Supreme Court of the United States
BROWN
v.
ALLEN, Warden, Central Prison of State of North Carolina.
SPELLER
v.
ALLEN, Warden, Central Prison of State of North Carolina.
DANIELS et al.
v.
ALLEN, Warden, Central Prison of State of North Carolina.
Nos. 32, 22, 20.

Reargued Oct. 13, 1952.
Decided Feb. 9, 1953.
Rehearing Denied April 27, 1953.

See 345 U.S. 946, 73 S.Ct. 827.

Habeas corpus proceeding brought by state convicts, contending that such convictions were invalid because, inter alia, of discrimination in selection of juries. The United States District Court for the Eastern District of North Carolina, Raleigh Division, 98 F.Supp. 866, 99 F.Supp. 92, 208, Don Gilliam, J., denied the writs, and the petitioners appealed. The United States Court of Appeals for the Fourth Circuit, 192 F.2d 477, 763, affirmed, and the petitioners brought certiorari. The United States Supreme Court, Mr. Justice Reed, held that the state had accorded the convicts a fair adjudication of their federal questions.

Affirmed.

Mr. Justice Black and Mr. Justice Douglas dissented; Mr. Justice Frankfurter dissented in Nos. 22 and 32.

Mr. Justice Frankfurter's separate opinion, 73 S.Ct. 437, represents the majority view as to the legal significance of a denial of certiorari in habeas corpus cases (syllabus paragraphs 3-8).

West Headnotes

[1] Habeas Corpus 197 365

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)4 Sufficiency of Presentation of Issue or Utilization of State Remedy
197k362 Particular Remedies or Proceedings
197k365 k. Coram Nobis, Post-Conviction Motion, or Similar Collateral Proceedings. Most Cited Cases
(Formerly 197k45(2), 197k45(5))

Where appellate remedies available in state courts and in Federal Supreme Court for direct review of state judgments had been exhausted, it was not a necessary prerequisite to invocation of federal courts' habeas corpus jurisdiction that state convicts have asked state for collateral relief, based on same evidence and issues already decided by direct review. 28 U.S.C.A. § 2254.

[2] Habeas Corpus 197 368.1

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)4 Sufficiency of Presentation of Issue or Utilization of State Remedy
197k368 Necessity for Repetition or Pursuit of Several Remedies
197k368.1 k. In General. Most Cited Cases
(Formerly 197k368, 197k45(2))

The statute governing habeas corpus jurisdiction of federal courts over state convicts was not intended to require repetitious applications to state courts. 28 U.S.C.A. § 2254.

[3] Federal Courts 170B 513

170B Federal Courts

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170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk513 k. Determination and Disposition of Cause. Most Cited Cases
(Formerly 106k400)
When reasons are given for a denial of certiorari by Federal Supreme Court, decision to deny will have effect indicated by reasons stated. Judiciary Act of 1925, 43 Stat. 936.

[4] Federal Courts 170B ⚷452

170B Federal Courts
170BVII Supreme Court
170BVII(B) Review of Decisions of Courts of Appeals
170Bk452 k. Certiorari in General. Most Cited Cases
(Formerly 106k383(1))
Certiorari jurisdiction was given Federal Supreme Court to permit that court to keep within manageable proportions, having due regard to conditions indispensable for wise adjudication of those cases which must be decided there, business that was allowed to come before such Court. Judiciary Act of 1925, 43 Stat. 936.

[5] Federal Courts 170B ⚷445

170B Federal Courts
170BVII Supreme Court
170BVII(A) In General
170Bk445 k. Appellate Jurisdiction and Procedure in General. Most Cited Cases
(Formerly 106k380)
The governing consideration of the successive measures by which Congress enlarged the discretionary jurisdiction of the Federal Supreme Court was authority in that Court to decline to review decisions which, right or wrong, did not present questions of sufficient gravity. Judiciary Act of 1925, 43 Stat. 936.

[6] Federal Courts 170B ⚷452

170B Federal Courts
170BVII Supreme Court
170BVII(B) Review of Decisions of Courts of Appeals
170Bk452 k. Certiorari in General. Most Cited Cases
(Formerly 106k383(1))
Denial of writ of certiorari by Federal Supreme Court imports no expression of opinion upon merits of case but means only that there were not four members of the Court who thought the case should be heard. Judiciary Act of 1925, 43 Stat. 936.

[7] Federal Courts 170B ⚷452

170B Federal Courts
170BVII Supreme Court
170BVII(B) Review of Decisions of Courts of Appeals
170Bk452 k. Certiorari in General. Most Cited Cases
(Formerly 106k383(1))
Even when application for writ of certiorari is made merely for purpose of exhausting 'state' remedies, as a prerequisite to applying to federal court for habeas corpus, Federal Supreme Court will want to have before it the petitions and the orders below. 28 U.S.C.A. s 2254.

[8] Habeas Corpus 197 ⚷367

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)4 Sufficiency of Presentation of Issue or Utilization of State Remedy
197k362 Particular Remedies or Proceedings
197k367 k. Review by Federal Supreme Court. Most Cited Cases
(Formerly 197k34, 197k120)

Habeas Corpus 197 ⚷777

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)4 Conclusiveness of Prior Determinations

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197k777 k. Decisions of United States Supreme Court. Most Cited Cases
(Formerly 197k45(2))
Federal Supreme Court's refusal of certiorari, though essential to exhaustion of state remedies as prerequisite to state convict's invocation of habeas corpus jurisdiction of federal courts, is not, in effect, res judicata and is without substantive significance in habeas corpus case. 28 U.S.C.A. § 2254.

[9] Habeas Corpus 197 ⚷422

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)6 State's Reliance on or Waiver of Procedural Bar or Want of Exhaustion
197k422 k. State Court Decision on Procedural Grounds, and Adequacy of Such Independent State Grounds. Most Cited Cases
(Formerly 197k45(2))
Where state action, questioned by state convict's application to Federal District Court for writ of habeas corpus, was based on adequate state ground, no further examination is required, unless no state remedy for deprivation of federal constitutional rights ever existed.

[10] Habeas Corpus 197 ⚷765.1

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)4 Conclusiveness of Prior Determinations
197k765 State Determinations in Federal Court
197k765.1 k. In General. Most Cited Cases
(Formerly 197k765, 197k34, 197k120)
Where there is material conflict of fact in transcripts of evidence as to deprivation of constitutional rights, Federal District Court to which state convict has addressed application for writ of habeas corpus may properly depend upon state's resolution of issue, but in other circumstances, state adjudication carries weight that federal practice gives to conclusion of court of last resort of another jurisdiction on federal constitutional issues, but is not res judicata.

[11] Habeas Corpus 197 ⚷665.1

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)1 In General
197k665 Petition or Application
197k665.1 k. In General. Most Cited Cases
(Formerly 197k665, 197k53)
In habeas corpus proceedings brought in Federal District Court by state convict, burden of overturning conviction rests on convict, and he should allege specifically, in cases where material, uncontradicted evidentiary facts appearing in record upon which is based his allegation of denial of constitutional rights.

[12] Habeas Corpus 197 ⚷861

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)3 Determination and Disposition
197k861 k. In General. Most Cited Cases
(Formerly 197k114, 197k14)
Where Federal District Court, in proceedings on state convicts' applications for habeas corpus, erroneously gave consideration to Federal Supreme Court's denial of certiorari for direct review of state adjudications complained of, but District Court's rulings showed that without such erroneous consideration it had found from its examination of state records and new evidence presented that conduct of respective state proceedings was in full accord with due process, whether denial of writs was affirmed or reversed would depend upon soundness of District Court's decision upon issues of alleged violation of federal procedural requirements or constitutional rights by state proceedings and not upon District Court's erroneous consideration of the denial of certiorari. 28 U.S.C.A. §§ 2241, 2242, 2251-2253.

[13] Appeal and Error 30 ⚷854(2)

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30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k851 Theory and Grounds of Decision of Lower Court
30k854 Reasons for Decision
30k854(2) k. Review of Correct Decision Based on Erroneous Reasoning in General. Most Cited Cases

Where decision below is correct, it must be affirmed, although court relied upon a wrong ground or gave a wrong reason.

[14] Criminal Law 110 ⚷1162

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1162 k. Prejudice to Rights of Party as Ground of Review. Most Cited Cases
(Formerly 110k162)

Errors which could not affect result may be disregarded, even in review of criminal trials.

[15] Habeas Corpus 197 ⚷742

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)3 Hearing
197k742 k. Discretion and Necessity in General. Most Cited Cases
(Formerly 197k62)

For purposes of Code sections dealing with habeas corpus, an application is not “entertained” by a mere filing and, as used therein, word “entertain” means a federal district court's conclusion, after examination of application with such accompanying papers as court deems necessary, that hearing on merits, legal or factual, is proper; and even after deciding to entertain an application, the District Court may determine later, from the return or otherwise, that the hearing is unnecessary. 28 U.S.C.A. §§ 2241(a), 2242-2244.

[16] Habeas Corpus 197 ⚷741

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)3 Hearing
197k741 k. In General. Most Cited Cases
(Formerly 197k34, 197k120)

Habeas Corpus 197 ⚷765.1

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)4 Conclusiveness of Prior Determinations
197k765 State Determinations in Federal Court
197k765.1 k. In General. Most Cited Cases
(Formerly 197k765, 197k59)

Federal district court to which state convict's application for habeas corpus is addressed has power to hold hearing on the merits; but since state and federal courts have same responsibilities to protect persons from violation of their constitutional rights, the federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to the state convict, where the legality of his detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or by denial of post-conviction remedies. 28 U.S.C.A. §§ 2244, 2254.

