6-1-1965

Federal Jurisdiction -- Non-Federal Ground Rule

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Recommended Citation
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the expert. If, on the other hand, the court wishes to retain the
notion that expert witnesses be restricted to giving opinion testimony
only of scientific possibilities, a different test must be fashioned.

WILLIAM H. CANNON

Federal Jurisdiction—Non-Federal Ground Rule

The petitioner in *Henry v. Mississippi*\(^1\) was convicted of dis-
orderly conduct. The conviction was based on corroborating evidence
which was admittedly obtained by unlawful means and in violation
of the state constitution.\(^2\) This evidence constituted an essential
ingredient of the state's case, without which the petitioner could
not have been connected with the crime. At the trial, counsel for
the petitioner failed to object to the introduction of the corrobora-
ting evidence,\(^3\) but a motion for a directed verdict was made at the
close of the state's case, which among other things specified that the
evidence had been illegally obtained.\(^4\) This motion was renewed at
the close of all the evidence.\(^5\) Petitioner appealed to the Supreme
Court of Mississippi where the decision was initially reversed and
the case remanded for a new trial.\(^6\) The court emphasized the plight
of out-of-state counsel unfamiliar with the procedural requirement
that the objection to illegally seized evidence must be made at the
time it is introduced.\(^7\) After the first opinion, the state filed a
Suggestion of Error which pointed out that the petitioner had in
fact been represented by competent local counsel. The Mississippi
Supreme Court then withdrew its first opinion and affirmed the
judgment of the trial court.\(^8\) The court stated that honest mistakes
of counsel in respect to policy or strategy "are binding upon the
client as a part of the hazards of courtroom battle."\(^9\)

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\(^1\) 379 U.S. 443 (1965).
\(^3\) Furthermore, the officer who was responsible for obtaining the evidence
was cross-examined concerning certain facts relating to its seizure. *Ibid.*
\(^4\) For the text of the motion of a directed verdict, see *Henry v. Missis-
\(^5\) *Id.* at 445.
\(^6\) This opinion appeared in the Southern Reporter advance sheets at
154 So. 2d 289 (Miss. 1963). For a criticism of the decision, see 35 Miss.
\(^7\) *Henry v. State*, *supra* note 6, at 296.
\(^8\) This opinion appears in the bound volume of the Southern Reporter;
the volume and page number are the same as that of the first opinion. See
note 6 *supra*.
Petitioner applied to the United States Supreme Court for a writ of certiorari alleging that his constitutional rights had been violated. The state contended that the failure of petitioner's counsel to object to the introduction of the tainted evidence constituted an adequate non-federal ground for the state decision, and hence, the Supreme Court had no jurisdiction to review. The Supreme Court granted certiorari and in a five-to-four decision vacated the judgment of the Mississippi Supreme Court and remanded the case for a hearing on the question of "whether the petitioner is to be deemed to have knowingly waived decision of his federal claim when timely objection was not made to the admission of the illegally seized evidence."

The Court, in what must be regarded as dictum, stated that the Mississippi contemporaneous objection rule served a "legitimate state interest," and intimated that nothing else appearing, it would have constituted an adequate non-federal ground which would preclude review. While expressly declining to decide this question, the Court gave two principal reasons for the remand. First, the Court stated that there was some indication that petitioner's counsel deliberately bypassed the opportunity to make timely objection in the state court for strategical or other reasons, in which case he would be precluded from thereafter asserting the federal right, whether the state ground be adequate or not. Secondly, the Court stated that:

a dismissal on the basis of an adequate state ground would not end this case; petitioner might still pursue vindication of his federal claim in a federal habeas corpus proceeding in which the procedural default will not alone preclude consideration of his claim, at least unless it is shown that petitioner deliberately bypassed the orderly procedure of the state courts.

The Court also implied that even if failure to comply with the contemporaneous objection requirement alone would constitute an adequate non-federal ground for decision, the motion for the directed verdict might have substantially satisfied the purpose of the rule in which case adherence to the rule would not serve a legitimate state

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10 379 U.S. 443, 446 (by implication).
11 Justices Black, Harlan, Clark, and Stewart dissented.
12 379 U.S. 443, 446.
13 Id. at 448.
14 Id. at 449-50.
15 Id. at 452.
interest. As stated by the Court, it "cannot be said to have frustrated the State's interest in avoiding delay and waste of time in the disposition of the case." This line of reasoning generated a vigorous dissent by Mr. Justice Harlan which challenged the Court's intimation that the trial judge should have to sift a general motion for a directed verdict, which in most cases is filed as a matter of course, to ascertain whether error had been committed in the entire proceeding.

