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The court's decision represents a major step in the area of prisoner's rights beyond the fact that it provides an alternative federal remedy to prisoners in certain special circumstances.⁹³ The import of this case stems more from the fact that it hopefully portends⁹⁴ a greater judicial receptivity to the rapidly increasing use of section 1983 by prisoners⁹⁵ and thus helps guarantee their access to a federal tribunal to protect their constitutional rights.

HABEAS CORPUS — EXHAUSTION OF REMEDIES

United States ex rel. Nelson v. Zelker

A deluge of habeas corpus petitions filed by state prisoners has caused serious concern among members of the federal judiciary. Some argue that the writ which, historically, has been held in high esteem as the primary safeguard against unconstitutional deprivations of liberty,⁹⁶

that, on June 19, 1972, the Supreme Court granted certiorari. *Oswald v. Rodriguez*, 407 U.S. 919 (1972). This is somewhat surprising considering the unanimous opinion in *Wilwording*. Perhaps the Supreme Court, realizing the difficulties encountered by the Second Circuit herein and the tenacity of the exhaustion requirement in this area (see note 77 *supra*), will attempt to finally settle the question by affirming the Second Circuit's decision. This is, of course, speculation but the fact remains that the granting of certiorari does muddy the waters somewhat at a time when they were finally clearing. Evidence that the Second Circuit is delaying application of the *Rodriguez* doctrine is found in *Ray v. Fritz*, No. 72-1455, (2d Cir. October 19, 1972), where the court stated:

We would thus remand without further ado were it not for the grant of certiorari by the Supreme Court in *Oswald v. Rodriguez*, 407 U.S. 919 (1972), decided by this court en banc sub nom. *Rodriguez v. Mc Ginnis*, 456 F.2d 79 (1972).

⁹³ The specific holding here provides alternative modes of relief only to those prisoners whose § 1983 actions are so timed that restoration of their good behavior time would result in their release. This group then has the alternative remedies of habeas corpus and § 1983.

⁹⁴ A significant limitation on the availability of § 1983 actions stems from the fact that the section is not applicable where a specific federal remedy is available for the right involved. See note 70 *supra*. After *Wilwording* and *Rodriguez*, the continued viability of this restriction must be questioned. The exhaustion requirement for § 1983 also appears to be fading in light of the multitude of Supreme Court precedents holding that exhaustion is not required. See note 91 *supra*. Elimination of these restrictions now appears likely and would obviously permit freer use of § 1983 by prisoners. However, the present situation within the Second Circuit remains in a state of flux pending Supreme Court review of *Rodriguez*. *Ray v. Fritz*, No. 72-1455 (2d Cir. October 19, 1972).

⁹⁵ In 1966, 21 state prisoner civil rights suits were commenced within the Second Circuit. By 1971, this number had increased to 535. 456 F.2d at 86.

⁹⁶ The writ of habeas corpus is one of our greatest safeguards of liberty. As R. Sokol says in *A HANDBOOK OF FEDERAL HABEAS CORPUS* (1965), "the function of the Great Writ can be simply expressed. It is to test in a court of law the legality of restraints on a person's liberty." *Id.* at 2. The power to grant a writ of federal habeas corpus is given to the Supreme Court, the courts of appeals and the district courts by 28 U.S.C. § 2241 (1970). Thus, a state prisoner, even after conviction and an unsuccessful appeal through the state court system, may raise issues of law and fact that can culminate in his discharge from custody.

The section of the habeas corpus statute (28 U.S.C. § 2241 *et seq.*) that applies to state prisoners is 28 U.S.C. § 2254 which provides that the writ may be granted "only

has become a vehicle for flooding the federal courts with frivolous claims.⁹⁷ The Second Circuit, in *United States ex rel. Nelson v. Zelker*,⁹⁸ denied a state prisoner's request for a writ of habeas corpus on the basis of a rigid and technical application of the requirement that state remedies be exhausted before application for relief is made to the federal courts.⁹⁹ The decision is a clear, albeit unauthorized, extension of the recent Supreme Court ruling in *Picard v. Connor*¹⁰⁰ which requires that the federal claims "be fairly presented to the state [courts]."¹⁰¹ If the opinion is to be explained, it can only be on the ground that the Second Circuit wishes to give notice that it intends to discourage those claims.

