Volume 65 | Issue 4 Article 2

June 1963

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West Virginia Law Review

Vol. 65 June 1963 Number 4

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The year 1963 may be marked as another milestone in the evolution of the federal writ of habeas corpus. Two recent decisions of the United States Supreme Court have resolved with long needed clarity two threshold problems that face a district court when application for the writ comes from a state prisoner: (1) what issues may be raised and (2) what effect is to be given previous state court consideration of these same issues. Though storms of protest resounded a decade ago about abuse of the writ,[1] the habeas corpus scene in more recent years has been relatively quiet. While academicians were seeking to shore up the rational underpinnings, the surface tensions have been salved by muddy doctrines which permitted district courts to slough off petitions for the writ in gross. The district courts, seemingly as anxious on the whole as state attorneys general, to avoid pressing the federal writ to the fullest scope, were anything but aggressive in responding to petitions for the writ. This situation will now change. A new donneybrook is in the offing.

The two decisions are *Faye v. Noia*[2] and *Townsend v. Sain*.[3] In the *Noia* case, petitioner was convicted in New York upon a confession which the state admitted in the federal habeas corpus proceeding had resulted from constitutionally prohibited coercion. Noia had not appealed his conviction as retrial would have exposed him to a possible death sentence. The New York courts offered

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[1] See, 1952 Resolution of the Conference of State Chief Justices, quoted in Brown v. Allen, 344 U.S. 443, 539 n. 13 (1953) (concurring opinion). See also, Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960).

[2] 83 Sup. Ct. 822 (1963).

[3] 83 Sup. Ct. 745 (1963).

no procedure by which Noia could now raise the issue of the manner by which the confession was obtained from him, and Noia turned to the federal courts. In an elaborate opinion, Mr. Justice Brennan rules that Noia now deserved consideration on the merits of his claim in the federal courts. Noia had not, ruled Justice Brennan, forfeited his right to complain of the constitutional infirmity of his conviction by his failure to appeal. Denial of consideration on the merits by the federal court is now grounded upon the "classic definition of waiver enunciated in *Johnston v. Zerbst* . . ." and is to be applied by district courts in the following manner:

> "If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons than can fairly be described as the deliberate bypassing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. . . ."[4]

No longer can claims of federal right be ignored because they were not pressed with procedural perfection in the state proceedings. Conscious waiver and deliberate bypassing are now the only means by which a state prisoner can forfeit the opportunity of having a federal court ultimately pass upon his federal claim. And, what, then of the state court's disposition of the claim? This is where the *Townsend* case comes into play. State court interpretation of the nature of the federal right—the legal standard employed—will not, of course, bind a federal court. But more importantly, *Townsend* deals directly with the question of the state court's determination of factual issues. This is the standard propounded by Chief Justice Warren in *Townsend:*

> "Where the facts are in dispute, the federal court on habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is

[4] 83 Sup. Ct. at 849.

> required unless the state-court trier of fact has after a full hearing reliably found the relevant facts. . . ."[5]

Elaboration upon this generalized standard indicates that an evidentiary hearing and independent determination of the facts by the federal court will be in order unless the record of the state court's determination on such issues reflects studied, careful concern for the claim of federal right.[6]

The combination of *Noia* and *Townsend* means that at worst a prisoner alleging a denial of a federal constitutional right in a state court criminal proceeding will be able to subject the manner of the state court's handling of his claim to scrutiny in a federal court. Moreover, if the state court's disposition of the claim did not meet the exacting standards of "full and fair" hearing as elaborated in *Townsend,* an independent redetermination of that claim is available in the federal court—and is available as a matter of right.

