2-1-1964

Constitutional Law -- Criminal Law -- Habeas Corpus -- The 1963 Trilogy

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NOTES AND COMMENTS

Constitutional Law—Criminal Law—Habeas Corpus—
The 1963 Trilogy

A merely representative list, not intended to be exhaustive, of the allegations of denial of due process in violation of the fourteenth amendment which the Supreme Court has deemed cognizable on habeas would include jury prejudice,1 use of coerced confessions,2 the knowing introduction of perjured testimony by the prosecution,3 mob domination of the trial,4 discrimination in jury selection5 and denial of counsel.6 And the currently expanding concepts of what constitutes due process of law will in the future present an even greater variety of situations in which habeas corpus will lie to test the constitutionality of state criminal proceedings.7

In 1963 the Supreme Court of the United States handed down three decisions which will greatly increase the importance of the writ of habeas corpus as a means of protecting the constitutional rights of those convicted of crimes. The first of these, Fay v. Noia,8 deals with the availability of federal habeas corpus relief to a person who has been convicted of a crime in a state court. Townsend v. Sain9 attempts to redefine the situations in which a person who has been convicted of a crime in a state court has a right to an evidentiary hearing in the federal courts upon submitting an application for habeas corpus. Finally, Sanders v. United States10 deals with the right of a person who has been convicted of a crime in the federal

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7 For example, the Court has recently overruled Betts v. Brady, 316 U.S. 455 (1942), in Gideon v. Wainright, 372 U.S. 335 (1963), holding that due process demands that indigent state criminal defendants be provided with counsel. And in an earlier case, Mapp v. Ohio, 367 U.S. 643 (1961), it was held that due process is violated by the use of illegally seized evidence in state criminal prosecutions.
courts to a second or successive hearing when he claims that he has been deprived of his constitutional rights.

I. Fay v. Noia*

Noia, Caminito and Bonino were taken into custody for questioning concerning a murder committed during an attempted robbery. They were held incommunicado, questioned by officers working in relays, falsely identified by three detectives posing as witnesses to the crime, and given unheated, unfurnished jail cells. Later, when Noia and Caminito were placed in the same cell, Noia suggested that they confess to escape further harassment, in the belief that the confessions would later be excluded as evidence due to coercion. The confessions were signed, and only then was the trio taken before a magistrate for arraignment.11

The trial court judge permitted the jury to pass on the question of coercion, and the issue was decided adversely to the defendants. Caminito and Bonino took direct appeals, but were unsuccessful in both the Appellate Division of the New York Supreme Court12 and the New York Court of Appeals.13 Caminito twice filed motions to reargue in the New York Court of Appeals without success.14 He applied to the United States Supreme Court for certiorari following the second denial, which was likewise unsuccessful.15 Bonino’s motion to reargue was also denied,16 as was his application for a writ of certiorari.17

Caminito then sought habeas corpus from the federal district court, which refused to issue the writ.18 The Second Circuit Court of Appeals, however, reversed, sustaining the claim that the confession had been secured in violation of the fourteenth amendment, and directed the State to discharge him from custody or give him a new

* This portion of the Note was contributed by Robert G. Baynes.
11 A complete statement of the circumstances surrounding the arrest and interrogation of the three men may be found in United States ex rel. Caminito v. Murphy, 222 F.2d 698 (2d Cir. 1955).
After Caminito's release, Bonino moved to reargue his appeal in the New York Court of Appeals, and his conviction was also set aside and a new trial ordered on the ground that it was unconstitutionally procured. In all probability, neither Caminito nor Bonino will ever be retried since the State presented no evidence other than the confessions, and there is little possibility of obtaining new evidence concerning a crime committed in 1942.

Following the release of his co-defendants, Noia, who had not appealed his original conviction, made an application to the sentencing court in the nature of coram nobis, and his conviction was set aside; however, the Appellate Division reversed and the New York Court of Appeals affirmed. A writ of certiorari was denied.

Noia's next step was to apply to the federal district court for a writ of habeas corpus. Relief was denied on the ground that he had failed to comply with 28 U.S.C. section 2254 requiring exhaustion of state remedies as a condition precedent to the granting of habeas corpus by the federal courts to a state prisoner. The Court of Appeals for the Second Circuit reversed, questioning whether the statute barred habeas corpus relief when the petitioner had failed to

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21 A writ of error coram nobis is a remedy to bring a case before the sentencing court for review or modification due to some error of law or fact affecting the validity of the proceedings which was not brought into issue at the trial. It challenges the validity of petitioner's conviction for matters extraneous to the record. In re Taylor, 230 N.C. 566, 53 S.E.2d 857 (1949); see generally, 24 C.J.S. Criminal Law § 1606 (1961).
27 28 U.S.C. § 2254 (1948). This statute provides: "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 United States ex rel. Noia v. Fay, 300 F.2d 345 (2d Cir. 1962).
exhaust state remedies no longer available to him at the time of his petition, and holding the statute inapplicable due to exceptional circumstances.\textsuperscript{29} The court of appeals also rejected the contention that New York’s refusal to grant \textit{coram nobis} after the time for appeal had lapsed was an adequate and independent ground of decision due again to the exceptional circumstances. Finally, that court held that no waiver of the constitutional claim could be inferred from Noia’s failure to appeal.