On March 20, 1964, petitioner Alvin Nelson and his co-defendant, Biggins, were convicted of felony murder¹⁰² in Supreme Court, New York County, and sentenced to life imprisonment. Prior to and during the course of trial, Biggins made two confessions. In the first, he implicated Nelson as responsible for the murder through a description of an accomplice that roughly fit Nelson. During the trial, Biggins attempted to plead guilty and to completely exonerate Nelson from any complicity in the crime. Out of the presence of the jury, Biggins stated

on the ground that he [the prisoner] is in custody in violation of the Constitution or laws or treaties of the United States."

⁹⁷ Suggestions for Lessening the Burden of Frivolous Applications, Address by Walter L. Pope, Senior Circuit Judge, Conference of the Ninth Judicial Circuit, Aug. 2, 1962, 33 F.R.D. 409. Judge Pope stated:

Anyone having any understanding of our system of criminal justice would, I think, heartily approve and regard with pride the many procedural safeguards furnished for the protection of the accused. I know of no judge who would for a moment consider changing the spirit of our law which calls for these safeguards. Yet many of our judges are deeply disturbed about the fact that in making these protections available to the presumably innocent defendant, we have at the same time opened the door to a multitude of utterly frivolous applications, many of them actually fraudulent as well as frivolous, which serve but to clog the dockets of the District Courts, and actually to lead to a feeling of frustration and resentment on the part of all judges, both trial and appellate.

Id.

⁹⁸ 465 F.2d 1121 (2d Cir. 1972).

⁹⁹ The requirement that a state prisoner exhaust state remedies is now expressly contained in the habeas corpus statute. 28 U.S.C. § 2254 (1970) provides, *inter alia*:

(b) 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.

(c) 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.

¹⁰⁰ 404 U.S. 270 (1971).

¹⁰¹ *Id.* at 275. See note 123 *infra*.

¹⁰² N.Y. PENAL LAW § 1044(2) (McKinney 1944).

that it was he who fired the fatal shots and that he had been aided by another accomplice, not Nelson. However, the prosecutor refused to accept this plea and, when Nelson moved for a severance of his trial so that he might call Biggins as a witness, the trial court denied the motion. The earlier, inculpatory confession was subsequently introduced into evidence.¹⁰³

Nelson appealed his conviction through the state courts,¹⁰⁴ challenging the trial court's refusal to sever as an abuse of discretion.¹⁰⁵ He began this, his third,¹⁰⁶ habeas corpus petition, as a *pro se* action, basing it on the same grounds and claiming that the alleged abuse deprived him of a fair trial. The District Court for the Southern District of New York rejected the petition on the merits and, on appeal, Nelson's assigned counsel raised an additional objection, citing *Brady v. Maryland*¹⁰⁷ as support for an argument that the prosecutor's refusal to accept Biggins' plea was a deliberate suppression of exculpatory evidence. The Second Circuit seized upon this new contention, declaring, "[t]his focuses attention upon the alleged misconduct of the prosecutor in a context certainly not considered by any state tribunal."¹⁰⁸

More significantly, however, the court devoted the greater part of its reasoning to a finding that Nelson had also failed to exhaust state remedies with respect to the abuse of discretion argument. The court

¹⁰³ This confession later became the basis for a state appeal board by Biggins who argued that it should have been excluded on the basis of *Miranda v. Arizona*, 384 U.S. 436 (1966). (*Miranda* was decided after Biggins and Nelson were tried). The New York Court of Appeals ordered a hearing on the voluntariness of the confession. *People v. Pitman (Biggins) & Nelson*, 18 N.Y.2d 919, 223 N.E.2d 494, 276 N.Y.S.2d 1001 (1966).

¹⁰⁴ *People v. Pitman (Biggins) & Nelson*, 25 App. Div. 2d 637, 268 N.Y.S.2d 83 (1st Dep't 1966), *aff'd* as to Nelson, *modified* as to Biggins, 18 N.Y.2d 919, 223 N.E.2d 494, 276 N.Y.S.2d 1001 (1966).

