

BROWN v. ALLEN, WARDEN

No. 32

SUPREME COURT OF THE UNITED STATES

344 U.S. 443; 73 S. Ct. 397; 97 L. Ed. 469; 1953 U.S. LEXIS 2391

April 29, 1952, Argued
February 9, 1953, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. *

II. The bearing that the proceedings in the State courts should have on the disposition of such an application in a district court.

OPINION

MR. JUSTICE REED delivered the opinion of the Court.

Certiorari was granted to review judgments of the United States Court of Appeals for the Fourth Circuit. *343 U.S. 903; 342 U.S. 953; 342 U.S. 941*. These cases were argued last year. As the records raised serious federal constitutional questions upon which the carrying out of death sentences depended and procedural issues of importance in the relations between states and the Federal Government upon which there was disagreement in this Court, we decided to set the cases for reargument. We have now heard the cases again.

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MR. JUSTICE FRANKFURTER (concurring)¹

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The course of litigation in these cases and their relevant facts are set out in MR. JUSTICE REED's opinion. This opinion is restricted to the two general questions which must be considered before the Court can pass on the specific situations presented by these cases. The two general problems are these:

I. The legal significance of a denial of certiorari, in a case required to be presented here under the doctrine of *Darr v. Burford*, *339 U.S. 200*, when an application for a writ of habeas corpus thereafter comes before a district court.

[*489] I.

Darr v. Burford sheds no light [***506] on the effect a district court is to give our denial of certiorari in one of these cases. That decision was expressly limited to ruling that "ordinarily" the certiorari jurisdiction of this Court must be invoked in an attempt to secure review of a State court's refusal of relief prior to an application for habeas corpus in a district court. *Darr v. Burford*, *339 U.S.*, at 201, 214. The fact that two members of the necessary majority in *Darr v. Burford* deemed it appropriate to disavow concurrence in any "indication" in the Court's opinion that any effect is to be given to the denial of certiorari emphasizes that no such ruling can be attributed to *Darr v. Burford*. It was the view of MR. JUSTICE BURTON and MR. JUSTICE CLARK "that the nature of the proceeding is such that, when the reasons for a denial of certiorari are not stated, the denial should be disregarded in passing upon a subsequent application for relief, except to note that this source of possible relief has been exhausted." *Darr v. Burford*, *supra*, at 219. Of course, when the reasons are given, the decision to deny will have the effect indicated by the reasons stated. But we know best how puzzling it often would be to state why the Court denied certiorari even when we are parties to the denial.

In the three cases now here from the Fourth Circuit, the Court of Appeals relied heavily on our denial of certiorari in ruling against applications for federal habeas corpus by State prisoners. ¹ Its opinion in No. 20 [*490] relies on, and the per curiam decision in Nos. 22 and 32 quotes, an earlier decision by that court based on an express assumption that if this Court had thought that the record showed a denial of constitutional rights, certiorari [*491] would have been granted. *Stonebreaker v. Smyth*, *163 F.2d 498, 499*.

¹Justice Frankfurter's reasoning represents the majority opinion on the legal effect of a prior denial of certiorari review.

1 In No. 20, *Daniels v. Allen*, after speaking of the denial of certiorari, the District Judge felt it difficult to believe "that any impartial person would conclude in the light of the procedural history of this case that it clearly

appears that petitioners were denied the substance of a fair trial." He concluded the petitioners had had a fair trial, that the writ should be vacated "because not available to petitioners on the procedural history, and if so, the petitioners are not entitled to discharge" since they did not substantiate their charges. *Daniels v. Crawford*, 99 F.Supp. 208, 213, 216. The Court of Appeals stated that it was only necessary to consider the proposition that petitioners were not entitled to the writ in view of the procedural history of the case and affirmed, saying that petitioners could not by habeas corpus circumvent the results of their failure to comply with the State procedural rules. Their allegation of peculiar hardship in only one day's default in complying with State procedural rules was before the Supreme Court in their application for certiorari "and, proper respect for that court requires that we assume that, if it had thought that such enforcement of the rules of court amounted to a denial of a fair hearing to men condemned to death, it would have granted certiorari either to the Supreme Court [of the State] or the trial court and would have reviewed the case. The case falls squarely, we think, within what was said by the Supreme Court in *Ex parte Hawk*, 321 U.S. 114, 118," *Daniels v. Allen*, 192 F.2d 763, 768, 769.

In No. 22, *Speller v. Allen*, the District Court stated that it "felt strongly disposed to deny the petition for writ of habeas corpus solely on the procedural history" but decided to hear evidence on the merits. After hearing evidence, the Court dismissed, "upon the procedural history and the record in the State Courts, for the reason that habeas corpus proceeding is not available to the petitioner for the purpose of raising the identical question passed upon in those Courts." Further, even if entitled to raise the same question, petitioner did not substantiate his claims. *Speller v. Crawford*, 99 F.Supp. 92, 95, 97. The Court of Appeals cited *Ex parte Hawk* and quoted from its opinion in *Stonebreaker v. Smyth*, 163 F.2d 498, 499, to the same effect as the language in No. 20, that "proper respect" compels the conclusion that the Supreme Court would have granted certiorari had it thought petitioner's constitutional rights violated. *Speller v. Allen*, 192 F.2d 477, 478.

