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Habeas Corpus - Federal Courts Have Power to Issue the Writ Provided Petitioner Has Exhausted Remedies Available in State Court at Time of Application

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be no retreat from their illogical position on prepaid income. The need now is for Congress to devise a plan which will serve the interests of both the Treasury and the taxpayer. A statute which eliminates the provision for a double deduction in the transitional year from one accounting method to another (which was the undesirable provision that caused the repeal of sections 452 and 462), but which specifically provides for the deferral of accurately computed prepaid income, will satisfy the needs of both the Treasury and the taxpayer. The Treasury would receive its share of income according to the statutory rate, and the taxpayer would be able to apply his accrual system consistently.

Christopher J. Clark

HABEAS CORPUS — FEDERAL COURTS HAVE POWER TO ISSUE THE WRIT PROVIDED PETITIONER HAS EXHAUSTED REMEDIES AVAILABLE IN STATE COURT AT TIME OF APPLICATION.

Fay v. Noia (U.S. 1963)

Defendant Noia and two others were convicted in New York, in 1942, of first degree felony-murder and sentenced to life imprisonment. Their respective convictions rested solely on the basis of confessions which each alleged to have been coerced. Noia failed to appeal and his codefendants' timely appeals were unsuccessful. Eventually however, one codefendant obtained release through federal habeas corpus on the grounds that his confession clearly had been coerced and his conviction procured in violation of the Fourteenth Amendment. The other cofelon, on rehearing before the highest state court, secured a reversal of his conviction on the same grounds. Noia, because of his failure to appeal, could not obtain similar relief in the state courts and therefore filed an application for a writ of habeas corpus in the federal district court. Relief was denied on the ground that his failure to appeal precluded relief under 28 U.S.C. § 2254,[1] which the court interpreted as requiring an applicant to exhaust his state remedies before being entitled to federal habeas corpus relief. The Court of Appeals reversed. The Supreme Court, three justices dissenting,

1. The statute reads:
An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. 28 U.S.C. § 2254 (1958).

affirmed on three grounds *holding* that: (1) Noia's failure to appeal was not a failure to exhaust "the remedies available in the courts of the State" under section 2254 of the Judicial Code, since such exhaustion refers only to those state remedies still available; (2) there was no intelligent and understanding waiver; (3) the doctrine of adequate and independent state grounds should not be extended to limit federal habeas corpus. *Fay v. Noia*, ... U.S. ....., 83 S.Ct. 822 (1963).

The origin of the writ of habeas corpus in the United States[2] can be traced to the Federal Judiciary Act of 1789[3] which provided that the Great Writ could issue from a federal court only where the prisoner was in federal custody. In 1867, Congress first extended federal habeas corpus to state prisoners for any detention in violation of the Constitution, laws or treaties of the United States.[4] The Supreme Court followed a pattern similar to that of Congress. At first the Court held that habeas corpus could properly be granted to state prisoners only where a state court lacked original jurisdiction. However, the landmark decisions of *Moore v. Dempsey*[5] and *Johnson v. Zerbst*[6] allowed the writ when the state tribunal had initial jurisdiction but proceeded to judgment in violation of petitioner's constitutional rights.[7] As the jurisdictional basis of habeas corpus expanded, abuses of the writ increased proportionately.[8] This parallel development found the Court (by self-imposition),[9] and the Legislature (by statute)[10] limiting the availibility of habeas corpus in aid of state prisoners. These limitations are chiefly three: the doctrines of waiver, independent and adequate state ground, and exhaustion of state remedies.

The Court first addressed itself to the problem of an adequate and independent state ground.[11] The purpose of this doctrine, announced in

2. For a history and development of the writ, see generally Hart, *Foreward: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84 (1959); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961); Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956); Note, *Federal Habeas Corpus for State Prisoners*, 55 COLUM. L. REV. 196 (1955).

3. 1 Stat. 73, 81-82 (1789). See *Ex parte* Dorr, 44 U.S. (3 How.) 103 (1845).

4. Act of Feb. 5, 1867, ch. 28, I, 14 Stat. 385.

5. 261 U.S. 86, 43 S.Ct. 265 (1923) (mob domination of trial).

6. 304 U.S. 458, 58 S.Ct. 1019 (1938) (denial of counsel).

