4-24-1963

Brief of Respondent

William B. Saxbe
Attorney General

William C. Baird
Assist. Attorney General

John Cianflona
Assist. Attorney General

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SAMUEL H. SHEPPARD,)
Petitioner,) NO. 6640
vs.)
) BRIEF OF RESPONDENT
E. L. MAXWELL, Warden,)
Respondent.)

STATEMENT OF FACTS

Samuel H. Sheppard, on April 11th, 1963, was granted leave to file his Petition for a Writ of Habeas Corpus in forma pauperis.

At the time of hearing of petitioner's application for leave to file in forma pauperis, counsel for the petitioner propounded that the discretion which formerly reposed in Federal District Courts as to whether a writ of habeas corpus should or should not be granted no longer exists and that the writ must issue. Cases cited in support of this position were decided by the Supreme Court of the United States on March 18, 1963: Townsend v. Sain, No. 8, October Term, 1962, and Fay v. Noia, No. 84, October Term, 1962.

This Court has directed that briefs be submitted dealing only with the question of whether it may exercise its discretion with respect to whether a writ of habeas corpus shall or shall not be issued.

LAW AND ARGUMENT

Title 28, Section 2243, U.S.C.A. is completely dispositive of the question presented. "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order

(5)

directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto." (Underlining supplied).

The provision that if it appears from the petition itself that the relator is not entitled to his discharge, the court should deny his petition without issuing the writ, merely declares the practice which existed at the common law in this respect. Ex parte Hearney, Dist. Col., 1882, 7 Wheat., 38, 5 L.ed., 391.

Under Title 28, Section 2243, U.S.C.A., there are more than three pages of citations reiterating that it is within the sound judicial discretion of the court to determine whether the writ shall issue and a plenary hearing be had. (Notes 76 and 77 at page 150).

This brings us to the question of whether the cases cited by counsel for the petitioner have changed the law from what it has been for centuries.

The case of Fay v. Noia holds:

> "(1) Federal courts have power under the federal habeas statute to grant relief despite the applicant's failure to have pursued a state remedy not available to him at the time he applies; the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute. (2) Noia's failure to appeal was not a failure to exhaust 'the remedies available in the courts of the State' as required by Section 2254; that requirement 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. (3) Noia's failure to appeal cannot under the circumstances be deemed an intelligent and understanding waiver of his right to appeal such as to justify the withholding of federal habeas corpus relief."
> (Underlining indicates italics in quotation.)

We advance that this decision has no application to the question at hand.

In Townsend v. Sain it is stated:

> "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 resolved 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."

This does not in any way deny to the District Courts their long standing power to exercise sound judicial discretion; it merely elaborates certain rules which will be applied to the exercise of such discretion. There is no question but that the court meant it to be nothing more as is evidenced by the comment just preceding the above holding, "The federal district judges are more intimately familiar with state criminal justice, and with the trial of fact, than are we, and to their sound discretion must be left in very large part the administration of federal habeas corpus."

Respectfully submitted,

WILLIAM B. SAXBE
Attorney General

WILLIAM C. BAIRD
Assistant Attorney General

JOHN CIANFLONA
Assistant Attorney General

Attorneys for Respondent.

CERTIFICATE OF SERVICE

Copies of the foregoing Brief of Respondent were mailed this 24 day of April, 1963, to F. Lee Bailey, 40 Court St., Boston, Mass., Russell A. Sherman, Lorain County Bank Bldg., Elyria, Ohio, and Alexander H. Martin, 33 Auburn St., Columbus, Ohio, Attorneys for petitioner herein.

WILLIAM C. BAIRD
Assistant Attorney General