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Federal Habeas Corpus - An Extended Remedy

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NOTES

Federal Habeas Corpus — An Extended Remedy

I. Scope of Inquiry in Habeas Corpus Proceedings

The Judiciary Act of 1867[1] made the federal writ of habeas corpus available to state prisoners. This Act raised many problems which necessarily attend any exercise of co-ordinate jurisdiction by two separate judicial systems. The most important of these problems was the determination of the scope of inquiry in a habeas corpus proceeding, *i.e.*, the minimal standards that a state court must satisfy to detain the prisoner and the method of ascertaining whether these standards in fact were met. In the early cases the scope of inquiry was confined to an examination of the state tribunal's jurisdiction over the person of the defendant and over the subject matter of the case. If the state court had jurisdiction, the writ would not issue.[2] The traditional jurisdictional concept of the scope of inquiry soon was expanded by *Ex parte Siebold*.[3] That case added the requirement that the sentencing tribunal must have proceeded under a constitutional statute and, further, a prisoner convicted under an unconstitutional statute could not be considered within the jurisdiction of the court. The Supreme Court also found a lack of jurisdiction if the trial judge imposed a sentence beyond that authorized by statute.[4] Thus, for purposes of habeas corpus, the concept of jurisdiction was extended beyond its traditional boundaries.

The Court in *Frank v. Mangum*[5] added an entirely new dimension to the scope of inquiry. That case held that if the state did not provide the applicant an adequate opportunity to raise his constitutional issues the federal court would hear his claims in a habeas corpus proceeding. Finally, in *Brown v. Allen*,[6] the Court ruled that if the applicant raised his claim in the state court, perfected his appeal

[1] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

[2] In the Matter of Moran, 203 U.S. 96 (1906); *In re* Belt 159 U.S. 95 (1895); Andrews v. Swartz, 156 U.S. 272 (1895); *In re* Schneider, 148 U.S. 162 (1893); *Ex parte* Yarbrough, 110 U.S. 651 (1884); *Ex parte* Parks, 93 U.S. 18 (1876); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830).

[3] 100 U.S. 371 (1879).

[4] *E.g.*, *Ex parte* Lange 85 U.S. (18 Wall.) 163 (1874) (detention was void for want of power of the judge to impose sentence of fine *and* imprisonment under a statute which only authorized fine *or* imprisonment and defendent paid fine); *Ex parte* Wilson, 114 U.S. 417 (1884) (Court had no jurisdiction in case in which defendant was sentenced to hard labor without indictment or presentment by grand jury in violation of fifth amendment rights); *In re* Snow, 120 U.S. 274 (1887); *cf. Ex parte* Bigelow, 113 U.S. 328 (1884).

[5] 237 U.S. 309 (1915).

[6] 344 U.S. 443 (1953).

through the state system, and was denied certiorari by the United States Supreme Court, he then would be entitled to a full reconsideration of his constitutional claims in an application to the federal district court for habeas corpus.[7] This broadened scope of inquiry in federal habeas corpus proceedings gives the state prisoner ample opportunity to present constitutional claims to a federal court *if* he follows the complete appellate route.[8]

II. The Abortive State Proceeding

A state prisoner applying for federal habeas corpus may encounter a unique problem—the "abortive" state proceeding.[9] A state criminal defendant suffers an abortive state proceeding if he fails to present his federal questions to the state court in a manner consistent with state procedure, and, as a result, the state remedy is foreclosed to him. Federal district courts frequently have denied federal habeas corpus relief to applicants who have suffered abortive state proceedings. Although the reasons for denial have not been stated clearly, the results have been analyzed in terms of three nonrelated legal doctrines: (1) failure to exhaust state remedies, (2) waiver, and (3) adequate and independent state ground of decision.

A. *Exhaustion Of State Remedies*

The federal courts have held consistently that habeas corpus relief will not be granted to a state prisoner who has a state remedy available[10] through direct appeal or collateral attack.[11] The power of the federal courts to issue the writ in such a case is unquestioned,[12] but courts have refrained from exercising this power[13] in the interest of

[7] Thus, the Court in *Frank* held that the state court must give the petitioner an opportunity to raise his constitutional claim in the state courts and if it did not, habeas corpus was available. See Moore v. Dempsey, 261 U.S. 86 (1923). The Court in *Brown* held that if the validity of a state decision to detain the petitioner rested on the determination of the constitutional claim that the state determination was erroneous, the federal court must ascertain whether the state court's decision was correct, using a de novo hearing if necessary.