In No. 32, *Brown v. Allen*, the District Court relied on *Stonebreaker v. Smyth* and denied the writ, noting that petitioner had apparently had a fair and impartial trial in the State courts and that the Supreme Court had refused to review the State court action. *Brown v. Crawford*, 98 F.Supp. 866. The Court of Appeals considered the case together with No. 22, and, as stated above, affirmed.

If we were to sanction a rule directing the District Courts to give any effect to a denial of certiorari,

let alone the effect of *res judicata* which is the practical result of the position of the Fourth Circuit, we would be ignoring actualities recognized ever since certiorari jurisdiction was conferred upon this Court more than sixty years ago.

From its inception certiorari jurisdiction has been treated for what it is in view of the function that it was devised to serve. It was designed to permit this Court to keep within manageable proportions, having due regard to the conditions indispensable for the wise adjudication of those cases which must be decided here, the business that is allowed to come before us. By successive measures Congress enlarged the discretionary jurisdiction of the Court until, by the Judiciary Act of 1925, supplemented by the Court's own invention of the jurisdictional statement in relation to the narrow scope of residual appeals, the Court became complete master of its docket. The governing consideration was authority in the Court to decline to review decisions which, right or wrong, do not present questions of sufficient gravity. Whatever the source of these questions, whether the common law, statutes or the Constitution, other cases of obvious gravity are more than enough to absorb the Court's time and thought. Cf. *Hamilton Shoe Co. v. Wolf Brothers*, [**439] 240 U.S. 251, 258.

It is within the experience of every member of this Court that we do not have to, and frequently do not, reach the merits of a case to decide that it is not of sufficient importance to warrant review here. Thirty years ago the Court rather sharply reminded the Bar not to draw strength for lower court opinions from the fact that they were left unreviewed here. "The denial of a writ of [*492] certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490. We have repeatedly indicated that a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard. Any departure from this fundamental rule in the type of case we are considering ought to be based on a showing that these denials of certiorari, unlike all the other denials, are in fact the essential equivalents of adjudication on the merits. The results of the inquiry detailed in the Appendix, *post*, p. 514, show that the contrary is the fact.² There is certainly no more assurance that these petitions have been canvassed on their merits than is true of cases within the ordinary domain of certiorari jurisdiction.

2 An attempt to determine the factual context of a statistically representative group of habeas corpus applications is summarized in the Appendix, *post*, p. 514; the study there reported reflects the examination of the 126 Supreme Court files in cases in which certiorari was denied to State prisoners during the October 1950 Term and habeas corpus applications subsequently made in federal district courts, and examination of materials obtained in response to questionnaires sent to the District Clerks concerning the applications and the dispositions of those 126 cases in the District Courts.

Indeed, there is less assurance that petitions by State prisoners could be considered on their merits than is the case with ordinary petitions for certiorari. To treat denials [***508] of certiorari in cases in which applications for habeas corpus are subsequently made in effect as adjudications here, presupposes, at the least, that such "determinations" [*493] are based on records of litigation in which issues are more or less carefully shaped by competent lawyers, as is after all true of the ordinary flow of certiorari cases. Such an assumption is shown to be wholly baseless by the study of the 126 certiorari files on which this opinion is based. It is also an assumption that falsifies the picture of the habeas corpus problems facing the District Judge.

These petitions for certiorari are rarely drawn by lawyers; some are almost unintelligible and certainly do not present a clear statement of issues necessary for our understanding, in view of the pressure of the Court's work.³ The certified records we have in the run of certiorari cases to assist understanding are almost unknown in this field.⁴ Indeed, the number of cases in which most of the papers necessary to [***440] prove what happened in the State proceedings are not filed is striking. Whether there has been an adjudication or simply a perfunctory denial of a claim below is rarely ascertainable. Seldom do we have enough on which to base a solid conclusion as to the adequacy of the State adjudication. Even if we are told something about a trial of the claims [*494] the applicant asserts, we almost never have a transcript of these proceedings to assist us in determining whether the trial was adequate.⁵ Equally unsatisfactory as a means for evaluating the State proceedings is the filing of opinions; in less than one-fourth of the cases is more than a perfunctory order of the State courts filed.⁶ We would have to have very different records and to alter our consideration of these cases radically if a denial could fairly be deemed to be an undisclosed decision on the merits. In a few cases the issues before the District Court had not even been raised here.⁷ In other cases, the emphasis put on the issues here

differed considerably from that put on them in the District Courts. Alice could understand, but not I, how under such circumstances a district judge could assume if he is so minded, that we "decided" the question now presented to him.