7. For other examples of constitutional violations, see Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461 (1936) (extorted confession); Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340 (1935) (deliberate use of perjured testimony). The combined result of these four cases was to flood the federal courts with applications for habeas corpus, the majority of which proved groundless.

8. See statistics and comments in the following sources: Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313 (1948); Speck, *Statistics on Federal Habeas Corpus*, 10 OHIO ST. L.J. 337 (1949) (complete statistics).

9. Unfavorable judicial reaction to this sudden wave of groundless petitions for federal habeas corpus is perhaps best illustrated by the dissenting opinion of Mr. Justice Frankfurter in Sunal v. Large, 332 U.S. 174, 67 S.Ct. 1588 (1947): "I think it is fair to say that the scope of habeas corpus in the federal courts is an untidy area of our law that calls for much more systematic consideration than it has thus far received." *Id.* at 184, 67 S.Ct. at 1594.

10. 28 U.S.C. § 2254 (1958). For the full text of the exhaustion of remedies doctrine, see *supra* note 1.

11. See 28 U.S.C. § 1257 (1958). For an excellent discussion of the doctrine of independent and adequate state ground and its proper relation to habeas corpus, see Reitz, *supra* note 2, at 1338.

the landmark case of *Murdock v. City of Memphis,* was ". . . to prevent a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant."[12] Inherent in this purpose was the refusal and inability of the Court to render advisory opinions.[13] Federal concern for the right of the states to control their own judicial systems and a respect for finality in state criminal proceedings support this policy.

The Supreme Court in *Daniels v. Allen*[14] extended this doctrine from the traditional area of direct appellate review, holding that it barred federal habeas corpus as well. Prior to the *Fay* case Mr. Justice Brennan, commenting on the *Daniels* decision, accurately termed this problem one of policy—whether to leave the federal judge with his full discretionary power, or to bind him by the rule that governs the Supreme Court on direct review of state court judgments.[15] In 1959, the Supreme Court in *Irvin v. Dowd*[16] implied that the adequate state ground rule should not apply to federal habeas corpus as it does to direct review, although the majority based their holding on the fact that the defendant had met the exhaustion requirement. Professor Hart, agreeing with the dissent in *Irvin,* urged that a federal court should be compelled to close its doors to a prisoner whose conviction rests on state law grounds sufficient to bar direct Supreme Court review.[17] Professor Reitz, on the other hand, claims that such an extension is unwarranted.[18]

The *Fay* Court intimated no view as to whether Noia's default can be deemed adequate and independent. However, the majority went on to say that even if it were, Noia could not be denied federal relief on that basis since the adequate state ground rule is a function of the limitations of appellate review only. One reason for this view is based on the different jurisdictional prerequisites for the two remedies. The prerequisite for direct appellate review is a judgment of a state court whereas habeas corpus requires only detention. Another difference is that in habeas corpus, the federal court does not purport to pass upon, but assumes,[19] the correctness of the state courts' interpretations or applications of state procedural law, and orders the prisoner released. In balancing the respective federal and state interests in the principal case, the court noted that the only relevant substantive law is the Fourteenth Amendment. State law appears

12. 87 U.S. (20 Wall.) 590, 635 (1875).
13. Herb v. Pitcairn, 324 U.S. 117, 125-26, 65 S.Ct. 459, 463 (1945).
14. Daniels v. Allen, *reported sub nom.* Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397 (1953).
15. Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism,* 7 UTAH L. REV. 423, 424 (1961).
16. 359 U.S. 394, 79 S.Ct. 825 (1959). Frankfurter, J., dissenting, would have extended to habeas corpus jurisdiction the rule barring direct review by the Supreme Court of the United States of state court decisions resting solely on adequate and independent state grounds.
17. Hart, *supra* note 2, at 118-19. "To the extent that state procedures would be respected by the Supreme Court on direct review . . . they should also be respected as precluding release on collateral review by a federal district court."
18. Reitz, *supra* note 2, at 1348.
19. Brennan, *supra* note 15, at 436.

only in the procedural framework for adjudicating the substantive federal question.[20]

Mr. Justice Clark, dissenting, accused the majority of skirting the real issue—whether Noia's conviction did, in fact, rest upon independent and adequate state grounds. To the dissent, which agreed with the dissenting opinion in *Irvin,* this was the controlling factor.[21]

The doctrine of exhaustion of state remedies, briefly stated, is that a federal court will not interfere in a state criminal prosecution before the state courts had had the opportunity to dispose of the matter themselves.[22] By so doing, a conflict in the delicate area of federal-state relations is avoided. The underlying policy here is one of comity between courts,[23] but this is not an absolute doctrine.[24] The theory of exhaustion was codified by Congress[25] in 1948.

