Were there any remaining doubt about whether *Sanders* properly presented his [sic] federal claim . . . *Sanders*'s reply brief to the Washington State Supreme Court . . . explicitly cited the federal Sixth Amendment." *Id.* at 999.

⁷⁰ See *Lowe v. Schomig*, No. 2:04-cv-01034-JCMM-RJJ, 2007 WL 773881, at *3 (D. Nev. Mar. 9, 2007) ("*Sanders* is distinguished by, *inter alia*, the fact that the document relied upon for exhaustion in that case was a *pro se* filing. However, the court is persuaded that the Ninth Circuit would follow *Sanders* and hold that, standing alone, the assertion of a claim [where state and federal standards are identical] . . . exhausts the federal claim.").

⁷¹ See, e.g., *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (admonishing the Seventh Circuit

This distinction between pro se and counseled litigants is reinforced when one also examines the manner in which courts have dealt with pro se criminal defendants and even pro se litigants in civil court.⁷²

II. THE PRO SE LITIGANT: JUDICIAL REACTION TO AND ACCOMMODATION FOR THE UNTRAINED

A. *Liberal Construction in Habeas and § 1983 Cases: Standards for Construing Pro Se Petitions*

This Note argues that a petitioner's pro se status should inform a court's analysis in determining whether identical standards might overcome a failure to cite to federal jurisprudence or the Constitution. The validity of this suggestion is evinced by the well-developed body of law stating that pro se petitions must be construed more liberally than those of counseled litigants.⁷³ This policy is designed to ensure that valid claims are not rejected simply because the petitioner was not aware of the correct procedures for bringing his claim.⁷⁴ Specifically, this doctrine of liberal construction can be seen in the context of prisoners challenging the validity of their conviction and the conditions of their confinement under habeas corpus and 42 U.S.C. § 1983, respectively.⁷⁵

Because there is no constitutional right to counsel when attacking

for granting summary judgment against the petitioner and holding that petitioner's allegations, "however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. . . . [A]llegations of [a] pro se complaint [are held] to less stringent standards than formal pleadings drafted by lawyers").

⁷² See *infra* Part II.

⁷³ *Haines*, 404 U.S. at 520-21.

⁷⁴ See, e.g., *Hughes v. Rowe*, 449 U.S. 5 (1980) (per curiam) (stating that dismissing a pro se prisoner's petition based on a failure to state a claim upon which relief can be granted is improper when a liberal construction of the claim hints at a valid federal claim). The court noted that "[a]lthough petitioner's pleadings are prolix and lacking in stylistic precision . . . [w]e cannot say with assurance that petitioner can prove no set of facts in support of his claim entitling him to relief." *Id.* at 12-13. The necessity of such a rule is apparent when one considers that fifty-seven percent—over half—of all pro se habeas petitions filed in federal district court were dismissed on procedural grounds—namely, failure to properly exhaust state remedies. See ROGER A. HANSON & HENRY W.K. DALEY, BUREAU OF JUSTICE STATISTICS, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CONVICTIONS 17-18 (1995), <http://www.ojp.usdoj.gov/bjs/pub/pdf/fhrcscsc.pdf> ("The reason for dismissals further illuminates the landscape. The majority of the dismissals were for failure to exhaust State remedies prior to filing the habeas corpus petition in federal court.").

⁷⁵ 42 U.S.C. § 1983 (2006) (permitting federal courts to hear allegations of the deprivation of a petitioner's federal civil rights); see also Alison Brill, Note, *Rights Without Remedy: The Myth of State Court Accessibility After the Prison Litigation Reform Act*, 30 CARDOZO L. REV. 645, 651-664 (2008) (detailing the development of § 1983 litigation as it relates to prisoners challenging the conditions of their confinement).

conditions of confinement,⁷⁶ the vast majority of both § 1983 and habeas petitions are filed pro se.⁷⁷ Courts hold these pro se petitions to a less stringent standard of specificity, particularly when respondents attempt to have such petitions dismissed on procedural grounds.⁷⁸ The protection of pro se petitioners from procedural pitfalls through liberal pleading standards has been particularly relevant when courts have felt that a dismissal based on procedural failure might result in injustice.⁷⁹ Additionally, when pro se petitioners fail to apply for relief under the proper statute or legal theory, courts have been willing to construe such petitions as having properly presented the relevant claim.⁸⁰

⁷⁶ See *Johnson v. Avery*, 393 U.S. 483, 488 (1969) (“It has not been held that there is any obligation of the courts, state or federal, to appoint counsel for prisoners who . . . wish to seek post-conviction relief. . . . [T]he initial burden of presenting a claim to post-conviction relief usually rests upon the indigent prisoner with such help as he can obtain within the prison walls or the prison system.”); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (“Our cases establish that the right to appointed counsel extends to the first appeal of right and no further.”).

⁷⁷ ROGER A. HANSON & HENRY W.K. DALEY, BUREAU OF JUSTICE STATISTICS, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 21 (1994), <http://www.ojp.usdoj.gov/bjs/pub/pdf/ccopaj.pdf> (“Ninety-six percent of all prisoners [in 1983 actions] proceed pro se; only four percent have counsel whether court appointed or otherwise.”); HANSON & DALEY, FEDERAL HABEAS CORPUS REVIEW, *supra* note 74, at 14 (“In 93% of the sampled habeas corpus cases, the prisoner was without counsel (pro se). Courts appointed attorneys in only 4% of the cases.”).

⁷⁸ In the context of motions to dismiss for failure to state a claim upon which relief can be granted, courts have consistently given pro se litigants some leeway in allowing them to proceed with their substantive claim despite procedural imperfections. See, e.g., *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam) (stating that the Court of Appeals’s dismissal of the complaint for failing to present a claim upon which relief can be granted was improper as such pro se petitions must be construed liberally); *Duncan v. Duckworth*, 644 F.2d 653, 655 (7th Cir. 1981) (finding it improper to dismiss for failure to state a claim because “treating this general principle of recovery under [§ 1983] as a strict rule of pleading and dismissing a complaint which otherwise states a valid claim . . . [runs] afoul of the well established requirement that pro se pleadings be held to less stringent standards than those prepared by counsel”).

⁷⁹ See, e.g., *Merritt v. Faulkner*, 697 F.2d 761, 769 (7th Cir. 1983) (Posner, J., concurring in part and dissenting in part) (“It is unfair to deny a litigant a lawyer and then trip him up on technicalities.”); *United States v. Sanchez*, 88 F.3d 1243, 1247 (D.C. Cir. 1996) (“Courts will go to particular pains to protect pro se litigants against the consequences of technical errors if injustice would otherwise result.”), *abrogated by* *Peguero v. United States*, 526 U.S. 23 (1999).

⁸⁰ See, e.g., *Tucker v. Carlson*, 925 F.2d 330 (9th Cir. 1991). Tucker challenged the length of his confinement by filing a § 1983 action and a *Bivens* claim, actions which are typically used to challenge prison conditions and to sue for monetary damages arising from constitutional violations, respectively. Nevertheless, the Ninth Circuit declared “We hold that to the extent that Tucker challenges the fact or duration of his confinement, the district court should have construed Tucker’s complaint as a petition for habeas corpus . . . [T]o the extent Tucker’s complaint seeks damages for civil rights violations, his complaint is construed as a [§1983] action.” *Id.* at 332. Because AEDPA bans the filing of successive habeas petitions, courts have become more cautious about converting petitions into habeas claims for fear that this conversion “may result in a disastrous deprivation of a future opportunity to have a well justified grievance adjudicated.” *Adams v. United States*, 155 F.3d 582, 583 (2d Cir. 1998). Several circuits have devised prophylactic procedures and now require that district courts warn pro se petitioners and offer them a chance to withdraw the complaint or petition prior to conversion. See, e.g., *Simons v. United States*, 359 F.3d 139, 141 (2d Cir. 2004); *United States v. Miller*, 197 F.3d 644, 646 (3d Cir. 1999). *But see* *Raineri v. United States*, 233 F.3d 96, 100 (1st Cir. 2000) (holding that it is

Courts will read allegations of substantive constitutional rights into a petitioner's pro se complaint or petition, even when the petitioner has failed to properly outline such claims.⁸¹ The liberal construction given to pro se pleadings is therefore not limited to minor housekeeping procedural corrections and offers substantial assistance to an untrained petitioner.⁸²

The policy behind construing such pleadings liberally is fairly obvious: courts recognize that pro se litigants on average simply do not possess the educational proficiency and literacy, much less the legal acumen, necessary to thoroughly research and properly present substantive claims.⁸³ The poor quality of pro se petitions makes sifting through such petitions a real challenge for district courts; some commentators have characterized pro se petitions as a burden on courts.⁸⁴ The inordinately high number of pro se habeas petitions and § 1983 complaints filed in federal court⁸⁵ has exacerbated these

unnecessary to burden overworked district courts with extraneous procedures to protect pro se petitioners from what is generally a beneficial practice).