[17] Habeas Corpus 197 ⚷892.1

197 Habeas Corpus
197IV Operation and Effect of Determination; Res Judicata; Successive Proceedings
197k892 Order of Discharge or Other Relief
197k892.1 k. In General. Most Cited Cases
(Formerly 197k892, 197k1)

Discharge from conviction through habeas corpus is not an act of judicial clemency but a protection against illegal custody.

[18] Habeas Corpus 197 ⚷752.1

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)3 Hearing
197k752 Conduct of Hearing
197k752.1 k. In General. Most Cited Cases
(Formerly 197k752, 197k59, 197k9)
The need for argument, in proceedings on state convict's application to federal district court for habeas corpus, is matter of judicial discretion. 28 U.S.C.A. § 2254.

[19] Constitutional Law 92 🔑3307

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)8 Race, National Origin, or Ethnicity
92k3305 Juries
92k3307 k. Proportional Representation, Underrepresentation, or Token Inclusion. Most Cited Cases
(Formerly 92k221(3), 92k221)

Jury 230 🔑33(1.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(1.2) Particular Groups, Inclusion or Exclusion
230k33(1.15) k. Race. Most Cited Cases
(Formerly 230k33(1.3), 230k33(1))
Discriminations against a race by barring or limiting citizens of that race from participation in jury service are odious to our thought and our Constitution, and mere token summoning of members of race for jury service does not comply with equal protection requirements of Constitution. U.S.C.A.Const. Amend. 14; 18 U.S.C.A. § 243.

[20] Jury 230 🔑33(1.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(1.2) Particular Groups, Inclusion or Exclusion
230k33(1.15) k. Race. Most Cited Cases
(Formerly 230k33(1.3), 230k33(1))
A state may confine the selection of jurors to males, to freeholders, to citizens, to persons within certain ages, or to persons having certain educational qualifications, but no race may be proscribed as incompetent for jury service. U.S.C.A.Const. Amend. 14; 18 U.S.C.A. § 243.

[21] Jury 230 🔑33(1.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(1.2) Particular Groups, Inclusion or Exclusion
230k33(1.15) k. Race. Most Cited Cases
(Formerly 230k33(1.3), 230k33(1))
It is the responsibility of the Federal Supreme Court, under the Constitution, to redress "jury packing", which is a sinister species of art, but it should not condemn good faith efforts to secure competent juries, merely because of varying racial proportions.

[22] Jury 230 🔑51

230 Jury
230III Qualifications of Jurors and Exemptions
230k51 k. Payment of Taxes. Most Cited Cases
Under North Carolina law, it is not mandatory that jury list include only taxpayers.

[23] Jury 230 🔑33(1.1)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(1.1) k. Representation of Community, in General. Most Cited Cases
(Formerly 230k33(1))

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States should decide for themselves the quality of their juries, as best fits their situation, so long as the classifications have relation to the efficiency of the jurors and are equally administered; and Federal Supreme Court's duty to protect federal constitutional rights of all does not mean that it must, or should, impose on states its conception of the proper source of jury lists, so long as source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty.

[24] Constitutional Law 92 3308(2)

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)8 Race, National Origin, or Ethnicity
92k3305 Juries
92k3308 Method of Selection
92k3308(2) k. Jury Lists. Most Cited Cases
(Formerly 92k221(2), 92k221)

Use of tax lists in selection of jurors is not violative of Fourteenth Amendment, in absence of resultant race discrimination. U.S.C.A.Const. Amend. 14.

[25] Constitutional Law 92 3308(2)

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)8 Race, National Origin, or Ethnicity
92k3305 Juries
92k3308 Method of Selection
92k3308(2) k. Jury Lists. Most Cited Cases
(Formerly 92k221(2), 92k221)

In habeas corpus proceedings brought by state prisoner convicted of rape, record would not sustain convict's contention that grand and petit juror selection, involving use of tax lists, have involved unconstitutional discrimination against a particular race. Rules of Practice in Supreme Court, N.C. rule 19; Public-Local Laws N.C.1937, c. 206, as amended Laws 1949, c. 577; G.S.N.C. §§ 9-1, 105-336, 105-339, 105-341.

[26] Jury 230 66(1)

230 Jury
230IV Summoning, Attendance, Discharge, and Compensation
230k66 Selection and Drawing of Regular Panel
230k66(1) k. In General. Most Cited Cases

Rules dealing with selection of juries in federal courts are not applicable in state court proceedings.

[27] Constitutional Law 92 4664(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)5 Evidence and Witnesses
92k4661 Statements, Confessions, and Admissions
92k4664 Circumstances Under Which Made; Interrogation
92k4664(1) k. In General. Most Cited Cases
(Formerly 92k266.1(4), 92k266)

Criminal Law 110 1169.12

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.12 k. Acts, Admissions, Declarations, and Confessions of Accused. Most Cited Cases
(Formerly 110k1169(12), 110k169(12))

Conviction by trial court which has admitted coerced confessions deprives defendant of liberty without due process of law, and such conviction will be set aside even though evidence apart from confessions is sufficient to sustain jury's verdict.

[28] Habeas Corpus 197 490(3)

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General

197k489 Evidence
197k490 Admissibility
197k490(3) k. Confessions, Declarations, and Admissions. Most Cited Cases
(Formerly 197k59)
In determining whether confession has been used by state in violation of constitutional rights of state convict petitioning for habeas corpus, federal court appraises alleged abuses by facts as shown at hearing or admitted on record, and it is immaterial whether jury was acquainted with all facts laid before trial judge at preliminary examination to determine whether statements were voluntary.

[29] Criminal Law 110 519(8)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(8) k. Confessions While in Custody Illegally or Under Invalid Process. Most Cited Cases
Federal courts will deny admission to confessions obtained before prompt arraignment, notwithstanding their voluntary character; but the federal rule does not arise from constitutional sources and does not constitute a constitutional limitation on the states.

[30] Criminal Law 110 519(3)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(3) k. Confessions While in Custody in General. Most Cited Cases
Mere detention and police examination in private of one in official state custody do not render involuntary statements or confessions made by person so detained.

[31] Constitutional Law 92 4664(2)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)5 Evidence and Witnesses
92k4661 Statements, Confessions, and Admissions
92k4664 Circumstances Under Which Made; Interrogation
92k4664(2) k. Particular Cases. Most Cited Cases
(Formerly 92k266.1(1), 92k266)
In state convict's habeas corpus proceeding, record showed no infringement of convict's constitutional rights by refusal of trial court, in rape prosecution, to exclude confession from evidence.

[32] Jury 230 120

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k114 Challenge to Panel or Array, and Motion to Quash Venire
230k120 k. Affidavits and Other Evidence. Most Cited Cases
Past practice is evidence of past attitude of mind, but former errors cannot invalidate future trials, and therefore long history of discrimination against Negro citizens by county jury commissioners would not be decisive on issue of racial discrimination in selection of particular jury.

[33] Jury 230 33(1.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(1.2) Particular Groups, Inclusion or Exclusion
230k33(1.15) k. Race. Most Cited Cases
(Formerly 230k33(1.3), 230k33(5))
Where defendant and his counsel had been present when venire was drawn by a child, aged 5, and special venire actually contained names of seven Negroes, even if names in jury box were marked, with a dot or period on the scroll, to indicate race, conviction was not invalidated.

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[34] Habeas Corpus 197 337

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)2 Particular Errors and Proceedings
197k332 Criminal Prosecutions
197k337 k. Jury; Grand Jury. Most Cited Cases
(Formerly 197k114)

Where clerk of jury commissioners filled jury box by selecting from tax lists names of those persons who owned most property, but no objection to selection of jurors on such economic basis was raised or developed at trial in State Court, on direct review in State Supreme Court and Federal Supreme Court, or in petition or brief on subsequent certiorari to Federal Supreme Court from denial of habeas corpus by lower federal courts; question as to whether such practice had resulted in discrimination against Negroes was not open for consideration by Federal Supreme Court.

[35] Habeas Corpus 197 316

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)1 In General
197k313 Forfeiture, Waiver, Bypass, Procedural Default, or Failure to Object
197k316 k. Tactical Decisions; Deliberate Bypass. Most Cited Cases
(Formerly 197k45(2))

Evidence in state criminal proceedings to support objections on federal constitutional grounds, known to state defendants and their counsel, or easily ascertainable, cannot be withheld or neglected at state trial and used later to support federal habeas corpus.

[36] Constitutional Law 92 3308(2)

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)8 Race, National Origin, or Ethnicity
92k3305 Juries
92k3308 Method of Selection
92k3308(2) k. Jury Lists. Most Cited Cases
(Formerly 92k221(2), 92k221)

Where 38% of taxpayers in county were Negroes but only 7% of persons whose names were placed in jury box after selection from tax lists were Negroes, disparity between races would not be accepted by Supreme Court solely on evidence of clerk of commissioners that he had selected names of qualified citizens of good moral character who had paid their taxes, but the disparity being explicable, in light of testimony by clerk of jury commissioners that he had used “comparative wealth” basis in selecting names from tax list, and no timely objection to the racially-discriminatory effect of such economic basis for selection having been made, conviction was not invalidated solely by such disparity.

[37] Federal Courts 170B 501

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk501 k. In General. Most Cited Cases
(Formerly 106k391(1))

Federal Supreme Court's delicate and serious responsibility of compelling state conformity to Constitution by overturning state criminal convictions should not be exercised without clear evidence of violation, since such an important national asset as state autonomy in local law enforcement is not to be eroded through indefinite charges of unconstitutional actions.