Although the remand of the case does not constitute a decision on whether failure to comply with the Mississippi contemporaneous objection rule is an adequate non-federal ground for the state court decision, the Court's reasons for remanding the case signify the continuance of a steady process of erosion of the non-federal ground rule as a limitation on the Supreme Court's review of state court decisions.

Since the Judiciary Act of 1789, the principle has been embedded in our concept of federalism, as it pertains to the judicial system, that where a state court decision rests upon adequate and independent state grounds it is not subject to correction by the Supreme Court. Professor Wright describes the non-federal ground rule as the "most important and most difficult limitation on Supreme Court review of state court decisions." The doctrine applies to both state substantive and state procedural grounds. It is usually said to be jurisdictional rather than dispositional, and although the question is not entirely settled, it has been said that it is derived from the Constitution's prohibition against advisory opinions.

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16 Id. at 448-49.
17 Id. at 449.
18 Id. at 461.
19 Ch. 20, 1 Stat. 85.
21 WRIGHT § 107, at 425.
26 The classic statement purporting to give the non-federal ground rule constitutional status is:
Before the Supreme Court will decline to review a state court decision because of the presence of a non-federal ground, two inquiries must be made. First, it must be determined whether the state court judgment or decree is based either exclusively or alternatively on a non-federal ground.27 If there be a non-federal ground in the state court decision, then it is the duty of the Court to make an independent determination as to whether the asserted non-federal ground is "adequate."28

To be an "adequate" non-federal ground, the basis of the state court decision must be "broad" enough to sustain the state court judgment;29 it must be "independent,"30 or sufficiently distinguish-

The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations on our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.


27 This question arises in four basic situations: (1) Where the state court expressly bases its decision upon two grounds one of which is federal and the other non-federal, the Court will determine if the non-federal ground is adequate and independent. E.g., Fox Film Corp. v. Muller, 296 U.S. 207 (1935). (2) Where the state court decision is based solely upon state law, but a timely assertion of a federal claim was made, the Court will determine if the non-federal ground is adequate; it is in no way bound by the state court's determination. E.g., Wood v. Chesborough, 228 U.S. 672 (1913). (3) Where both federal and non-federal questions are raised in the record but the state court considers neither question, the Court will usually presume that the decision rested on a non-federal ground and decline to review. E.g., Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54 (1934). In some cases where the basis of the state court decision is ambiguous, the Court has vacated the judgment and remanded the case to the state court for clarification. E.g., Minnesota v. National Tea Co., 309 U.S. 551 (1940). (4) Where the state court expressly bases its judgment upon the determination of the federal question, the Court will not entertain a contention that the judgment might have been decided on a non-federal ground. E.g., Steele v. Louisville & Nashville R.R., 323 U.S. 192, 197 n.1 (1944). See generally Robertson & Kirkham § 91; Stern & Gressman § 3-32; Wright § 107; Note, The Untenable Nonfederal Ground in the Supreme Court, supra note 24.

28 [T]he federal ground being present, it is incumbent upon this Court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, in order that the constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment. Abie State Bank v. Bryan, 282 U.S. 765, 773 (1931).


able from the federal ground; and it must be "tenable." Of these three standards of "adequacy," the concept of "tenability" is the most difficult to demarcate. There is a conspicuous absence of any definitive guidelines pervading the decisions on the question of the "untenable non-federal ground." It has been said that the state ground must have "substantial basis"; that it must not be "unfair or unreasonable"; that it must not be "palpably unfounded"; that it must not be "arbitrary or a mere device to prevent a review of the decision upon the federal question"; and that it must be "sufficiently well founded to furnish adequate support for the judgment." An examination of the language of the decisions shows a noticeable display of illusiveness. Perhaps the only accurate general statement that can be made about the concept of "tenability" is that the state courts must not purposely utilize state law to evade federal claims or prevent their review by the Supreme Court. Beyond this very broad generalization what the Court will regard as "untenable" depends largely upon the circumstances of the particular case.

The doctrine of the adequate non-federal ground has been termed a "doctrine supported by weighty considerations of law and policy . . . the solid instrument of federalism." Recently, this "solid instrument of federalism" has been attacked from two sources, one of which may be deemed direct and the other collateral.

(1917). "In such situations [involving a federal ground and a non-federal ground] our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment." Id. at 164. The concepts of breadth and independence are hard to distinguish in actual application and are often used to describe the same requirement. See Note, The Untenable Nonfederal Ground in the Supreme Court, supra note 24, at 1382.


Ibid.