⁸¹ See, e.g., *Wilson v. Civil Town of Clayton*, 839 F.2d 375, 378 (7th Cir. 1988) (holding that while the petitioner's substantive claim ultimately failed, the "district court erred by narrowly construing his pro se complaint as nothing more than a procedural due process claim instead of reading it broadly to allege substantive constitutional violations that state a claim under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment"); *Beavers v. Lockhart*, 755 F.2d 657, 662 (8th Cir. 1985) (addressing claims that the pro se petitioner did not raise in his habeas motion).

⁸² It is therefore unsurprising that courts are wary of attorneys "ghostwriting" petitions so as to take advantage of the liberal pleading standard. Ghostwriting in the legal forum generally consists of lawyers writing the filings for their clients without indicating authorship, thereby giving the impression that the petition has been prepared by a pro se litigant. See, e.g., John C. Rothermich, *Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 *FORDHAM L. REV.* 2687 (1999); see also *Johnson v. Bd. of County Comm'rs*, 868 F. Supp. 1226, 1231 (D. Colo. 1994) ("Pleadings seemingly filed pro se but drafted by an attorney would give [the filing party] the unwarranted advantage of having a liberal pleading standard applied whilst holding the [non-moving party] to a more demanding scrutiny."), *rev'd on other grounds*, 85 F.3d 489 (10th Cir. 1996).

⁸³ See, e.g., *Murray v. Giarratano* 492 U.S. 1, 27-28 (1989) (Stevens, J., dissenting) (arguing that expecting death row inmates to draft lucid complaints is unrealistic as "this Court's death penalty jurisprudence unquestionably is difficult for even a trained lawyer to master."); *Brown v. Vasquez*, 952 F.2d 1164, 1167 (9th Cir. 1991) ("Compounding this [statute of limitations] burden, the petitioner is often illiterate or poorly educated and yet must decipher a complex maze of jurisprudence in order to determine which of his constitutional rights, if any, have been violated.").

⁸⁴ See, e.g., *Application for Writs of Habeas Corpus and Post Conviction Review of Sentences in the United States Courts*, 33 *F.R.D.* 364, 384-85 (1963) ("Much of the judge's time is spent in trying to decipher and interpret chaotic papers that come to them from prison inmates. Many of the petitioners are illiterates, or persons of limited education . . . [and] their work product is often a mass of confused legal mumbo-jumbo. Judges have no way of knowing [whether the petitioner] . . . has something worthwhile to allege, but is inept due to his lack of legal training.").

⁸⁵ A study of ten different federal district courts from 1991-1994 found that 21% of all filings were by pro se litigants. DAVID RAUMA & CHARLES SUTELAN, *ANALYSIS OF PRO SE CASE FILINGS IN TEN U.S. DISTRICT COURTS YIELDS NEW INFORMATION*, *FJC DIRECTIONS* 6 (June 1996). Of those pro se petitions, 63% of those litigants were prisoners challenging the length or condition of their confinement. *Id.* Therefore, from 1991-994, over 13% of all district court

difficulties. Indeed, commentators have argued that it is precisely a pro se litigant's lack of legal training and low levels of education and literacy which have caused the high number of pro se prisoner appeals, as such petitioners do not have the legal training to determine which claims lack merit.⁸⁶

B. *Judicial Assistance of Pro Se Prisoners: Substantive Due Process Beyond Liberal Pleading Standards*

Some federal circuits have done more to protect incarcerated pro se petitioners, holding that district courts must actively warn the prisoner about the consequences of certain procedural motions and briefly outline what options are available to the petitioner.⁸⁷ For example, in the context of summary judgment, the majority of the federal circuits hold that a judge must warn a pro se prisoner of the effects of the motion and must advise him that he has the obligation to produce counter-affidavits or other evidence to refute the motion.⁸⁸ The circuits have been divided, though, on whether such protections apply to non-prisoner pro se petitioners.⁸⁹

filings came from pro se prisoners. Furthermore, it should be noted that despite the passage of AEDPA in 1996, the number of habeas petitions increased 50% between 1995 and 2000. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980-2000, at 1 (2002), <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf>.

⁸⁶ See, e.g., Marshall Krause, *A Prisoner Looks at Writ-Writing*, 56 CAL. L. REV. 371, 372 (1968) ("These litigants have no way of knowing whether their petitions contain legal merit. We may well analogize . . . [to a situation where] every person who thought he had a civil suit were required to first state his claim in a court pleading after which a lawyer would look over the claim to determine whether it had merit."). Some commentators have also argued that the one year statute of limitations for habeas motions instituted under AEDPA has further inflated the number of meritless claims as prisoners have very little time in which to learn the relevant legal principles and research their claim. See, e.g., Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299, 307 (2006) ("[T]he [one-year statute of limitations] has a perverse effect, as prisoners no longer have sufficient time to learn legal procedures and research potential claims adequately. Therefore, many pro se prisoners, rushed to file petitions, end up filing claims that may not warrant reversal of a conviction while overlooking claims that may.").

⁸⁷ See, e.g., *supra* note 75.

⁸⁸ See, e.g., *Klinge v. Eikenberry*, 849 F.2d 409, 413 (9th Cir. 1988) (reaffirming that summary judgment is inappropriate when the pro se petitioner had no notice of the motion and its effect); *Graham v. Lewinski*, 848 F.2d 342, 344 (2nd Cir. 1988) (holding that it would not be fair to enter an order for summary judgment when the pro se petitioner was unaware of his duty to respond); *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975) (holding that a pro se petitioner should be "advised of his right to file counter-affidavits and other responsive material and alerted to the fact that his failure to so respond might result in the entry of summary judgment against him").

⁸⁹ Compare *Jacobsen v. Filler*, 790 F.2d 1362, 1365-66 (9th Cir. 1986) (holding that non-prisoner pro se litigants do not enjoy this protection from the courts because, just as the court would not intercede when an attorney makes a mistake, so "[a] litigant who chooses *himself* as

Recognizing the challenges facing incarcerated pro se petitioners, the Supreme Court has historically attempted to ensure that their ability to file habeas petitions is unimpeded and that, to the extent practical, courts afford these petitioners a fair chance to receive legal advice and conduct legal research.⁹⁰ For example, in *Ex Parte Hull*,⁹¹ the Court invalidated the practice of requiring the clearance of habeas petitions with a state investigator prior to filing, holding that the rule unconstitutionally restricted a prisoner's access to the courts.⁹² In *Johnson v. Avery*,⁹³ the Court invalidated a regulation preventing prisoners from helping other inmates with habeas corpus applications and other legal matters, recognizing that such assistance was frequently the only legal advice available in prison.⁹⁴ In *Wolff v. McDonell*,⁹⁵ this guarantee was later expanded to cover inmate legal assistance for § 1983 civil rights actions.⁹⁶ In *Bounds v. Smith*,⁹⁷ the Court held that the state must provide prisoners with adequate legal resources or offer some modicum of meaningful legal assistance.⁹⁸

Both the liberal pleadings standard and the more substantive due process protections outlined above speak to the Court's recognition of the seemingly insurmountable challenges facing incarcerated pro se litigants. These efforts underscore the tension inherent in giving pro se petitioners a fair opportunity to be heard. A judge must consider how

legal representative should be treated no differently"), and *Brock v. Hendershott*, 840 F.2d 339, 343 (6th Cir. 1988) (affirming the holding of *Jacobsen*), with *Jaxon v. Circle K Corp.*, 773 F.2d 1138, 1140 (10th Cir. 1985) (extending such protections to all pro se petitioners).