¹⁰⁵ Nelson also contended that he had been denied his constitutional right to defend himself and had been deprived of a fair trial because of prejudicial conduct on the part of the prosecutor. Those contentions were rejected by the Appellate Division of the New York Supreme Court and the New York Court of Appeals and were summarily treated by the Second Circuit on this appeal. 465 F.2d at 1122-23.

¹⁰⁶ Nelson filed his first petition on November 30, 1967, alleging violations of his rights to confrontation (since he could not cross-examine Biggins as to the confession admitted into evidence) and to compulsory process (with respect to one of his subpoenaed witnesses). After the petition was dismissed for failure to exhaust state remedies, Nelson sought state *coram nobis* relief. Denial of his application was unanimously affirmed in *People v. Nelson*, 31 App. Div. 2d 601, 295 N.Y.S.2d 590 (1st Dep't 1968) (mem.). Nelson filed his second petition for habeas corpus on March 29, 1969, alleging the same issues which he raised in his first petition and in the *coram nobis* proceedings, *i.e.*, sixth and fourteenth amendment violations because of the admission of Biggins' confession without opportunity for Nelson to cross-examine (the *Bruton* problem. See note 126 *infra*) and because of the alleged denial of his right to compulsory process. The petition was denied on the merits by the district court and affirmed in *United States ex rel. Nelson v. Follette*, 430 F.2d 1055 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971).

¹⁰⁷ 373 U.S. 83 (1963). See notes 128 & 129 and accompanying text *infra*.

¹⁰⁸ 465 F.2d at 1124.

acknowledged that the argument had been litigated through the state courts and found that "although couched in terms of an abuse of discretion vested in the trial judge under section 391 of the former New York Code of Criminal Procedure . . . it might be properly construed as also raising the claim that the abuse resulted in a denial of due process."¹⁰⁹ Nevertheless, the Second Circuit opinion complained that the argument "was *muted* in comparison with" another constitutional claim raised by Nelson on appeal¹¹⁰ and, therefore, under the holding of *Picard*, the state courts never had "a fair opportunity" to consider the alleged constitutional defect."¹¹¹

The exhaustion of state remedies doctrine evolved from the 1886 case of *Ex parte Royall*.¹¹² There, the Supreme Court held that a federal court should not intervene in a state criminal proceeding in advance of trial and indicated that federal courts should likewise be reluctant, in the absence of good cause shown, to consider petitions for writs before state appellate proceedings are exhausted. The Supreme Court reiterated the doctrine in subsequent cases¹¹³ and one decision, *Ex parte Hawk*,¹¹⁴ served as the basis for codification of the exhaustion requirement.¹¹⁵

The doctrine underwent a liberalization with *Brown v. Allen*,¹¹⁶ decided in 1953. In *Brown*, the Court held that exhaustion requirements

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (emphasis added). As support, the Second Circuit stated, "In fact, in his first federal habeas corpus proceeding this [the *Bruton* argument. See note 106 *supra* and note 126 *infra*] was the basis of the entire severance argument, with no mention at all of the exculpatory confession as a basis for constitutional infirmity." 465 F.2d at 1124. The court failed to explain what bearing contentions raised by Nelson in a federal habeas corpus action had on the question whether he had provided state courts a fair opportunity to consider the abuse of discretion argument.

¹¹¹ 465 F.2d at 1124, quoting *Picard v. Connor*, 404 U.S. 270, 276 (1971).

¹¹² 117 U.S. 241 (1886).

¹¹³ *Davis v. Burke*, 179 U.S. 399 (1900). The Court stated that the federal writ "should be confined to cases where the facts imperatively demand it." *Id.* at 402. See also *Urquhart v. Brown*, 205 U.S. 179 (1907).

¹¹⁴ 321 U.S. 114 (1944). The Court said:

Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts . . . have been exhausted.

Id. at 116-17. See also *Darr v. Burford*, 339 U.S. 200 (1950).

¹¹⁵ See note 99 *supra*.