[8] However, if a prisoner is detained lawfully under one count of the indictment, he cannot challenge the lawfulness of a second count by federal habeas corpus. McNally v. Hill, 293 U.S. 131 (1934).

[9] Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315 (1961).

[10] *Ex parte* Royall, 117 U.S. 241 (1886).

[11] Mooney v. Holohan, 294 U.S. 103 (1935).

[12] *Ex parte* Royall, 117 U.S. 241 (1886). "The rule is not one defining power but one which relates to the appropriate exercise of power." Bowen v. Johnston, 306 U.S. 19, 27 (1939).

[13] See Covell v. Heyman, 111 U.S. 176 (1884):

> The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise toward each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity,

orderly administration of state procedure. Exhaustion of state remedies has not been required if the remedy was inadequate for proper review of the federal question[14] or if the state offered no process to review the question.[15] The requirement of exhaustion, with its exceptions, was codified as section 2254 of the Judicial Code.[16] Soon after the codification, the Supreme Court in *Darr v. Burford*[17] held that a state prisoner ordinarily must seek certiorari in the United States Supreme Court in order to fulfill the requirement of exhaustion of state remedies.

Uncertainty remained, however, because of the statutory requirement that the writ of habeas corpus is to be denied "unless it appears that the applicant has exhausted the remedies *available* in the courts of the state. . . ."[18] It was unclear whether this statute required the applicant to show that he had perfected a complete state appeal and that no other state remedies existed or to show merely that there were no state remedies available *at the time of application* regardless of his prior efforts to utilize state remedies.[19] The results of the decisions indicate that the Supreme Court adopted the first interpretation. The reasoning of the opinions, however, leaves the issue in doubt for they did not clearly indicate which of the three possible theories was used to deny the writ.

An illuminating example of the confusion surrounding section 2254 is *Daniels v. Allen*.[20] Applicant Daniels was one day late in filing notice of appeal and lost his state right to appeal his constitutional claim. The United States Supreme Court denied the writ, using the following language:

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with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and, therefore, of necessity. *Id.* at 182.

[14] Moore v. Dempsey, 261 U.S. 86 (1923).

[15] Mooney v. Holohan, 294 U.S. 103 (1935).

[16] 28 U.S.C. § 2254 (1958). The text of the statute reads:

> 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.

[17] 339 U.S. 200 (1950).

[18] 28 U.S.C. § 2254 (1958). (Emphasis added.) See note 16 *supra* for complete text of statute.

[19] Daniels v. Allen, decided with Brown v. Allen, 344 U.S. 443, 482 (1953); *Ex parte* Spencer, 228 U.S. 652 (1913).

[20] *Ibid.*

> The state furnished an adequate and easily-complied-with method of appeal . . . . Of course, Federal habeas corpus is allowed where time has expired without appeal when the prisoner is detained without opportunity to appeal because of lack of counsel, incapacity, or some interference by officials . . . . Failure to appeal is much like failure to raise a known and existing question of unconstitutional proceeding or action prior to conviction or commitment. Such failure, of course, bars subsequent objection to conviction on those grounds . . . . A failure to use a state's available remedy, in the absence of some interference or incapacity . . . bars federal habeas corpus. *The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ.*[21] (Emphasis added.)

The italicized words speak in terms of *forfeiture* for failure to utilize the state's appellate remedies but the preceding language obscures the true reasoning of the court by speaking in terms of waiver and independent state ground of decision.