The Supreme Court granted certiorari\textsuperscript{30} and held:

(1) Federal courts have \textit{power} under the federal habeas corpus 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 § 2254; that requirement refers only to a failure to exhaust state remedies still open to the applicant at the time he files his application to 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.\textsuperscript{31}

These three doctrinal hurdles to federal jurisdiction—the rule requiring exhaustion of state remedies, the doctrine of waiver and the doctrine of independent and adequate state grounds for decision—will be treated separately.

\textit{A. The Exhaustion Requirement}

The statute\textsuperscript{32} requiring the exhaustion of state remedies as a condition precedent to an application for federal habeas corpus relief

\textsuperscript{29} The exceptional circumstances were “the undisputed violation of a significant constitutional right, the knowledge of this violation brought home to the federal court at the incipiency of the habeas corpus proceeding so forcibly that the state made no effort to contradict it, and the freedom the relator’s codefendants now have by virtue of their vindications of the identical constitutional right....” United States \textit{ex rel. Noia v. Fay}, 300 F.2d 345, 362 (2d Cir. 1962).


\textsuperscript{32} See note 27 \textit{supra}. 
on behalf of a state prisoner is a codification of earlier case law.\textsuperscript{83} Those decisions establish that the rule is not inflexible\textsuperscript{84} and is one which should yield always to exceptional circumstances.\textsuperscript{85} In addition, the statute explicitly excuses a failure to exhaust when "there is either an absence of available State corrective process or the existence of circumstances rendering the process ineffective to protect the rights of the prisoner."\textsuperscript{36}

The exhaustion requirement is based on two policy considerations: first, it is dictated by the exigencies of federalism (the doctrine whereby the federal courts defer action on state cases until the state courts have acted);\textsuperscript{37} second, it is necessary to prevent an influx of habeas petitions into the federal courts.\textsuperscript{38}

Necessarily, the exhaustion requirement presupposes the existence of some adequate state post-conviction remedy to test the constitutionality of the conviction,\textsuperscript{39} whether it be by way of appeal, habeas corpus, or a writ of error coram nobis. If such a remedy is unavailable, the federal district court may entertain an application for a writ of habeas corpus without further proceedings.\textsuperscript{40} There is also federal jurisdiction when the remedy, otherwise valid, is shown to be unavailable or seriously inadequate in a particular case.\textsuperscript{40a} Finally, the rule requiring the exhaustion of state remedies is not enforced when post-conviction remedies are discriminatorily denied the applicant in violation of the equal protection clause.\textsuperscript{41}

A problem which arises immediately in the construction of this statute\textsuperscript{42} is whether the exhaustion requirement applies only to those remedies still available to petitioner at the time of his application for habeas, or whether the remedies must have been exhausted during the time when they were available according to state procedure. In other words, is there a doctrine of forfeiture built into the exhaustion rule?

\begin{footnotesize}
\begin{enumerate}
\item Ex parte Hawk, 321 U.S. 114 (1944).
\item Wade v. Mayo, 334 U.S. 672 (1948).
\item 28 U.S.C. § 2254 (1948).
\item Wade v. Mayo, 334 U.S. 672 (1948).
\item Jennings v. Illinois, 342 U.S. 104 (1951).
\item Moore v. Dempsey, 261 U.S. 86 (1923).
\item Ibid.
\item See note 27 supra.
\end{enumerate}
\end{footnotesize}
With a reminder that the statute was a codification of then existing case law, the Court in Fay addressed itself to the precedents bearing on this point. In Ex parte Spencer, the Court gave a clear indication that federal relief would not be available to an applicant who had failed to exhaust the state remedies while they were still available. The same position was taken in Frank v. Mangum, but this case may have been overruled by Moore v. Dempsey. And in Mooney v. Holohan, the Court phrased the exhaustion requirement in terms of the remedies which "may still remain open." The majority in Fay, refusing to construe the statute as indicating a congressional intent to change the law in this regard, squarely held that the requirement is limited in application to "failure to exhaust state remedies still open to the applicant at the time he files his application in federal court.

What of the situation where in a given state there is more than one procedural device by which the defendant can vindicate the claimed violation of his constitutional rights? Must he avail himself of all remedies before he will be deemed to have complied with the statutory admonition to exhaust state remedies, or is it sufficient that one alternative has been pursued to a conclusion?