⁹⁰ See, e.g., *Ross v. Moffitt*, 417 U.S. 600, 616 (1969) (stating that for a prisoner to have meaningful access to courts, states "must assure the indigent defendant an adequate opportunity to present his claims fairly").

⁹¹ 312 U.S. 546 (1941).

⁹² *Id.* at 549 ("The considerations that prompted [this regulation's] formulation are not without merit, but the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition . . . is properly drawn and what allegations it must contain are questions for that court alone to determine.").

⁹³ 393 U.S. 483 (1969).

⁹⁴ *Id.* at 489-491 (holding that, absent some alternative means for receiving legal advice, the prohibition on receiving assistance from "jailhouse lawyers" would deprive "those unable themselves, with reasonable adequacy, to prepare their petitions" and would deny "access to the constitutionally and statutorily protected availability of the writ of habeas corpus"); see also *Krause*, *supra* note 86, at 376 ("Not unnaturally, a semi-literate prisoner prefers the [legal] aid of a convicted murderer to no help at all.").

⁹⁵ 418 U.S. 539 (1974).

⁹⁶ *Id.* at 579 ("[W]hile it is true that only in habeas actions may relief be granted which will shorten the term of confinement . . . it is more pertinent that both actions serve to protect basic constitutional rights. The right of access to the courts, upon which *Avery* was premised . . . assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.").

⁹⁷ 430 U.S. 817 (1977).

⁹⁸ *Id.* at 828 ("We hold, therefore, that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.").

much assistance and what types of accommodation must be offered to such petitioners without sacrificing the judiciary's duty to remain a neutral arbiter in a legal system driven by the adversarial process.⁹⁹ This has been particularly true when courts have considered procedural barriers and have struggled to determine how stringently pro se petitioners should be held to procedural rules.¹⁰⁰ This tension is also evinced in the context of criminal and civil litigants electing to proceed pro se at trial; courts have similarly struggled to find the right balance between assisting pro se litigants while still remaining neutral.

C. *Judicial Accommodation of Criminal and Civil Pro Se Litigants*

In 1975, in *Faretta v. California*,¹⁰¹ the Supreme Court held for the first time that there is a constitutional right to represent oneself in a criminal trial,¹⁰² though the Court recognized as well that this is almost certainly a bad decision.¹⁰³ Justice Blackmun, in a dissent joined by Justices Burger and Rehnquist, argued that recognizing such a right would result in a host of problems as untrained pro se defendants attempted to navigate the criminal justice system.¹⁰⁴ This concern was especially marked in terms of the procedural hurdles pro se defendants would have to overcome.¹⁰⁵ *Faretta* and its progeny¹⁰⁶ have engendered

⁹⁹ Our judicial system has long relied on an adversarial system of criminal system in order to ensure just and accurate results. *See, e.g.*, *Herring v. New York*, 422 U.S. 853, 862 (1975) (“The very premise of our adversarial system . . . is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”); *United States v. Bagley*, 473 U.S. 667, 682-83 (1985) (recognizing that prosecutors have a duty to inform defendants of exculpatory evidence in the governments possession, so as to prevent the corruption of the adversarial system).

¹⁰⁰ *See Slack v. McDaniel*, 529 U.S. 473 (2000) (recognizing that the exhaustion requirement in habeas law is not meant to confuse pro se petitioners, who frequently have little legal knowledge).

¹⁰¹ 422 U.S. 806 (1975).

¹⁰² *Id.* at 820. The Court based its ruling on an interpretation of the Sixth Amendment wherein they argued that, since the Amendment refers only to “assistance of counsel,” forcing an attorney on an unwilling defendant would make the attorney the “master” in the case and, consequently, “the right to make a defense [would be] stripped of the personal character upon which the Amendment insists.” *Id.*

¹⁰³ *Id.* at 834. The Court stated, “It is undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled efforts. . . . [Without counsel], the potential advantage of a lawyer’s training and experience can be realized, if at all, only imperfectly.”

¹⁰⁴ *Id.* at 846-47, 852.

¹⁰⁵ *Id.* at 852 (Blackmun, J., dissenting) (“I note briefly the procedural problems that, I suspect, today’s decision will visit upon trial courts in the future. . . . Must the trial court treat the pro se defendant differently than it would professional counsel? . . . Many [of these questions], such as the standards of waiver and treatment of the pro se defendant, will haunt the trial of every defendant who elects to exercise his right to self-representation.”).

¹⁰⁶ *See, e.g.*, *Martinez v. Court of Appeals*, 528 U.S. 152 (2000) (holding that the right to self-

a great deal of judicial and academic criticism suggesting that an untrained pro se defendant undermines the fairness of trials and the adversarial process.¹⁰⁷ A degree of the negative attention has focused on the perception that only mentally ill or deranged defendants assert this right and that they use their trial as some kind of personal forum.¹⁰⁸ However, some commentators have also focused on the tension between aiding the untrained defendants while still requiring that they comply with the procedural rules imposed on represented defendants.¹⁰⁹ Significantly, the Supreme Court recognized these concerns when it held that the right to represent oneself did not extend to a defendant's first appeal.¹¹⁰

representation does not extend to ones first appeal of right); *Godinez v. Moran*, 509 U.S. 389, 402 (rejecting an enhanced competency standard for defendants who wish to represent themselves and holding that the competency required to waive counsel was no greater than that required to waive any other trial right).

¹⁰⁷ See, e.g., Christopher Johnson, *The Law's Hard Choice: Self-Inflicted Injustice or Lawyer Inflicted Indignity*, 93 KY. L.J. 39, 41 (2004-2005) ("The community's interest in the sound functioning of the adversary system on which we rely to guarantee, as far as humanly possible, the accuracy of criminal verdicts favor[s] allocating the decision[s] to the lawyer."); Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 165 (2000) ("[T]his failure of the criminal justice process flows from the profound philosophical tension in our legal and moral tradition between respect for individual autonomy . . . and our commitment to justice, which demands meaningful representation within the adversarial process.").

¹⁰⁸ See, e.g., John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Faretta*, 6 SETON HALL CONST. L.J. 483, 487 (1996) (discussing cases where mentally ill or unstable defendants attempted to represent themselves and concluding that many pro se defendants are "so totally out of touch with reality that they believe they can do it all themselves"); Sabelli & Leyton, *supra* note 107, at 164 ("The right to self representation, recognized in *Faretta v. California*, effectively endows mentally ill defendants with the power to veto the decision to present evidence of their mental illness."); Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 628 (2005) (suggesting that unstable pro se defendants "have turned trials into circuses through the device of self-representation"). But see Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423 (2007) (arguing that defendants typically elect to proceed pro se either because they believe that the public defenders assigned to them do not have the resources and time to represent them effectively or because they wish to present an ideological defense, such as arguing that the Sixteenth Amendment is unconstitutional in a tax evasion case).

¹⁰⁹ In *Faretta* the Court acknowledged this dichotomy when it acknowledged that pro se petitioners have little ability to present an effective defense, while still holding such petitioners to the same requirements as professional lawyers. The Court noted that "[t]he right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Faretta*, 422 U.S. at 834.

¹¹⁰ *Martinez v. Court of Appeals*, 528 U.S. 152, 162 (2000) (choosing, instead of *Faretta*'s autonomy approach, to balance a defendant's interest in representing oneself against the "government's interest in ensuring . . . integrity and efficiency"). Justice Breyer's concurrence explicitly acknowledged that some lower courts have complained about the unfairness engendered by the Court's decision in *Faretta*. *Id.* at 164 (Breyer, J., concurring). Critics have argued that dicta in the Court's opinion in *Martinez* alluded to the problems created by the recognition of the right in *Faretta* and challenged its "core reasoning." Hashimoto, *supra* note 108, at 436.

