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SUPREME COURT DECISIONS

Habeas Corpus—A Dilemma Revisited

by John Oshinsky

Despite the trend toward limitation of habeas corpus review,[1] the Supreme Court, in *Rose v. Mitchell*, 99 S. Ct. 2993 (1979), widens the scope of review by holding that federal habeas corpus review may be used to redetermine constitutional questions adjudicated in state court. *Rose* began in November, 1972 in Tipton County, Tennessee, where a grand jury indicted black defendants for murder. Before trial, defendants filed a plea in abatement seeking dismissal of the indictment. They contended that blacks had been systematically excluded from serving as grand jury foremen. Three former Tipton County grand jury foremen testified at a March 18, 1973 evidentiary hearing. At the conclusion of the inquiry, the judge denied the plea in abatement. The Tennessee Court of Criminal Appeals affirmed. The Supreme Court of Tennessee denied certiorari and the defendants then filed a habeas corpus petition in the United States Federal District Court.

Dismissing the petition, the Federal District Court found that the State had effectively refuted the defendants' prima facie case of discrimination in the grand jury foreman selection process. The United States Court of Appeals for the Sixth Circuit reversed, holding that the State had failed to refute the respondants' claim of discrimination in the selection process.

The United States Supreme Court granted certiorari. On July 2, 1979, in a split decision, the court held that defendants had failed to make a prima facie case of discrimination violative of the Fourteenth Amendment's Equal Protection Clause in selection of a grand jury foreman.

The Court affirmatively answered the question whether claims of discrimination in the selection of the grand jury foreman are cognizable on an application for a writ of habeas corpus by a defendant judged guilty at proceedings otherwise free of constitutional error. The Court recognized that a negative response would be viewed as a lack of fairness contrary to our system's principles of justice. The Court reached this conclusion despite its awareness of the costs associated with hearing a case.[2]

Justice Blackmun pointed out that the Supreme Court, in a continuous line of cases extending back to *Strauder v. West Virginia*, 100 U.S. 303 (1880), has held that "a criminal conviction of a Negro cannot stand under the Equal Protection Clause of the Fourteenth Amendment if it is based on an indictment of a grand jury from which Negroes were excluded by reason of their race . . . Where sufficient proof of discrimination in violation of the Fourteenth Amendment has been made out and not rebutted, this Court uniformly has required that the conviction be set aside and the indictment returned by the unconstitutionally constituted grand jury be quashed." *Rose, supra* at 2997-98. The Court in *Rose*, however, uses *Strauder* to justify extending the writ of habeas corpus even though *Strauder* involved a writ of error. 100 U.S. at 304. A writ of error is in no way analagous to the writ of habeas corpus. Habeas corpus seeks release of a prisoner while a writ of error seeks to set aside a judgment on an alleged error of law. *Neal v. Delaware*, 103 U.S. 370 (1881).

Justice Blackmun noted that prior to *Rose*, only former Supreme Court Justice Jackson had felt convictions should not be set aside because of discrimination in the grand jury selection process. In his dissenting opinion in *Cassell v. Texas*, 339 U.S. 282, 293 (1950), Justice Jackson stated that discrimination in the grand jury selection process is not connected with guilt or innocence because the grand jury does not make a final determination of guilt or innocence. While acknowledging the harm of discrimination in the selection of grand juries, Justice Jackson concluded that "however great the wrong toward qualified Negroes of the community," it was harmless to the defendant. *Id.* at 304 (Jackson, J., dissenting).

Although the issue as to the exclusion of blacks from grand and petit juries was raised as far back as 1880, the question of whether to review convictions on a writ of habeas corpus because of these exclusions has not yet been clearly resolved. As Justice Walter V. Schaefer of the Illinois Supreme Court has pointed out, "The problem has remained an important and, to a degree, an unresolved one." Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 3 (1956) [hereinafter Schaefer].