B. *Waiver*

Although there is a presumption against waiver of constitutional rights,[22] certain constitutional guarantees—such as right to trial by jury,[23] right to counsel,[24] and privilege against self-incrimination[25]—may be waived by criminal defendants. Federal district courts often have used the waiver theory to deny habeas corpus if the applicant failed to raise his constitutional claim in the state's trial court or if, having raised it in the trial court, he failed to pursue it in the state's appellate courts. In the latter case denial of the writ on the ground of waiver seemed to be another way of holding that failure to exhaust (i.e., pursue) state remedies resulted in a forfeiture of federal habeas corpus rights. *Johnson v. Zerbst*[26] furnishes the controlling definitional standard of waiver—"an intentional relinquishment or abandonment of a known right or privilege."[27] A state court's finding of waiver is not binding on the federal courts because waiver of federal rights is a federal question.[28] *Daniels v. Allen* states that "failure to appeal is much like failure to raise a known and existing question of unconstitutional proceeding or action prior to commitment. Such failure of course, *bars* subsequent objection to conviction on those grounds."[29]

[21] *Id.* at 485-87. See also, Sunal v. Large, 332 U.S. 174 (1947), which involves a federal prisoner, but stands for the same principle.
[22] Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1937).
[23] Patton v. United States, 281 U.S. 276 (1930).
[24] Carter v. Illinois, 329 U.S. 173 (1946); Johnson v. Zerbst, 304 U.S. 458 (1938).
[25] Rogers v. United States, 340 U.S. 367 (1951).
[26] 304 U.S. 458 (1938).
[27] *Id.* at 464.
[28] Rice v. Olson, 324 U.S. 786 (1945).
[29] 344 U.S. 443, 486 (1953). (Emphasis added.)

This phraseology indicates that waiver is an independent ground of denial of the writ.[30]

C. *Adequate And Independent State Ground Of Decision*

In cases arising in state courts involving questions of both state law and federal law, the doctrine developed that if the decision rested on an adequate and independent state ground, the federal court would not review the federal question.[31] The reason for such a rule is obvious. If the state court decides the federal question correctly, no purpose is served by an appeal which affirms the judgment; if it decides the federal question incorrectly, the judgment still will not be changed because the decision can be sustained on the state ground. In either case, if the federal court reviews the question it would render the equivalent of an advisory opinion. The doctrine also has been applied to state procedural grounds. In *Edelman v. California*,[32] the Court stated that it was powerless to decide whether constitutional rights had been violated if a federal question was not raised reasonably in accordance with state law requirements and that such noncompliance with local law was an adequate state ground of decision. Language in *Daniels v. Allen* indicated that the doctrine *did* apply to federal habeas except in cases in which extraordinary or exceptional circumstances were presented: "The state furnished an *adequate* and easily-complied-with method of appeal . . . . *A failure to use a state's available remedy . . . bars federal habeas corpus.*"[33]

To be adequate the state ground must be "sufficiently broad to maintain the judgment of that court"[34] and it "must be free from certain infirmities so that it will justify a foreclosing of consideration of the federal issues involved in the case."[35] The question of adequacy is to be determined by federal law.[36] State procedural grounds have been held inadequate if the state rule: (1) evades the federal ques-

[30] See Brown v. Allen, 344 U.S. 443, 559 n.2 (1953) (dissenting opinion).

[31] Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 634-36 (1875); for the introduction of the doctrine into federal habeas corpus see Irvin v. Dowd, in which the Court stated: "We do not reach the question whether federal habeas corpus would have been available to the petitioner had the Indiana Supreme Court rested its decision on the [state] ground." 359 U.S. 394, 406 (1959). Professor Hart advocated the adequate state ground doctrine. Hart, *Foreward: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 118-19 (1959). Professor Reitz disagreed strongly. Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315, 1338-63 (1961).

[32] 344 U.S. 357 (1953).

[33] 344 U.S. 443, 485-87 (1953). (Emphasis added.) See text accompanying note 21 *supra*.

[34] United States *ex rel.* Noia v. Fay, 300 F.2d 345, 359 (2d Cir. 1962).

[35] *Ibid.*

[36] Staub v. City of Baxley, 355 U.S. 313, 318-19 (1958).

tion,[37] (2) discriminates against the particular prisoner,[38] (3) bars unreasonably the federal rights,[39] or (4) has no genuine basis in state law.[40]

III. Summary Prior to Fay v. Noia

Until 1963, federal habeas corpus relief under section 2254 of the Judicial Code was administered under the following rules. The state prisoner was required to exhaust all available state remedies unless he could bring himself within one of the exceptions.[41] Exhaustion of state remedies usually entailed petition to the United States Supreme Court for certiorari.[42] It was not clear whether section 2254 contained an implied doctrine of forfeiture if the applicant suffered an abortive state proceeding. The Court often denied federal habeas corpus relief to an applicant on the ground that he had waived his federal claim, or on the ground that the conviction could be sustained by an adequate state ground independent from the alleged violation of federal rights. The reasoning of the courts in denying habeas corpus relief generally was unclear, but one or a combination of these three theories usually resulted in a denial of the federal remedy.