In Ex parte Hawk, it was suggested that federal habeas corpus would be available to a state prisoner only after all state remedies had been exhausted on the theory that so long as there remained an untried remedy, there had been no denial of due process, and therefore there was no justification for permitting the conviction to be collaterally attacked. This approach was given further impetus in a later case which, though not presenting a square holding on the point, indicated that the rule should be strictly construed as requiring exhaustion of every alternative. But the Court changed its direction completely in Wade v. Mayo by holding that to exhaust any single alternative remedy constituted compliance with the require-

43 Ex parte Hawk, 321 U.S. 114 (1944).
44 228 U.S. 652 (1913).
45 237 U.S. 309 (1915).
46 261 U.S. 86 (1923).
47 294 U.S. 103 (1935).
48 Id. at 115 (dictum).
50 321 U.S. 114 (1944).
And, the question was finally laid to rest when Brown v. Allen reaffirmed Wade on this point.

Another aspect of the exhaustion requirement which has had an inconstant career before the Supreme Court is the rule that, upon exhaustion of state remedies, the petitioner must apply unsuccess-fully to the Supreme Court for certiorari before applying to the federal district court for a writ of habeas corpus, in spite of the fact that the statute speaks only of exhausting remedies still available in the state. This rule was announced in Ex parte Hawk and was prompted by a desire to preserve the delicate balance of federal-state relations. Later, there was an indication that application for certiorari would no longer be required, but this liberal trend was short-lived. In Darr v. Burford, the Court restated its holding in Hawk.

This additional prerequisite to federal habeas corpus for state prisoners was not really at issue in Fay v. Noia since Noia had petitioned for certiorari following denial of coram nobis relief. Nevertheless, the Court expressly disapproved of this requirement on the ground that it had served in practice only to impede prompt judicial administration. And though a dictum, the Court's statement makes it clear that a petition for certiorari following an adverse decision of the highest state tribunal will no longer be required as a condition precedent to federal habeas corpus.

B. Adequate Non-Federal Ground

It has long been held that the Supreme Court will decline to review those judgments of state courts which rest on adequate and independent state grounds, even though federal questions are present in the case. A state ground may be deemed independent

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59 372 U.S. at 435.
whether it is based on substantive61 or procedural62 law. To be deemed adequate, a state procedural rule may not on its face hinder the exercise of federal rights63 or be applied in an unduly burdensome manner.64

Noia had failed to perfect an appeal within the time specified by New York procedure. For this reason, he was denied a writ of error coram nobis.65 Non-compliance with state procedural rules has been held to be an adequate state ground of decision.66 It could be logically asserted, therefore, that there was an adequate and independent state ground for the denial of coram nobis sufficient to preclude direct review by the Supreme Court on certiorari. The Court expressed no opinion on this point, but held, instead, that this doctrine which limits the Court's appellate jurisdiction was not to be applied to restrict the federal district court's jurisdiction in an original proceeding (habeas corpus). Mr. Justice Harlan, joined by Justices Clark and Stewart, dissenting, termed this result "wholly unprecedented."67 They were greatly disturbed by the fact that a petitioner, under the rule announced, whose application for certiorari to review the state court judgment might be denied due to a procedural default constituting an adequate state ground of decision, may nevertheless proceed immediately to petition the district court for habeas corpus. This is, in the words of Mr. Justice Harlan, "to turn habeas corpus into a roving commission of inquiry into every possible invasion of the applicant's civil rights that may ever have occurred...."68 This criticism has obvious appeal to those who feel that the power of the federal judiciary has been extended to the point where it infringes upon that of the state. But it is deprived of its validity by the majority's holding which gives discretion to the

61 Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1874). The question was whether or not a trust was established for the benefit of plaintiffs.
62 Herb v. Pitcairn, 324 U.S. 117 (1945). This case involved jurisdiction of the court and the statute of limitations.
63 Central Union Telephone Co. v. City of Edwardsville, 269 U.S. 190, 194 (1925) (clear dictum).
64 Staub v. City of Baxley, 355 U.S. 313 (1958). A statute prohibited solicitation without a permit from the mayor and the city council.
67 372 U.S. at 463.
68 Id. at 469.
district judge to deny relief to an applicant who deliberately bypasses the state appellate procedure.  

C. Waiver

The Supreme Court declines to reverse the judgments of lower courts if it finds that the federal claim has, at some stage of the proceedings, been waived. And failure to comply with state procedural requirements has been held a waiver, assuming the absence of circumstances excusing noncompliance such as official restraint of the petitioner in the exercise of his rights. What has become the classic definition of waiver was enunciated in *Johnson v. Zerbst* as "an intentional relinquishment or abandonment of a known right or privilege." The Court in *Fay* purported to apply this standard but held that Noia's failure to appeal could not, under the circumstances, be deemed a waiver of the alleged violation of his constitutional rights. It was said that if the habeas applicant has deliberately bypassed the state appellate procedure, for strategic, tactical or other reasons, the federal district court has discretion to deny him relief. The standard to be applied in all cases is predicated on the considered choice of the petitioner.

Had Noia appealed his conviction, reversal would have meant a new trial at which he could have been sentenced to death. Clearly, his decision not to take such an unappealing alternative, but to serve his sentence of life imprisonment, was not merely a strategic or tactical choice. Just as clearly, however, it was "an intentional relinquishment or abandonment of a known right or privilege" and while the Court cautions against the assumption that waiver will not be found merely because there is a very real risk of a heavier penalty being imposed, it relies on the fact that Noia's risk of incurring the death penalty was "palpable and indeed acute."