3 See Appendix, *post*, p. 516. As shown there, only 13 of 126 petitions were drawn by lawyers; others, of course, may have been drawn by lawyers either in or out of prison who did not choose to sign the petition. But our experience affirms the conclusion set forth in the survey based on one test of the legal adequacy of the petitions, that in a large number of cases, the petitions must be combed through to find the issues, certainly much more so than is true of the ordinary petitions for certiorari.

4 See Appendix, *post*, pp. 516-517 and Table 1, *post*, pp. 518-519. The fact that we rarely do have sufficient papers may account for our disputes, even in the cases we grant, as to what has happened below. See, *e. g.*, *Uveges v. Pennsylvania*, 335 U.S. 437. At the very least, we would want to have the petitions and the orders below, but even as to this minimum, as Table 1, Part 2 shows (Item "a and c"), in only 53 of the 114 cases in which the issues were raised after trial was this minimum available to us.

5 See Appendix, Table 1, Part 2, *post*, p. 519.

6 See Appendix, Table 1, Part 1, *post*, p. 518.

7 See Appendix, *post*, pp. 525-526.

Just as there is no ground for holding that our denial is in effect *res judicata*, so equally is there no basis for leaving the District Judge free to decide whether we passed on the merits. For there is more to the story. The District Judge ordinarily knows painfully little of the painfully little we knew. It is a rare case indeed in which the District Court has any information concerning the certiorari proceeding. In over 90% of the cases studied, there were neither papers filed nor allegations made indicating in any way what issue the petition for certiorari presented.⁸ In even fewer cases was there any indication that [***509] any papers from the State proceedings had been before this Court.⁹ It may be said that the District Court [*495] can call for the papers that were here. It is seldom done.¹⁰ Moreover, in view of the unlikelihood that such a record could reveal enough for a sound judgment, such a requirement would be futile. But otherwise the District Judge can know only in a negligible number of cases what little we had before us. To say that he is at liberty to decide whether we passed on the merits of a case invites what must, in almost all cases, be idle speculation. We would be inviting a busy federal district judge to rest on our denial and cloak his failure to exercise a judgment in formal compliance with

a statement that he can give meaning to something that almost always must to him be meaningless.

8 See Appendix, Table 2, *post*, p. 523.

9 See Appendix, Column 3 of Table 1, *post*, p. 518.

10 In 2 cases of the 126 studied, an order was entered in this Court returning original papers to the petitioner. Altogether, among the 329 applications for review of State denials of relief to State prisoners in the 1950 Term, 3 such orders were entered.

It is inadmissible to act as though these cases proceeded through the courts in an orderly fashion, leaving behind neat records which can be traced effectively with promise of enlightenment, once traced. Although it seems difficult to conceive of many cases in which a district judge, presented with a full record of the proceedings here, could give any relevant effect to the denial of certiorari, the likelihood is negligible that such a case will also be one of the very few in which he has enough materials to know what was before us. To give him discretion to interpret the denial of certiorari as a "determination" can so rarely be rationally justified that it is either futile or mischievous to allow such denial to weigh in the District Court's disposition.

In *Darr v. Burford* it was decided, as a matter of proper administration, that due regard for the relations between State and federal authority makes it undesirable in the ordinary case to permit an application to a federal district [*496] court on a claim which [*441] has already been presented to the State court before we have had an opportunity to review the State court action here. To hold, however, that a denial of certiorari may be deemed to be approval of the decision of the State court would be something far beyond fashioning a rule for the administration of judicial business. If district judges were authorized to deny an application for habeas corpus merely because the issues may have been considered by this Court in denying a petition for certiorari, the duty, which has been entrusted to the Federal Courts since the enlargement of the scope of habeas corpus jurisdiction by the Act of 1867, to deal judicially with applications for writs of habeas corpus by State convicts would be left to the unbounded, because undefined, discretion of the District Judges throughout the land. Judges dealing with the writ of habeas corpus, as with temporary injunctions, must be left some discretion -- room for assessing fact and balancing conflicting considerations of public interest -- if law is not to be a Procrustes bed. But discretion must be judicial discretion. It must be subject to rational criteria, by which particular situations may be adjudged. To allow applications for habeas corpus to be denied merely because it is deemed, on no reasonable or,

at best, on the most fragile foundations, that the matter has already been adjudicated here, is to afford no criterion, but merely a shelter for district judges to respond according to the individual will.

We must not invite the exercise of judicial impressionism. Discretion there may be, but "methodized by analogy, disciplined by system."Cardozo, *The Nature of the Judicial Process*, 139, 141 (1921). Discretion without a criterion for its exercise is authorization of arbitrariness. The Nation's Supreme Court ought to be able to do better than to tell the Federal Judges of the land, in a field [***510] so vital as that of habeas corpus to vindicate constitutional [*497] rights, that they may do as they please -- that they are not to be bound, nor to be guided, by considerations capable of rational formulation.