IV. Fay v. Noia[43]

In 1942, Noia and two others were convicted of felony murder on the basis of their signed confessions. Noia failed to appeal because he did not want to burden his family financially and because he recognized the possibility of a death sentence in a new trial. His accomplices did appeal, however, and after extended legal proceedings (which were not available to Noia because of his failure to appeal) the confessions were found to have been coerced and the convictions were set aside. Armed with a stipulation that his confession was coerced, Noia sought federal habeas corpus relief in 1960, eighteen years after conviction. Relief was denied in the district court because the judge interpreted section 2254[44] as implying forfeiture of federal habeas corpus relief in cases of abortive state proceedings.[45]

[37] Rogers v. Alabama, 192 U.S. 226 (1904).
[38] United States *ex rel.* Noia v. Fay, 300 F.2d 345 (2d Cir. 1962).
[39] Davis v. Wechsler, 263 U.S. 22 (1923); Williams v. Georgia, 349 U.S. 375 (1955) (dissenting opinion).
[40] Staub v. City of Baxley, 355 U.S. 313 (1958).
[41] 28 U.S.C. § 2254 (1958); see *Ex parte* Hawk, 321 U.S. 114 (1944).
[42] Darr v. Burford, 339 U.S. 200 (1950).
[43] 372 U.S. 391 (1963).
[44] 28 U.S.C. § 2254 (1958).
[45] United States *ex rel.* Noia v. Fay, 183 F. Supp. 222, 225 (S.D.N.Y. 1960).

The writ was granted by the court of appeals on a finding that exceptional circumstances existed which excused strict compliance with the section.[46] The Supreme Court affirmed on different grounds and rendered a decision on federal habeas that affected all three legal doctrines involved in abortive state procedings.

A. *Effect On Exhaustion Of State Remedies Doctrine*

The Court answered squarely the question whether section 2254[47] contained an implied doctrine of forfeiture by holding that Noia's failure to appeal was not a failure to exhaust the remedies available in the courts of the state within the meaning of that section. That requirement was held to refer only to exhaustion of state remedies still open to the applicant *at the time he files his application for habeas corpus in the federal court.*[48] This holding substantially strengthened federal habeas corpus as a collateral remedy to assure protection of an individual's constitutional rights. The Court substantially overruled *Darr v. Burford*[49] by holding that (1) failure to seek certiorari in the United States Supreme Court will not bar a state prisoner from federal habeas relief and (2) certiorari is not essential to the statutory requirement of present exhaustion.[50] This ruling should relieve the Court of numerous petitions for certiorari by state prisoners seeking to forge an unnecessary link in the chain of remedies.[51]

B. *Effect On Adequate And Independent State Ground Doctrine*

The Court overruled *Daniels v. Allen*[52] by deciding that the doctrine under which a state *procedural* default is held to constitute an adequate and independent ground of decision is applicable only in the case of a direct appeal and will not limit a federal court in a habeas corpus proceeding.[53] In other words, the decisions[54] which compelled an inquiry on appeal into the adequacy of the state procedural grounds are not applicable in a habeas corpus proceeding.[55]

[46] United States *ex rel.* Noia v. Fay, 300 F.2d 345 (2d Cir. 1962). "But we cannot assert with confidence that section 2254 only refers to present state remedies. Language in certain recent Supreme Court decisions indicates that interpreting the section to apply only to the exhaustion of presently available remedies would be erroneous." *Id.* at 356.

[47] 28 U.S.C. § 2254 (1958).

[48] 372 U.S. at 435. With this decision, the Court adopts Professor Hart's view. See Hart, *supra* note 31, at 112-14.

[49] 339 U.S. 200 (1950). See note 17 *supra* and accompanying text.