[38] Habeas Corpus 197 723

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)2 Evidence
197k715 Criminal Proceedings, Weight and Sufficiency
197k723 k. Jury; Grand Jury; Deliberations. Most Cited Cases

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(Formerly 197k85(1))
In habeas corpus proceedings brought by state convict, sentenced three times on charge of rape, evidence as to racial discrimination in selection of jury was insufficient to invalidate conviction.

[39] Criminal Law 110 ⚷1451

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(B) Grounds for Relief
110k1451 k. Constitutional or Fundamental Error. Most Cited Cases
(Formerly 110k997.5, 110k997)
The writ of coram nobis is available in North Carolina to test constitutional rights extraneous of record.

[40] Criminal Law 110 ⚷1099.6(1)

110 Criminal Law
110XXIV Review
110XXIV(G) Record and Proceedings Not in Record
110XXIV(G)4 Case or Statement of Facts
110k1099 Settlement, Signing, and Filing
110k1099.6 Time Prescribed or Allowed
110k1099.6(1) k. In General. Most Cited Cases
(Formerly 110k1099(7))
North Carolina rules requiring service to be made of case on appeal within specified time are mandatory. Rules of Practice in Supreme Court N.C. rule 17; G.S.N.C. § 1-282.

[41] Habeas Corpus 197 ⚷366

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)4 Sufficiency of Presentation of Issue or Utilization of State Remedy
197k362 Particular Remedies or Proceedings
197k366 k. Direct Review; Appeal or Error. Most Cited Cases
(Formerly 197k45(5))
Whether state convict is in custody in violation of constitution of United States is not to be tested by use of habeas corpus in lieu of appeal. 28 U.S.C.A. § 2241; G.S.N.C. § 1-587.

[42] Habeas Corpus 197 ⚷377

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)4 Sufficiency of Presentation of Issue or Utilization of State Remedy
197k374 Availability and Effectiveness of State Remedies
197k377 k. Delay in Remedy; Frustration by State. Most Cited Cases
(Formerly 197k45(5))
As general rule failure to avail of state remedy of appeal bars federal habeas corpus; but federal habeas corpus is allowed where time has expired without appeal, when prisoner was detained without opportunity to appeal because of lack of counsel, incapacity or some interference by officials. 28 U.S.C.A. § 2241.

[43] Federal Courts 170B ⚷506

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk504 Nature of Decisions or Questions Involved
170Bk506 k. Criminal Matters; Habeas Corpus. Most Cited Cases
(Formerly 106k391(3))

Habeas Corpus 197 ⚷364

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)4 Sufficiency of Presentation of Issue or Utilization of State Remedy

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197k362 Particular Remedies or Proceedings
197k364 k. Habeas Corpus. Most Cited Cases
(Formerly 197k45(5))

Habeas Corpus 197 ⚷366

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)4 Sufficiency of Presentation of Issue or Utilization of State Remedy
197k362 Particular Remedies or Proceedings
197k366 k. Direct Review; Appeal or Error. Most Cited Cases
(Formerly 197k120)
As general rule failure to use available state remedy will bar federal habeas corpus; but Federal Supreme Court will review state habeas corpus proceedings, even though no appeal was taken, if state treated habeas corpus as permissible; and federal habeas corpus will be available following Federal Supreme Court's denial of certiorari to review such state habeas corpus proceedings.

[44] Criminal Law 110 ⚷1030(2)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of Objections in General
110k1030(2) k. Constitutional Questions. Most Cited Cases
Failure to raise a known and existing question, of unconstitutional proceedings or action, prior to conviction or commitment bars subsequent objection to conviction on those grounds.

[45] Constitutional Law 92 ⚷4766

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)8 Appeal or Other Proceedings for Review
92k4766 k. Right to Review. Most Cited Cases
(Formerly 92k271)
A review by an appellate court of final judgment in criminal case, however grave offense of which accused is convicted, was not at common law, and is not now, a necessary element of due process of law; and a period of limitation on the right of appeal accords with the Federal Supreme Court's conception of proper procedure.

[46] Constitutional Law 92 ⚷4769

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)8 Appeal or Other Proceedings for Review
92k4769 k. Course and Conduct of Proceedings. Most Cited Cases
(Formerly 92k271)

Criminal Law 110 ⚷1069(6)

110 Criminal Law
110XXIV Review
110XXIV(F) Proceedings, Generally
110k1069 Time of Taking Proceedings
110k1069(6) k. Effect of Delay. Most Cited Cases
(Formerly 92k271)
Defendants convicted of murder in state prosecution were not deprived of a constitutional right by state supreme court's refusal to review because statement of case on appeal was served one day late.

[47] Habeas Corpus 197 ⚷374.1

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by

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State Prisoners
197I(D)4 Sufficiency of Presentation of Issue or Utilization of State Remedy
197k374 Availability and Effectiveness of State Remedies
197k374.1 k. In General. Most Cited Cases
(Formerly 197k374, 197k45(5))
To show that time has passed for appeal from judgment of conviction in state court is not enough to empower Federal District Court to issue writ of habeas corpus. 28 U.S.C.A. § 2254.
****402 *445** No. 32:

***446** Mr. Hosea V. Price, Winston-Salem, N.C., for petitioner Brown.

Mr. R. Brookes Peters, Raleigh, N.C., for respondent.

No. 22:

Mr. Herman L. Taylor, Raleigh, N.C., for petitioner Speller.

Mr. E. O. Brogden, Jr., Raleigh, N.C., for respondent.

No. 20:

Messrs. O. John Rogge and Murray A. Gordon, New York City, for petitioners Daniels.

Mr. Ralph Moody, Raleigh, N.C., for respondent.

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. Brown v. Allen, 343 U.S. 903, 72 S.Ct. 640, 96 L.Ed. 1322; Speller v. Allen, 342 U.S. 953, 72 S.Ct. 628, 96 L.Ed. 708; Daniels v. Allen, 342 U.S. 941, 72 S.Ct. 564, 96 L.Ed. 700. These cases ***447** 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. 343 U.S. 973, 72 S.Ct. 1072, 96 L.Ed. 1366. We have now heard the cases again.

[1] The judgments of affirmance were entered October 12, 1951, on appeal from three judgments of the United States District Court for the Eastern District of North Carolina, refusing writs of habeas corpus sought by prisoners convicted in that state. We conclude that all required procedure for state review of the convictions had been exhausted by petitioners in each case before they sought the writs of habeas corpus in the federal courts. In each case petitions for certiorari to this Court for direct review of the state judgments rendered by the highest court of the state in the face of the same federal issues now presented by habeas corpus had been denied. FN1

FN1. Brown v. State of North Carolina, 341 U.S. 943, 71 S.Ct. 997, 95 L.Ed. 1369; Speller v. State of North Carolina, 340 U.S. 835, 71 S.Ct. 18, 95 L.Ed. 613; Daniels v. State of North Carolina, 339 U.S. 954, 70 S.Ct. 837, 94 L.Ed. 1366.

It is not necessary in such circumstances for the prisoner to ask the state for collateral relief, based on the same evidence and issues already decided by direct review with another petition for certiorari directed to this Court. FN2 It is to be noted that an applicant is barred unless he has 'exhausted the remedies available in the courts of the State * * * by any available procedure.' The legislative history shows that this paragraph, in haec verba, was presented to the Congress with the recommendation of ***448** the Judicial Conference. The legislative history of s 2254 has no discussion of the considerations which moved congressional enactment other than that contained in S.Rep.No. 1559. But see a similar clause s 2254 in H.R. 3214, 80th Cong., 1st Sess.; H.R. 3214, 80th Cong., 2d Sess.; S.Rep.No. 1559, 80th Cong., 2d Sess., p. 9; Report of the Judicial Conferences of Senior Circuit Judges, 1947, pp. 17-20.

FN2. We reach this conclusion after consideration of the second paragraph of 28 U.S.C. s 2254, 28 U.S.C.A. s 2254.

'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.'

****403** [2] The second paragraph of s 2254 has been construed by several courts of appeals. In Ekberg v. McGee, 191 F.2d 625, the Ninth Circuit refused to consider that the statute meant to deny a federal forum where state procedures were inexhaustible. The Third Circuit in Master v. Baldi, 198 F.2d 113, 116, held that the exhaustion of one of several available alternative state remedies with this Court's denial of certiorari therefrom is all that is necessary. In Bacom v. Sullivan, 181 F.2d 177, and Bacom v. Sullivan, 194 F.2d 166, the Fifth Circuit ruled that when a federal question had been presented to the state courts by at least one post-conviction procedure, certiorari on the same question having been once denied by this Court, there appeared a unique and extraordinary circumstance justifying federal examination under the Darr case.[FN3] (Darr v. Burford, 339 U.S. 200, 70 S.Ct. 587, 94 L.Ed. 761.)

FN3. Outside the cases, it has been strongly urged that the purpose of subparagraph 2 was to eliminate the right of a federal district court to entertain an application so long as any state remedy remained available. In an article by Judge Parker, Chairman of the Judicial Conference Committee which drafted the new Habeas Corpus Act, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171, 176 (1949), this construction of s 2254 is presented:

'The effect of this last provision is to eliminate, for all practical purposes, the right to apply to the lower federal courts for habeas corpus in all states in which successive applications may be made for habeas corpus to the state courts; for, in all such states, the applicant has the right, notwithstanding the denial of prior applications, to apply again to the state courts for habeas corpus and to have action upon such later application reviewed by the Supreme Court of the United States on application for certiorari.'

We do not so construe s 2254. We do not believe Congress intended to require repetitious applications to state courts. s 2254 originally read as follows:

s 2254 of H.R. 3214 80th Cong. 2d Sess.