¹¹⁶ 344 U.S. 443 (1953). See, e.g., *Irvin v. Dowd*, 359 U.S. 394 (1959) where a prisoner who had appealed to the state's highest court on two grounds, one constitutional and the other state, was held to have exhausted his state remedies since the state court's opinion would be deemed based on the constitutional argument. For a liberal Second Circuit dictum, see *United States ex rel. Cuomo v. Foy*, 257 F.2d 438 (2d Cir. 1958), cert. denied, 358 U.S. 935 (1959). See also *McBee v. Bomar*, 296 F.2d 235 (6th Cir. 1961), where a prisoner who had appealed on a general abuse of discretion issue to the state courts was held to have exhausted his state remedies.

were met where a state prisoner's federal constitutional claim was decided adversely by the state's highest court despite the prisoner's failure to pursue a state collateral remedy that would have been based on the same facts and issues and notwithstanding the fact that certiorari had been denied with respect to the state appellate decision. Further liberalization took place in *Fay v. Noia*¹¹⁷ where a prisoner who had lost his right to state appeal by a failure to timely file such an appeal was deemed to have exhausted his state remedies. This trend climaxed in *Roberts v. LaVallee*¹¹⁸ where the Court held that a prisoner need not resubmit to state courts a constitutional question the answer to which is dictated by Supreme Court precedent.¹¹⁹

The Court may have signaled its disinclination to continue in this direction by its *Picard* decision but such a reading of the case would still not justify the Second Circuit's reasoning in *Nelson*.

The *Picard* petitioner alleged in both his state appeal and federal petition that he was brought to trial pursuant to a defective state indictment in violation of his fifth amendment right to indictment by grand jury. The district court dismissed¹²⁰ but the First Circuit reversed on the ground that there was a denial of equal protection.¹²¹ As the Supreme Court noted, the "equal protection issue entered [the] case only because the Court of Appeals injected it."¹²² The Court went on to hold

¹¹⁷ 372 U.S. 391 (1963). For an opposing view, see 48 VA. L. REV. 761 (1962). The author says, "the federal system requires that state court defendants not be allowed to forego the available appellate procedures of the state and then seek relief in the federal court." *Id.* at 765. For a similar view, see *Kling v. LaVallee*, 306 F.2d 199 (2d Cir. 1962).

¹¹⁸ 389 U.S. 40 (1967) (per curiam). *Accord*, *Coleman v. Maxwell*, 351 F.2d 285 (6th Cir. 1965); *Saulsbury v. Green*, 347 F.2d 828 (6th Cir. 1965).

However, courts have been reluctant to grant the federal writ in situations where it would be based on factual allegations not presented to the state courts. *See, e.g.*, *United States ex rel. Brodie v. Herold*, 349 F.2d 372 (2d Cir. 1965); *Blair v. California*, 340 F.2d 741 (9th Cir. 1965); *Pennsylvania ex rel. Raymond v. Rundle*, 339 F.2d 598 (3d Cir. 1964); *Schiers v. California*, 333 F.2d 173 (9th Cir. 1964). *See also* *Gilday v. Scafati*, 428 F.2d 1027 (1st Cir. 1970), where the validity of an arrest was first presented as an issue to the federal court.

Recently, the exhaustion doctrine was strictly applied in *Davis v. Dunbar*, 394 F.2d 754 (9th Cir. 1968), *cert. denied*, 393 U.S. 884 (1969), where petitioner advanced two contentions not presented on appeal. *See also* *Daniels v. Nelson*, 453 F.2d 340 (9th Cir. 1972); *Lattimore v. Craven*, 453 F.2d 1249 (9th Cir. 1972).

¹¹⁹ In the *Roberts* case, the state's highest court, in the interim between the denial of the prisoner's petition by a district court and his appeal to the circuit court, had reversed itself with respect to the constitutional issue raised by petitioner and originally decided against him. The court of appeals held that, since relief was now available in the state courts, petitioner should return there but the Supreme Court reversed this ruling.

¹²⁰ *Connor v. Picard*, 308 F. Supp. 843 (D. Mass. 1970).