The Supreme Court in *Darr v. Burford*[26] interpreted section 2254 to require exhaustion of state remedies, including application to the United States Supreme Court for certiorari, as a prerequisite to granting federal habeas corpus relief, thereby lending further judicial support to the statutory doctrine. In *Daniels v. Allen*[27] the Supreme Court denied federal habeas corpus to a prisoner, under penalty of death, whose attorney filed appeal papers one day late, on the ground that "a failure to use the state's available remedy, in the absence of some interference or incapacity . . . bars federal habeas corpus."[28] Subsequently in *Irvin v. Dowd*[29] the *Daniels* rationale lost some of its vitality. The Court held that petitioner had exhausted his state remedies since the Indiana Supreme Court had reached the merits of Irvin's federal claim, thus permitting the district court to determine the merits of his constitutional contentions. After the *Irvin* decision the judicial pendulum continued to swing away from the *Daniels* rationale in the direction of *Irvin* and greater flexibility. In short, the stage was set for the instant decision.

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20. Recognizing this as largely a policy decision, the majority resolved it by saying that "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that constitutional rights of personal liberty not be denied without the fullest opportunity for plenary federal judicial review." Fay v. Noia, 83 S.Ct. 822, 841 (1963).

21. "The short of it is that Noia's incarceration rests entirely on an adequate and independent state ground—namely, that he knowingly failed to perfect any appeal from his conviction of murder." *Id.* at 852 (dissenting opinion).

22. *Ex parte* Royall, 117 U.S. 241, 247, 6 S.Ct. 734, 738 (1886).

23. For a discussion of comity and its relation to the problem of exhaustion of remedies, see Darr v. Burford, 339 U.S. 200, 70 S.Ct. 587 (1950), and cases cited therein.

24. *Ex parte* Hawk, 321 U.S. 114, 116, 64 S.Ct. 448, 451 (1944). In this case the Supreme Court held that "ordinarily" exhaustion is required, thereby implying that in extraordinary situations the rule can properly be disregarded.

25. 28 U.S.C. § 2254 (Supp. 1951). For a discussion of the legislative history of the 1948 amendments, see Holtzoff, *Collateral Review of Convictions in Federal Courts,* 25 B.U.L. REV. 26 (1945).

26. 339 U.S. 200, 70 S.Ct. 587 (1950).

27. Daniels v. Allen, *reported sub nom.* Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397 (1953).

28. "To allow habeas corpus in such circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime." *Id.* at 485, 73 S.Ct. 421-22.

29. 359 U.S. 394, 79 S.Ct. 825 (1959).

The *Fay* Court overruled *Darr v. Burford*[30] to the extent that that case barred a state prisoner from federal habeas relief if his petition for review by the Supreme Court were untimely. The Court reasoned that since certiorari is not a matter of right, but discretionary, it is not meant to be included in the list of remedies to be exhausted. Although not expressly done, the Court also seems to have overruled *Daniels sub silentio* by holding that section 2254 refers only to a failure to exhaust state remedies still open to the applicant at the time he files his application for habeas corpus in the federal court. What remnants of the exhaustion doctrine, enunciated in *Darr* and *Daniels,* remain in view of the principal case? Cannot a prisoner allow his state remedies to pass by and later apply for federal habeas corpus claiming that no remedies are available when he applies? Is state habeas corpus one of the remedies to be exhausted as a prerequisite to federal habeas relief since many state prisoners might prefer the impartial treatment of federal courts to the possible prejudice of state courts? Although the *Fay* opinion re-emphasizes the discretion of a federal judge in denying habeas corpus to a prisoner who has failed to exhaust state remedies available at the time of application, the Court leaves unanswered these and a myriad of other practical questions.