'An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court or authority of a State officer 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 no adequate remedy available in such courts or that such courts have denied him a fair adjudication of the legality of his detention under the Constitution and laws of the United States.'

***449** When, in April 1948, Judge Maris presented the Judicial Conference draft of s 2254 to the Senate Judiciary Subcommittee, the language of the revision of 28 U.S.C., on which the hearings were being held, set out three bases for exercise of federal jurisdiction over applications for habeas corpus from state prisoners. Under the language of the bill as it then read, an application might have been entertained where it appeared (1) that the applicant had exhausted the remedies available in the courts of the state, or (2) where there was no adequate remedy available in such courts, or (3) where such courts had denied the applicant a fair adjudication of the legality of his detention under the Constitution and laws of the United States. In accepting the recommendation of the Judicial Conference, the Congress eliminated the third basis of jurisdiction. S.Rep.No. 1559, p. 9, shows the reason for this as follows:

'The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that the State court has denied a prisoner a 'fair adjudication of the legality of his detention under the Constitution and laws of the United States.' The Judicial Conference believes that

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this would be an undesirable***450** ground for Federal jurisdiction in addition to exhaustion of State remedies or lack of adequate remedy in the State courts because it would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies or if he had no adequate State remedy.

'The third purpose is to substitute ****404** detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not sufficiently specific and precise, and its meaning should, therefore, be spelled out in more detail in the section as is done by the amendment.'

If the substitution for 'adequate remedy available' of the present definition was intended by the Congress to eliminate the right of a state prisoner to apply for relief by habeas corpus to the lower federal courts, we do not think that the report would have suggested that a remedy for denial of a 'fair adjudication' was in the federal court. The suggested elimination of district and circuit courts does not square with the other statutory habeas corpus provisions. See 28 U.S.C. ss 2241, 2242, 2251, 2252, 2253, 3d paragraph, 28 U.S.C.A. ss 2241, 2242, 2251, 2252, 2253. We are unwilling to conclude without a definite congressional direction that so radical a change was intended.

[3][4][5][6][7][8] In each of these cases the District Court in determining the propriety of its granting the writ, considered the effect of our refusal of certiorari on the same questions upon direct review of the judgments of the highest court of the state. As that question, pretermitted in our ruling in Darr v. Burford, 339 U.S. 200, 214-217, 70 S.Ct. 587, 595-597, 97 L.Ed. 761, a case where no certiorari was sought here from state denial of collateral relief by habeas corpus from imprisonment, had given rise to definite differences of opinion in the federal ***451** courts, a ruling here was necessary.FN4 There is a similar difference in this Court.FN5 As other issues command a majority that upholds the ****405** judgments of the Court of Appeals, this opinion is that of the Court although it represents the minority view on the effect of our denial ***452** of certiorari. The position of the majority upon that point is expressed by the opinion of Mr. Justice Frankfurter, Daniels v. Allen, 344 U.S. 443, 73 S.Ct. 437. A summary review of habeas corpus practice in the federal courts in relation to state criminal convictions will be found in Hawk v. Olson, 326 U.S. 271, 274, 66 S.Ct. 116, 118, 90 L.Ed. 61, and Darr v. Burford, 339 U.S. 200, 203, 70 S.Ct. 587, 589, 94 L.Ed. 761. It is hoped the conclusions reached herein will result in the improvement of the administration of justice and leave the indispensable function of the Great Writ unimpaired in usefulness.

FN4. The courts below have divided since the Darr case on the effect to be accorded a denial of certiorari by this Court.

NO SUBSTANTIVE EFFECT

Goodman v. Lainson, 8 Cir., 182 F.2d 814.

McGarty v. O'Brien, 1 Cir., 188 F.2d 151.

Soulia v. O'Brien, 1 Cir., 188 F.2d 233.

Odell v. Hudspeth, 10 Cir., 189 F.2d 300.

Ekberg v. McGee, 9 Cir., 191 F.2d 625 (also reported at 9 Cir., 194 F.2d 178).

Sampsell v. People of State of California, 9 Cir., 191 F.2d 721.

Melanson v. O'Brien, 1 Cir., 191 F.2d 963.

Bacom v. Sullivan, 5 Cir., 194 F.2d 166.

Almeida v. Baldi, 3 Cir., 195 F.2d 815.

Hawk v. Hann, D.C., 103 F.Supp. 138.

Ex parte Wells, D.C., 99 F.Supp. 320.

Fouquette v. Bernard, 9 Cir., 198 F.2d 96.

Master v. Baldi, 3 Cir., 198 F.2d 113.

Daverse v. Hohn, 3 Cir., 198 F.2d 934.

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DISCRETIONARY EFFECT

Anderson v. Eidson, 8 Cir., 191 F.2d 193.

Holland v. Eidson, D.C., 90 F.Supp. 314.

Com. of Pennsylvania ex rel. Gibbs v. Ashe, D.C., 93 F.Supp. 542.

Soulia v. O'Brien, D.C., 94 F.Supp. 764.

McGarty v. O'Brien, D.C., 96 F.Supp. 704.

Goodwin v. Smyth, 4 Cir., 181 F.2d 498.

Adkins v. Smyth, 4 Cir., 188 F.2d 452.

Byars v. Swenson, 4 Cir., 192 F.2d 739.

Frazier v. Ellis, 5 Cir., 196 F.2d 231.

Lyle v. Eidson, 8 Cir., 197 F.2d 327.

Skinner v. Robinson, D.C., 105 F.Supp. 153.

FN5. The participation of a district court through habeas corpus proceedings in determining whether state prisoners have been granted a fair trial is a sensitive area in our federated system. Speller v. Crawford, D.C., 99 F.Supp. 92, 96; U.S. ex rel. Smith v. Baldi, 3 Cir., 192 F.2d 540, 543.

In September 1952, at its fourth annual meeting, the Conference of Chief Justices adopted a resolution questioning the habeas corpus principles ‘enunciated in certain recent federal decisions.’ The resolution expressed the consensus of the Chief Justices that ‘a final judgment of a state's highest court (should) be subject to review or reversal only by the Supreme Court of the United States.’ Concern was noted that the hearing of the successive petitions by federal district courts would tend toward a dilution of the sense of judicial responsibility, a delay in the enforcement of criminal justice, and an impairment of confidence in state judicial institutions. 25 State Government, pp. 249-250.

II. Effect of Former Proceedings.

The effect to be given this Court's former refusal of certiorari in these cases was presented to the District Court which heard the applications for federal habeas corpus upon full records of the state proceedings in the trial and appellate courts. In No. 32, Brown v. Allen, the District Court, upon examination of the application, the answer, and the exhibits adopted, without hearing argument or testimony, the findings of the sentencing judge with respect to both the composition of the grand jury and the voluntary character of the confession. These were the federal constitutional issues involved in the state trial. The record which the District Judge had before him embraced the record of the case in the North Carolina courts and this Court, including all the relevant portions of the transcript of proceedings in the sentencing court. The District Court then dismissed the petition. Sub nom. Brown v. Crawford, D.C., 98 F.Supp. 866.

In No. 22, Speller v. Allen, the petition for habeas corpus in the District Court raised again the same federal question which had been passed upon by the trial and appellate***453** courts in North Carolina and which had been offered to this Court on petition for certiorari; to wit, the jury commissioners had ‘pursuant to a long and continuous practice, discriminated against Negroes in the selection of juries, solely on account of race and/or color.’ The District Court had before it the record which had been filed in the Supreme Court of North Carolina on appeal. State v. Brown, 233 N.C. 202, 63 S.E.2d 99. Included in this record was the same transcript of proceedings in the trial court which had been before the State Supreme Court. In addition, the District Court took further evidence by way of testimony and stipulation. The District Court, upon examination of all the evidence and the stipulations, adopted the findings of the sentencing judge with respect to the composition of the trial jury. It added that petitioner ‘failed to substantiate the charge that he did not have a trial according to due process, * * *.’ The court then vacated the writ; and held that while the petition could be dismissed

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'solely in the light of the procedural history', there was the added alternative ground of failure to substantiate the charge. Sub nom. Speller v. Crawford, D.C., 99 F.Supp. 92, 97.

In No. 20, Daniels v. Allen, petitioners at the state trial made a timely motion to quash the indictment and challenged the array, alleging discrimination against Negroes in the selection of both grand and petit jurors in contravention of the guarantees of the Fourteenth Amendment. Timely objection was also made to admission in evidence of what were alleged to be coerced confessions. Petitioners contend that the admission of these confessions violated their due process rights under the Fourteenth Amendment. They also urge that the refusal of the Supreme Court of North Carolina to examine the merits of the trial ****406** record in the state courts because of their failure to serve a statement of the case on appeal until one day beyond the period of limitation, is a denial of equal protection under the Fourteenth Amendment. In their ***454** application to the District Court, petitioners repeated once again those federal constitutional questions which had earlier been presented to the sentencing court and the Supreme Court of North Carolina and which had also been repeated in their petition for certiorari filed in this Court.

In examining the application, the District Court Judge studied the records of the trial and appellate courts of North Carolina, including a transcript of the proceedings in the sentencing court. He concluded that the findings of the judge of the sentencing court on the matter of whether the jury had been properly selected were 'supported by all the evidence' and that it was not shown that there was a 'purposeful and systematic exclusion of negroes solely on account of race.' He also found that the trial judge correctly determined that the confessions were voluntary and that the instruction concerning the confessions was adequate. In addition the District Judge heard all evidence offered by the prosecution or defense.