¹²¹ 434 F.2d 673 (1st Cir. 1970).

¹²² 404 U.S. at 277.

that the claim raised in the state court must be "substantial[ly] equivalent"¹²³ to that considered by the federal forum.

In *Nelson*, the Second Circuit readily conceded that petitioner raised his due process arguments before both the federal and state tribunals.¹²⁴ However, the Court was not convinced that the rule of *Picard* was satisfied. Instead, it utilized the Supreme Court's statement that the state court must have "'a fair opportunity'"¹²⁵ to consider the constitutional claim and concluded that no such opportunity had been presented since the exculpatory testimony argument had been "muted" by the *Bruton* argument.¹²⁶

Thus, the Second Circuit held, in effect, that in order to exhaust state remedies under *Picard*, a petitioner must not only allege each constitutional theory in detail but must also carefully balance the arguments so that one cannot later be said to have obscured any other. Whether this is the correct thrust of the Supreme Court's "substantial equivalent" test is seriously open to question.

Nevertheless, the court of appeals sought to remove any "doubt [which] might exist about" its holding¹²⁷ by noting that *Nelson* failed to allege in the state court that the prosecutor's deliberate suppression of evidence was in violation of the doctrine of *Brady v. Maryland*.¹²⁸ In *Brady*, the prosecution suppressed a statement by petitioner's co-defendant who admitted the actual homicide. The Court held "that

¹²³ *Id.* at 278. The Court admitted that identical facts were presented by petitioner in both his state appeal and federal proceedings. Thus, *Picard's* substantial equivalency test must be read as applying to constitutional theories as well as facts. The Court heavily emphasized that petitioner's new equal protection claim could not be deemed the substantial equivalent, or even a near relation, to his original argument seeking to apply the fifth amendment's indictment by grand jury requirement to the states via the due process clause of the fourteenth amendment.

¹²⁴ 465 F.2d at 1124.

¹²⁵ *Id.*, quoting *Picard v. Connor*, 404 U.S. 270, 276 (1971).

¹²⁶ In *Bruton v. United States*, 391 U.S. 123 (1968), the prosecution introduced as evidence a confession of defendant's alleged co-conspirator implicating him. Since the confession was directly inculpatory and defendant could not cross-examine his co-defendant, the Court held this to be a violation of the right to confrontation. *Nelson* relied on *Roberts v. Russell*, 392 U.S. 293 (1968), which held that *Bruton* must be applied retroactively. The Second Circuit, in *United States ex rel. Nelson v. Follette*, 430 F.2d 1055 (2d Cir. 1970), ruled that the confession in *Nelson* was not the type of "clearly inculpatory" or "'powerfully incriminating'" statement that *Bruton* had in mind nor did it "form . . . such a vital part of the Government's case against *Nelson* that . . . [it was] bound to have a devastating effect on the minds of the jurors incurable by appropriate cautionary instructions." *Id.* at 1058-59.

See, e.g., *United States v. Rizzo*, 413 F.2d 71 (7th Cir. 1969); *Slavek v. United States*, 413 F.2d 957 (8th Cir. 1969); *United States v. Lipowitz*, 407 F.2d 597 (3d Cir. 1969). These cases upheld convictions on the ground that defendants were not prejudiced by confessions of their co-defendants.

¹²⁷ 465 F.2d at 1124.

¹²⁸ 373 U.S. 83 (1963).

the suppression by the prosecution of evidence favorable to an accused upon [defendant's] request violated due process. . . ."¹²⁹

The failure to raise this alternative claim which would have bolstered Nelson's due process argument can hardly justify the conclusion that the state court was not sufficiently apprised of the constitutional claim. In fact, both the abuse of discretion and *Brady* claims raised by Nelson are assertions of a denial of due process springing from the same set of facts. *Picard* dealt with a situation where two distinctly different theories,¹³⁰ *i.e.*, due process and equal protection, were advanced. It seems that Nelson's (or his counsel's) major error was his lack of familiarity with the *Brady* case at the time of state appeal. Yet, *Picard* states, "[W]e do not imply that respondent could have raised the equal protection claim only by citing 'book and verse on the federal constitution.'"¹³¹