Much as Justice Blackmun predicted, courts have struggled to determine what procedures should be taken to ensure that a defendant is “knowingly and intelligently”¹¹¹ electing to proceed pro se. More substantively, courts have demonstrated uncertainty as to how much aid a judge should give a pro se defendant in presenting an effective defense. To ensure a valid waiver of the right to counsel, courts have been required to issue some kind of admonishment in a colloquy with the defendant in which he is warned of the disadvantages of proceeding pro se.¹¹² The Supreme Court, however, left few guidelines for courts to consider in determining whether a defendant has been sufficiently warned of the challenges of pro se defense.¹¹³ Lower courts have typically focused on the nature of the judge’s admonishment, rather than how “knowing” the defendant’s waiver is.¹¹⁴

At least one circuit, however, has suggested that the court’s proper focus should be on the defendant’s understanding of the requirements of a pro se defense.¹¹⁵ Knowing that pro se defendants have little experience dealing with court procedure, some circuits issued guidelines for district courts instructing them to ascertain the level of the defendant’s familiarity with procedural and evidentiary requirements.¹¹⁶ A defendant’s level of education and familiarity with the system has been used to justify the trial court’s acceptance of the defendant’s waiver, even after minimal admonishments.¹¹⁷ One court went so far as

¹¹¹ *Faretta*, 422 U.S. at 835 (“[I]n order to represent himself, the accused must ‘knowingly and intelligently’ forgo those relinquished benefits.”).

¹¹² *Id.* (“[The defendant] should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he ‘knows what he is doing and his choice is made with eyes wide open.’” (citation omitted)).

¹¹³ *See Decker*, *supra* note 108, at 510-12 (“[C]ourts have never mandated what constitutes a proper judicial inquiry into the defendant’s understanding of self-representation and its hazards, and thus, trial judges must make an estimated guess when questioning and cautioning the accused regarding his right to counsel.”).

¹¹⁴ *Id.* at 510-18. *Decker* states, “Determining whether a defendant is capable of a knowing and voluntary election to proceed pro se is a matter within the trial court’s discretion. The reviewing court, therefore, will not reverse the trial court’s determination unless there has been an abuse of that discretion.” *Id.* at 511.

¹¹⁵ *See United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) (“The real question . . . is not the quality of the judge’s inquiry; rather, it is whether the defendant knowingly and voluntarily waived his right to counsel.”).

¹¹⁶ *See, e.g., United States v. McDowell*, 814 F.2d 245, 251 (6th Cir. 1987) (instructing district courts to determine the knowingness of a defendant’s waiver by asking, among other questions, whether he has ever studied law, whether he has some familiarity with both the Federal Rules of Evidence and Criminal Procedure and whether he understands that those rules will govern his trial); *United States v. Mitchell*, 788 F.2d 1232, 1236 (7th Cir. 1986) (holding that the district court’s admonishment was not extensive enough and that the court should have inquired about the defendant’s level of education as well as his familiarity and access to the Federal Rules of Evidence and Criminal Procedure), *superseded by statute*, 18 U.S.C.A. § 3742(a)(1) (West 2009), *on other grounds, as recognized in United States v. Guerrero*, 894 F.2d 261 (7th Cir. 1990).

¹¹⁷ *See, e.g., Berkowitz*, 927 F.2d at 1384 (noting that the defendant was a college graduate and that his “trial conduct demonstrated a fairly sophisticated understanding of the judicial process. *Berkowitz* made several evidentiary motions that the district court sustained”); *United States v.*

to state that a defendant's waiver had not been knowing because the judge had failed to instruct him on the technical aspects of his defense.¹¹⁸

Once courts find that the defendant's waiver is voluntary and knowing, they are expected to remain neutral arbiters and should furnish no aid to pro se defendants.¹¹⁹ Nevertheless, courts have recognized the inability of pro se litigants to defend themselves properly and have attempted to mitigate this disparity, particularly as it relates to procedural errors.¹²⁰ For example, the Seventh Circuit has held that a judge must protect a defendant's rights when crafting jury instructions, even when the defendant was able to furnish little or no meaningful assistance.¹²¹

D. *Identical Standards in Habeas and Pro Se Litigants*

As the preceding sections suggest, focusing on a petitioner's pro se status presents a meaningful opportunity for courts to establish a bright line, objective rule for determining when identical standards will suffice to overcome an ambiguous habeas petition. First, adopting such an analysis will lead to fewer contradictory decisions, as district courts will no longer have to conduct the less objective inquiry to determine whether the state court judge should have realized that a federal claim was being presented.¹²² A test based on identical standards will present

Hafen, 726 F.2d 21, 25 (1st Cir. 1984) (noting that the appellant was a college graduate who had gone to law school for two years and that "[a]ppellant's financial dealings bespeak considerable sophistication").

¹¹⁸ State v. Christensen, 698 P.2d 1069, 1072 (Wash. Ct. App. 1985) (stating that the technical aspects included, *inter alia*, the right to object, procedures for preserving error, voir dire, and cross-examination).

¹¹⁹ See, e.g., McKaskle v. Wiggins, 465 U.S. 168, 183-84 (1984) ("A defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure."); United States v. Barfield, 969 F.2d 1554, 1558 (4th Cir. 1992) ("[I]t is well settled that a trial judge is under no heightened obligation to assist a defendant who chose to represent himself or herself in a criminal case.>").

¹²⁰ See, e.g., People v. Hudson, 408 N.E.2d 325, 329 (Ill. App. Ct. 1980) (reversing the conviction where the defendant failed to object to the prosecutor introducing five unsworn, prior consistent statements given to police. Despite the defendant's failure to object, the judge noted that "[t]he prosecution must have known such a tactic to be highly improper, bordering on prosecutorial misconduct and overreaching.>").

¹²¹ United States v. Pavich, 568 F.2d 33, 40 (7th Cir. 1978) ("[T]he trial judge ordinarily cannot expect much assistance [from a pro se defendant] . . . in framing his charges; but, since the ultimate responsibility for a fair charge remains with the judge, he must exercise special care in his charge to protect the defendant's rights.>").

¹²² Such a test is not only less objective than an "identical standards" inquiry but is also more confusing and leads to inconsistent rulings. See, e.g., Verdin v. O'Leary, 972 F.2d 1467, 1478-79 (7th Cir. 1992). In *Verdin* the court compared various cases wherein a court had to decide whether the petitioner's petition used "terms so particular as to call to mind" a specific constitutional right. Several such petitions were granted while others were denied, with no

fewer federalism concerns than determining whether a state court should have noticed an ambiguous federal claim. Although technically an objective test, asking district courts to reevaluate a petitioner's state court pleading to determine whether they should have recognized a federal claim implicates the federalism and comity concerns that the exhaustion doctrine was meant to avoid. Merely asking whether the claim in question is adjudicated identically under both the state and federal constitution will obviate such concerns.¹²³

Furthermore, there is significant precedent for an approach that recognizes the pro se nature of a habeas petition when determining whether identical standards should suffice to fairly present a claim. As we have seen, the Supreme Court has mandated that both habeas and § 1983 pro se pleadings be construed more liberally as there is an understanding that frequently such petitioners do not have the legal acumen to draft cogent petitions and overcome procedural hurdles.¹²⁴ This judicial tension between aiding unprepared and untrained pro se petitioners while remaining neutral arbiters is also implicated in the line of substantive due process decisions which assure prisoners at least minimal access to legal advice and resources.¹²⁵ We can also see this tension in the way in which trial and appellate courts have attempted to accommodate pro se defendants by assisting them when their lack of training and procedural expertise is likely to result in an unfair and illegitimate trial.¹²⁶

A habeas petitioner's pro se status should be relevant to the question of whether identical standards might suffice to fairly present a habeas claim. Focusing on a petitioner's status is consistent with judicial attempts to ensure that pro se petitioners are given a fair and meaningful opportunity to present their claims.¹²⁷ This objective

discerning criteria established to determine why such a conclusion was reached.

¹²³ See *infra* Part III for a discussion of what constitutes "identical standards" and whether state or federal courts should define the standard as such.

¹²⁴ See *Slack v. McDaniel*, 529 U.S. 473 (2000) (recognizing that the exhaustion requirements in habeas law are not meant to confuse pro se petitioners, who frequently have little legal knowledge); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1971).

¹²⁵ See *supra* Part II.B.

¹²⁶ See *supra* Part II.C.