[1] In *Wainwright v. Sykes*, 433 U.S. 72 (1977), the adequate state ground doctrine, that state courts that have decided not to consider claims for a nonconstitutional reason, was held to be nonreviewable on federal habeas corpus. This amounted to a rejection of *Fay v. Noia*, 372 U.S. 391 (1973) with regard to this point. In *Swain v. Pressley*, 430 U.S. 372 (1977), the Court, in a *per curium* decision, upheld the power of Congress to remove habeas jurisdiction from federal courts, replacing it with an adequate remedy to be used in the local District of Columbia courts. Both of these cases stem from *Stone v. Powell*, 428 U.S. 405 (1979), which held first, that a forfeiture standard renews the adequate state ground doctrine, and second, to prevent habeas relief when the state has provided an adequate post-conviction procedure.

[2] These costs include time, money and, most important, its effect upon the federal structure. The grant of habeas corpus by federal courts saps the justices' vitality and strains the already overtaxed budget, while accomplishing nothing. Pollack, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50 (1956).

In *In re Wood,* 140 U.S. 278 (1891), Wood, a black man, was convicted of murder by a New York court. Following his conviction, Wood argued that the grand and petit juries before which he appeared excluded blacks from jury service. Affirming dismissal of the writ of habeas corpus. Justice Harlan stated that whether the grand or petit jury was discriminatorily selected "was a question which the trial court was entirely competent to decide and its determination could not be reviewed . . . upon a writ of habeas corpus, without making that writ serve the purpose of writ of error." *Id.* at 286.

The position of Justices Jackson and Harlan received support from other members of the Court in *Rose.* Justices Stewart, Rehnquist and Powell agreed that intentional discrimination in the selection of the grand jury foreman was not reason enough to cast aside an otherwise error-free conviction. Additionally, Justice Powell stated that issuance of the writ of habeas corpus in *Rose* was unsupported by the writ's history and purpose. The writ was intended to be limited to those instances in which the trial court lacked jurisdiction to render a competent judgment.

Justice Powell agreed with the petitioner's view that habeas corpus review has been extended too far, becoming, in fact, a continuation of the state appellate process. Thus, in *Rose,* the alleged discrimination in selecting a grand jury foreman did not create sufficient grounds for granting habeas corpus review because the subsequent trial was free from reversible constitutional error and there had been a complete and impartial litigation in state court. As Justice Powell mentioned, *Rose* cast aside the traditional purpose of the writ by allowing federal district courts to review state decisions "in criminal cases as the rule, rather than the exception that it should be." [3] *99 S.Ct. at 3013* (Powell, J., concurring).

As it had frequently done since *Brown v. Allen,* 344 U.S. 443 (1953), the Supreme Court took for granted that the function of federal habeas corpus review was to redetermine the merits of federal issues previously litigated in state court. *Brown* allowed all constitutional issues to be reviewed under a writ of habeas corpus without considering the competency of the state court's adjudication of the claim. Yet this writ should be used only where the state court did not provide full and conscientious adjudication of federal claims.[4] The administration of justice would be better served by returning to the pre-*Brown* federal habeas review standard. This attitude was largely reflected in the Court's opinions in *In re Wood,* and in *Frank v. Magnum,* 237 U.S. 309 (1951), which served to reiterate *Wood.*

There are significant problems arising from the expansion of federal habeas jurisdiction. While existence of habeas corpus serves as an ever-present reminder that federal law is superior to state law, its expanded use has intensified the rift between state and federal courts.[5]

The concept of federalism necessitates that conflicts resulting from federal interference with the states' performance in adjudicating claims be outside the federal domain in the absence of need, where the urgency for habeas relief is as uncertain as it was in *Rose.* According to one commentator, the desire for finality and settlement, legitimate goals of the criminal process, are undermined by the continuous reexamination of questions as a way of insuring that no errors were committed.[6] It is generally acknowledged that it is inappropriate for a lone federal district court judge to reexamine the correctness of a state court conviction, especially where the conviction has been affirmed by the state's highest court and certiorari has been denied by the United States Supreme Court. Schaefer, *supra* at 17-18. Consequently, it has been suggested that the use of federal habeas corpus has retarded the administration of state criminal sanctions. *Id.* at 17.

While *Brown v. Allen, supra,* involved problems relating to federalism, it would be inappropriate to view these problems as simply a source of friction between state and federal judges when state judges' decisions are reversed. Habeas review taxes the resources of the state judiciary, the State's Attorney's Office as well as the Public Defender's Office.[7] The process of justice falters because of the span of time between conviction in the trial court and final habeas corpus relief, all attributable to the indiscriminate review of cases taken up on habeas. While we should not be restricted by the fact that these resources are not available in unlimited supply, we should be sensitive to this.

