Habeas Corpus -- Waiver of Constitutional Guarantees

George V. Hanna III

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amount of the counterclaim.\textsuperscript{38} This solution would not only bring uniformity to the treatment of such counterclaims but would also serve the interest of efficient litigation by allowing all the rights and liabilities of the parties to be determined in a single suit in the district court.

\textbf{Jerry M. Trammell}

\textbf{Habeas Corpus—Waiver of Constitutional Guarantees}

In \textit{Stem v. Turner}\textsuperscript{1} the appellant, a prisoner, appealed the denial of habeas corpus relief by a federal district court. The district judge after a thorough review of most of the records of the appellant's trial in a North Carolina state court and of his attempts at state post-conviction relief, refused to grant a plenary hearing and dismissed the writ. The district court found as to some of Stem's allegations that the findings of facts in state hearings were correct and concluded as to other allegations that the appellant had failed to exhaust his state remedy under the post-conviction statute. The Court of Appeals for the 4th Circuit interpreted a section of the North Carolina Post-Conviction Act\textsuperscript{2} such that the appellant's state remedy had been exhausted and as a result the appellant was entitled to a plenary hearing in a federal district court.

In November of 1958, Thomas Stem was convicted in a North Carolina court of assault on a female with intent to rape and sentenced to a term of fifteen years. At his trial the two arresting police officers introduced illegally obtained evidence and testimony that was extremely prejudicial to him.\textsuperscript{3} Stem's privately retained

\textsuperscript{38} It appears that such a provision should allow the litigation of permissive as well as compulsory counterclaims. Where neither claim requires a long and complicated trial, apparently there would be no unreasonable delay. If a long or complicated trial be anticipated the court can always in furtherance of convenience order separate trials. \textit{Fed. R. Civ. P. 42(b)}.

\textsuperscript{1} 370 F.2d 895 (4th Cir. 1966).

\textsuperscript{2} N.C. GEN. STAT. § 15-218 (Supp. 1965).

\textsuperscript{3} Stem was arrested without a warrant at his home. No search was made of the house at that time, but the police officers returned to the house later that afternoon to search it. Nowhere in the record did it appear that the officers had a search warrant, or that Stem had consented to the search. As a result of the search, the officers found the girl's underpants which were introduced into evidence, made certain observations they testified about at the trial, and took photographs of parts of the house. All of this illegally obtained evidence corroborated the story of the girl. 370 F.2d at 898.
counsel failed to object to the evidence and testimony even though North Carolina law renders evidence obtained by an illegal search incompetent.\textsuperscript{4} The conviction was not appealed, but Stem did assert many times in several forums various legal improprieties that supposedly occurred in his trial.\textsuperscript{5} All of these were denied, including attempts under the state post-conviction relief statute and under a writ of habeas corpus to state courts. At this point, the appellant sought a writ of habeas corpus from the United States District Court for the Eastern District of North Carolina which was also denied.

In seeking a writ of habeas corpus from the federal courts, Stem asserted many grounds, but the one which eventually found favor with the court of appeals was ineffectiveness of counsel amounting to a deprivation of due process under the fourteenth amendment.\textsuperscript{6} The district judge had concluded that this issue, although formally raised in the pleadings, had not been asserted with proof to sustain it in any state court proceeding and, therefore, the appellant had failed to exhaust the remedy still available to him under the North Carolina Post-Conviction Hearing Act.\textsuperscript{7} However, the act\textsuperscript{8} seemingly provides to the contrary that "any claims of substantial denial of constitutional rights or of other error remediable under this arti-

\textsuperscript{4} N.C. Gen. Stat. § 15-27 (1953). The prohibition against the use of evidence obtained as a result of an illegal search extends to "facts discovered or evidence obtained" by reason of the search. The federal court presumed that this would bar testimony concerning observations made during the search. Stem v. Turner, 370 F.2d 895, 898 (4th Cir. 1966).

\textsuperscript{5} Stem v. Turner, 370 F.2d 895 (4th Cir. 1966) gives a history of the case.