No doubt the district courts—those judges on the "front line" in Justice Brennan's battlefield terminology—will feel in many instances that they have been posted to direct traffic on a quiet residential street and armed with nothing but deadly weapons to prevent the escape of violators. The devastating effect of the collateral relief of habeas corpus, its timeliness at almost any time, affords a portion of the explosive qualities of this tender juncture of state-federal relations. This unsettling aspect of rousing sleeping dogs is aggravated by the tenuous, subjective qualities of the constitutional rights that now qualify for hearing—the constitutional limits of search and seizure, the varagries of "coercion," the over-all elusiveness of the borderlands of "ordered liberty." As the late Mr. Justice Jackson wrote a decade ago:

> "[I]t is prudent to assume that the scope and reach of the Fourteenth Amendment will continue to be unknown and

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[5] 83 Sup. Ct. at 757.

[6] "We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolve in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. . . ." 83 Sup. Ct. at 757. Each of the six circumstances is further elaborated.

> unknowable, that what seems established by one decision is apt to be unsettled by another, and that its interpretation will be more or less swayed by contemporary intellectual fashions and political currents. . . ."[7]

This lack of precision in the federal standards upon which the habeas writs are bottomed, combined with the dubious finality of state court fact determinations crucial to fair application of the standard, unsettled Mr. Justice Jackson. It still bothers members of the Supreme Court, led by Mr. Justice Harlan who dissented in *Noia.*[8]

Jurisdiction to grant habeas corpus to prisoners "held in custody in violation of the constitution" was granted by Congress in 1867.[9] In the near century that has elapsed since that authority was granted, what issues could be decided and what degree of finality attached to state court fact determinations have been far from clear.[10] In the early era, the absence of any significant development of due process limitations on state criminal procedures limited the number of instances in which any claim of constitutional right could be ventured. *Ex parte Royall*[11] held the use of the writ in abeyance further by requiring the state prisoner to present his claim of federal right first to the state courts. The *Frank* and *Moore* cases of 1915-1923 added a new dimension to the federal writ. While previous decisions still approached the writ as testing only jurisdictional issues—though the scope of this examination was broadening somewhat[12]—*Frank* and *Moore* combined to broaden the inquiry. Both of these cases involved claims of denial of due process by virtue of mob dominated trials. In the earlier case, *Frank v. Magnum,*[13] Justice Pitney wrote for the majority

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[7] Brown v. Allen, 344 U.S. 443, 534 (1953) (concurring opinion).

[8] In Sanders v. United States, 83 Sup. Ct. 1068 (1963) dealing with successive applications by federal prisoners for relief under 28 U.S.C. § 2255, the statutory substitute of habeas corpus for federal prisoners, Justice Harlan again dissented, referring to the Noia-Townsend-Sanders cases as a trilogy: "The over-all effect of this trilogy of pronouncements is to relegate to a back seat, as it affects state and federal criminal cases finding their way into federal post-conviction proceedings, the principle that there must be some end to litigation. . . ." *Id.*, at 1081 (dissenting opinion).

[9] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385-86.

[10] See Hart, *Foreword; The Time Chart of the Justices, The Supreme Court, 1958 Term,* 73 HARV. L. REV. 84 (1959).

[11] 117 U.S. 241 (1886).

[12] *Ex parte* Siebold, 100 U.S. 371 (1879) (conviction by court of competent jurisdiction under an act of Congress held unconstitutional set aside in habeas corpus); *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873) (Sentence in excess of that permitted by law held subject to attack on habeas corpus).

[13] 237 U.S. 309 (1915).

and proferred a rather confusing test.[14] Since the claim of mob domination was elaborately reviewed by the Supreme Court of Georgia, he propounded, due process had not been denied. Agreeing as he did that mob domination of trial would in fact deny due process, still the state met minimum constitutional standards of fairness by affording a tribunal insulated from such pressures to consider that allegation. The old jurisdictional limitations of habeas corpus were still present in his reference to the absence of a "jurisdictional flaw" in the state appellate consideration of the claim of federal right. Mr. Justice Holmes dissented, arguing that petitioner deserved an opportunity to have a federal court determine the claim of mob domination on the merits where constitutional standards and questions of fact were so intimately blended.[15] Though Justice Pitney's opinion couched the pivotal questions—the consideration of the constitutional claim by the state tribunal—in terms of jurisdiction, at bottom the case appeared to rest on the *adequacy* of the state's corrective processes more than the jurisdictional competence of the tribunal considering the constitutional claim. Eight years later in *Moore v. Dempsey*[16] this became quite obvious as in this case the federal district court was directed to afford a hearing on the claim of mob domination of trial when the appellate review of the question appeared cursory, at best, though within the "jurisdiction" of the appellate tribunal.