The District Court Judge did advert to the circumstance that this Court had denied a petition for certiorari on the same questions, and he further observed that to his mind the procedural history of the case did not make it appear that petitioners were denied the substance of a fair trial. He added that petitioners 'failed to substantiate the charges made.' 99 F.Supp. at page 216. The writ was vacated and the application dismissed. On the procedural history, the District Court refused to entertain the request. Sub nom. Daniels v. Crawford, D.C., 99 F.Supp. 208.

The records of the former proceedings thus determined the action of the United States District Court. The fact that further evidence was heard in two of the cases was to assure the judge that the prisoners were not held in custody in violation of the Constitution. In dismissing these petitions for habeas corpus the District Court did not treat our denial of certiorari as conclusive.

***455** In the Brown case, the last one decided, Judge Gilliam based his decision on this finding of fact:

'12. The facts found by the trial Judge, in respect to the composition of the grand jury, are supported by the evidence before him, and these findings and the conclusion thereon are adopted as findings in this respect, and the facts found by that Court in respect to the question of admission of statements made by the defendant are also supported by the evidence, and these findings and the conclusions thereon are likewise adopted.' 98 F.Supp. 866, 870.

The court cited from Stonebreaker v. Smyth, 4 Cir., 163 F.2d 498, 499, in support of the above statement that this is the proper rule:
"While action of the Virginia courts and the denial of certiorari by the Supreme Court were not binding on the principle of res judicata, they were matters entitled to respectful consideration by the court below; and in the absence of some most unusual situation, they were sufficient reason for that court to deny a further writ of habeas corpus." 98 F.Supp. at page 868.

In the Speller case, the pith of his conclusion is stated as follows:

"The Court now concludes that the writ should be vacated and the petition dismissed upon the procedural history and the record in the State Courts, for the reason

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that habeas corpus proceeding is not available to the petitioner for the purpose of raising the identical question passed upon in those Courts." 99 F.Supp. 92, 95.

To this was added the alternative ground of agreement with the conclusions of the sentencing court. See 344 U.S. 452, 453, 73 S.Ct. 405, supra.

***456** In the Daniels case, decided the same day, the District Court left open the question of its power to reexamine, 99 F.Supp. at page 213, and concluded on the record that the State had afforded a fair trial.

****407** A. Effect of Denial of Certiorari.-In cases such as these, a minority of this Court is of the opinion that there is no reason why a district court should not give consideration to the record of the prior certiorari in this Court and such weight to our denial as the District Court feels the record justifies. This is the view of the Court of Appeals. 192 F.2d 763, 768 et seq.; Speller v. Allen, 4 Cir., 192 F.2d 477. This is, we think, the teaching of Ex parte Hawk, 321 U.S. 114, 118, 64 S.Ct. 448, 450, 88 L.Ed. 572, and White v. Ragen, 324 U.S. 760, 764, 765, 65 S.Ct. 978, 980, 981, 89 L.Ed. 1348. We have frequently said that the denial of certiorari 'imports no expression of opinion upon the merits of a case.' House v. Mayo, 324 U.S. 42, 48, 65 S.Ct. 517, 521, 89 L.Ed. 739; Hamilton Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258, 36 S.Ct. 269, 271, 60 L.Ed. 629. Cf. Ex parte Abernathy, 320 U.S. 219, 64 S.Ct. 13, 88 L.Ed. 3. When on review of proceedings no res judicata or precedential effect follows, the result would be in accord with that expression, that statement is satisfied. But denial of certiorari marks final action on state criminal proceedings. In fields other than habeas corpus with its unique opportunity for repetitious litigation, as demonstrated in Dorsey v. Gill, 80 U.S.App.D.C. 9, 148 F.2d 857, see 7 F.R.D. 313, the denial would make the issues res judicata. The minority thinks that where a record distinctly presenting a substantial federal constitutional question disentangled from problems of procedure is brought here by certiorari and denied, courts dealing with the petitioner's future applications for habeas corpus on the same issues presented in earlier applications for writs of certiorari to this Court, should have the power to take the denial into consideration in determining their action. We indicated as much in House v. Mayo, supra, 324 U.S. at page 48, 65 S.Ct. at page 521, 89 L.Ed. 739, and Ex parte Hawk, supra, 321 U.S. at page 117, 64 S.Ct. at page 450, 88 L.Ed. 572 ***457** when we specifically approved a district court's refusal to reexamine ordinarily the questions passed upon by our denial. Permitting a district court to dismiss an application for habeas corpus on the strength of the prior record should be a procedural development to reduce abuse of the right to repeated hearings such as were permitted during the period when there was no review of the refusal of a habeas corpus application, Salinger v. Loisel, 265 U.S. 224, 44 S.Ct. 519, 68 L.Ed. 989. See 61 Harv.L.Rev. 657, 670. Compare the protection given by statute against abuse of habeas corpus in federal criminal proceedings, 28 U.S.C. s 2244, 28 U.S.C.A. s 2244. Since a federal district court has power to intervene, there is a guard against injustice through error. Darr v. Burford, supra, 339 U.S. at page 214, 70 S.Ct. at page 595, 94 L.Ed. 761. It should be noted that the minority does not urge that the denial of certiorari here is res judicata of the issues presented. It is true as is pointed out in the opinion of Mr. Justice Frankfurter, the records of applications for certiorari to review state criminal convictions, directly or collaterally, through habeas corpus or otherwise, are not always clear and full. Some records, however, are. It seems proper for a district court to give to these refusals of certiorari on adequate records the consideration the district court may conclude these refusals merit. This would be a matter of practice to keep pace with the statutory development of 1867 that expanded habeas corpus. We think it inconsistent to allow a district court to dismiss an application on its appraisal of the state trial record, as we understand those do who oppose our suggestion (see Mr. Justice Frankfurter's opinion, 344 U.S. 500, 501, 503-506, 73 S.Ct. 443, 444-446), but to refuse to permit the district court to consider relevant our denial of certiorari.

[9][10][11] B. Effect of State Court Adjudications.-With the above statement of the position of the minority on the weight to be given our denial of certiorari, we turn to another question. The fact that no weight is to be given ***458** by the Federal District Court to our

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denial of certiorari should not be taken as an indication that similar treatment is to be accorded to the orders of the state courts. So far as weight to be given the proceedings in the courts of the state **408 is concerned, a United States district court, with its familiarity with state practice is in a favorable position to recognize adequate state grounds in denials of relief by state courts without opinion. A fortiori, where the state action was based on an adequate state ground, no further, examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791; Ex parte Hawk, 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572. Furthermore, where there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court may properly depend upon the state's resolution of the issue. Malinski v. People of State of New York, 324 U.S. 401, 404, 65 S.Ct. 781, 783, 89 L.Ed. 1029. In other circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not res judicata.FN6

FN6. As the burden of overturning the conviction rests on the applicant, he should allege specifically, in cases where material, the uncontradicted evidentiary facts appearing in the record upon which is based his allegation of denial of constitutional rights.

[12][13][14] Furthermore, the view of the consideration that was given by the District Court to our denial of certiorari in these cases, should we return them to that court for reexamination in the light of this Court's ruling upon the effect to be given to the denial? We think not. From the findings of fact and the judgments of the District Court we cannot see that such consideration as was given by that court to our denials of certiorari could have had any effect on its conclusions as to whether the respective defendants had been denied federal constitutional protection. [FN7] *459 It is true, under the Court's ruling today, that the District Court in each of the three cases erroneously gave consideration to our denial of certiorari. It is also true that its rulings, set out above, show that without that consideration, it found from its examination of the state records and new evidence presented that the conduct of the respective state proceedings was in full accord with due process. Such conclusions make immaterial the fact that the trial court gave consideration to our denial of certiorari.

FN7. The applicable Rule 61 of the Fed.Rules Civ.Proc., 28 U.S.C.A., is as follows:

'No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.'

The District Court and the Court of Appeals recognized the power of the District Court to reexamine federal constitutional issues even after trial and review by a state and refusal of certiorari in this Court. Darr v. Burford, 339 U.S. at page 214, 70 S.Ct. at page 595, 94 L.Ed. 761. The intimation to the contrary in the Speller case, 99 F.Supp. at page 95, see 344 U.S. 453, 73 S.Ct. 405, supra, must be read as the Court's opinion after the hearing. 'In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must beaffirmed, although the lower court relied upon a wrong ground or gave a wrong reason.'FN8 Certainly the consideration given by the District Court to our former refusals of certiorari on the issues presented cannot affect its determinations that there was no merit in any of the applications for habeas corpus. 98 F.Supp. 866, 868, 870; *46099 F.Supp. 92, 97, 99; 99 F.Supp. at page 216. Where it is made to appear affirmatively, as here, that the alleged error could not affect the result, such errors may **409 be disregarded even in the review of criminal trials.FN9 Whether we affirm or reverse in these cases, therefore, does not depend upon

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the trial court's consideration of our denial of certiorari but upon the soundness of its decisions upon the issues of alleged violation of federal procedural requirements or of petitioner's constitutional rights by the North Carolina proceedings. We now take up those problems.

FN8. Helvering v. Gowran, 302 U.S. 238, 245, 58 S.Ct. 154, 157, 158, 82 L.Ed. 224. See Riley Inv. Co. v. Commissioner, 311 U.S. 55, 59, 61 S.Ct. 95, 97, 85 L.Ed. 36.

FN9. Rule 52, Fed.Rules Crim.Proc., 18 U.S.C.A.; Berger v. United States, 295 U.S. 78, 81-84, 55 S.Ct. 629, 630-631, 79 L.Ed. 1314. See Kotteakos v. United States, 328 U.S. 750, 763, 66 S.Ct. 1239, 1247, 90 L.Ed. 1557; Bihn v. United States, 328 U.S. 633, 66 S.Ct. 1172, 90 L.Ed. 1485.