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69 372 U.S. at 438.
72a 304 U.S. 458 (1938).
73 Id at 464.
74 Ibid.
75 372 U.S. at 440.
76 Indeed, Noia had barely escaped the death penalty at his trial. The sentencing judge, not bound by the jury's recommendation of a life sentence, informed Noia that he accepted the jury's recommendation only because of the persuasiveness of defense counsel: "You have got a good lawyer, that is my wife. The last thing she told me this morning is to give you a chance." *Fay v. Noia*, 372 U.S. 391, 396 n.3.
II. Townsend v. Sain*

Another case concerning the duties of federal district courts when habeas corpus is sought on the grounds that a state court conviction has denied petitioner his constitutional rights was decided with Fay v. Noia. Petitioner's conviction of murder in the courts of Illinois was largely the result of the admission into evidence of a confession which was claimed to be involuntary. The trial judge held an evidentiary hearing to determine this question at which conflicting testimony was introduced, but he made no findings of fact and did not write an opinion stating the grounds for his decision. Petitioner appealed the conviction unsuccessfully and also sought post conviction relief in the Illinois courts, continuously asserting the involuntariness of his confession. He then sought habeas corpus in the federal district court, but his petition was denied without a hearing. The Supreme Court reversed, but on remand the court of appeals again denied a hearing, holding that on habeas corpus the inquiry of the district judge is limited to the undisputed portion of the record. The Supreme Court again granted certiorari, and Chief Justice Warren, speaking for a majority of five, again reversed.

In Brown v. Allen the Supreme Court laid down the following rule to guide the federal district courts in determining when an evidentiary hearing is mandatory:

* This portion of the Note was contributed by DeWitt C. McCotter.

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* The opinion of the Supreme Court has been relied upon for a statement of these facts. See 372 U.S. at 296.
* People v. Townsend, 11 Ill. 2d 30, cert. denied, 355 U.S. 850 (1957).
* This attempt is apparently unreported.
* United States ex rel. Townsend v. Sain, 265 F.2d 660 (7th Cir. 1958).
* United States ex rel. Townsend v. Sain, 276 F.2d 324 (7th Cir. 1960).
* 344 U.S. 443 (1953).
* Congress has given federal courts power to "summarily hear and determine the facts as law and justice require." 28 U.S.C. § 2243 (1958). The Supreme Court has interpreted this power to be largely within the discretion of the district court judges. Thomas v. Arizona, 356 U.S. 390 (1958); Brown v. Allen, supra note 85.
have been tried and adjudged against the applicant. Unless a vital flaw be found in the process of ascertaining such facts in the state court, the district judge may accept the determination in the state proceeding and deny the application.\(^8\)

More recently, the Court made the following statement about the applicability of that rule:

While the district judge may, unless he finds a vital flaw in the state court proceedings, accept the determination in such proceedings, he need not deem such determinations binding, and may take testimony.\(^8\)

In light of this language, it is easy to see that the test formulated in \textit{Brown} was not concerned with whether the petitioner's claim of error was based on the undisputed portion of the record, and the Court in the instant case could have reversed on that reason alone. Further, testimony had been admitted at the petitioner's trial on behalf of the State which was directly contradictory to that which the State had presented at the evidentiary hearing; the issue had been whether petitioner was under the influence of a “truth serum” when he made the confession, and the doctor who administered the drug, when testifying as a State's witness, had not disclosed that the drug given to petitioner shortly before he confessed was commonly thought of as a “truth serum.” On these facts it hardly seems likely that the Court was compelled to formulate new rules in order to justify a compulsory hearing.

The Court stated, though, that the test laid down in \textit{Brown} for determining when a federal district judge must hold an evidentiary hearing was inadequate,\(^8\) and formulated the following test to replace it:

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 required unless the state

\(^8\) 344 U.S. at 507 (1953).
\(^8\) Rogers v. Richmond, 357 U.S. 220 (1958) (per curiam).
court trier of fact has after a full hearing reliably found the facts.\(^0\)

Then the Court set out six specific situations in which an evidentiary hearing would be mandatory under this test.

First, the district judge must hold a hearing if "the merits of the factual dispute were not resolved in the state hearing."\(^1\) If a full and fair hearing has been made and the state trier of fact has made an express adverse determination of the facts, there is no obligation on the part of the district judge to hold an evidentiary hearing. Further, even if there has been no express finding of fact, the district judge does not have to hold an evidentiary hearing if he can ascertain that the facts have been impliedly resolved against the applicant for habeas. But, if no express finding of fact was made and if it is unclear whether the correct constitutional standards have been applied either because the applicant is able to introduce some evidence creating this doubt or because the issue of law raised by any possible interpretation of the facts presents a difficult or novel constitutional question, the district judge must hold an evidentiary hearing.