The *Brown* decision opened the gates to a myriad of habeas petitions from state prisoners. Justice Jackson spells out some of the resulting problems judges face

[3] Justice Powell carefully pointed out that in such cases as *Pierre v. Louisiana,* 306 U.S. 354 (1939). *Hill v. Texas,* 316 U.S. 400 (1942), and *Alexander v. Louisiana,* 405 U.S. 625 (1972), "the question of discrimination in selection of the grand jury was presented on direct appeal, and there was no occasion to consider the proprity of federal collateral attack." 99 S. Ct. at 3013 (Powell, J., concurring).

[4] Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit, sees no reason to single out claims of a constitutional nature as grounds for collateral attack where these questions have been completely addressed under equitable state proceedings. According to Judge Friendly, it makes "good sense" to deny prisoners the use of collateral attack following proper adjudication of claims in state court, for it would deter frivolous petitions. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgements,* 38 U. CHI. L. REV. 142, 156-157 (1970) [Hereinafter Friendly].

[5] Wright and Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact Finding Responsibility,* 75 YALE L.J. 895, 899 (1966).

[6] Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 HARV. L. REV. 441, 505 (1963) [Hereafter Bator].

[7] Friendly, *supra* at 148.

when deluged by these petitions. The "frivolous and repetitious petitions . . . prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." *334 U.S. at 536-537.*

One commentator is careful to point out that were the *Brown* decision overturned, this would not guarantee that petitions lacking merit would disappear.[8] But given the physical limitations associated with our legal system, it makes little economic sense and lacks reasoned institutional justification to redetermine the merits of a particular case. There is, or should be, according to the commentator, a presumption that if a job can be performed once it need not be done twice.[9]

Another side of this problem surfaces as a result of insufficient post-conviction remedies offered by many states. Another commentator maintains that in such instances, collateral attack is the only avenue available to preserve a state prisoner's federal constitutional rights.[10] If no collateral attack were made available, then there would be no sufficient remedy should facts be unearthed after conviction. Both *Alcorta v. Texas*, 355 U.S. 28 (1957), where the prosecution concealed evidence favorable to the defendant, and *Mooney v. Holohan*, 294 U.S. 103 (1935), where perjured testimony was introduced, illustrate the commentator's assertion. He recognizes the need for habeas relief when courts are derelict in their duty to insure a fair hearing.[11] However, he fails to fathom the superfluousness connected with the extension of the writ after state trial courts have thoroughly and fairly adjudicated constitutional questions. *Brown.*

[8] Bator, *supra* at 507.
[9] *Id.* at 450.
[10] Reitz, *Federal Habeas Corpus: Post Conviction Remedy for State Prisoners,* 108 U. PA. L. REV. 461, 464 (1960).
[11] *Id.* at 524.
[12] Of course, not all persons view relitigation as superfluous in nature. Some suggest that redundancy, with respect to a relitigation of error alleged by the defendant, increases the probability that constitutional rights will be protected. Robert M. Cover and T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court,* 86 YALE L. J. 1035 at 1045, (1978). Aleinikoff's and Cover's views are acknowledged by Professor Pye, who feels that the expanded scope of habeas review, has led to the "implementation of constitution rights which have existed only in theory in the past." *Pye, The Warren Court and Criminal Procedure,* 67 MICH. L. REV. 249, 258 (1968).

This article does not presume to suggest that trial courts should have the final say in all cases, nor does it recommend the reduction of federal guarantees for state prisoners, which would surely make the administration of justice on the state level less consistent and more prone to mistake. It simply advocates the reduction of habeas appeal of claims fully adjudicated in state courts. The burden should be on the state courts to insure the safeguards that had previously been guaranteed through habeas corpus relief. This will serve the best interests of justice by permitting the majority of state decisions, which are conscientiously and constitutionally made, to stand. Only where states do not provide full and conscientious adjudication of federal claims and constitutional questions is it in the interest of justice to grant habeas corpus review.