The sweep of the federal habeas writ now began to come to light. The writ was unleashed from its traditional jurisdictional moorings and fastened in some still-to-be-determined manner to the plastic concept of due process. In the ensuing decades, the federal due process limitations on state criminal proceedings began

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[14] "We of course agree that if a trial is in fact dominated by a mob . . . there is, in that court, a departure from due process of law in the proper sense of the term. . . . But the state may supply such corrective process as to it seems proper. . . . [W]e hold that such a determination of the facts as was thus made by the court of last resort of Georgia respecting the alleged interference with the trial . . . cannot, in this collateral inquiry, be treated as a nullity, but must be taken as setting forth the truth of the matter; certainly until some reasonable ground is shown for an interference that the court which rendered it either was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction; . . ." 237 U.S. at 335-36.

[15] "When the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the other, the Federal court must examine the facts. . . ." 237 U.S. 309 at 347 (dissenting opinion).

[16] 261 U.S. 86 (1923).

to develop in earnest.[17] While *Johnston v. Zerbst*[18] and *Waley v. Johnston*[19] carried the issues raised by the federal prisoner's application for the writ into bold new areas, applications by state prisoners became enmeshed in the morass of the question of exhaustion of state remedies.[20] Vexed by an increasing flood of applications and serious doubt as to the proper disposition, the Supreme Court attempted in *Brown v. Allen*[21] to pose a solution to some of these problems. Decided in 1953, the opinion of the court written by Mr. Justice Reed was hopefully propounded to bring some clarity to a now difficult and aggravating area of the law:

> "It is hoped the conclusions reached herein will result in the improvement of the administration of justice and leave the indispensable function of the Great Writ unimpaired in usefulness. . . ."[22]

Unfortunately, *Brown v. Allen* did not achieve that noble aim.[23] Brown had been convicted in North Carolina of the crime of murder and sentenced to death. He had appealed raising issues of a coerced confession and systematic exclusion of Negroes from both the grand jury that indicted him and the petit jury that convicted him. On appeal, his conviction was affirmed, and the Supreme Court refused certiorari. Brown then sought habeas corpus in the federal district court. The Supreme Court ruled that Brown's claims were then ripe for consideration by the federal district court. The scope of the hearing was left largely to the discretion of the district judge in the majority opinion. This point will be mentioned again in a moment. The companion case of *Daniels*, reported with the decision in *Brown*, was much the same, save that Daniels had failed to obtain a state supreme court review of his conviction because he had failed, by one day, to make a timely filing of papers necessary for the appeal. In this instance, the majority ruled that Daniels could not be heard to complain

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[17] See, Allen, *The Supreme Court, Federalism and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213 (1959); Shaeffer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956).

[18] 304 U.S. 458 (1938).

[19] 316 U.S. 101 (1942).

[20] See, Annot., *Exhaustion of State Remedies as Condition of Issuance by Federal Court of Writ of Habeas Corpus for Release of State Prisoners*, 97 L. Ed. 543 (1953).

[21] 344 U.S. 443 (1953).

[22] *Id.* at 452.

[23] See, Reitz, *op. cit. supra* note 1; Note, *Habeas Corpus: Developments Since Brown v. Allen: A Survey and Analysis*, 54 NW. L. REV. 765 (1959).

in the federal district court. The explanation for this determination was grounded apparently on a combination of three considerations: (1) That habeas corpus may not be substituted for appeal; (2) That failure to appeal is "much like" waiver, thought the word waiver was not used; and (3) That failure to appeal was a failure to exhaust state remedies. Thus, a state prisoner who could obtain state court review on the merits of his constitutional claim could have a second look taken by a federal court. The prisoner who failed to do so, would be denied an opportunity for consideration of his claim in a federal court also. In Mr. Justice Reed's view, the exhaustion rule became essentially a rule of waiver. On the other hand where a state prisoner had obtained a state court ruling on the constitutional issue, there was little room left for redetermination of such issues. An application for habeas in a federal court should be given the same effect as a second application for the writ to a federal judge after a previous denial by another judge:

> "Applications to district courts on grounds determined adversely to the applicant by state courts should follow the same principle—a refusal of the writ without more, if the court is satisfied, by the record, that the state process has given fair consideration to the issues and the offered evidence, and has resulted in a satisfactory conclusion. . . ."[24]

Hopefully, the majority view in the *Brown* and *Allen* cases could bring some measure of stability to the federal habeas corpus problem. The state prisoner who failed to pursue in timely fashion his state remedies lost thereby his opportunity for federal court consideration, if his loss of opportunity to raise the issue under state law resulted from the nondiscriminatory application of a reasonable procedural rule. The astute prisoner who pursued his state remedies could obtain consideration in the federal courts, but Mr. Justice Reed's opinion apparently considered this of little moment by equating the nature of this review with the successive application test to a second federal judge. Unfortunately, the vast majority of habeas applications do not arise in the orderly processes, with a fully developed record, as was the case in *Brown* and *Daniels*. With obvious concern for the practical problems facing the district court judges, Mr. Justice Frankfurter added a concurring opinion which sought to establish more concrete guidelines for the consideration of the merits of the applicant's claim.

[24] 344 U.S. at 463.

The two most crucial of the six guidelines proposed dealt with allegations of "basic facts" which conflicted with the conclusions of state courts (e.g., that state officers physically beat the prisoner to compel a confession); and the "interpretation of the legal significance of such facts" (e.g., did an admitted period of questioning during an admitted period of time amount to coercion). Both the majority opinion by Mr. Justice Reed and the concurrence by Mr. Justice Frankfurter left to the discretion of the district judge a more wide ranging inquiry for exceptional cases. Basically, it appears that Mr. Justice Reed was thinking in terms of a federal review limited to the adequacy of the *opportunity* of raising the federal issue while Mr. Justice Frankfurter was concerned more with the adequacy of the actual *consideration* given by the same proceeding.

Needless to say, much doubt still persisted as to just what was the proper approach to be taken by the federal district court upon an application for habeas corpus. *Irvin v. Doud*[25] posed just one such vexing problem: Where a state court reviewed claimed denials of constitutional rights though under state procedural rules the right to press such a claim in the appellate tribunal had been forfeited, could the federal district court then entertain the federal issues; or should it refuse to do so on the *Daniels* rule? *Irvin v. Doud* concluded that a hearing should be held, and the analysis by the court in the case gave rise to two penetrating discussions of the continued confusion. Professor Hart employed the *Irvin* case as an illustration of his thesis that the collective consideration of cases by the Supreme Court was inadequate—the result bringing forth opinions such as *Irvin v. Doud* doing little to resolve difficult principles of federal and constitutional law.[26] Seeking a doctrine which would restrict the issues open on federal habeas corpus by state prisoners, he suggested that the issues open to inquiry by the districts courts should be no wider than that available upon review by the Supreme Court in normal appellate proceedings, *viz.*, a reasonable state procedural rule that denies a prisoner the opportunity to present his claim in the state courts should foreclose reconsideration of that claim in the federal courts.[27] Professor

[25] 359 U.S. 394 (1959).

[26] Hart, *op. cit. supra* note 10.

[27] *Id.* at 119: "To the extent that state procedures would be respected by the Supreme Court on direct review on certiorari in such a case, and held to constitute an adequate and independent ground of state decision precluding reversal, they should be respected also as precluding release on collateral review

Reitz challenged this thesis admirably, arguing in the main that the intentional, conscious waiver doctrine of *Zerbst* should be the appropriate standard for forfeiture of claim of federal right.[28] Professor Reitz's view has carried the day with the pronouncement by Mr. Justice Brennan in the *Noia* case of the intentional bypassing test.