Second, the district judge must hold a hearing if "the state factual determination is not fairly supported by the record as a whole."\(^2\) The Court makes it clear that this situation presents nothing which has not been consistently followed in the past.\(^3\)

Third, the district judge must hold a hearing if "the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing."\(^4\) Thus, the obligation of the federal district judge does not terminate with a finding that all of the relevant facts have been presented at the state court hearing. If the state procedure is inadequate for ascertaining the truth, then the federal district judge must disregard the state findings and hold an evidentiary hearing.

Fourth, the federal district judge must hold an evidentiary hearing "where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented

\(^0\) Id. at 312.
\(^1\) Id. at 313.
\(^2\) Ibid.
\(^3\) Ibid.
\(^*\) 372 U.S. at 313.
This evidence must relate to the constitutionality of the detention of the prisoner, as newly discovered evidence relevant to the guilt of the applicant is not a grounds for habeas relief.

Fifth, there must be a hearing if "the material facts were not adequately developed at the state court hearing." This requires a hearing if for some reason not attributable to the inexcusable neglect of petitioner, evidence necessary to an adequate consideration of the constitutional claim of the petitioner was not developed at the state court hearing.

Finally, a hearing is required in the federal courts if "for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." This category was intentionally left open because the Court thought it impossible to anticipate all of the situations in which a hearing was required.

As the dissenting opinion pointed out, the Court here attempted to catalogue a set of standards in advance and this in itself is of doubtful wisdom. The policy of rendering advisory opinions has long been held to be objectionable on grounds that the Court may not give full consideration to issues not presented by the facts of the particular case before it.

Furthermore, there are objections to the standards themselves. For example, the third criterion laid down by the Court requires a hearing if the state fact finding procedure is not adequate for ascertaining the truth. The Court gives the "burden of proof" as an example of something which would make the state procedure inadequate. This seems to fail as a means of defining the general lan-

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98 Ibid.
99 Ibid.
97 Ibid.
8 Id. at 317.
96 Id. at 327.
90 "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually presented before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in relation to the case decided, but their possible hearing on all other cases is seldom completely investigated." Cohen v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821).
91 372 U.S. at 316.
guage used in the formulation of this criterion, for the term "burden of proof" is itself subject to more than one meaning. Other than the burden of proof, there is no hint as to what will make a state court proceeding inadequate for ascertaining the truth, and it is hard to believe that the Court really meant to leave it up to the individual judge's development of the conception of inadequacy, when the very purpose of the criterion is uniformity. The requirement seems to suffer the same fallacy found by the Court to be inherent in the Brozhou test, this being that the language of the Court lends itself to varied and confused interpretations.

The fourth and fifth criteria should be read together. The fourth deals with newly discovered evidence, and the fifth covers relevant evidence which was not presented to the state court in a manner that would normally reveal its significance. Both of these reflect the principle that protection of the rights of the applicant for habeas corpus is the court's concern even above rules designed to facilitate finality of litigation. Thus, the Illinois court in the principal case had not given the petitioner a "full and fair" hearing because it had not considered the effect of the drugs administered to him in the light of the material fact that the drug which had been used was commonly thought of as a truth serum. Rules as to newly discovered evidence are found in many states with a difference in emphasis. As the Court views it, an evidentiary hearing should be held under the enumerated circumstances unless the federal district court judge finds that the failure to introduce or develop such evidence was due to the fault of the petitioner, whereas states have generally imposed procedural requirements having nothing to do with the fault of the convicted person.

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102 Strohfeld v. Cox, 325 Mo. 901, 30 S.W.2d 462 (1930). "The term 'burden of proof' has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make out a prima facie case." Id. at 907, 30 S.W.2d at 465.

103 See text accompanying note 87 supra.

104 This criterion seems to be in step with the intent of the general test to provide a full and fair hearing, as a full and fair hearing contemplates consideration of all relevant evidence, whether it was brought to the attention of the state trier of fact or not. See text accompanying note 90 supra.


106 For example, 12 VT. STAT. §2356 (1958) provides, in part: "[I]f the
When evaluating the test laid down in *Townsend*, one is apt to confuse two different questions. The first of these is whether the protection of the constitutional rights of an accused is important enough to justify both extensive examination of state practices and the confusion which must result when the same question is open to reexamination by so many different courts and procedures. As to this question, it clearly seems that *Townsend* answers in the affirmative, with only the following language of the Court possibly serving as a qualification:

We are aware that the too-promiscuous grant of evidentiary hearings could both swamp the dockets of the district courts and cause acute and unnecessary friction with state organs of criminal justice, while the too-limited use of such hearings would allow many grave constitutional errors to go forever unprotected. The accommodation of these competing factors must be made on the front line, by the district judges who are conscious of their paramount responsibility in this area.\(^{107}\)

The second question is whether or not the guidelines formulated by the Court will be sufficient to enable the federal district courts to protect an accused's constitutional rights. General objections to such tests because they resemble advisory opinions have already been discussed;\(^{108}\) however, it must be remembered that the Supreme Court undertakes to exercise a supervisory power over lower federal courts,\(^{109}\) and, for this reason, attempts to lay down standards may be desirable if the standards are clear and understandable. Furthermore, their existence tends to solve the problem created when lower federal courts are given broad discretionary powers to examine the practices of state appellate courts,\(^{110}\) because the district judges can say with justification that they are acting under a mandate from the United States Supreme Court, which clearly has the right to review reasons assigned are the discovery of new evidence or other matter of fact, such citation shall be served within two years after rendition of the original judgment."