¹²⁷ Note, for example, that many courts that have expressed some concern about allowing ambiguously worded petitions to count as fairly presenting a federal claim have typically done so under the assumption that such petitions are being prepared by professional lawyers, rather than pro se litigants. See, e.g., *Peterson v. Lampert*, 319 F.3d 1153, 1159 (9th Cir. 2003) (en banc) (finding that petitioner had not fairly presented a federal claim as, "[i]n this case, the clear language used in Peterson's counseled petition leads us to conclude he made a deliberate, strategic choice not to present the federal issue in his petition"); *Nadworny v. Fair*, 872 F.2d 1093, 1098 (1st Cir. 1987) (stating that, when considering whether a reference to a phrase typically indicative of a specific federal constitutional guarantee might fairly present a federal claim, "[w]e do not declare that such [an ambiguously written petition] will never suffice, but suggest that it is risky business for counsel to gamble a client's fate on such long odds").

solution has the added benefit of both recognizing the legitimate challenges facing pro se litigants and relieving courts of the requirement to search for a middle ground wherein they can aid the pro se petitioner without sacrificing judicial neutrality. Allowing an “identical standards” exception has the benefit of accounting for a pro se petitioner’s limitations without having courts “bend the rules” to accommodate pro se petitioners. One circuit court of appeals has already found that a petitioner’s pro se status should play a role in determining whether identical standards should suffice to fairly present a claim.¹²⁸

III. IDENTICAL STANDARDS AND PRACTICAL APPLICATION

A. *When Are Identical Standards ‘Identical?’*

As previously discussed, five circuit courts of appeals have agreed that identical standards between the state and federal constitutions in regards to any given claim may suffice to excuse an ambiguously worded state court habeas petition.¹²⁹ Yet the application of this rule has been uneven.¹³⁰ Certain courts have seemed to conflate the question of identical standards with the less objective inquiry as to whether the petitioner used “terms so particular as to call to mind” a constitutional right or terms “well within the mainstream of constitutional litigation.”¹³¹ This confusion is unsurprising considering that the five circuits have agreed that identical standards may provide a valid exception to the fair presentation rule, without ever specifically

¹²⁸ See *Sanders v. Ryder*, 342 F.3d 991, 999 (9th Cir. 2003) (distinguishing this case from *Peterson*, 319 F.3d at 1159, in which the Ninth Circuit rejected an identical standards exception because the petitioner here filed pro se while the petitioner in the earlier case was counseled).

¹²⁹ See, e.g., *Sanders*, 342 F.3d at 999-1001; *Evans v. Court of Common Pleas*, 959 F.2d 1227, 1232 (3d Cir. 1992); *Verdin v. O’Leary*, 972 F.2d 1467, 1474-76 (7th Cir. 1992); *Nadworny*, 872 F.2d 1093, 1098; *Daye v. Attorney Gen.*, 696 F.2d 186, 194 (2nd Cir. 1982).

¹³⁰ The lack of standards for determining when or how an “identical standards” exception will apply is nowhere more evident than in the Ninth Circuit, where two courts have issued contradictory rulings. Compare *Casey v. Moore*, 386 F.3d 896, 914 (9th Cir. 2004) (holding that the court would not consider the petitioner’s claim of identical standards, as the Washington Supreme Court applies a six-part test in determining whether a federal claim will be treated identically under the Washington Constitution and “[the petitioner] has not presented the [six-part] analysis either to the district court or to us”) with *Sanders*, 342 F.3d at 1000 (holding that the standards for adjudicating an ineffective assistance of counsel claim was identical under the Washington and Federal Constitution despite any presentation of the six part constitutional analysis).

¹³¹ *Verdin*, 972 F.2d at 1478; *Nadworny*, 872 F.2d at 1101-02 (finding that the First Circuit’s standards for adjudicating the petitioner’s sufficiency of the evidence claim were identical but still based their ruling on the fact that “the manner of *Nadworny*’s presentation before the [Massachusetts Supreme Judicial Court] yielded federal claims; he met the bare minimum required to create “a constitutional frame of reference”).

outlining what such an exception would look like.¹³² Several circuits have gone about ascertaining whether the state and federal standards were identical in different ways.¹³³ The Supreme Court has accordingly declared that the question remains an open one.¹³⁴

Despite the lack of direction, courts have produced some common guidelines and concerns as they have explored the concept of identical standards. Federalism and comity concerns have been predominant as federal courts have been wary of overstepping their bounds in accepting an identical standards exception.¹³⁵ Therefore, courts and commentators have generally held that the determination of whether identical standards exist between the state and federal Constitution must remain solely with the state's highest court or legislature.¹³⁶ Federal courts must also be wary of state courts modifying their interpretation of the state constitutions so as to obtain a result that might differ from the Supreme Court's interpretation of the federal Constitution.¹³⁷ Even

¹³² Certain considerations as to how the district court will determine whether the standards are identical have not been described with any specificity by several circuits. *See, e.g., Nadworny*, 872 F.2d at 1102 (holding merely that "the test for reviewing sufficiency of the evidence is essentially identical under state law as under the Constitution"); *Daye*, 696 F.2d at 192-93 (holding in a conclusory fashion that the state and federal standards for adjudicating a sufficiency of the evidence are "substantial[ly] equivalent").

¹³³ *Compare Evans*, 959 F.2d 1227, 1232-33 (3d Cir. 1992) (finding identical the state and federal standards for a sufficiency of the evidence claim when counsel for the state admitted as much during oral argument), with *Sanders*, 342 F.3d at 1000 (determining that the standards were identical only after the state supreme court found the state constitution's specific protections to be "coextensive" with the federal constitution).

¹³⁴ *Baldwin v. Reese*, 541 U.S. 27, 33-34 (2004) (sidestepping the petitioner's claims that the standards for adjudicating his claim were identical under the Oregon and Federal Constitution and suggesting the concept needed more consideration from lower courts).

¹³⁵ *See Nadworny*, 872 F.2d at 1101 ("Comity considerations, the Court has counselled, render the instances in which we ransack the facts of a state-law complaint in search of an 'inhere[nt]' federal claim, few indeed." (internal citations omitted)); *State v. Ball*, 471 A.2d 347, 350 (N.H. 1983) ("We live under a unique concept of federalism and divided sovereignty between the nation and fifty states. The New Hampshire Constitution is the fundamental charter of our State. . . . When State constitutional issues have been raised, [the New Hampshire Supreme Court] has a responsibility to make an independent determination of the protection afforded in the New Hampshire Constitution.").

¹³⁶ *See, e.g., Park & Kelton*, *supra* note 42, at 497 (noting that the Ninth Circuit could only hold that the standards between the state and federal Constitution were identical because the Washington Supreme Court had explicitly held them to be identical). The authors note that "[i]f the Ninth Circuit had attempted to declare that Washington's ineffective-counsel standard was identical to its federal counterpart in the first instance, that may have implicated serious federalism concerns because the interpretation of state law is generally the province of the state courts, not the federal courts." *Id.*

¹³⁷ *Id.* at 500 ("[E]ven if a state court treats claims raised under its state constitution identically to the way it treats claims raised under similar provisions of the U.S. Constitution, the claims are still not the same because the source of the claim necessarily defines the authority of the state court to resolve the claim."); *Nadworny*, 872 F.2d at 1100 ("Substantive deviations between superficially similar federal and state claims often exist. State courts are increasingly conscious that state law and the Constitution, though identically or similarly worded, may be differently construed.").

seemingly superficial differences in the treatment of any given claim by state courts under the state constitutions and federal Constitution may suggest that the claim is not “identical.”¹³⁸

The scope of such a potential exception has also been somewhat unclear. For example, in *Nadworny*, the First Circuit agreed that identical standards might suffice to fairly present a state-law driven petition but suggested that such instances would be extremely rare.¹³⁹ The court further suggested that such instances would be mostly restricted to claims concerning “bedrock principles of criminal law,” as such claims were the most likely to alert a judge to a federal claim.¹⁴⁰ Notwithstanding the First Circuit’s belief that the existence of identical standards would be restricted to “bedrock” principles of criminal law, other courts have applied an identical standards analysis for a variety of federal claims.¹⁴¹ Despite the uncertainty as to the scope of a potential identical standards exception, the one constant requirement recognized by courts has been that the initial determination of whether the standards are identical must be left to the state courts and legislatures.¹⁴²

This Note has so far addressed the concept of identical standards in the abstract—examining the various circumstances under which state courts have been willing to accept an identical standards exception and the concerns which have accompanied this debate. This Note has also explained how limiting such an exception solely to pro se litigants

¹³⁸ See *Peterson v. Lampert*, 319 F.3d 1153, 1160-61 (9th Cir. 2003) (en banc) (holding that, because Oregon used the term “inadequate” assistance of counsel rather than “ineffective” assistance of counsel—the latter being the language used by the Supreme Court—the standards for adjudicating such a claim under the respective constitutions were no more than merely similar).