The federal writ has evolved from a creature bearing close resemblance to the traditional English writ which was employed basically to challenge executive confinement into a vehicle for enforcement of federal due process standards in state criminal cases.[29] Several aspects of such application of federal due process standards in state criminal proceedings tend to undermine seriously the finality of state determinations. First, there is the elusive nature of the standards themselves. As Mr. Justice Jackson complained, even the astute state judge may be seriously in doubt as to the nature of the federal rights which may be involved. Second, these rights have been broadening and since last year's conviction is susceptible to challenge under this year's constitutional determination in next year's habeas corpus proceeding, the state determination is contingent not only upon illusive present constitutional doctrine, but also upon unknown future constitutional doctrine as well. And third, state courts in many instances do not make adequate records of their treatment of the constitutional rights that are known. The run-of-the-mill guilty plea to a low grade felony is frequently run through the court with no pretense at studied explanation of rights available to the accused or a carefully made record of knowledgeable waiver of these rights. Such cursory disposition of potential existing constitutional claims can hardly be said to meet the exacting demands of *Townsend's* "full and fair" hearing and *Noia's* "conscious waiver." These unsettling effects will set the stage for a new battle over the federal writ.

This paper was not intended to profer of thoughtful judgment on the merits of the two principal cases here mentioned, nor to

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by a federal district court. This result is dictated by much more than mere convenience in district-court administration. For the Supreme Court to concede to the district courts a wider scope of review of the correctness of state-court judgments as they stand on the record already made than it asserts itself would be not only anomalous and impolite but also irreconciable with the traditional function of the writ of habeas corpus. . . ."

[28] Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961).

[29] See Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657 (1948).

offer a studied solution to the problem that is at hand. Tentatively, it is submitted that both *Noia* and *Townsend* are rational solutions to the problems there presented, but, again tentatively, the impact that these decisions will have upon the finality of state criminal convictions may be indeed unreasonable.

State courts can do much to insulate their judgments for subsequent federal scrutiny by serious efforts to insure that existing constitutional rights are known and intelligently dealt with by criminal defendants, and by making adequate records of the disposition of constitutional claims and fact determinations related to such claims. In short, the hurried, mass production approach to the dispensation of criminal justice can lead only to tentative convictions which are sure to collapse under even lukewarm application of the *Noia-Townsend* principles.[30]

Moreover, it would not seem inappropriate to distinguish the nature of constitutional rights that may be enforced on collateral attack through habeas corpus from those which evolve through direct appeal to the Supreme Court. Constitutional doctrines are not static. To some degree, this element of change ought to be recognized in the collateral relief afforded by habeas corpus. This devastating retroactive effect of habeas has been avoided in large measure to date by the muddled confusion about the exhaustion principle—a basis well demolished in this writer's mind by Professor Reitz.[31] Still there is room to make allowance for the growing, evolving nature of the federal constitutional limitations on state criminal procedures. To apply the conscious waiver test to a right that existed at the time of trial is one thing. To apply the same stringent test to a right which evolved subsequent to the trial is quite another.[32] The federal writ has grown to be quite unique in breaking loose from the traditional jurisdictional moorings that restrained it under common law. This unique scope affords a rational basis for unique limitations also.

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[30] See the discussion by Reitz in *Federal Habeas Corpus: Postconviction Remedy for State Prisoners,* 108 U. PA. L. REV. 461 (1960) at 467-68.

[31] Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding,* 74 HARV. L. REV. 1315 (1961).

[32] *Compare,* Hall v. Warden, 313 F.2d 483 (4th Cir. 1963) (granting relief to a state prisoner convicted prior to the pronouncement of the Mapp v. Ohio rule prohibiting admission of illegally siezed in state criminal proceedings in a post-Mapp habeas corpus proceeding) *with* Gaitian v. United States, 31 U.S.L.WEEK 2532 (10th Cir. April 22, 1963) (denying similar relief to a federal prisoner in respect to evidence illegally siezed by state officers and admitted in a federal prosecution).