This is not to impugn the conscientiousness of federal judges; if left at large in disposing of applications for a writ of habeas corpus, they would necessarily be thrown back upon their individual judgments, and that would be the exercise not of law but of arbitrariness.

[***LEdHR3B] [3B]

The reasons why our denial of certiorari in the ordinary run of cases can be any number of things other than a decision on the merits are only multiplied by the circumstances of this class of petitions. And so we conclude that in habeas corpus cases, as in others, denial of certiorari cannot be interpreted as an "expression of opinion on the merits." *Sunal v. Large*, 332 U.S. 174, 181.

II.

The issue of the significance of the denial of certiorari raises a sharp division in the Court. This is not so as to the bearing of the proceedings in the State courts upon the disposition of the application for a writ of habeas corpus in the Federal District Courts. This opinion is designed to make explicit and detailed matters that are also the concern of MR. JUSTICE REED's opinion. The uncommon circumstances in which a district court should entertain an application ought to be defined with greater particularity, as should be the criteria for determining when a hearing is proper. The views of the Court on these questions may thus be drawn from the two opinions jointly.

I deem it appropriate to begin by making explicit some basic considerations underlying the federal habeas corpus jurisdiction. Experience may be summoned to support the belief that most claims in these attempts to obtain review of State convictions are without merit.

Presumably they are adequately dealt with in the State courts. [*498] Again, no one can feel more strongly than I do that a casual, unrestricted opening of the doors of the federal courts to these claims not only would cast an undue burden upon those courts, but would also disregard our duty to support and not weaken the sturdy enforcement of their criminal laws [**442] by the States. That wholesale opening of State prison doors by federal courts is, however, not at all the real issue before us is best indicated by a survey recently prepared in the Administrative Office of the United States Courts for the Conference of Chief Justices: of all federal question applications for habeas corpus, some not even relating to State convictions, only 67 out of 3,702 applications were granted in the last seven years. And "only a small number" of these 67 applications resulted in release from prison: "a more detailed study over the last four years . . . shows that out of 29 petitions granted, there were only 5 petitioners who were released from state penitentiaries."

¹¹ The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by indiscriminating generalities. The complexities of our federalism and the workings of a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other, are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others.

11 Habeas Corpus Cases in the Federal Courts Brought by State Prisoners, Administrative Office of the United States Courts 4 (Dec. 16, 1952). See also Appendix, *post*, pp. 526-527 and especially 526, n. 19, discussing the reluctance of the District Court to grant the one application out of the 126 there surveyed which was granted.

For surely it is an abuse to deal too casually and too lightly with rights guaranteed by the Federal [***511] Constitution, even though they involve limitations upon State power and may be invoked by those morally unworthy. Under the guise of fashioning a procedural rule, we are [*499] not justified in wiping out the practical efficacy of a jurisdiction conferred by Congress on the District Courts. Rules which in effect treat all these cases indiscriminately as frivolous do not fall far short of abolishing this head of jurisdiction.

Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. These tribunals are under the same duty as the federal courts to respect rights under the United States Constitution. See *The Federalist*, No. 82; *Clafflin v. Houseman*, 93 U.S. 130; *Testa v. Katt*, 330 U.S. 386;

Note, 60 Harv. L. Rev. 966. Indeed, the jurisdiction given to the federal courts to issue writs of habeas corpus by the First Judiciary Act, § 14, 1 Stat. 81-82, extended only to prisoners in custody under authority of the United States. It was not until the Act of 1867 that the power to issue the writ was extended to an applicant under sentence of a State court. It is not for us to determine whether this power should have been vested in the federal courts. As Mr. Justice Bradley, with his usual acuteness, commented not long after the passage of that Act, "although it may appear unseemly that a prisoner, after conviction in a state court, should be set at liberty by a single judge on *habeas corpus*, there seems to be no escape from the law." *Ex parte Bridges*, 2 Woods (5th Cir.) 428, 432. His feeling has been recently echoed in a proposal of the Judicial Conference of Senior Circuit Judges that these cases be heard by three-judge courts.¹² See [*500] Rep. Jud. Conf. 1943, p. 23. But the wisdom of such a modification in the law is for Congress to consider, particularly in view of the effect of the expanding concept of due process upon enforcement by the States of their criminal laws. It is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress. By giving [**443] the federal courts that jurisdiction, Congress has imbedded into federal legislation the historic function of habeas corpus adapted to reaching an enlarged area of claims. See, *e. g.*, *Mooney v. Holohan*, 294 U.S. 103; *Johnson v. Zerbst*, 304 U.S. 458.

¹² The proposal has now been abandoned. See Rep. Jud. Conf., 1947, p. 17. A suggestion of Mr. Justice Bradley on the subject, *Ex parte Bridges*, *loc. cit. supra*, is reflected in the proposal of the Conference of the Chief Justices of the States that the final judgment of a State's highest court in a criminal proceeding "be subject to review or reversal only by the Supreme Court of the United States." 25 State Government 249-250 (November 1952).