¹³⁹ *Nadworny*, 872 F.2d at 1100 (“[J]urisprudential genetics is an uncertain science. . . . As a rule, identical standards rarely appear; the caselaw in this circuit unmistakably suggests how cabined are the circumstances under which some claims arise.”).

¹⁴⁰ *Id.* at 1100. The First Circuit surveyed several cases in which identical standards were found but noted that the claims dealt with sufficiency of the evidence and objections to an impermissibly suggestive photo spread, claims which “[fell] into well-defined categories of the criminal law.” *Id.* The court noted that “A common strand binds these cases together. Each involved bedrock concepts of criminal law. . . . In other words, the likelihood that the state tribunal had been made aware of the claim’s federal quality was great.” *Id.*

¹⁴¹ See, e.g., *Howell v. Mississippi*, 543 U.S. 440, 444-45 (2005) (per curiam) (analyzing whether the constitutionality of withholding a lesser-included-offense instruction from the jury was identical under the state and federal constitution); *Casey v. Moore*, 386 F.3d 896, 914 (9th Cir. 2004) (questioning whether the petitioner’s confrontation clause claim could be construed identically under the state and federal constitution); *Daye v. Attorney Gen.*, 696 F.2d 186, 192-93 (2d Cir. 1982) (holding that a complaint alleging “ineffectiveness of counsel” fairly presented a federal claim as the standards for determining such claims were “substantial[ly] equivalent”).

¹⁴² See *Park & Kelton*, *supra* note 42, at 497 (noting that the Ninth Circuit could only hold that the standards for determining whether a claim of ineffectiveness of counsel was identical under the state and federal constitution because its holding “was based on the conclusion that Washington’s Supreme Court had explicitly held that its state ineffective-assistance of counsel standard was identical to the federal standard. Thus, it was the state court, not the federal court, declaring that the state and federal ineffectiveness of counsel standards were identical.”).

would be consistent with the Supreme Court's efforts to afford untrained litigants fair access to courts.¹⁴³ Limiting an identical standards exception to pro se litigants would also allay courts' federalism and comity concerns. With such a limitation, state courts could be certain that professional attorneys were not using such an exception to "sandbag" state courts.¹⁴⁴ This Note will demonstrate that such an exception is workable and that, in fact, it applies perfectly to the most common claim raised in habeas petitions: those alleging ineffective assistance of counsel.¹⁴⁵

B. *Ineffective Assistance of Counsel: An Overview*

Before examining how ineffective assistance of counsel (IAC) claims fit into an identical standards exception, one must first review what such a claim consists of and explain its prevalence in collateral habeas proceedings. Claims of ineffective assistance of counsel implicate the Sixth Amendment, which provides that each criminal defendant shall have "the Assistance of Counsel for his defence."¹⁴⁶ The Supreme Court held in *Strickland v. Washington* that, in order to safeguard the adversarial process underpinning our system of justice, the Sixth Amendment guarantees not only the right to have counsel appointed but also the right to receive "effective" assistance of counsel.¹⁴⁷ While the standard elucidated in *Strickland* technically applies only to a defendant's attorney during trial, most courts have extended the Court's analysis to claims of ineffective assistance of appellate counsel.¹⁴⁸

Claims of IAC form the bulk of habeas petitions and are, in fact,

¹⁴³ See *supra* Part II.

¹⁴⁴ See, e.g., *Peterson v. Lampert*, 319 F.3d 1153, 1159 (9th Cir. 2003) (en banc) ("In this case, the clear language used in Peterson's counseled petition leads us to conclude he made a deliberate, strategic choice not to present the federal issue in his petition. . . . But we can at least say that, for purposes of exhaustion, counseled petitions in state court may, and sometimes should, be read differently from pro se petitions.").

¹⁴⁵ See *infra* Part III.C.

¹⁴⁶ See U.S. CONST. amend. VI.

¹⁴⁷ 466 U.S. 668 (1984) (establishing a two-prong analysis for determining whether an attorney's performance has been so deficient as to violate the Sixth Amendment's right to effective assistance of counsel). A court first asks, considering the totality of the circumstances, whether the attorney provided reasonably effective assistance to his client. Second, the court will ask whether there is a reasonable probability that but for the attorney's incompetence, the result of the proceeding would have been different. *Id.*

¹⁴⁸ See, e.g., Lissa Griffin, *The Right to Effective Assistance of Appellate Counsel*, 97 W. VA. L. REV. 1, 20 (1994) (noting that the eleven federal circuit courts of appeals apply the *Strickland* standard to claims on ineffective assistance of appellate counsel). Ms. Griffin notes that the Ninth Circuit explained that such a holding was obvious as "the principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial." *Id.* (quoting *Strickland*, 466 U.S. at 697).

the most common claim asserted in habeas petitions by state prisoners.¹⁴⁹ It is not surprising that IAC claims dominate habeas petitions¹⁵⁰ to such a degree as most courts require that IAC claims be brought only in collateral review.¹⁵¹ The steady deterioration in the quality of public defenders for indigent clients has led to the growing prevalence of IAC claims in habeas petitions.¹⁵² Numerous courts and commentators have suggested that the public defender agencies that provide free representation to impoverished clients are almost universally under-funded and overworked.¹⁵³

Claims of ineffective assistance of counsel have also proven crucial to habeas litigants because such claims allow them to escape the preclusive effect of procedural default rules.¹⁵⁴ Procedurally defaulting a claim presents a far greater obstacle to a habeas petitioner than failing to exhaust state remedies, since a failure to comply with state procedural rules will generally foreclose federal review.¹⁵⁵ In contrast,

¹⁴⁹ See, e.g., HANSON & DALEY, FEDERAL HABEAS CORPUS REVIEW, *supra* note 74, at 6, 14 (stating that ineffective assistance of counsel was, by far, the most common claim asserted by state prisoners in habeas petitions, and that claims of ineffective assistance of counsel were found in 25% of all habeas petitions). The second most common complaint in state habeas petitions alleged some kind of trial court error. Such claims were found in only 15% of habeas petitions. *Id.* at 14.

¹⁵⁰ Federal courts are not constrained by state court determinations concerning the petitioner's IAC claim. Because IAC claims present a mixed question of law and fact, federal courts review such claims *de novo*. See, e.g., Cuyler v. Sullivan, 446 U.S. 335, 342 (1980).

¹⁵¹ See, e.g., Commonwealth v. Grant, 813 A.2d 726, 735-36 (Pa. 2002) ("However, as a general rule, the federal courts defer review of ineffectiveness claims until collateral review. Similarly, an overwhelming majority of states indicate a general reluctance to entertain ineffectiveness claims on direct appeal."); Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1104 (1999) ("[F]ederal practice, as affirmed by the Supreme Court, is that [ineffective assistance of counsel claims] should be raised not on direct appeal, but rather in collateral proceedings.").

¹⁵² See, e.g., McFarland v. Scott, 512 U.S. 1256, 1257 (1994) (Blackmun, J., dissenting from denial of certiorari) ("Two factors contribute to the general unavailability of qualified attorneys to represent capital defendants. The absence of standards governing court-appointed capital-defense counsel means that unqualified lawyers often are appointed, and the absence of funds to compensate lawyers prevents even qualified lawyers from being able to present an adequate defense."); State v. Peart, 621 So.2d 780, 791 (La. 1993) (instructing lower courts to adopt a rebuttable presumption that indigent defendants received ineffective assistance of counsel because public defenders' case overload had become so extreme).