\(^{107}\) 372 U.S. at 319.

\(^{108}\) See note 100 supra and accompanying text.

\(^{109}\) "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of maintaining and establishing civilized standards of procedure and evidence. McNabb v. United States, 318 U.S. 332, 340 (1942)."

state appellate courts in matters involving the Constitution of the United States.\textsuperscript{111}

Another consideration which must have influenced the Court in laying down a new test was that the one formulated in Brown v. Allen had wrought confusing and conflicting views in the several circuits. For example, one view was that a hearing was required if the well pleaded facts were sufficient to establish a prima facie case of merit.\textsuperscript{112} Another view had it that the trial court's determination of the disputed facts was binding on the district judge.\textsuperscript{113} Consequently, the situation demanded clarification, and the Court may well have thought that the validity of a person's imprisonment was too important a consideration to wait on a case by case examination of each view.

However, whether the guidelines formulated in Townsend will provide a workable standard is an unanswerable question at the present time. The Court expressly left room to expand the situations in which an evidentiary hearing will be required,\textsuperscript{114} and it seems to have been deliberately general in laying out those situations which it did discuss. In fact, it is probable that the Court thinks that district court judges have been too slow in granting evidentiary hearings and wrote its opinion more to change their basic approach than to revolutionize the grounds for granting evidentiary hearings. Thus, the desirability of what the Court did will be an open question to those who are not opposed to the Court's concept of habeas corpus altogether, and they will have to reserve judgment pending application of the criteria by the lower federal courts. At the present time, however, it is clear that federal district court judges have been told that protecting the constitutional rights of habeas corpus applicants is more important than considerations of the possible impact of their decisions on federal-state relations and of reducing a crowded federal docket. Therefore, habeas corpus is bound to be an increasingly important part of the process by which a criminal suspect's constitutional rights are protected.

\textsuperscript{111} See 28 U.S.C § 1257 (1958).
\textsuperscript{112} Wiggins v. Ragen, 238 F.2d 309 (7th Cir. 1956).
\textsuperscript{113} This was view taken by the court of appeals in the principle case. See note 82 \textit{supra} and accompanying text. See generally Comment, \textit{Federal Habeas Corpus Review of State Convictions: An Interplay of Appellate and District Court Discretion}, 68 \textit{Yale L.J.} 98 (1958).
\textsuperscript{114} See note 98 \textit{supra} and accompanying text.
In Sanders v. United States\(^{115}\) the Supreme Court broadened post-conviction collateral relief from criminal convictions in the federal courts. Sanders was convicted of robbing a federally-insured bank and received a fifteen year sentence. Thereafter he filed a motion to vacate the conviction under 28 U.S.C. section 2255,\(^{116}\) which was denied without a hearing on the ground that it alleged only bare conclusions. The court went on to say, however, that the records of the trial conclusively showed the petitioner's claims to be without merit. Subsequently, Sanders filed a second motion to vacate, alleging that he was a known narcotics addict; that medical authorities administered narcotics to him from time to time while he was being detained, including the period during which he had appeared in court; and that as a result of the administration of narcotics, he had been mentally incompetent when he had pleaded guilty and had been sentenced. The district court again denied petitioner's motion without a hearing, basing its denial on his failure to indicate why the allegation of mental incompetency had not been presented on the first motion and stating that his claims were without merit. The Court of Appeals for the Ninth Circuit affirmed the district court's decision,\(^{117}\) approving the grounds on which the hearing was denied and stressing the fact that petitioner had knowledge of the facts alleged on the second motion at the time he had filed his first motion.\(^{118}\) The Supreme Court of the United States granted certiorari,\(^{119}\) reversed both lower courts, and held that the district court should have held a hearing on the merits of the second motion.\(^{120}\)


\(^{116}\) "Under that statute, a federal prisoner who claims that his sentence was imposed in violation of the Constitution or laws of the United States may seek relief from the sentence by filing a motion in the sentencing court stating the facts supporting his claim. '"Prompt hearing' on the motion is required 'unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief....' The section further provides that 'the sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.'" Sanders v. United States, 373 U.S. 1, 3-4 (1963).

\(^{117}\) Sanders v. United States, 297 F.2d 735 (9th Cir. 1961).

\(^{118}\) This statement of facts is taken from Sanders v. United States, 297 F.2d 735, 736 (9th Cir. 1961).

\(^{119}\) 370 U.S. 936 (1962).