The Court lastly addressed itself to the problem of waiver. Courts have long held that a person may waive certain constitutional rights if the waiver is freely made.[31] In this sense the purpose of waiver is to provide a legitimate shortcut in the judicial process. In these cases the choice is made before the time for assertion of the right arrives. More recently however, the Court has applied an after-the-fact type of waiver where it has found that circumstances indicated a waiver by operation of law.[32]

The classic definition of waiver was announced in *Johnson v. Zerbst* as ". . . an intentional relinquishment or abandonment of a known right or privilege."[33] One might ask at the outset if the *Fay* Court added to or subtracted from that definition. A hasty answer would be that it actually did neither, since the Court expressly stated that the *Zerbst* definition furnishes the controlling standard.[34] However, the Court proceeded to expand that definition to fit Noia's singular predicament and offered further guidelines to federal judges who must decide the waiver issue. These guidelines are as follows: (1) there must be a considered choice on the part of the petitioner; (2) a choice made by counsel not participated in by the petitioner does not automatically bar relief; (3) nor does the state court's finding of waiver bar independent determination of the question by the federal courts on habeas corpus, for waiver affecting federal rights is a federal question.[35] Applying these rules to the instant case, the court

30. 339 U.S. 200, 70 S.Ct. 587 (1950).
31. Reitz, *supra* note 2, at 1333.
32. Daniels v. Allen, *reported sub nom.* Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397 (1953).
33. 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938).
34. Fay v. Noia, 83 S.Ct. 822, 849 (1963).
35. For a discussion of the question of a state court's determination of factual issues and the power of a federal court in subsequent habeas corpus proceedings to

found that under the circumstances, Noia's failure to appeal cannot be deemed a merely tactical step, or in any way a deliberate circumvention of state procedures. Underlying the majority's position is the refusal to assume the role of a passive observer while a prisoner such as Noia suffers long imprisonment or even death when his constitutional rights clearly have been violated, owing to a state procedural rule. However, the Court, by placing great emphasis on the fact that Noia feared the death penalty on retrial and that his cofelons had already secured their freedom, seems to be guilty of unconsciously administering a brand of "relative justice." In *Daniels* the prisoner was under penalty of death, but habeas corpus was denied him. Would the Court here have found an "intelligent waiver" present if the maximum penalty facing Noia on retrial were life imprisonment, and he still failed to appeal? The answer is not clear. Perhaps the majority merely created another category of "exceptional circumstances" confined to the facts of the principal case.[36]

It is now necessary to determine whether or not the purposes of the three limitations on habeas corpus would be served by giving effect to these doctrines in Noia's situation. It will be apparent why the *Fay* decision for the most part, defined the limits of the Great Writ more clearly than earlier decisions.

If the purpose of the doctrine of an independent and adequate state ground is to prevent a useless and profitless reversal, it is clear that the purposes would not be implemented by its application to habeas corpus. Congress chose not to incorporate the independent state ground doctrine into the habeas corpus statute. This was avoided because the functions of direct review and habeas corpus are themselves different. Furthermore, nothing in the habeas statute, substantially unchanged since 1867, suggests that it was intended to express any direct relationship between federal and state proceedings. Also, as concepts of due process change, it is fitting that such changes should be reflected in the collateral relief afforded by habeas corpus. The alternative would be to allow clear violations of constitutional rights such as Noia's to go unredressed because the traditional limitations on direct review demand this result.

Since the chief purpose of exhaustion is to allow state courts to pursue their criminal proceedings to conclusion, it is obvious that in Noia's case this purpose will not be accomplished. The State of New York offered no further post-conviction remedies to Noia and intended to proceed no further. This would result in Noia's incarceration notwithstanding an admittedly clear constitutional violation.

As for waiver, *Fay* eliminates certain fictions by holding waiver effective only when exercised by a defendant in accordance with the *Zerbst* definition. This is the sounder view, since in no case should waiver

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afford petitioner a full hearing on his constitutional claims, see Townsend v. Sain, 83 S.Ct. 745 (1963).

36. Compare United States *ex rel.* Smith v. Jackson, 234 F.2d 742 (2d Cir. 1956); Pennsylvania *ex rel.* Woods v. Cavell, 157 F. Supp. 272 (W.D. Pa. 1957).