¹⁵³ See, e.g., Hashimoto, *supra* note 108 (suggesting that the majority of criminal defendants choose to represent themselves at trial because they are not convinced that state public defenders have the requisite funding and time to represent them effectively); Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 DUKE U. LAW & CONTEMP. PROBS., 81, 85-86 (1995) (describing public defenders facing "unconscionable caseload[s]" as a result of a lack of funding from the states).

¹⁵⁴ Procedural default in the habeas context occurs when "a state prisoner [has] exhaust[ed] his state remedies without obtaining any decision on the merits of his federal constitutional claim because he has failed to comply with state procedural rules on how the claim must be raised." 17B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, FEDERAL PRACTICE AND PROCEDURE § 4266 (2007).

¹⁵⁵ See 2 HERTZ & LIEBMAN, *supra* note 28, at 1054 ("The procedural default doctrine is

failure to exhaust state remedies will usually result in the petition being dismissed without prejudice so that the litigant may return to state court and begin the habeas process once again.¹⁵⁶ Because the procedural default doctrine can present an absolute bar to relief for habeas petitioners, courts and commentators have struggled to restrict its preclusive effect so as to prevent a miscarriage of justice.¹⁵⁷ This has been particularly true of pro se litigants, as they rarely possess the legal acumen to successfully comply with state court procedures.¹⁵⁸ Alleging ineffective assistance of counsel is one of the few ways in which a habeas petitioner can explain away his inability to comply with state procedural rules and avoid having his claim procedurally defaulted.¹⁵⁹

IAC claims not only allow habeas litigants to avoid the repercussions of failing to follow state-law procedures but they also allow litigants to raise claims in habeas review that were never presented during trial or post-conviction state proceedings.¹⁶⁰ Although attempting to raise new claims on collateral review is generally a difficult proposition and the Supreme Court has been inconsistent in recognizing such claims, the use of an IAC claim offers one avenue wherein they might be accepted.¹⁶¹

potentially a far more decisive obstacle to federal relief. . . . If a default occurs, if the state asserts it as a defense to habeas corpus relief, and if none of the exceptions to the procedural default rule apply, then federal court relief is *foreclosed*.”)

¹⁵⁶ *Id.*

¹⁵⁷ For example, in 1990 the American Bar Association (ABA) recommended that federal courts ignore procedural default rules in capital cases as long as the petitioner could show that his failure to preserve the claim was due to ignorance or if failing to consider the petitioner's claim would result in a miscarriage of justice. See AMERICAN BAR ASSOCIATION TASK FORCE ON DEATH PENALTY HABEAS CORPUS: A REPORT CONTAINING THE AMERICAN BAR ASSOCIATION'S RECOMMENDATIONS CONCERNING DEATH PENALTY HABEAS CORPUS AND RELATED MATERIALS FROM THE AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION'S PROJECT ON DEATH PENALTY HABEAS CORPUS (1990), reprinted in Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 10 (1990).

¹⁵⁸ As of 1994, pro se litigants filed ninety-one percent of all federal habeas claims which were dismissed because of a procedural default. Eighty-two percent of all state cases resulting in a procedural default were filed by a pro se litigant. See VICTOR E. FLANGO, *HABEAS CORPUS IN STATE AND FEDERAL COURTS* 74 (1994).

¹⁵⁹ See 2 HERTZ & LIEBMAN, *supra* note 28, at 1317 (noting that because the Supreme Court has held that the ineffectiveness of counsel must be imputed to the state, such an occurrence is an external factor from the defense and will excuse the defendant from failing to comply with state procedure); John C. Jeffries & William Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 681-82 (noting that a petitioner can avoid procedurally defaulting his claim by arguing that his failure to comply with procedure was the result of a separate constitutional violation—the ineffectiveness of his attorney).

¹⁶⁰ See, e.g., *Kimmelman v. Morrisson*, 477 U.S. 365, 379-80, 391 (1986) (finding that the petitioner's attorney failed to file a motion seeking the suppression of probative bed sheets that were illegally seized from his apartment and holding that the petitioner should be allowed to raise this Fourth Amendment violation in his habeas petition notwithstanding his lawyer's failure to object to its admission).

¹⁶¹ See, e.g., Jeffries & Stuntz, *supra* note 159, at 685-86 (stating that an earlier Supreme

IAC claims form the bulk of habeas claims by state prisoners and for good reason—the problem of ineffective attorneys has become endemic in our system. Claims of ineffective assistance of counsel are of vital importance to habeas petitioners because they allow litigants to escape the preclusive effect of procedural default rules.¹⁶² Additionally, such claims enable petitioners to raise claims that were not presented at trial or in state post-conviction proceedings due to ineffective assistance of counsel.¹⁶³ Despite the importance of IAC claims to habeas petitioners, generally they must be raised collaterally—that is, when litigants are no longer guaranteed the right to counsel.¹⁶⁴ Because the vast majority of habeas petitioners must bring IAC claims without the benefit of professional attorneys to draft their petitions, the chances are great that such claims may not be fairly presented to state courts due to ambiguous wording or citations. Therefore, an examination of whether the standards for adjudicating an IAC claim can be considered “identical” between any given state constitution and the federal Constitution must be undertaken. Using the basic guidelines outlined in Part III.A, we must determine whether a state-law driven petition alleging ineffective assistance of counsel may still “fairly present” a federal claim to state courts.

C. *Ineffective Assistance of Counsel and Identical Standards:
A Practical Application*

Claims of ineffective assistance of counsel fit squarely within the framework of an identical standards exception proposed in this Note. To reiterate the previously outlined criteria, only a state’s legislature or highest court may decide that the standards for adjudicating an IAC claim are identical between the state constitution and federal Constitution.¹⁶⁵ Even under this restrictive standard, forty states and the District of Columbia have explicitly adopted the *Strickland* test outlined by the Supreme Court.¹⁶⁶ In an abundance of caution, this list does not

Court case, *Nix v. Whiteside*, 475 U.S. 157 (1986), seemed to disagree with the exception carved out in *Kimmelman* in that the effect of ineffective assistance of counsel was immaterial unless it could be shown that the petitioner suffered sufficient prejudice or that the petitioner was likely innocent).

¹⁶² See *supra* notes 154-158 and accompanying text.

¹⁶³ See *supra* notes 159-160 and accompanying text.

¹⁶⁴ See *supra* note 151 and accompanying text.

¹⁶⁵ See *supra* Part III.A.

¹⁶⁶ See, e.g., *Silva v. People*, 156 P.3d 1164, 1169 (Colo. 2007) (“The *Strickland* test has been adopted explicitly by this court not only for trial counsel but also for appellate counsel.”); Alabama: *Ex Parte Baldwin*, 456 S.2d 129 (Ala. 1984); Arizona: *State v. Nash*, 694 P.2d 222, 227 (Ariz. 1985); Arkansas: *Johnson v. State*, 157 S.W.3d 151, 158 (Ark. 2004); Colorado: *People v. Valdez*, 789 P.2d 406 (Colo. 1994); Delaware: *Albury v. State*, 551 A.2d 53 (Del.

include states which pay lip service to the *Strickland* test while still differentiating the Sixth Amendment right to effective assistance of counsel from the parallel state constitutional provision.¹⁶⁷ It is therefore clear that claims of ineffective assistance of counsel would fit within the identical standards exception proposed in this Note. Under this analysis, a state court habeas petition alleging ineffective assistance of counsel that cites only to state law or cases construing state constitutional guarantees would nevertheless “fairly present” a federal claim, as the standard for adjudicating such a claim would be identical.