\(^{120}\) Sanders v. United States, 373 U.S. 1 (1963).
In reaching its decision the Court was faced with the problem of interpreting the provision in section 2255 which provides that the "sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."\(^{121}\) At the time of this appeal this provision had received conflicting interpretations in the various circuits. Some courts had been liberal in requiring a hearing on the second motion, holding that such a motion alleging new grounds requires a hearing unless the record conclusively shows that the movant is entitled to no relief;\(^{122}\) that it need only allege facts sufficient to entitle the petitioner to relief and need not allege non-abuse of the process;\(^{123}\) and that a hearing is required when the government neither denies the new allegations nor pleads abuse of the process.\(^{124}\) Others had been very strict, holding that even when new grounds are alleged, the court may exercise its discretion and deny a hearing on the motion.\(^{125}\)

In the instant case it appears that the district court would have required without qualification that the second motion justify the omission from the first motion of the new grounds, while the court of appeals would have required such justification if it appeared that the petitioner had withheld grounds on the first motion and sought to avail himself of those grounds on a later motion.

To resolve this conflict, the Supreme Court turned to the histories of sections 2244 and 2255 of the Judicial Code. Section 2244,\(^{126}\) enacted in 1948, is a codification of the following principle laid down in *Salinger vs. Loisel*:\(^{127}\)

\(^{122}\) Juelich v. United States, 300 F.2d 381 (5th Cir. 1962).
\(^{123}\) Smith v. United States, 270 F.2d 921 (D.C. Cir. 1959). This position recognizes that the applications are frequently drafted by the petitioner without aid of counsel, and in such a case the petitioner should not be held to the niceties of pleading an elaborate negative.
\(^{124}\) Dunn v. United States, 234 F.2d 219 (6th Cir. 1956).
\(^{125}\) Lipscomb v. United States, 226 F.2d 812 (8th Cir. 1955); Johnson v. United States, 213 F.2d 492 (5th Cir. 1954).
\(^{126}\) 28 U.S.C. § 2244 (1958) provides that "No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry."
\(^{127}\) 265 U.S. 224 (1924).
[E]ach application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are... a prior refusal to discharge on a like application.\textsuperscript{128}

In \textit{Sanders} the Court interpreted this language to mean that under section 2244 a district court may deny the second motion without a hearing only when it seeks to retry a claim fully decided in a prior motion.

Section 2255 was enacted in 1948 to provide "an expeditious remedy for correcting erroneous sentences without resort to habeas corpus,"\textsuperscript{129} and to afford the prisoner "the same rights in another and more convenient forum."\textsuperscript{130} Hence the similar relief provision of section 2255 should be interpreted as the equivalent of section 2244.

Thus the Court has completely removed \textit{res judicata} as an important consideration in post-conviction collateral relief. This was done because "conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."\textsuperscript{131}

In \textit{Sanders}, as in \textit{Fay v. Noia}\textsuperscript{132} and \textit{Townsend v. Sain},\textsuperscript{133} the Supreme Court formulated some basic rules to guide the lower federal courts. The rules announced in the \textit{Sanders} case are intended to aid the lower courts in handling successive applications for federal habeas corpus and motions under section 2255. When a subsequent motion relies on a ground presented in the prior motion, the subsequent motion is properly denied without a hearing only if (1) the same ground was determined adversely to the applicant on the prior motion;\textsuperscript{134} (2) the prior determination was on the merits;\textsuperscript{135}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 231.
\item 28 U.S.C. § 2255 (1958), Reviser's Note.
\item Sanders v. United States, 373 U.S. 1, 8 (1963).
\item 372 U.S. 293 (1963). See Part II supra.
\item The Court defined "ground" as a sufficient legal basis for granting relief. It is necessary to distinguish between a new ground and a same ground couched in different language or supported by different legal arguments and factual allegations. Should there be any doubt as to whether two grounds are different or are the same, the court should resolve the doubt in favor of the petitioner. 373 U.S. at 16.
\item "[I]f factual issues were raised in the prior application, and it was not
\end{enumerate}
\end{footnotesize}
and (3) the ends of justice would not be served by a hearing on the merits of the subsequent motion.\textsuperscript{186} In a case where a subsequent application presents either a new ground or a ground previously alleged but not adjudged on the merits, a hearing on the merits of the subsequent application must be held unless there has been an abuse of process on the part of the petitioner and the Government has the burden of pleading such abuse.\textsuperscript{187} Thus it is clear that there are two principles upon which a subsequent motion may be denied without a hearing: a prior adverse determination of the grounds on the merits and abuse of process. The Court addressed these principles to the sound discretion of the federal trial judges. "Their is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits."\textsuperscript{188}

These three cases reflect the Court’s concern with making available to prisoners an effective device to safeguard their constitutional rights. Quoting in part from Fay, the Court in Sanders said: "If 'government... [is] always [to] be accountable to the judiciary for a man's imprisonment'... access to the courts on habeas must not be thus impeded."\textsuperscript{189}

The Supreme Court, in these decisions, seems to be eliminating the authority of a lower federal court to deny a hearing on a motion for collateral relief on procedural defects alone. It appears now that denied on the basis that the files and records conclusively resolved these issues, an evidentiary hearing was held." 373 U.S. at 16.