III. Right to Plenary Hearing.

Petitioner alleges a procedural error in No. 32, Brown v. Allen. As we stated in the preceding subdivision, the writ of habeas corpus was refused on the entire record of the respective state and federal courts. 98 F.Supp. 866. It is petitioner's contention, however, that the District Court committed error when it took no evidence and heard no argument on the federal constitutional issues. He contends he is entitled to a plenary trial of his federal constitutional issues in the District Court. He argues that the Federal District Court, with jurisdiction of the particular habeas corpus, must exercise its judicial power to hear again the controversy notwithstanding prior determinations of substantially identical federal issues by the highest state court, either on direct review of the conviction or by post-conviction remedy, habeas corpus, coram nobis, delayed appeal or otherwise.[FN10]

FN10. See note 15, infra.

[15] Jurisdiction over applications for federal habeas corpus is controlled by statute.[FN11] The Code directs a court entertaining***461** an application to award the writ.[FN12] But an application is not ‘entertained’ by a mere filing. Liberal as the courts are and should be as to practice in setting out claimed violations of constitutional rights, the applicant must meet the statutory test of alleging facts that entitle him to relief.[FN13]

FN11. 28 U.S.C. s 2241(a), 28 U.S.C.A. s 2241(a).

FN12. 28 U.S.C. s 2243, 28 U.S.C.A. s 2243:

‘A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto. * * *

‘Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

‘The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.’

FN13. 28 U.S.C. s 2242, 28 U.S.C.A. s 2242. Darr v. Burford, supra, 339 U.S. at page 203, 70 S.Ct. at page 589, 94 L.Ed. 761. See s 2243, supra.

The word ‘entertain’ presents difficulties. Its meaning may vary according to its surroundings.[FN14] In s 2243 and s 2244 we think it means a federal district court's conclusion, after examination of the application with such accompanying papers as the court deems necessary, that a hearing on the merits legal or factual is proper. See Walker v. Johnston, 312 U.S. 275, 283, 61 S.Ct. 574, 577, 85 L.Ed. 830, First and Second; United States v. Baldi, 344 U.S. 561, 568, 73 S.Ct. 391, 395. Even after deciding to entertain the application, the District Court may determine later from the return or otherwise that the hearing is unnecessary.

FN14. See Denholm & McKay Co. v. Commissioner, 1 Cir., 132 F.2d 243, 247, and cases cited.

It is clear by statutory enactment that a federal district court is not required to entertain an application for habeas corpus if it appears that 'the legality of such detention has been determined by a judge or court of the ***462** United States on a prior application****410** for a writ of habeas corpus'.FN15 The Reviser's notes to this section in House Report No. 308, 80th Cong., 1st Sess., say that no material change in existing practice is intended. Nothing else indicates that the purpose of Congress was to restrict by the adoption of the Code of 1948 the discretion of the District Court, if it had such discretion before, to entertain petitions from state prisoners which raised the same issues raised in the state courts.FN16

FN15. 28 U.S.C. s 2244, 28 U.S.C.A. s 2244:

'No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and 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.'

See S.Rep.No.1559, 80th Cong., 2d Sess., Amendment No. 45.

FN16. See H.R. 4232, 79th Cong., 1st Sess.; H.R. 3214, 80th Cong., 1st Sess.; H.R. 3214, 80th Cong., 2d Sess.; Report of the Judicial Conference of Senior Circuit Judges, 1947, pp. 17-20.

Furthermore, in enacting 28 U.S.C. s 2254, 28 U.S.C.A. s 2254, dealing with persons in custody under state judgments, Congress made no reference to the power of a federal district court over federal habeas corpus for claimed wrongs previously passed upon by state courts. FN17 See discussion 344 U.S. 447, 73 S.Ct. 402, supra. A federal judge on a habeas corpus application is required to 'summarily hear and determine the facts, and dispose of the matter as law and justice require', 28 U.S.C. s 2243, 28 U.S.C.A. s 2243. This has long been the law. R.S. s 761, ***463** old 28 U.S.C. s 461. It was under this general rule that this Court approved in Salinger v. Loisel, 265 U.S. 224, 231, 44 S.Ct. 519, 521, 68 L.Ed. 989, the procedure that a federal judge might refuse a writ where application for one had been made to and refused by another federal judge and the second judge is of the opinion that in the light of the record a satisfactory conclusion has been reached. FN18 That principle is also applicable to state prisoners. Darr v. Burford, supra, 339 U.S. at pages 214-215, 70 S.Ct. at pages 595-596, 94 L.Ed. 761.

FN17. 28 U.S.C. s 2254, 28 U.S.C.A. s 2254:

'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.'

FN18. The reason for the change in procedure was stated:

'But it does not follow that a refusal to discharge on one application is without bearing or weight when a later application is being considered. In early times, when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number. But when a right to an appellate review was given, the reason for that practice ceased, and the practice

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came to be materially changed-just as, when a right to a comprehensive review in criminal cases was given, the scope of inquiry deemed admissible on habeas corpus came to be relatively narrowed.' Id. 265 U.S. at pages 230-231, 44 S.Ct. at page 521, 68 L.Ed. 989.

[16] Applications to district courts on grounds determined adversely to the applicant by state courts should follow the same principle-a refusal of the writ without more, if the court is satisfied, by the record, that the state process has given fair consideration to the issues and the offered evidence, and has resulted in a satisfactory conclusion. Where the record of the application ****411** affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required. See 344 U.S. 457, 73 S.Ct. 407, supra. However, a trial may be had in the discretion of the federal ***464** court or judge hearing the new application. A way is left open to redress violations of the Constitution. See 344 U.S. 447, 73 S.Ct. 402, supra. Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543. Although they have the power, it is not necessary for federal courts to hold hearings on the merits, facts or law a second time when satisfied that federal constitutional rights have been protected.[FN19] It is necessary to exercise jurisdiction to the extent of determining by examination of the record whether or not a hearing would serve the ends of justice. ***465** Cf. 28 U.S.C. s 2244, 28 U.S.C.A. s 2244. See note 15, supra. As the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of post-conviction remedies. See White v. Ragen, 324 U.S. 760, 764, 65 S.Ct. 978, 980, 89 L.Ed. 1348.

FN19. When an application for habeas corpus by a state prisoner is filed in a federal district court after the exhaustion of state remedies, including a certiorari to this Court, it rests on a record that was made in the applicant's effort to secure relief through the state from imprisonment, allegedly in violation of federal constitutional rights. The District Court, a court convenient to the place of litigation, 28 U.S.C. s 2241(b), 28 U.S.C.A. s 2241(b), after determining grounds for relief are stated in the petition, 'may require a showing of the record and action on prior applications'. Darr v. Burford, supra, 339 U.S. at page 215, 70 S.Ct. at page 596, 94 L.Ed. 761; Salinger v. Loisel, 265 U.S. 224, 232, 44 S.Ct. 519, 522, 68 L.Ed. 989; cf. Ex parte Elmer Davis, 318 U.S. 412, 63 S.Ct. 679, 87 L.Ed. 868. Original records in state courts are returned by this Court. (E.g., see in Daniels v. North Carolina, 339 U.S. 954, 70 S.Ct. 837, 94 L.Ed. 1366, the order of The Chief Justice of the Supreme Court of the United States, dated May 12, 1950, as the same remains upon the files of this Court, directing, on the application of petitioner's counsel, the return of the original record from the files of this Court to the Supreme Court of North Carolina.) Copies of petitions for certiorari are normally available to petitioners. See 28 U.S.C. s 2250, 28 U.S.C.A. s 2250. Other sections strengthen the ability of the court hearing the application fully to advise itself concerning prior hearings of the same issues for the applicant. 28 U.S.C. s 2245, 28 U.S.C.A. s 2245, allows a certificate as to certain facts; s 2246 provides for depositions and affidavits. Section 2247 makes liberal provision for the use of records of former proceedings in evidence. See also ss 2248-2254, inclusive. Of course, the other usual methods of completing the record in civil cases, such as subpoena duces tecum and discovery, are generally available to the applicant and respondent. If useful records of prior litigation are difficult to secure or unobtainable, the District Court may find it necessary or desirable to hold limited hearings to supply them where the allegations of the application for

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habeas corpus state adequate grounds for relief.

[17] As will presently appear, this case involves no extraordinary situation. Since the complete record was before the District Court, there was no need for rehearing or taking of further evidence. Treating the State's response to the application as a motion to dismiss, the court properly granted that motion. Discharge from conviction through habeas corpus is not an act of judicial clemency but a protection against illegal custody.

[18] The need for argument is a matter of judicial discretion. All issues were adequately presented. There was no abuse.

IV. Disposition of Constitutional Issues.

Next we direct our attention to the records which were before the District Court ****412** in order to review that court's conclusions that North Carolina accorded petitioners a fair adjudication of their federal questions. Questions of discrimination and admission of coerced confessions lie in the compass of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Have petitioners received hearings consonant with standards accepted by this Nation as adequate to justify their convictions? Hebert v. State of Louisiana, 272 U.S. 312, 47 S.Ct. 105, 71 L.Ed. 270; Adamson v. People of State of California, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903.

***466** First. We take up Brown v. Allen, No. 32, a case that turns more generally than the others on the constitutional issues.