Claims of ineffective assistance of counsel are also especially relevant to the identical standards exception outlined in this Note, as IAC claims usually must be alleged in collateral review.¹⁶⁸ Because of this restriction, the vast majority of habeas petitions alleging IAC must be prepared by untrained and unprepared pro se litigants.¹⁶⁹ It is precisely untrained pro se litigants who are most at risk of failing to fairly present a federal claim because of ambiguous wording or poor

1988); District of Columbia: *White v. United States*, 484 A.2d 553, 558 (D.C. 1984); Florida: *Downs v. State*, 453 So.2d 1102 (Fla. 1984); Georgia: *Perkins v. State*, 392 S.E.2d 872 (Ga. 1992); Idaho: *Mitchell v. State*, 971 P.2d 727, 730 (Idaho 1998); Illinois: *People v. Albanese*, 473 N.E.2d 1246 (Ill. 1984); Indiana: *Lawrence v. State*, 464 N.E.2d 1291, 1294 (Ind. 1984); Iowa: *State v. Losee*, 354 N.W.2d 239, 243 (Iowa 1984); Kansas: *Chamberlain v. State*, 694 P.2d 468 (Kan. 1985); Kentucky: *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985); Louisiana: *State v. Washington*, 491 So.2d 1337, 1339 (La. 1986); Michigan: *People v. Pickens*, 521 N.W.2d 797 (Mich. 1994); Minnesota: *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999); Mississippi: *Stringer v. State*, 454 So.2d 468 (Miss. 1984); Missouri: *Sanders v. State*, 738 S.W.2d 856, 857-58 (Mo. 1987); Montana: *State v. Meyers*, 168 P.3d 645, 648 (Mont. 2007); Nebraska: *State v. Canbaz*, 705 N.W.2d 221 (Neb. 2005); Nevada: *Bejarano v. State*, 801 P.2d 1388, 1389 (Nev. 1984); New Jersey: *State v. Fritz*, 519 A.2d 336 (N.J. 1987); New Mexico: *State v. Hester*, 979 P.2d 729 (N.M. 1999); North Carolina: *State v. Braswell*, 324 S.E.2d 241, 248 (N.C. 1985); North Dakota: *State v. Keener*, 755 N.W. 2d 462, 466-67 (N.D. 2008); Ohio: *State v. Bradley*, 538 N.E.2d 373 (Ohio 1989); Oklahoma: *Hooks v. State*, 902 P.2d 1120 (Okla. Crim. App. 1995); Pennsylvania: *Commonwealth v. Pierce*, 527 A.2d 973, 976 (Pa. 1987); Rhode Island: *Rodriguez v. State*, 941 A.2d 158, 162 (R.I. 2008); South Carolina: *Cherry v. State*, 386 S.E.2d 624 (S.C. 1989); South Dakota: *Luna v. Solem*, 411 N.W.2d 656, 658 (S.D. 1987); Tennessee: *Butler v. State*, 789 S.W.2d 898, 899 (Tenn. 1990); Texas: *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986); Utah: *State v. Templin*, 805 P.2d 182, 185-86 (Utah 1990); Vermont: *In Re Pernicka*, 513 A.2d 616 (Vt. 1986); Virginia: *Va. Dep't of Corr. v. Clark*, 318 S.E.2d 399, 403 (Va. 1984); Washington: *State v. Long*, 705 P.2d 245, 246 (Wash. 1985); West Virginia: *State v. Miller*, 459 S.E.2d 114 (W.Va. 1995); Wisconsin: *State v. Pitsch*, 369 N.W.2d 711 (Wis. 1985); Wyoming: *Munden v. State*, 698 P.2d 621, 623 (Wyo. 1985).

¹⁶⁷ See, e.g., *State v. Flynn*, 855 A.2d 1254, 1267 (N.H. 2004) (“As the Federal Constitution offers the defendant no greater protection than the State Constitution under these circumstances . . . we reach the same result under the Federal Constitution as we do under the State Constitution.” (internal citations omitted)).

¹⁶⁸ See, e.g., *United States v. Cocivera*, 104 F.3d 566, 570 (3d Cir. 1996) (stating that IAC claims should be raised on collateral review as it “affords the opportunity to develop a factual basis for the claim that counsel’s performance did not meet the standard for effective assistance of counsel”).

¹⁶⁹ See *supra* Part II (discussing how over 90% of habeas petitions are prepared by pro se litigants without the benefit of counsel and that pro se litigants frequently lack the legal acumen or training to draft cogent legal petitions).

legal research and, as such, they are the most likely beneficiaries of the identical standards exception outlined above.¹⁷⁰ Therefore, an identical standards exception for pro se litigants would augment habeas jurisprudence, and such an exception would be of great use to the untrained as they attempt to fairly present federal claims in state court.

CONCLUSION

The fair presentation and exhaustion doctrines in habeas law are designed to ensure that state courts are afforded an equal role in adjudicating a petitioner's federal constitutional claims.¹⁷¹ These principles of exhaustion, however, were never meant to be "rigid and inflexible."¹⁷² Such principles have been tested when federal courts have considered habeas petitions that purport to raise a federal claim, but which are ambiguously worded and primarily reference state law. Such petitions have frequently been dismissed for failing to fairly present the federal claim to the applicable state court. In addressing such petitions, some federal courts have suggested that they should be considered to have fairly presented a federal claim so long as the standards for adjudicating such a claim are identical.¹⁷³ This suggestion, however, has often been conjoined with a separate analysis wherein a court asks whether the petition used "terms so particular as to call to mind" a constitutional right or terms "well within the mainstream of constitutional litigation."¹⁷⁴ As explained, the question of whether a litigant has used the proper terms to alert the state court to a federal claim involves a more subjective inquiry, one fraught with a measure of arbitrariness.¹⁷⁵

Despite the confusion amongst the several circuits regarding the applicability and formulation of an identical standards exception, this Note has argued that such an exception can work and that its application

¹⁷⁰ See, e.g., *Brown v. Vasquez*, 952 F.2d 1164, 1167 (9th Cir. 1991) ("[T]he petitioner [applying for habeas relief] is often illiterate and poorly educated and yet must decipher a complex maze of jurisprudence in order to determine which of his constitutional rights, if any, may have been violated. Such a task is 'difficult even for a trained lawyer to master,' and, understandably, is often beyond the abilities of most prisoners." (internal citations omitted)).

¹⁷¹ *Nadworny v. Fair*, 872 F.2d 1093, 1096 (1st Cir. 1989) ("The junction where federal habeas power intersects with state criminal processes is enswathed in a mutuality of respect between sovereigns. It is that principle of comity which underlies the federal courts' unwillingness to adjudicate too hastily matters of fundamental federal significance arising out of state prosecutions.").

¹⁷² See 2 HERTZ & LIEBMAN, *supra* note 28, at 1050 (quoting *Granberry v. Greer*, 481 U.S. 129, 136 (1987)).

¹⁷³ See *supra* Part I.

¹⁷⁴ *Id.*; see also *supra* note 131 and accompanying text.

¹⁷⁵ See, e.g., *supra* note 122 and accompanying text.

to certain claims, such as those alleging ineffective assistance of counsel, will prove of great use to pro se habeas petitioners. By placing solely with state courts and legislatures the power to decide when the standards between the state constitutions and federal Constitution are identical, some of the federalism and comity concerns regarding such an exception will be assuaged. Additionally, limiting such an exception to pro se petitioners will address the comity and federalism concerns shared by state and federal courts alike, as this limitation will prevent unscrupulous attorneys from attempting to evade the fair presentation requirements under AEDPA.¹⁷⁶ Limiting such an exception to pro se petitioners will also give some extra leeway to those who need it most.

This Note argues that claims of ineffective assistance of counsel fit within the framework of an identical standards exception to the fair presentation rule. Further research is required, however, in order to determine whether other claims may fit within the framework established in this Note. A promising line of decisions suggests that sufficiency of the evidence claims may also be suitable for an identical standards exception.¹⁷⁷ Hopefully, such an inquiry will further extend and refine the exception proposed in this Note and will enable practitioners and pro se litigants alike to navigate the procedural requirements of habeas in a fair and equitable manner.

¹⁷⁶ See *supra* note 144 and accompanying text.

¹⁷⁷ See, e.g., *Evans v. Court of Common Pleas*, 959 F.2d 1227 (3d Cir. 1992) (suggesting that the standards for adjudicating a sufficiency of the evidence claim may be identical in both state and federal court); accord *Lowe v. Schomig*, No. 2:04-cv-01034-JCMM-RJJ, 2007 WL 773881 (D. Nev. Mar. 9, 2007); *Strogov v. Attorney Gen.*, 191 F.3d 188 (2d Cir. 1999).