A \textit{pro se} petition for certiorari to review the conviction was denied by the North Carolina Supreme Court on Nov. 21, 1961. Represented by privately retained counsel, appellant then sought, and was denied, relief under the North Carolina Post-Conviction Hearing Act (N.C. G.S. §§ 15-217 et seq.), after he was given a plenary hearing. A petition for writ of certiorari to the North Carolina Supreme Court to review that denial was denied Nov. 26, 1963, and a petition for a writ of certiorari was thereafter denied by the Supreme Court of the United States. Stem v. North Carolina, 379 U.S. 849 (1964). Next, a \textit{pro se} petition for a writ of habeas corpus was denied by Wake County (North Carolina) Superior Court on April 15, 1965, and certiorari to the North Carolina Supreme Court denied June 2, 1965. \textit{Id.} at 896 n.2.

\textsuperscript{6} Stem's main contention centered on the failure of his privately retained counsel to object to evidence that resulted from the illegal search. \textit{Id.} at 900.

\textsuperscript{7} \textit{Id.} at 897.

cle not raised or set forth in the original or any amendment petition shall be deemed waived." Despite the literal language of the statute, the Attorney General of North Carolina argued that the state trial courts followed the practice of considering claims that were not raised or decided in previous applications. However, the court of appeals noted that the North Carolina Supreme Court had not had occasion to speak definitely on the subject and that absent a definite state adjudication to the contrary, the professed language of the statute must prevail over asserted trial court practice. Since claims by Stem could no longer be heard under the Post-Conviction Hearing Act, he had exhausted his state remedies, but since Stem had not waived his constitutional claims under the federal standard, he was entitled to a plenary hearing in the federal district court to establish his claim to a writ of habeas corpus.

The development of the writ of habeas corpus in this country has been one of growing importance. Due in part to currently expanding concepts of due process of law, the use of the writ to test the constitutionality of state criminal proceedings will continue to accelerate. However, in order to maintain a balance between the state and federal court systems, Congress has declared that federal courts should abstain from exercising jurisdiction over state prisoners until state remedies have been exhausted.

In 1963, the Supreme Court of the United States decided the fa-

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10 370 F.2d at 897.
12 The number of habeas corpus applications filed in federal district courts by state prisoners is greatly increasing:
  1941—127
  1950—560
  1955—660
  1959—828
  1962—1115
  1963—1903
  1964—3531
  1965—4664

13 28 U.S.C. § 2254 (1964) provides that:
   the habeas corpus writ will not be granted for a state court unless it appears that the applicant has exhausted remedies available in the courts of the state. Remedies are not exhausted in state courts if the applicant has a right under the law of the state to raise by any available procedure, the question presented.
mous trilogy of *Fay v. Noia*,¹⁴ *Townsend v. Sain*,¹⁵ and *Sanders v. United States*,¹⁶ which laid down certain federal standards for dealing with habeas corpus. In *Townsend v. Sain*, the court attempted to redefine the guidelines as to when a petitioner tried in a state court is entitled to an evidentiary hearing in a federal district court. The Court said:

Where the facts are in dispute, the federal court in 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-Court trier of fact has after a full hearing reliably found the relevant facts.¹⁷

The court set out six specific situations in which an evidentiary hearing would be mandatory under the test, including the case where "the merits of the factual dispute were not resolved in the state hearing."¹⁸

In *Fay v. Noia* the Court laid down certain federal standards relating to the problem of exhaustion and waiver of state remedies. The court held that procedural defaults incurred by the applicant during the state court proceedings would not bar federal habeas corpus relief as a failure to exhaust state court remedies, unless the state remedies were knowingly waived. The requirement of exhaustion of state court remedies was interpreted to mean those state court remedies still available to the applicant at the time an application for habeas corpus was filed in federal court. The federal habeas judge was given some discretion in denying relief to an applicant who had deliberately by-passed state court procedure and in doing so had forfeited his state court remedies. But the Supreme Court plainly stated that the forfeiture must meet the federal standards of waiver, for waiver affecting federal rights is a federal question.¹⁹