In exercising the power thus bestowed, the District Judge must take due account of the proceedings that are challenged by the application for a writ. All that has gone before is not to be ignored as irrelevant. But the prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have. Cf. *Ex parte Royall*, 117 U.S. 241, 248-250. A State determination may help to define the claim urged in the application for the writ and may bear on the seriousness of the claim. That most claims are frivolous has an important bearing upon the procedure to be followed by a district judge. The prior State

determination may guide his discretion in deciding upon the appropriate course to be followed in disposing of the application before him. The State record may serve to indicate the [***512] necessity of further pleadings or of a quick hearing to clear up an ambiguity, or the State record may show the claim to be frivolous or not within the competence of a federal court because solely dependent on State law.

It may be a matter of phrasing whether we say that the District Judge summarily denies an application for a writ by accepting the ruling of the State court or by making an independent judgment, though he does so on [*501] the basis of what the State record reveals. But since phrasing mirrors thought, it is important that the phrasing not obscure the true issue before a federal court. Our problem arises because Congress has told the District Judge to act on those occasions, however rare, when there are meritorious causes in which habeas corpus is the ultimate and only relief and designed to be such. Vague, undefined directions permitting the District Court to give "consideration" to a prior State determination fall short of appropriate guidance for bringing to the surface the meritorious case. They may serve indiscriminately to preclude a hearing where one should have been granted, and yet this basis for denial may be so woven into the texture of the result that an improper deference to a State court treatment of a constitutional issue cannot even be corrected on review. If we are to give effect to the statute and at the same time avoid improper intrusion into the State criminal process by federal judges -- and there is no basis for thinking there is such intrusion unless "men think dramatically, not quantitatively," Holmes, *Collected Legal Papers*, p. 293 -- we must direct them to probe the federal question while drawing on available records of prior proceedings to guide them in doing so.

Of course, experience cautions that the very nature and function of the writ of habeas corpus precludes the formulation of fool-proof standards which the 225 District Judges can automatically apply. Here as elsewhere in matters of judicial administration we must attribute to them the good sense and sturdiness appropriate for men who wield the power of a federal judge. Certainly we will not get these qualities if we fashion rules assuming the contrary. But it is important, in order to preclude individualized enforcement of the Constitution in different parts of the Nation, to lay down as specifically as the nature of the problem permits the standards or directions [*502] that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State courts.

First. Just as in all other litigation, a prima facie case must be made out by the petitioner. The application should be dismissed when it fails to state a federal question, or fails to set forth facts which, if accepted at face value, would entitle the applicant to relief.

Care will naturally be taken that the frequent lack of technical competence of prisoners [***444] should not strangle consideration of a valid constitutional claim that is bunglingly presented. District judges have resorted to various procedures to that end. Thus, a lawyer may be appointed, in the exercise of the inherent authority of the District Court (*cf.*, *e. g.*, *Ex parte Peterson*, 253 U.S. 300), either as an *amicus* or as counsel for the petitioner, to examine the claim and to report, or the judge may dismiss the petition without prejudice.¹³

13 The Appendix shows a wide variety of procedures used to accommodate judicial proceedings to the needs of petitioners ill-equipped to state whatever claims they may have. See Appendix, Table 4, *post*, p. 528, and *post*, p. 527. By any standard, the applications for habeas corpus are very often woefully inadequate to apprise the judge of the claim. See Appendix, *post*, pp. 522-523.

[***LEdHR50] [50]Second. Failure to exhaust an available State remedy is an obvious [***513] ground for denying the application. An attempt must have been made in the State court to present the claim now asserted in the District Court, in compliance with § 2254 of the Judicial Code. *Section 2254* does not, however, require repeated attempts to invoke the same remedy nor more than one attempt where there are alternative remedies. Further, *Darr v. Burford* requires "ordinarily" an application for certiorari to the United States Supreme Court from the State's denial of relief. *Cf. Frisbie v. Collins*, 342 U.S. 519, 520-522.

[*503] [***LEdHR51] [51]Of course, nothing we have said suggests that the federal habeas corpus jurisdiction can displace a State's procedural rule requiring that certain errors be raised on appeal. Normally rights under the Federal Constitution may be waived at the trial, *Adams v. United States ex rel. McCann*, 317 U.S. 269, and may likewise be waived by failure to assert such errors on appeal. Compare *Frank v. Mangum*, 237 U.S. 309, 343. When a State insists that a defendant be held to his choice of trial strategy and not be allowed to try a different tack on State habeas corpus, he may be deemed to have waived his claim and thus have no right to assert on federal habeas corpus. Such considerations of orderly appellate procedure give rise to the conventional statement that habeas corpus should not

do service for an appeal. See *Adams v. United States ex rel. McCann*, *supra*, at 274. Compare *Sunal v. Large*, 332 U.S. 174, with *Johnson v. Zerbst*, 304 U.S. 458, 465-469. However, this does not touch one of those extraordinary cases in which a substantial claim goes to the very foundation of a proceeding, as in *Moore v. Dempsey*, 261 U.S. 86. Cf. *Ex parte Lange*, 18 Wall. 163; *Ex parte Royall*, 117 U.S. 241.