\textsuperscript{186} Even when a prior motion has been denied on the merits, the court may, in its discretion, consider a subsequent motion. The petitioner may, for example, show that there has been an intervening change in the law; or he may show that he did not receive a full and fair evidentiary hearing on the prior hearing. (The criteria of a full and fair evidentiary hearing are discussed in Townsend v. Sain). The burden is on the petitioner to show that the ends of justice would be served by a redetermination of a ground previously adjudged adversely to him. 373 U.S. at 16-17.

\textsuperscript{187} The Court does not allocate the burden of proof; however, in Price v. Johnston, 334 U.S. 266 (1948), the Court placed the burden on the petitioner to prove non-abuse of the writ of habeas corpus. This is a justifiable allocation of the burden; the relevant facts would nearly always be within the exclusive possession of the petitioner. Furthermore, a prisoner who wishes to reopen his case and challenge the finality of the litigation should be required to show that he is acting in good faith and not out of a desire to harass the courts.

\textsuperscript{188} 373 U.S. at 18.

\textsuperscript{189} 373 U.S. at 8.
the court must hear any motion for relief unless the record conclusively shows the movant is not entitled to a hearing or unless it is evident that the movant has abused the process. Determining whether or not an applicant has a just complaint is thus more important than requiring him to conform to the niceties of judicial procedure.

IV. Conclusion

Though the general and sweeping language of the Court in these three decisions makes it difficult to formulate concrete predictions about the outcome of future cases, it seems fairly certain, barring action by Congress or a change in the personnel of the Court, that habeas corpus will be an important instrument in determining the scope of the ever-increasing constitutional protection afforded those accused of crime. The remaining obstacle which the court faces, however, is formidable. From 1946 to 1957 only 1.4 per cent of the applicants for habeas corpus were successful. This may be because most of the applications were "frivolous," or it may be because federal district judges have neither been disposed nor equipped to determine whether habeas corpus should have been granted. Yet the number of such applications has been steadily increasing, and these decisions, when coupled with those in *Gideon v. Wainright* and *Mapp v. Ohio*, are bound to cause an even greater augmentation.

In the light of problems of time and personnel which are certain to plague the lower federal courts, the Supreme Court has only three alternatives. It can continue to reverse the decisions of the lower federal courts and thus complicate the problems even more; it can devise either some methods to aid these courts in determining whether there is merit in an application, rather than just the possibility of merit, or some rules facilitating finality of litigation; or it can retreat from the position it has taken in these three cases. Of these only the second is desirable. The constitutional rights of the criminally accused are indeed important, but unless there is a way

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141 This is Mr. Justice Clark's reason. Id. at 445.
142 Id. at 446 n.2.
to make hearing their applications physically possible, these constitutional rights will not be adequately protected by the writ of habeas corpus.

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Federal Income Taxation—The Unhappy Circumstance of Liquidation And Reincorporation

Two recent decisions of the Tax Court, David T. Grubbs\(^1\) and Joseph C. Gallagher,\(^2\) illustrate the problems which confront the Commissioner of Internal Revenue when he attempts to tax distributions of accumulated earnings and profits\(^3\) at ordinary income tax rates when such distributions occur in a transaction of preincorporation-liquidation or liquidation-reincorporation.

In a typical situation the corporation will have been in business for some time and have accumulated at least a material amount of earnings and profits. Assume that a new corporate entity is formed and that the essential operating assets of the old corporation are transferred to the new corporation for voting stock. The shareholders then liquidate the old corporation and distribute the new corporation's stock and any remaining cash and other liquid assets to the stockholders of the old corporation (preincorporation-liquidation).\(^4\)

If the device is successful there will be a complete liquidation

\(^1\) 39 T.C. No. 5 (Oct. 8, 1962).
\(^2\) 39 T.C. No. 13 (Oct. 17, 1962). An appeal to the Ninth Circuit was dismissed.
\(^3\) This term (earnings and profits) is not defined in the 1954 Code; however, § 312 describes the effect some transactions have on earnings and profits. For purposes of this note, earnings and profits can be thought of as the retained earnings or earned surplus of the corporation, without regard to the fact that some transactions may be recorded differently for federal tax purposes than for corporate book purposes. See generally STANLEY & KILCULLEN, THE FEDERAL INCOME TAX § 301 at 119 (4th ed. 1961); WIXON, ACCOUNTANTS' HANDBOOK § 22 (4th ed. 1960).
\(^4\) A similar problem is raised when the old corporation is liquidated, distributing its cash, liquid and operating assets to its shareholders, part or all of whom then reincorporate the operating assets and continue the business in corporate form (liquidation-reincorporation). See generally Kuhn, Liquidation and Reincorporation Under the 1954 Code, 51 Geo. L.J. 96 (1962); Rice, When is a Liquidation Not a Liquidation for Federal Income Tax Purposes?, 8 STAN. L. REV. 208 (1956).