Even if the claim presented by Nelson in the federal courts had not been raised in the state courts, *Picard* did not repudiate criteria established earlier in *Fay v. Noia*¹³² and *Roberts v. La Vallee*.¹³³ In *Fay*, the Court held that a prisoner who was barred from state relief for failing to file a timely appeal was deemed to have exhausted his state remedies unless there was an *intentional* waiver of his state appellate rights. Nelson's time limit for state appeal had elapsed prior to this appeal. The precise allegations Nelson made can, therefore, no longer be asserted on appeal.¹³⁴ Under the *Fay* rule, unless Nelson intentionally

¹²⁹ *Id.* at 87. The suppression doctrine was first developed in *Mooney v. Holohan*, 294 U.S. 103 (1935), where the Court held that perjured testimony introduced by a prosecutor violated the accused's rights. The Court said:

Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

Id. at 112.

The doctrine was extended in *United States ex rel. Almeida v. Baldi*, 195 F.2d 815 (3d Cir. 1952), where the court granted a habeas corpus petition when evidence tending to show that a policeman, rather than the accused, fired the fatal shot was suppressed by the prosecution. The doctrine was reaffirmed in *Napue v. Illinois*, 360 U.S. 264 (1959), where a prosecutor failed to correct a state witness who testified falsely that he had not negotiated with the prosecutor. *See also* *Wilde v. Wyoming*, 362 U.S. 607 (1960) (*per curiam*); *Alcorta v. Texas*, 355 U.S. 28 (1957) (*per curiam*) (prosecutor suppressed evidence of a wife's infidelity that could have reduced a murder charge to "murder without malice" under Texas law); *United States ex rel. Thompson v. Dye*, 221 F.2d 763 (3d Cir. 1955) (a prosecutor suppressed evidence that defendant was drunk, relevant to the culpability of his mental state).

¹³⁰ *But see* 404 U.S. at 278-81 (Douglas, J., dissenting).

¹³¹ *Id.* at 278 (majority opinion).

¹³² 372 U.S. 391 (1963).

¹³³ 389 U.S. 40 (1967) (*per curiam*).

¹³⁴ Under *Brown v. Allen*, 344 U.S. 443 (1953), Nelson does not have to pursue collateral relief in the state courts to exhaust his remedies. *See* text accompanying note 116 *supra*.

waived his right to a state appeal, his claim should have been heard by the federal court.

In *Roberts v. La Vallee*,¹³⁵ the Court held that the "mere possibility of a successful application to the state courts"¹³⁶ would not bar relief under the exhaustion doctrine. The Court stated that such a stringent requirement would severely limit federal habeas corpus petitions and concluded:

We can conceive of no reason why the State would wish to burden its judicial calendar with a narrow issue the resolution of which is predetermined by established federal principles.¹³⁷

The suppression issue presented by *Nelson* has been firmly established as violative of due process in *Brady* and thus would seem clearly predetermined by federal law.

A rigid requirement of exhaustion of state remedies frustrates the purpose of the federal writ of habeas corpus. The purpose of the federal writ is to provide a prisoner with another civil review to safeguard his federal rights.¹³⁸ The exhaustion doctrine is based on comity and is not a jurisdictional requirement.¹³⁹ The reasons for the doctrine are sound: since the state remains the basic political unit in America, the federal judiciary should not interfere with state court proceedings without affording the courts a fair opportunity to correct their constitutionally defective rulings;¹⁴⁰ moreover, the federal courts are simply not equipped to handle the great volume of state appeals.¹⁴¹ Such reasons would not have been disturbed by a contrary holding in *Nelson* while such a holding would have established that the exhaustion doctrine may not be wrongly used to avoid a decision on the merits.¹⁴² A

¹³⁵ 389 U.S. 40 (1967) (per curiam).

¹³⁶ *Id.* at 42-43, citing *Brown v. Allen*, 344 U.S. 443 (1953).

¹³⁷ *Id.* at 43.