[**LEdHR52] [52]Third. If the record of the State proceedings is not filed, the judge is required to decide, with due regard to efficiency in judicial administration, whether it is more desirable to call for the record or to hold a hearing. Ordinarily, where the issues are complex, it will be simpler to call for the record, certainly in the first instance. If the issues are simple, or if the record is called for and is found inadequate to show how the State court decided the relevant historical facts, the District Court shall use appropriate procedures, including a hearing if necessary, to decide the issues.

Such flexibility in the inquiry into the facts is unnecessary. A printed record reflecting orderly procedure through the State courts and showing clearly what has [*504] happened in the State courts is rarely available in these cases.¹⁴ The effort and expense of calling for a record and of having a transcript of the proceedings prepared might be more burdensome than a short hearing, especially where the questions of fact are simple and easily settled. It seems an unnecessary deference to State proceedings to say that the District Judge, regardless of the relative expense of one procedure or the other, must always call for [**445] everything in the State proceedings. To satisfy requirements of exhaustion he will want to know enough to know whether the claim presented to him was presented in the State courts. But if the claim is either frivolous or, at the other extreme, substantial and if the facts are undisputed, to call for the State record would probably avail little. If the claim is frivolous, the judge should deny the application without more. If the question is one on which he [***514] must exercise his legal judgment under the habeas corpus statute,¹⁵ it may be sufficient to have information, perhaps presented by the pleadings of the applicant or of the State, as to the disposition of any disputed questions of fact. It seems unduly rigid to require the District Judge to call for the State record in every case.

14 See Appendix, Table 1, *post*, pp. 518-519.

15 See pp. 500-501, *supra*, and pp. 507-508, *post*.

Moreover, the kinds of State adjudications differ. In some cases the State court has held a hearing and

rendered a decision based on specific findings of fact; there may have been review by a higher State court which had before it the pleadings, the testimony, opinions and briefs on appeal. It certainly would make only for burdensome and useless repetition of effort if the federal courts were to rehear the facts in such cases. At the other pole is the perfunctory memorandum order denying a badly drawn petition and stating simply that the petitioner is not entitled [*505] to relief. The District Judge cannot give the same weight to this sort of adjudication as he does to the first; he has no basis for exercising the judgment the statute requires him to exercise.

These criteria for determining when it is proper to hold a hearing seem to me appropriate in relating the habeas corpus provisions to the realities of these cases. *Section 2241* empowers the District Courts to grant writs of habeas corpus to prisoners in custody in violation of the Federal Constitution. *Section 2243* commands the judge "entertaining" an application to award the writ or issue an order to show cause "unless it appears from the application that the applicant . . . is not entitled thereto." It seems clear enough that the word "entertain" does not refer to holding a hearing, and MR. JUSTICE REED's suggestion that it refers to the District Court's conclusion that a hearing is "proper,"¹⁶ is unsatisfying.¹⁷ The proviso that no writ or order need be issued if the application shows that the applicant is not entitled thereto certainly permits "entertaining" and nevertheless summarily dismissing for failure to state a claim, failure to exhaust State remedies, or proof from the papers themselves, including the record of the State proceedings, if filed, that there is no claim. At the same time, the command that the writ or an order be issued in some cases hardly requires a hearing in every such case. As in any litigation, the pleadings may show, either separately or taken together, that there is no claim. It can hardly be contended that by "entertaining" the application to the extent of issuing the writ or an order, the [*506] District Judge commits himself to holding a hearing, if the return to the writ or the order to show cause shows unquestionably that the applicant is not entitled to discharge.¹⁸

16 Opinion of MR. JUSTICE REED, *supra*, p. 461.

17 MR. JUSTICE REED's citation of *Walker v. Johnston*, 312 U.S. 275, to indicate what might be a "proper" case in which to hold a hearing is puzzling, for that case requires, in habeas corpus actions by federal prisoners, that a hearing be held if the application and the answer or return to the writ raise a question of fact.

18 The language of § 2243, "When the writ or order is returned a day shall be set for hearing . . .," hardly

requires a hearing in every case in which a writ is issued. Just as the District Judge may deny an application without a hearing if the return shows that applicant failed to exhaust the State remedy -- as he certainly may do -- so may he dispose of the case without a hearing if the return conclusively shows applicant's failure to state a claim.