[50] 372 U.S. at 435-36.

[51] "[T]he requirement of Darr v. Burford has proved only to be an unnecessarily burdensome step in the orderly processing of the federal claims of those convicted of state crimes." 372 U.S. at 437.

[52] 344 U.S. 443, 482 (1953). See note 33 *supra* and accompanying text.

[53] 372 U.S. at 428-34.

[54] See notes 32-40 *supra* and accompanying text.

[55] Speaking of the problem generally, the Court in *Noia* proceeds thusly: "Despite the

If section 2254[56] applies only to remedies presently available and if the adequate state ground doctrine does not limit federal habeas corpus jurisdiction, the question of procedural adequacy becomes moot.[57] Thus, in the instant case the Court expressly disclaimed any opinion as to the adequacy of the state ground of decision.[58] The basis for such a holding is that a conviction that is procured in an unconstitutional manner is not made legitimate by a forfeiture of state remedies.[59] Furthermore, the decision seems to respect the intent of the statute of 1867[60] to create an efficacious collateral remedy, independent of appeal, which would prevent the extinguishing of federal substantive rights.[61]

Court's refusal to give binding wegiht to state court determinations of the merits in habeas, it has not infrequently suggested that where the state court declines to reach the merits because of a procedural default, the federal courts may be foreclosed from granting the relief sought on habeas corpus. But the Court's practice in this area has been far from uniform . . . ." 372 U.S. at 424. The Court states, "Moore v. Dempsey . . . is the most striking example of the Court's seeming refusal to give effect to a state procedural ground, *though the Court's language is ambiguous.*" 372 U.S. at 425 n. 36. (Emphasis added.) It should be noted that Moore v. Dempsey was not an abortive state proceeding. An appeal was taken by Moore and his four codefendants. Hicks v. State, 143 Ark. 158, 220 S.W. 308 (1920). State habeas corpus was denied. State v. Martineau, 149 Ark. 237, 232 S.W. 609 (1921). The prisoners exhausted all state remedies. The Court in *Moore* suggested the remedy *as applied* was not an adequate state remedy because of the fact that the state appelate court's treatment was too perfunctory and was not acceptable as a proper review of the case. Moore v. Dempsey, 261 U.S. 86, 91 (1923). Under this view of the case, which was followed in *Ex parte* Hawk, 321 U.S. 114 (1944) and codified in 28 U.S.C. § 2254 (1958), the writ would lie before or after exhaustion.

[56] 28 U.S.C. § 2254 (1958).

[57] However, short of this holding for purposes of habeas corpus, the recognized tests of adequacy would have compelled a different result. (1) New York was not evading the federal question on state grounds; no argument of evasion was raised. (2) New York was not discriminating against Noia because any other prisoner who did not appeal would be denied relief. N.Y. Code Crim. Proc. § 535. (3) The rule requiring appeal is basic, reasonable, and fair. It is necessary to an orderly administration of justice that a conviction become final when the defendant chooses not to appeal. See Daniels v. Allen, 344 U.S. 443, 486 (1953).

There is a genuine basis in New York law for the rule applied by the state court that all parties must appeal to preserve their legal defenses. In the strikingly similar fact situation of People v. Rizzo, 246 N.Y. 334, 158 N.E. 888 (1927), four defendants were tried together and convicted on the same evidence for attempted robbery. Rizzo, the only one who appealed, was successful in gaining a reversal. The court noted: "If he were not guilty, neither were the other three. As the others, however, did not appeal, there is no remedy for them through the courts; their judgments stand and they must serve their sentences." *Id.* at 890.

[58] 372 U.S. at 429.

[59] *Id.* at 427.

[60] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

[61] And if because of inadvertence or neglect he runs afoul of a state procedural requirement, and thereby forfeits his state remedies, appellate and collateral, as well as direct review thereof in this Court, those consequences should be sufficient to vindicate the State's valid interest in orderly procedure. Whatever residuum of state interest there may be under such circumstances is manifestly insufficient in the face of the federal policy, drawn from the ancient principles of the writ of habeas corpus, embodied both in the Federal Constitution and in the habeas corpus provisions of the Judicial Code, and consistently upheld by this Court, of affording an effective remedy for restraints contrary to the Constitution. 372 U.S. at 433-34.