Petitioner, a Negro, was indicted on September 4, 1950, and tried in the North Carolina courts on a charge of rape, and, having been found guilty, he was sentenced to death on September 15, 1950. In the sentencing court petitioner made a timely motion to quash the bill of indictment, alleging discrimination against Negroes in the selection of grand jurors in contravention of the guarantees of the Fourteenth Amendment to the Federal Constitution. After the verdict, but before sentencing, petitioner, by a motion to set aside the verdict, sought to expand his constitutional attack on the selection of the grand jury to embrace the petit jury also. On appeal the State Supreme Court treated, as we do, petitioner's motions as adequate to challenge the selection of both juries. 233 N.C. 202, 205-206, 63 S.E.2d 99. A second federal question was raised in the sentencing court when petitioner opposed admission into evidence of a confession which he alleged had been given involuntarily. Following sentencing, petitioner took an appeal to the State Supreme Court and there presented for review the issues of jury discrimination and admission of a coerced confession. On this appeal, that court had before it both a brief on behalf of petitioner and a transcript of all those portions of the sentencing court proceedings which petitioner deemed relevant to a review of his federal questions.[FN20] Dealing with the federal constitutional questions on their merits, the State Supreme Court ***467** affirmed the conviction. State v. Brown, 233 N.C. 202, 63 S.E.2d 99.

FN20. Rule 19 of the Rules of the Supreme Court of North Carolina permits an appellant to bring up on appeal as much of the record as is necessary 'to an understanding of the exceptions relied on.' Petitioner does not contend that the record before the Supreme Court of North Carolina was inadequate fully to support an adjudication on his federal questions.

A. Petitioner's charge of discrimination against Negroes in the selection of grand and petit jurors in violation of his constitutional rights attacks the operation of a method used by North Carolina in selecting juries in Forsyth County. The statutes detailing the method of selection are cited below. [FN21] It is petitioner's contention that no more than one or two Negroes at a time have ever served on a Forsyth County grand jury and that no more than five Negroes have ever previously served on a petit jury panel in the county. These contentions are the basis of the allegation that a system of discrimination is being employed against the Negro residents of the county. Petitioner offered no evidence to support his charge of limitation against the jury service of Negroes, except the fact that fewer Negroes than whites, having regard for their proportion of the population, appeared on the jury panels.

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FN21. See Chapter 206, 1937 Public Local Laws, as amended by Chapter 264, 1947 Session Laws, and as amended by Chapter 577, 1949 N.C. Session Laws. And Gen.Stats. of N.C.1943, c. 9, Arts. 1-4, as amended.

The 1940 Census shows the following figures in respect to the population of Forsyth County.

	Population	Percent	21 Plus	Percent
White	85,323	67.5	50,499	66.5
Negro	41,152	32.5	25,057	33.5
Total	126,475	100.0	75,556	100.0

****413** According to the unchallenged testimony of the IBM Supervisor in the office of the Tax Supervisor of Forsyth County, a list of names is compiled from a tabulation of all the county property and poll taxpayers who make returns and is thereafter tendered to the County Commissioners for use in jury selection. All males ***468** between 21 and 50 years of age are required to list themselves for poll tax as well as to list their property. Gen.Stat. of North Carolina ss 105-307, 105-341. In 1948, Winston Township, the most heavily populated in Forsyth County, had 7,659 white males and 2,752 colored males who listed polls. In the County of Forsyth outside Winston Township, 10,319 white males and 587 colored males listed polls. This indicates that Negroes number approximately 16% of the listed taxpayers. No figures appear in the record of the percentage of Negroes on the property tax lists.

In June 1949, a list of approximately 40,000 names compiled from all the tax lists was handed to the Commissioners by the office of the Tax Supervisor. There is uncontradicted testimony by the IBM Supervisor that the list of jurors was prepared without regard to color, and that it constituted a complete compilation of the names of all resident, adult, listed taxpayers of Forsyth County. Both the grand and petit jury panels employed in this case were drawn from that pool. All the names on that list and no others (the list having been cut up into individual slips of uniform size bearing only one person's name) were put into a jury box. The selection from the jury box of names of persons subject to a summons to serve as grand jurors in a term of court is made by lot, as is the selection of panels of persons subject to summons for duty on petit juries. As the drawings were made by a small child and recorded in public there is no claim or evidence of chicanery in the drawings.

Grand jurors in Forsyth County are selected in January and July for a six months' term. See c. 206, 1937 Pub. Local Laws, as amended by c. 264, 1947 Session Laws, as amended by c. 577, 1949 N.C. Session Laws. A panel of 60 names is drawn from the jury box each December and June by a child in the presence of the County Commissioners. At the June 5, 1950, meeting of the ***469** Commissioners, 60 names were drawn. These 60 names constituted the panel of persons subject to summons for service on the grand jury which returned the indictment against petitioner. After such a drawing, a jury order is immediately prepared and given to the sheriff, who then summons all the parties he can find to appear for drawings for grand or petit jury service, as the case may be. All persons whose names were drawn were summoned if they could be found. Although there is no evidence as to how many persons were summoned by the sheriff, there is evidence to show that at least four or five Negroes were summoned. The final drawing for grand jury service is conducted in the court room in the presence of the Superior Court Judge. When the July 1950 grand jury was selected from the panel of 60, the drawing was again made by a child. The names of all the persons summoned by the sheriff were put into a special section of the jury box and the 18-man grand jury was then drawn. The name of one of the four or five Negroes summoned was drawn in the group of 18, and that Negro served on the grand jury. The remaining names are used for the petit jury panel.

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When they are needed, petit jury panels in Forsyth County are drawn from the same jury box in groups of 44 persons. C. 206, Public Laws, supra. After a drawing, the names are given to a deputy sheriff who then summons those persons on the list whom he can find. On the lists supplied to the deputies there are no indications as to whether the persons named are Negro or white. According to the statute all summoned persons must report for jury service. At the selection of the petit jurors for the trial of this case 8 of the 37 persons summoned on the panel were Negroes, as were 3 of a special venire of 20. ****414** Challenges, peremptory or for cause, eliminated all Negroes. No objections are made to the legality of these challenges. Uncontradicted evidence by a state witness ***470** shows that in the two years 1949 and 1950 the percentages of Negroes drawn on grand jury panels in Forsyth County varied between 7% and 10% of all persons drawn. In 1950 the percentage of Negroes drawn on petit jury panels varied between 9% and 17% of all persons drawn.

Prior to 1947, the jury list was composed of those taxpayers who had 'paid all the taxes assessed against them for the preceding year.' N.C.Gen.Stat.1943, s 9-1; cf. State v. Davis, 109 N.C. 780, 14 S.E. 55; State v. Dixon, 131 N.C. 808, 42 S.E. 944. This requirement has now been removed, as is shown by comparing the earlier statutes with the present wording of s 9-1 which was put into law in 1947. No change was made in the duty of all males between 21 and 50 to list their polls for assessment nor of the requirement for the county to collect an annual poll tax. Gen. St. 105-307, 105-336, 105-339 and 105-341; cf. State v. Brown, 233 N.C. 202, 205, 63 S.E.2d 99. The pool of eligible jurors was thus enlarged. This enlargement and the practice of selecting jurors under the new statute worked a radical change in the racial proportions of drawings of jurors in Forsyth County. As is shown by the record in this Court of Brunson v. State of North Carolina, 333 U.S. 851, 68 S.Ct. 634, 92 L.Ed. 1132, tried in North Carolina in October, 1946, Forsyth County with its large Negro population, at that time had a jury pool of 10,622 white and 255 colored citizens. At that time a sheriff, then in office for 10 years, testified that he had summoned only about twelve Negroes for jury service in that time. In 1949, the jury box was purged. All those listing taxes and eligible were listed for jury service with the result in this case shown above.

[19][20] Discriminations against a race by barring or limiting citizens of that race from participation in jury service are odious to our thought and our Constitution. This has long been accepted as the law. Brunson v. State of North Carolina, 333 U.S. 851, 68 S.Ct. 634, 92 L.Ed. 1132; ***471**Cassell v. State of Texas, 339 U.S. 282, 286- 287, 70 S.Ct. 629, 631, 94 L.Ed. 839; State v. Peoples, 131 N.C. 784, 42 S.E. 814. Such discrimination is forbidden by statute, 18 U.S.C. s 243, 18 U.S.C.A. s 243, and has been treated as a denial of equal protection under the Fourteenth Amendment to an accused, of the race against which such discrimination is directed. Neal v. State of Delaware, 103 U.S. 370, 390, 26 L.Ed. 567. The discrimination forbidden is racial discrimination, however, directed to accomplish the result of eliminating or limiting the service of the proscribed race by statute or by practice. Smith v. State of Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84; Patton v. State of Mississippi, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76. It was explained in 1880 by this Court, when composed of justices familiar with the evils the Amendment sought to remedy, as permitting a state to 'confine the selection (of jurors) to males, to freeholders, to citizens, to persons within certain ages or to persons having educational qualifications.' Strauder v. State of West Virginia, 100 U.S. 303, 310, 25 L.Ed. 664. Cf. Franklin v. State of South Carolina, 218 U.S. 161, 167-168, 30 S.Ct. 640, 642, 54 L.Ed. 980; Fay v. People of State of New York, 332 U.S. 261, 268-272, 67 S.Ct. 1613, 1617-1619, 91 L.Ed. 2043. While discriminations worked by consistent exclusion have been rigorously dealt with, Neal v. State of Delaware, 103 U.S. 370, 26 L.Ed. 567; Carter v. State of Texas, 177 U.S. 442, 20 S.Ct. 687, 44 L.Ed. 839; Norris v. State of Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074; Pierre v. State of Louisiana, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757; Hill v. State of Texas, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559; Patton v. State of Mississippi, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76, variations in proportions of Negroes and whites on jury lists from racial proportions in the population have not been considered violat-

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ive of the Constitution where they are explained and not long continued. **415Akins v. State of Texas, 325 U.S. 398, 403, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692. Of course, token summoning of Negroes for jury service does not comply with equal protection, Smith v. State of Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84. Nor can a race be proscribed as incompetent for service, Hill v. State of Texas, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559.