[**446] *Fourth*. When the record of the State court proceedings is before the court, it may appear that the issue turns on basic facts and that the facts (in the sense of a recital of external events and the credibility of their narrators) have been tried and adjudicated against the applicant. Unless a vital flaw be found in the process of ascertaining such facts [**515] in the State court, the District Judge may accept their determination in the State proceeding and deny the application. On the other hand, State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide.¹⁹

¹⁹ See pp. 507-508, *post*.

A State determination of the historical facts, the external events that occurred, may have been made after hearing witnesses perhaps no longer available or whose recollection later may have been affected by the passage of time or by the fact that one judicial determination has already been made. To be sure, these considerations argue equally against hearing the claims at all long after the facts took place. But Congress, by making habeas corpus available, has determined that other considerations prevail. We are left to devise appropriate rules, and the congressional determination does not preclude rules recognizing the soundness of giving great weight to testimony earlier heard, just as it does not undermine the principle [**507] that the burden of proving facts inconsistent with judicial records in all proceedings of this kind is heavy.

Fifth. Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, see *Baumgartner v. United States*, 322 U.S. 665, 670-671, the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.

For instance, the question whether established primary facts underlying a confession prove that the confession was coerced or voluntary cannot rest on the State decision. See, e. g., *Haley v. Ohio*, 332 U.S. 596,

601 (concurring opinion) and *Stroble v. California*, 343 U.S. 181, 190. Again, *Powell v. Alabama*, 287 U.S. 45, represents the settled rule that due process requires a State court in capital cases to assign counsel to the accused. Consequently, a finding in a State court of the historical fact that the accused had not had counsel could be considered binding by the District Judge, who would issue the writ regardless of what conclusion the State court had reached as to the law on representation by counsel in capital cases. If the conviction was not for a capital offense, however, *Powell v. Alabama* may not apply, and the considerations adverted to in that opinion as to the necessity of counsel in a particular case to ensure fundamental fairness would be controlling. The District Judge would then look to the State proceedings for whatever light they shed on the historical facts such as the age and intelligence of the accused, his familiarity with legal proceedings, and the kind of issues against which he had to defend himself. Cf. *Johnson v. Zerbst*, 304 U.S. 458. But it is for the federal judge to assess on the basis of such historical facts the fundamental fairness [**508] of a conviction without counsel in the circumstances. Although there is no need for the federal judge, if he could, to shut his eyes to the State consideration of such issues, no binding weight is to be attached to the State determination. The congressional requirement [**447] is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.

Sixth. A federal district judge may under § 2244 take into consideration a prior denial of relief by a [**516] federal court, and in that sense § 2244 is of course applicable to State prisoners. *Section 2244* merely gave statutory form to the practice established by *Salinger v. Loisel*, 265 U.S. 224. What was there decided and what § 2244 now authorizes is that a federal judge, although he may, need not inquire anew into a prior denial of a habeas corpus application in a federal court if "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."

These standards, addressed as they are to the practical situation facing the District Judge, recognize the discretion of judges to give weight to whatever may be relevant in the State proceedings, and yet preserve the full implication of the requirement of Congress that the District Judge decide constitutional questions presented by a State prisoner even after his claims have been carefully considered by the State courts. Congress has the power to distribute among the courts of the States

and of the United States jurisdiction to determine federal claims. It has seen fit to give this Court power to review errors of federal law in State determinations, and in addition to give to the lower federal courts power to inquire into federal claims, [*509] by way of habeas corpus. Such power is in the spirit of our inherited law. It accords with, and is thoroughly regardful of, "the liberty of the subject," from which flows the right in England to go from judge to judge, any one of whose decisions to discharge the prisoner is final.²⁰ Our rule is not so extreme as in England; § 2244 does place some limits on repeating [*448] applications to the Federal Courts. But it would be in disregard of what Congress [*510] has expressly required to deny State prisoners access to the federal courts.

20 See *Secretary of State for Home Affairs v. O'Brien*, [1923] A. C. 603, 610, where the House of Lords ruled that despite the fact that "in terms the words [of § 3 of the Appellate Jurisdiction Act of 1876, 39 & 40 Vict. 380] are wide enough to give an appeal in such a matter as the present," the House of Lords has no jurisdiction to hear an appeal in a habeas corpus case that went in favor of "the liberty of the subject." It is worth noting that by this decision the House of Lords applied and extended an earlier decision of the House of Lords (*Cox v. Hakes*, 15 A. C. 506 (1890)) in which so powerful a group of judges as Lord Halsbury L. C. and Lords Watson, Bramwell, Herschell and Macnaghten joined. The tenor of that decision is sufficiently indicated by the quotations that follow. Lord Halsbury wrote:

"In days of technical pleading no informality was allowed to prevent the substantial question of the right of the subject to his liberty being heard and determined. The right to an instant determination as to the lawfulness of an existing imprisonment, and the twofold quality of such a determination that, if favourable to liberty it was without appeal, and if unfavourable it might be renewed until each jurisdiction had in turn been exhausted, have from time to time been pointed out by Judges as securing in a marked and exceptional manner the personal freedom of the subject. It was not a proceeding in a suit but was a summary application by the person detained." 15 A. C., at 514-515.