C. *Effect On Waiver Doctrine*

Considering the Court's decision on exhaustion of state remedies and on procedural defaults, waiver is apparently the only bar to federal habeas corpus relief after an abortive state proceeding. Thus, the question of waiver becomes the critical issue in determining whether the applicant is entitled to a habeas corpus hearing. In the instant case the Court decided that, under the circumstances, Noia's failure to appeal could not be deemed such an intelligent and understanding waiver of his right to appeal as to justify withholding federal habeas corpus relief. The definition of waiver in *Johnson v. Zerbst*—"an intentional relinquishment or abandonment of a known right or privilege"[62]—still controls, but the Court adds that the writ should not be denied for reasons that cannot "fairly be described as the deliberate bypassing of state procedures,"[63] and that the standard "depends on the considered choice of the petitioner."[64] Noia intentionally abandoned his right of appeal, but he did not deliberately bypass the state procedures.[65]

Under section 2243[66] the Court recognizes "a limited discretion in the federal judge to deny relief to an applicant under certain circumstances."[67] The Court holds that in the exercise of this limited discretion conferred by section 2243,[68] it is "*open* to the federal court on habeas to deny . . . all relief"[69] for any reasons "that can fairly be described as the deliberate bypassing of the state procedures."[70] Although such a course is *open* to the judge, apparently, he does not have to deny it even if he does find a deliberate bypass. Traditionally, waiver of a right cuts off the remedy, but for the purposes of habeas corpus this concept must be regarded as modified. It is doubtful whether any prisoner would *deliberately* bypass the state appellate system in an attempt to vindicate his federal claim in a habeas corpus proceeding. If he has a constitutional objection, he first should follow the state appellate route before seeking habeas corpus, for if he deliberately bypasses the state system, the possibility exists that he will be denied a hearing. The deliberate bypass concept probably does not

[62] 304 U.S. 458, 464 (1938).
[63] 372 U.S. at 439.
[64] *Ibid.*
[65] Noia waived his right to appeal. He did not waive his right to be free from conviction on the basis of a coerced confession, 372 U.S. at 427, so his action in state court is unimportant. See Reitz, *supra* note 31 at 1333.
[66] "The court shall summarily hear and determine the facts, and dispose of the matter *as law and justice require.*" 28 U.S.C. § 2243 (1958). (Emphasis added.)
[67] 372 U.S. at 438.
[68] 28 U.S.C. § 2243 (1958).
[69] 372 U.S. at 439. (Emphasis added.)
[70] *Ibid.*

involve a specific intent to obtain habeas corpus relief by thwarting state procedural rules, but it will require a more definitive statement to indicate its scope.

D. *Summary Of Effects Of Fay v. Noia*

From the explicit (and implicit) holdings in *Fay v. Noia*, the following rules apparently will govern future habeas corpus proceedings under section 2254.[71] First, if there are state remedies presently available, the applicant will come squarely within section 2254 and will be required to exhaust his *state* remedies unless his case falls within one of the recognized exceptions. Application to the United States Supreme Court for certiorari from the final decision of the state is not required for full exhaustion of a state remedy and failure to apply for certiorari will not bar a state prisoner from federal habeas corpus relief. A procedural default by an applicant in the state court will not constitute an adequate and independent state ground so as to bar a federal district court from granting habeas relief as a matter of law. Third, if there are no state remedies presently available (in cases in which the state prisoner did not bring himself within one of the section 2254 exceptions), the federal district court judge must decide if the applicant has deliberately bypassed the state courts. If he has, the judge has a limited discretion to deny relief without a hearing on the merits; if he has not, he will be granted a hearing.

V. Conclusion

The principal case is extremely important when applied in conjunction with numerous other habeas corpus cases the Court has decided recently. Because it substantially broadens the scope of inquiry in a habeas corpus proceeding, it potentially extends the collateral federal remedy to every state prisoner who alleges an unconstitutional detention after suffering an abortive state proceeding. It will enable applicants to test the validity of their convictions under the theories of *Mapp v. Ohio*[72] and *Gideon v. Wainwright*.[73] Most of the courts that have considered the question have held that *Mapp* and *Gideon* apply retroactively.[74] If the Supreme Court accepts this view, state

[71] 28 U.S.C. § 2254 (1958).