The *Townsend* and *Noia* decisions outline the possible results

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¹⁷ 372 U.S. at 312.
¹⁸ Id. at 313.
¹⁹ See Johnson v. Zerbt, 304 U.S. 458 (1938). The case gives the classic definition of waiver as an intentional relinquishment or abandonment of a known right or privilege.
when a state court prisoner seeks habeas corpus relief before a federal court:
1. If there has been a full hearing in the state court on the merits on the issue for which relief is sought in the federal court, the state court prisoner is not entitled to relief whether there has been a waiver or not.
2. If there has not been a full hearing in a state court on the merits, but the prisoner has knowingly waived his state court remedies, then the state court prisoner is not entitled to relief in the federal court.
3. If, however, there has not been a full hearing on the merits in the state court and there has been no waiver of state court remedies that meets federal standards, the prisoner is entitled to a hearing in the federal courts.

This last situation is applicable to Stem v. Turner. Stem's claim for relief based on ineffectiveness of counsel had not been considered on the merits by a North Carolina hearing, but was barred by state procedure, a waiver that did not meet the federal standards.

In McNeil v. North Carolina, the court of appeals overruled the same district court judge involved in the Stem case. The appellant was seeking habeas corpus relief due to the systematic exclusion of Negroes from his jury, and as in the Stem case the conflict between the federal standard of waiver and the North Carolina standard resulted in the assumption of habeas corpus jurisdiction by the federal courts. North Carolina case law holds that any objection to a jury not raised prior to the entry of the plea shall deemed waived, and the North Carolina post-conviction statutes state that any claim not raised in the original petition shall be deemed waived. Since this does not meet the federal standard of waiver of a constitutional protection, the federal district court was directed to grant the requested writ.

The Supreme Court has made it clear that the doctrine of comity is not going to prevent the federal courts from using the writ of habeas corpus to protect the federal rights of state prisoners. Fed-

20 370 F.2d at 895.
21 368 F.2d 313 (4th Cir. 1966).
eral standards are to be applied in such areas as waiver, and state procedural defaults will not bar later applications for federal habeas corpus relief. There was much criticism of the Court from various sources for these decisions. Justices Clark and Harlan wrote vigorous dissenting opinions to \textit{Fay v. Noia}, attacking the new federal standards as abrupt departures from the Constitution and past decisions.\textsuperscript{28} There was a fear that the delicate balance between state and federal courts would be destroyed,\textsuperscript{24} and that the federal courts would be swamped with habeas corpus applications having an adverse effect upon the disposition of meritorious applications.\textsuperscript{25}

In \textit{Case v. Nebraska}\textsuperscript{26} the court attempted to answer some of its critics by placing responsibility on the states to adopt broad post-conviction relief statutes in order to minimize the necessity of state prisoners resorting to federal habeas corpus. Justice Brennan in a concurring opinion stated that:

Our federal system entrusts the states with primary responsibility for the administration of their criminal laws. The Fourteenth Amendment and Supremacy clause make requirements of fair and just procedures an integral part of those laws, and state procedures should ideally include adequate administration of these guarantees as well. If, by effective corrective processes, the States assumed this burden, the exhaustion requirement of 28 U.S.C. § 2254 (1958 ed.) would clearly promote state primacy in the implementation of these guarantees. Of greater importance, it would assure not only that meritorious claims would generally be vindicated without any need for federal courts intervention, but that nonmeritorious claims would be fully ventilated, making easier the task of the federal judge if the state prisoner pursued his cause further . . . . Greater finality would inevitably attach to state court determinations of federal constitutional questions, because further evidentiary hearings on federal habeas corpus would, if conditions of \textit{Townsend v. Sain} were met, prove unnecessary.\textsuperscript{27}

The Supreme Court has clearly put the states on notice that the maintenance of the balance between state and federal court systems

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\textsuperscript{28} 372 U.S. at 445 (Clark, J., dissenting).
\textsuperscript{24} See, \textit{e.g.}, Desmond, Federal and State Habeas Corpus, 49 A.B.A.J. 1166 (1963).
\textsuperscript{26} 372 U.S. at 445 (Clark, J., dissenting).
\textsuperscript{26} 381 U.S. 336 (1965) (per curiam with Clark, J. and Brennan, J. concurring in separate opinions).
\textsuperscript{27} \textit{Id.} at 345 (Brennan, J., concurring).
}\end{footnotes}
is now in the hands of the states. The growing protections that the
Court's interpretation of the Constitution affords to state prisoners
demands that the states reform their systems in order to comply with
the federal standards. If the state systems are not reformed in such
areas as right to counsel, discrimination in jury selection and use of
coerced confessions there will be a continued friction between fed-
eral and state courts and an increasing flood of applications for
federal habeas corpus. 28