And this is from the judgment of Lord Herschell:

"No Court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each Court exercised its independent judgment upon the case, and determined for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained in custody might thus proceed from court to court until he

obtained his liberty. . . . I need not dwell upon the security which was thus afforded against any unlawful imprisonment. It is sufficient to say that no person could be detained in custody if any one of the tribunals having power to issue the writ of habeas corpus was of opinion that the custody was unlawful." *Id.*, at 527-528.

The reliable figures of the *Administrative Office of the United States Courts*, *supra*, p. 498, showing that during the last four years five State [***517] prisoners, all told, were discharged by federal district courts, prove beyond peradventure that it is a baseless fear, a bogeyman, to worry lest State convictions be upset by allowing district courts to entertain applications for habeas corpus on behalf of prisoners under State sentence. Insofar as this jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the *Supremacy Clause of the Constitution* whereby federal law is higher than State law. It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law. The fact that Congress has authorized district courts to be the organ of the higher law rather than a Court of Appeals, or exclusively this Court, does not mean that it allows a lower court to overrule a higher court. It merely expresses the choice of Congress how the superior authority of federal law should be asserted.

I yield to no member of this Court in awareness of the enormity of the difficulties of dealing with crime that is the concomitant of our industrialized society. And I am deeply mindful of the fact that the responsibility for this task largely rests with the States. I would not for a [*511] moment hamper them in the effective discharge of this responsibility. Equally am I aware that misuse of legal procedures, whereby the administration of criminal justice is too often rendered leaden-footed, is one of the disturbing features about American criminal justice. On the other hand, it must not be lost sight of that there are also abuses by the law-enforcing agencies. It does not lessen the mischief that it is due more often to lack of professional competence and want of an austere employment of the awful processes of criminal justice than to wilful misconduct. In this connection it is relevant to quote the observations of one of the most esteemed of Attorneys General of the United States, William D. Mitchell:

"Detection and punishment of crime must be effected by strictly lawful methods. Nothing has a greater tendency to beget lawlessness than lawless methods of law enforcement. The greater the difficulties

of detecting and punishing crime, the greater the temptation to place a strained construction on statutes to supply what may be thought to be more efficient means of enforcing law. The statutory and constitutional rights of all persons must be regarded, and their violation, inadvertent or otherwise, is to be avoided." (Department of Justice release, for April 8, 1929.)

Unfortunately, instances are not wanting in which even the highest State courts have failed to recognize violations of these precepts that offend the limitations which the Constitution of the United States places upon enforcement by the States of their criminal law. See, e. g., *De Meerleer v. Michigan*, 329 U.S. 663, and *Marino v. Ragen*, 332 U.S. 561. Can it really be denied that in both these cases, which antedated *Darr v. Burford*, the [*512] United States District Courts sitting in Illinois and Michigan would have been justified in granting the writ of habeas corpus had application been made for it? The tag that an inferior court should not override a superior court would not have been a fit objection against the exercise of the jurisdiction with which the Congress invested the District Courts.

The uniqueness of habeas corpus in the procedural armory of our law cannot be too [*449] often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for such detention. Of course this does not mean that prison doors may readily be opened. It does mean that explanation may be exacted [***518] why they should remain closed. It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world. "The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defence of personal freedom." Mr. Chief Justice Chase, writing for the Court, in *Ex parte Yerger*, 8 Wall. 85, 95. Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments.

The significance of the writ for the moral health of our kind of society has been amply attested by all the great commentators, historians and jurists, on our institutions. It has appropriately been characterized by Hallam as "the principal bulwark of English liberty." But the writ has potentialities for evil as well as for good. Abuse of the writ may undermine the orderly administration of justice and therefore weaken the forces of authority that are essential for civilization.

The circumstances and conditions for bringing into action a legal remedy having such potentialities obviously [*513] cannot be defined with a particularity appropriate to legal remedies of much more limited scope. To attempt rigid rules would either give spuriously concrete form to wide-ranging purposes or betray the purposes by strangulating rigidities. Equally un mindful, however, of the purposes of the writ - its history and its functions -- would it be to advise the Federal District Courts as to their duty in regard to habeas corpus in terms so ambiguous as in effect to leave their individual judgment unguided. This would leave them free to misuse the writ by being either too lax or too rigid in its employment. The fact that we cannot formulate rules that are absolute or of a definiteness almost mechanically applicable does not discharge us from the duty of trying to be as accurate and specific as the nature of the subject permits.

It is inadmissible to deny the use of the writ merely because a State court has passed on a federal constitutional issue. The discretion of the lower courts must be canalized within banks of standards governing all federal judges alike, so as to mean essentially the same thing to all and to leave only the margin of freedom of movement inevitably entailed by the nature of habeas corpus and the indefinable variety of circumstances which bring it into play.

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