[72] 367 U.S. 643 (1961). See Sisk v. Lane, 219 F. Supp. 507 (N.D. Ind. 1963); United States *ex rel.* Emerick v. Denno, 220 F. Supp. 890 (S.D.N.Y. 1963).

[73] 372 U.S. 335 (1963), noted in 18 Sw. L.J. 284 (1964).

[74] United States *ex rel.* Durocher v. La Vallee, 330 F.2d 303 (2d Cir. 1964) (*Gideon*); United States *ex rel.* Craig v. Myers, 329 F.2d 856 (3d Cir. 1964) (*Gideon*); Yeager v. Director, Dep't of Welfare & Institutions, 319 F.2d 771 (4th Cir. 1963) (*Gideon*); Hall v. Warden, Maryland Penitentiary, 313 F.2d 483 (4th Cir. 1963), *cert. denied*, 374 U.S. 809 (1963) (*Mapp*); *Ex parte* Hope, — Tex. Crim. —, 374 S.W.2d 441 (1964) (*Gideon*).

prisoners should be able to secure their release under *Fay v. Noia* without having appealed the constitutional point. The waiver test would not seem to be a problem because the prisoner could hardly waive a right that was held not to exist at the time of his trial.[75] Even if these convictions are ten or twenty years old, the prisoners may be freed and the state probably will be precluded from trying some prisoners again because of lack of evidence, unavailability of witnesses, or shortage of judicial facilities.

Viewed realistically, habeas corpus is effectively substituted for appeal in the instant decision.[76] The state's interest in finality of convictions certainly would have been protected better if Noia had appealed; but the predilection of the Court today is to weigh the individual's rights heavily in balancing his interest against that of the state.[77] The immediate consequence of the decision will be an increase in the number of applications from state prisoners to the federal district courts.[78] Because habeas corpus is governed by equitable principles,[79] the judge to whom application is made must exercise

Contra, United States *ex rel.* Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963),*cert. granted,* 377 U.S. 930 (1964) (*Mapp*); Gaitan v. United States, 317 F.2d 494 (10th Cir. 1963) (*Mapp*); People v. Muller, 11 N.Y.2d 154, 182 N.E.2d 99 (1962) (*Mapp*); Commonwealth *ex rel.* Craig v. Banmiller, 410 Pa. 584, 189 A.2d 875 (1963) (*Gideon*).

[75] Until 1963, Betts v. Brady, 316 U.S. 455 (1942) governed.

[76] The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the federal court. It is only authorized when a state prisoner is in custody in violation of the Constitution of the United States. . . . *That fact is not to be tested by the use of habeas corpus in lieu of an appeal.* To allow habeas corpus in such circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime. Daniels v. Allen, 344 U.S. 443, 485 (1953). (Emphasis added.)

In a case dealing with a federal prisoner, the Court stated, "So far as convictions obtained in the federal courts are concerned, the general rule is that the writ of habas corpus will not be allowed to do service for an appeal. . . . Of course, if [the defendants] . . . had pursued the appellate course and failed, their cases would be quite different. But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile." Sunal v. Large, 332 U.S. 174, 178-81 (1947). Apparently, Noia could not have succeeded if he were a federal prisoner.

[77] See Gideon v. Wainwright, 372 U.S. 335 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

[78] It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search. Nor is it any answer to say that few of these petitions in any court really result in the discharge of the petitioner. That is the condemnation of the procedure which has encouraged frivolous cases. In this multiplicity of worthless cases, states are compelled to default or to defend the integrity of their judges and their official records, sometimes concerning trials or pleas that were closed many years ago. Brown v. Allen, 344 U.S. 443, 537 (1953) (concurring opinion).

Mr. Justice Clark points out that from 1946 to 1957 the petitioners were successful in 1.4% of the cases. The number of applications per year increased from 127 in 1941 to 1,232 in 1962. Fay v. Noia, 372 U.S. 391, 445-46 (dissenting opinion).

[79] United States *ex rel.* Smith v. Baldi, 344 U.S. 561, 573 (1953) (dissenting opinion).