Justice Clark in his concurring opinion in Case v. Nebraska,
cited North Carolina as one of the seven states to lead in providing
modern post-conviction relief procedure for testing federal claims
in the state courts. 29 But North Carolina has failed to go far eonugh
in complying with federal standards.

The Supreme Court has indicated "that at some point in the
criminal process, a convicted person will get a full evidentiary hear-
ing on the merits of every federal right he asserts" and "if the
prisoner has had no adequate hearing in the state court he will surely
get one in the federal courts." 30 Justice Brennan in Case v. Nebras-
ka 31 suggested certain desirable attributes that a state post-convic-
tion procedure should have. He felt that "it should be sufficiently
comprehensive to embrace all federal constitutional claims" and "in
light of Fay v. Noia it should eschew rigid and technical doctrines

28 Dean Griswold of Harvard Law School in an address, "The States and
Criminal Law," given on May 13, 1965, to the Cleveland Bar Association,
said:

For, after all, the basic responsibility for the enforcement of the
criminal law remains in the States. The States are, or should be, as
much concerned with high standards as is the Federal government.
The States should, in my view, welcome the determinations of the
Supreme Court that the high standards prescribed by our Federal
Constitution are to be taken seriously and should be enforced. What
is needed now is for the States to accept this responsibility and to
adopt means to carry it out. With proper explanation and under-
standing, this can, I believe, be done without impairing our enforce-
ment of the criminal law. When the States do fully meet this re-
sponsibility, we will all be better off, and we will more nearly have
realized the potentialities of our Great Federal Form of Government.
Case v. Nebraska, 381 U.S. 336, 344 n.7 (1965). See, e.g., Brennan, Some

29 381 U.S. at 340.

30 Meador, Accommodating State Criminal Procedure and Federal Post-
conviction Reviews, 50 A.B.A.J. 928, 929 (1964). See White v. Swenson,

of forfeiture, waiver, or default." Professor Meador of the University of Virginia Law School has stated:

The federal habeas corpus judge will not now be foreclosed by a state procedural waiver. The federal judge will examine the alleged waiver himself and will give it effect only if it amounts to a deliberate by-passing of state procedure, as explained by Noia. This means that if the states hope to terminate a substantial portion of their criminal business in their own courts, the states may not invoke any doctrine of waiver more stringent than this federal concept. The Noia definition of an effective waiver promises to pose one of the most troublesome aspects of Supreme Court trilogy. Whatever, we think of it, however, we should understand its consequences and make decisions about state procedure accordingly.

North Carolina deserves praise in its liberal post-conviction hearing statute, but the Stem and McNeil cases have shown that the federal courts will not be bound by the statute’s language concerning waiver. Counsel from the North Carolina Attorney General’s office stated in both cases that in spite of the language of the post-conviction statute, North Carolina courts would hear subsequent petitions raising issues available at the time a previous petition was filed. But the court of appeals felt bound by the stated language of the statute. North Carolina in order to bring its statute in line with actual state practice and federal standards, should amend N.C. Gen. Stat. § 15-218 (Supp. 1965) to allow subsequent petitions for post-conviction hearings dealing with claimed denials of constitutional rights that have not been knowingly and deliberately waived by the petitioner, and that have not previously been heard on the merits. In other words, North Carolina should adopt the federal standard of waiver in the post-conviction relief statute. This would add finally to North Carolina state court litigation by allowing the North Carolina courts to make final dispositions of a larger proportion of its criminal cases and eliminate for the federal courts a potential burden of serious proportions.

GEORGE V. HANNA III

22 Id. at 346-47.
24 See note 9 supra and accompanying text.
26 370 F.2d at 897.