Central Union Tel. Co. v. City of Edwardsville, 269 U.S. 190, 195 (1925).

Johnson v. Risk, 137 U.S. 300, 307 (1890); see Leathe v. Thomas, 207 U.S. 93, 99 (1907).


Postal Tel. Cable Co. v. City of Newport, 247 U.S. 464, 475 (1918).

See, e.g., cases cited in ROBERTSON & KIRKHAM §§ 97-103; cases cited notes 34-38 supra.

The non-federal ground rule has been devitalized directly through the court's application of the illusive concept of "tenability." This devitalization has occurred primarily in the area of state procedural law.\textsuperscript{41} It is a settled principle that the state has the right to prescribe the procedural rules for invoking its jurisdiction.\textsuperscript{42} Failure to comply with local procedure can be an adequate non-federal ground for decision.\textsuperscript{43} Two relatively recent decisions demonstrate how the Court's varying standard of "tenability" has been used to strike down, as a bar to review, state grounds for decision predicated upon failure to comply with state procedural requirements; there was no apparent indication that the state courts in these decisions acted evasively or arbitrarily in applying and adhering to their procedural rules.

In \textit{Williams v. Georgia},\textsuperscript{44} decided in 1955, the Supreme Court held that where the Georgia courts had refused petitioner's extraordinary motion for a new trial—a matter of discretion—because he had not challenged the array of jurors when they were "put upon him," the Court was not precluded from reviewing his constitutional claim that the method of jury selection had deprived him of equal protection of the laws. In respect to the state ground for the decision the Court said: "[W]here a State allows questions of this sort to be raised . . . as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in this particular circumstance is, in effect, an avoidance of the federal right."\textsuperscript{45} Thus, it would seem the Court left the door open to strike down as an adequate state ground any discretionary procedural rule for the airing of federal claims.\textsuperscript{46} Indeed, the Court

\textsuperscript{41} See \textit{Stern & Gressman} \S\ 3-33; \textit{Robertson & Kirkham} \S\ 103.
\textsuperscript{42} Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. \textit{John v. Paullin}, 231 U.S. 583, 585 (1913).

\textsuperscript{43} It is clear that this Court is without power to decide whether constitutional rights have been violated when federal questions are not seasonably raised in accordance with the requirements of state law. . . . Noncompliance with such local law can thus be an adequate state ground for a decision below. \textit{Edelman v. California}, 344 U.S. 357, 358-59 (1953).

\textsuperscript{44} 349 U.S. 375 (1955).

\textsuperscript{45} Id. at 383.

\textsuperscript{46} See Note, 20 \textit{Albany L. Rev.} 46 (1956). The writer takes the posi-
in *Henry*, although expressly declining to base its decision on *Williams*, stated unequivocally that it stands for the above proposition.\(^47\)

Another decision holding a state procedural default to be untenable as a non-federal ground is *Staub v. City of Baxley*.\(^48\) In that case, the Court held that a procedural rule requiring that each section of an ordinance be specifically and separately attacked when its constitutionality is challenged—in contrast to a blanket assertion of unconstitutionality—to be untenable, and that a state dismissal on these grounds would not preclude review. There was no intimation that the state court had acted evasively, arbitrarily, or intentionally to avoid the assertion and review of the federal claim in applying its procedural rule. The Court set out the following criterion: "To require . . . [petitioner] to count off, one by one, the several sections of the ordinance would be to force resort to an arid ritual of meaningless form."\(^49\) Mr. Justice Frankfurter, dissenting, stated that "the relevance of a state procedure requiring that constitutional issues be presented in their narrowest possible scope is confirmed by the practice of this Court."\(^50\)

These two decisions would seem to illustrate how seemingly valid and purposeful state procedural rules have been emasculated as adequate state grounds in accordance with illusive and poorly defined standards. *Henry* would seem to be a continuation of this practice in one important respect. The intimation that petitioner's failure to comply with the Mississippi contemporaneous objection rule might not be "adequate" to bar review simply because its purpose might be served by another procedural device available later in the trial—the motion for a directed verdict—is carrying the office of the Court in determining adequacy to an unprecedented level.\(^61\)

It would seem that there must now be an examination of the total

\(^{47}\) "We do not rely on the principle that our review is not precluded when the state court has failed to exercise discretion to disregard the procedural default." 379 U.S. 443, 449 n.1 (1965).

\(^{48}\) 355 U.S. 313 (1958).

\(^{49}\) Id. at 320.

\(^{50}\) Id. at 330.