¹³⁸ See 17 ARK. L. REV. 78 (1962-63). "Simply put, the manifest purpose of federal habeas corpus is to insure a federal forum to hear alleged deprivations of constitutional rights." *Id.* at 84.

¹³⁹ *Fay v. Noia*, 372 U.S. 391 (1963). See R. SOKOL, *supra* note 96, at 113-14.

¹⁴⁰ See 48 VA. L. REV. 761 (1962). The author says the situation "is part of a more expansive problem of regulating the delicate balance in a constitutional federalism." *Id.* at 764. But see 76 HARV. L. REV. 416, 417 (1962). See also Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657 (1948).

¹⁴¹ The argument that the federal courts are not able to handle the number of appeals that the state courts have is a cogent one. See 1963 DUKE L. J. 374, 376 (1963) where the author speaks of the courts becoming "overwhelmed with petitions." See also the argument presented by New York Appellate Division Justice James D. Hopkins in *Federal Habeas Corpus: Easing the Tension Between the State and Federal Courts*, 44 ST. JOHN'S L. REV. 660, 666 (1970).

¹⁴² D. MEADOR, *PRELUDES TO GIDEON* (1967). Dean Meador says,

[T]he exhaustion doctrine provides the state with a procedural defense to habeas corpus actions in federal courts. . . . It is one of these procedural aspects of the

stringent exhaustion requirement permits only those serving lengthy sentences to qualify for the federal writ.¹⁴³ A policy of rigid procedural restraints on the writ seems unsound since it frustrates decisions on the merits of at least some petitions that are, in fact, substantively meritorious. Such a policy, as Justice Douglas has noted, makes a "trap out of the exhaustion doctrine which promises to exhaust the litigant and his resources, not the remedies."¹⁴⁴

SUFFICIENCY OF PROSECUTOR'S EVIDENCE

United States v. Taylor

The Supreme Court has observed "that proof of a criminal charge beyond a reasonable doubt is constitutionally required."¹⁴⁵ While the concept of "beyond a reasonable doubt" is not synonymous with mathematical certainty,¹⁴⁶ it is more exacting than the burden of proof required in civil actions,¹⁴⁷ with the distinction often expressed in terms of probability of occurrence:

With respect to a normal issue in a civil case, one party loses if the jury does not believe that existence of the fact is more probable than its nonexistence With respect to a normal issue in a criminal case, the state loses if the jury does not believe that existence of the fact is so highly probable "as to dissipate all reasonable doubt."¹⁴⁸

case that can frustrate a decision on the merits. If the court wishes to avoid deciding the constitutional issue, it will often be able to say that state remedies have not yet been exhausted. On the other hand, if the court desires to make a constitutional ruling, it is often just as easy for it to say that state remedies have been sufficiently exhausted or that under the circumstances exhaustion will be excused.

Id. at 21.

¹⁴³ See Comment, *Exhaustion of State Remedies Before Bringing Federal Habeas Corpus: A Reappraisal of U.S. Code Section 2254*, 43 NEB. L. REV. 120 (1963).

It evidently takes so long under the present requirements of Section 2254 to mature a case for federal habeas corpus that the "lighter" sentences of only a few years are completed and the cases thereby become moot before they can even receive a hearing.

Id. at 132.

¹⁴⁴ Picard v. Connor, 404 U.S. at 281 (Douglas, J., dissenting).

¹⁴⁵ *In re Winship*, 397 U.S. 358, 362 (1970). This rule is so strong that the Court applied it even to a juvenile proceeding where a 12-year-old was faced with confinement for six years. The Court gave a concise history of the due process requirement that a criminal conviction be based upon proof beyond a reasonable doubt, noting that the standard is applicable to "every fact necessary to constitute the crime with which [one] is charged." *Id.* at 364.

¹⁴⁶ *Holland v. United States*, 348 U.S. 121, 138 (1954). "The government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty." *Id.*

¹⁴⁷ The standard of proof in civil cases is a preponderance of the evidence. See PRINCE, RICHARDSON ON EVIDENCE § 97 (9th ed. 1964).

¹⁴⁸ McNaughton, *Burden of Production of Evidence: A Function of a Burden of*