\(^{61}\) "[W]here the non-federal ground has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other state decisions of non-federal questions." Enterprise Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917). See Note, 20 ALBANY L. REV. 46 (1956).
state procedural system for presenting federal claims to ascertain if one admittedly valid rule remains so in context of the total procedural system.

Perhaps the more troublesome and unmarked attack on the non-federal ground rule has come about through the collateral effect of the Court's decision in *Fay v. Noia,*[52] where the non-federal ground rule was held not to apply to federal habeas corpus proceedings.[53] In other words, a procedural default in the state court, no matter what its effect would be on direct review, will not preclude a petitioner from coming into the federal courts, and ultimately to the Supreme Court, through a habeas corpus proceeding.[54] Although the Court in *Fay* gave lip service to the non-federal ground rule as a limitation on direct review,[55] Mr. Justice Harlan, dissenting, predicted that the decision would have grave consequences for the non-federal ground rule and the federal system.[56]

*Henry,* coming only two years after *Fay,* is ample and convincing proof that Mr. Justice Harlan's prophecy was not unfounded. As already noted, one of the principal reasons for the remand of the case in the presence of a seemingly adequate non-federal ground was the ability of the petitioner to vindicate his federal claim in a federal habeas corpus proceeding. The only apparent justification for this action was stated by the Court as follows: "By permitting the Mississippi courts to make an initial determination of waiver, we serve the causes of efficient administration of criminal justice, and of harmonious federal-state judicial

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52 372 U.S. 391 (1963); see Comment, 42 N.C.L. Rev. 352, 353-60 (1964).
53 For a discussion of the Court's rationale in rejecting the adequate non-federal ground rule see *The Supreme Court, 1962 Term,* 77 Harv. L. Rev. 62, 140-149 (1963).
54 28 U.S.C. § 2241(c)(3) (1958) provides that "the writ of habeas corpus shall not extend to a prisoner unless—he is in custody in violation of the Constitution or laws or treaties of the United States. . . ." See generally *Wright* § 53.
55 "The fatal weakness of this contention [that the non-federal ground rule applies to habeas corpus proceedings] is its failure to recognize that the adequate state-ground rule is a function of the limitations of appellate review." *Fay v. Noia,* 372 U.S. 391, 429 (1963). For a discussion of the controversy over whether the adequate non-federal ground rule is a limitation on habeas corpus proceedings in the federal courts, see Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding,* 74 Harv. L. Rev. 1315 (1961); Brennan, *supra* note 40.
56 "This decision, both in its abrupt break with the past and in its consequences for the future, is one of the most disquieting that the Court has rendered in a long time." 372 U.S. 391, 448 (1963).
relations." It is interesting to speculate what brand of federalism strips an admittedly valid state procedural rule of its efficacy and finality and forces a busy state court to reconsider a case which under its own procedure—a procedure concededly designed to serve a legitimate state purpose—had been heard and fairly determined.

In *Fay v. Noia*, Mr. Justice Harlan predicted that "the effect of the approach adopted by the Court is, indeed, to do away with the adequate state ground rule entirely in every state case, involving a federal question, in which detention follows from a judgment." It would seem that the Court in *Henry*, with its reliance on the collateral effect of *Fay*, substantiates the warning by Mr. Justice Harlan, and that a concept—by many thought basic to a federal system—has in the course of two years been substantially diluted if not fatally undermined.

**RONALD W. HOWELL**

**Jurisdiction—Collateral Attack—Bootstrap Doctrine**

In the recent case of *McKee v. Hassebroek,* the United States Court of Appeals for the Tenth Circuit affirmed a federal district court decision allowing the heirs of a joint owner of United States savings bonds to attack collaterally an Oklahoma probate court's distribution of those bonds as a part of the estate of the other joint tenant. The joint tenants, husband and wife, had apparently agreed that the bonds would be included in the husband's estate. The wife, who was co-executrix of her husband's estate and devisee of a life estate in his personal property, considered the bonds a part of his estate and never asserted her own ownership, except as life tenant under the will. After her death intestate, the wife's heirs-at-law gained possession of the bonds, and the remainderven under the husband's will brought an action in the federal district court to recover them. The Tenth Circuit Court of Appeals affirmed the district court's decision.

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69 It should be noted in this respect that the Court in *Henry* adopts the same "waiver" concept as that set out by the Court in *Fay*—a deliberate by-passing of state procedural rules. The fact that the Court relies on *Fay* in applying this concept would seem to lend strong support to the conclusion that only the most flagrant procedural defaults will prevent a person detained pursuant to a state judgment from asserting his federal claims either on direct appeal or in a collateral habeas corpus proceeding.
70 337 F.2d 310 (10th Cir. 1964).