[21] Responsible as this Court is under the Constitution to redress the jury packing which Bentham properly characterized as a sinister species of art, Bentham, Elements of the Art of Packing as Applied to Special Juries, p. 6, ***472** it should not condemn good faith efforts to secure competent juries merely because of varying racial proportions.

[22][23][24][25][26] The Supreme Court of North Carolina concluded that objection to the lists based on the racial composition of the tax lists was 'far-fetched' and that it was not a racial discrimination when a list which included only taxpayers was used. State v. Brown, 233 N.C. 202, 63 S.E.2d 99.[FN22] ***473** We recognize the fact that these lists have a higher proportion of white citizens than of colored, doubtless due to inequality of educational and economic opportunities. While those who chose the names for the jury lists might have included names other than taxpayers, such action was not mandatory under state law. State v. Brown, 233 N.C. 202, 205, 63 S.E.2d 99. As only property and poll tax lists were used, see 344 U.S. 467, 73 S.Ct. 413, supra, this case presents a jury selection as though limited by statute to all property owners and voters. We assume only reasonable tax levies were used. It is to be noted all males between 21 and 50 must list both property, however modest in amount, and polls, see 344 U.S. 467, 468, 73 S.Ct. 413, supra, so that in that sense there is no exclusion on racial grounds. The name of every property owner and every voter is in the jury box. We recognize, too, that we are now reviewing a constitutional objection to a ****416** state court conviction, and we may not act to alter practices of a state which are short of a denial of equal protection or due process in the selection of juries.[FN23] States should decide for themselves the quality of their juries as best fits their situation so long as the classifications have relation to the efficiency of the jurors and are equally administered.

FN22. In addition to North Carolina, the following states are among those which also base the composition of jury lists on tax lists:

Colo.Stat.Ann.1951, c. 95, s 10 (may use tax list);

Ga.Code Ann.1951, s 59.106 (jury commissioners 'shall select from the books of the tax receiver');

Kan.Gen.Stat.1949, c. 43 ('select from those assessed on the assessment roll of the preceding year');

Ky.Rev.Stat.1948, s 29.070 (last returned tax commissioner's book);

Md.Ann.Code 1939, Art. 51, s 6 (from a 'complete list of the male taxable inhabitants * * * whose names appear on the tax books');

Mich.Stat.Ann.1938 and 1951, ss 27.246, 27.247, Comp.Laws 1948, ss 602.121, 602.122 (select from 'persons assessed on the assessment roll'; provides for additional names);

Mont.Rev.Code 1947, Tit. 93, s 1402 ('select, from the last assessment roll of the county');

McKinney's N.Y.Consol.Laws, c. 30, Judiciary Law, s 502 (1948) (own real property $150, or personal property $250, or married to someone who does; jurors in counties outside of cities having a population of one million or more). McKinney's N.Y.Laws, Judiciary Law, s 596;

N.D.Rev.Code 1943, s 27-0906 ('The names on the assessors' lists * * * for the preceding year shall be the basis for making' an apportionment of the 200 names per county to the various cities and towns within the county);

38 O.S.1951 s 18 (jury lists shall be selected

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from the names on the tax rolls of the county);

Ore.Comp.Laws 1940, s 14-201 (make a jury list, 'as far as it may be able to ascertain the same from the latest tax roll and/or registration books of the county');

Utah Code Ann.1943, s 48-0-17 ('select from the names of the legal voters on the assessment roll * * *');

Remington's Wash.Rev.Stat.1932, s 94 (no person is competent to serve as a juror unless he be (1) an elector and taxpayer of the state);

Wyo.Comp.Stat.1945, s 12-101(4) (a person is competent if he be (4) assessed on the last assessment roll of the county).

See also Morse, A Survey of the Grand Jury System, part 2, 10 Ore.L.Rev. 217, 227 (1931). The answers to the questionnaires sent out by Mr. Morse indicated that in twenty-two states the names for the grand jury lists were selected from county tax rolls or assessment rolls.

FN23. Rules dealing with the selection of juries in federal courts, as announced in Thiel v. Southern Pacific Co., 328 U.S. 217, 221, 66 S.Ct. 984, 986, 90 L.Ed. 1181, are not applicable in state court proceedings. Fay v. People of State of New York, 332 U.S. 261, 287, 67 S.Ct. 1613, 1627, 91 L.Ed. 2043.

***474** Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty. Short of an annual census or required population registration, these tax lists offer the most comprehensive source of available names. We do not think a use, nondiscriminatory as to race, of the tax lists violates the Fourteenth Amendment, nor can we conclude on the evidence adduced that the results of the use require a conclusion of unconstitutionality. Assuming that before the Brunson case, 333 U.S. 851, 68 S.Ct. 634, 92 L.Ed. 1132, there were unconstitutional exclusions of Negroes in this North Carolina county, the present record does not show such exclusions in this case. The evidence is to the contrary. The District Court correctly determined this issue as to the grand jury. As both the grand and petit juries in this case were drawn from the same filling of the jury box, the reasoning of the District Court is applicable to the petit jury here involved.

B. Petitioner contends further that his conviction was procured in violation of the Fourteenth Amendment of the Federal Constitution because the trial judge permitted the jury to rely on a confession claimed by petitioner to be coerced in determining his guilt. At the trial petitioner registered timely objection to use by the state of his purported confessions. The objection having been made, the trial judge immediately excused the jury and ordered a preliminary examination to determine whether or not the statements were voluntary. It was in this preliminary hearing, in which the petitioner and two police officers testified, that the admitted facts were first developed upon which petitioner rests this phase of his case. After hearing the testimony, the trial judge found that the petitioner's statements were freely and voluntarily given and declared them to be competent. ***475** Upon recall of the jury, the state introduced the statements in evidence, objections again being noted. Although the petitioner chose not to take the stand in the trial of his cause, his counsel, while cross-examining the officers who had taken the challenged statements from the petitioner, developed again for the jury all the facts upon which petitioner now relies.

[27] A conviction by a trial court which has admitted coerced confessions deprives a defendant of liberty without due process of law. Brown v. State of Mississippi, 297 U.S. 278, 280, 286-287, 56 S.Ct. 461, 462, 465, 80 L.Ed. 682. When the facts admitted by the state show coercion, Ashcraft v. State of Tennessee, 327 U.S. 274, 66 S.Ct. 544, 90 L.Ed. 667, a conviction will be set aside as violative of due process. Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716. This is true even though the evidence apart from the confessions might have been sufficient to sustain the jury's

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verdict. Malinski v. People of State of New York, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029; see Lyons v. State of Oklahoma, 322 U.S. 596, 597, 64 S.Ct. 1208, 1210, 88 L.Ed. 1481.

[28] Therefore, it does not matter in this case whether or not the jury was acquainted with all the facts laid before the judge upon which petitioner now relies or whether the jury heard or did not hear the petitioner testify. Neither does it matter that there possibly is evidence in the record independent of the confessions which could ****417** sustain the verdict. The mere admission of the confessions by the trial judge constituted a use of them by the state, and if the confessions were improperly obtained, such a use constitutes a denial of due process of law as guaranteed by the Fourteenth Amendment. In determining whether a confession has been used by the state in violation of the constitutional rights of a petitioner, a United States court appraises the alleged abuses by the facts as shown at the hearing or admitted on the record.

[29][30][31] Petitioner's contention that he had a constitutional right to have his statements excluded from the record rests upon these admitted facts. He is an illiterate. ***476** He was held after arrest for five days before being charged with the crime for which he was convicted. He was not given a preliminary hearing until 18 days after his arrest. No counsel was provided for him in the period of his detention. The alleged confessions were taken prior to the preliminary hearing and appointment of counsel. There is no record of physical coercion or of that less painful duress generated by prolonged questioning. There is evidence that petitioner was told he could remain silent and that any statement he might make could be used against him. He chose to speak, and he made that choice without a promise of reward or immunity having been extended. He was never denied the right to counsel of his choice and was never without competent counsel from the inception of judicial proceedings. If the delay in the arraignment of petitioner was greater than that which might be tolerated in a federal criminal proceeding, due process was not violated. Under the leadership of this Court a rule has been adopted for federal courts, that denies admission to confessions obtained before prompt arraignment notwithstanding their voluntary character. McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819; Upshaw v. United States, 335 U.S. 410, 69 S.Ct. 170, 93 L.Ed. 100. Cf. Allen v. United States, 91 U.S.App.D.C. 197, 202 F.2d 329. This experiment has been made in an attempt to abolish the opportunities for coercion which prolonged detention without a hearing is said to enhance. But the federal rule does not arise from constitutional sources. The Court has repeatedly refused to convert this rule of evidence for federal courts into a constitutional limitation on the states. Gallegos v. State of Nebraska, 342 U.S. 55, 63-65, 72 S.Ct. 141, 146-147, 96 L.Ed. 86. Mere detention and police examination in private of one in official state custody do not render involuntary the statements or confessions made by the person so detained. Petitioner's constitutional rights were not infringed by the refusal of the trial court to exclude his confessions as evidence.

***477** Second. We examine the constitutional issues in No. 22, Speller v. allen.

Petitioner, a Negro, was indicted and in August, 1949, tried in the Superior Court of Bertie County, North Carolina, upon a charge of rape. He has been convicted and sentenced to death on this charge three times, the first two convictions having been set aside on appeal by the Supreme Court of North Carolina on the ground of discriminatory selection of jurors. State v. Speller, 229 N.C. 67, 47 S.E.2d 537; Id., 230 N.C. 345, 53 S.E.2d 294. At this, his third trial, August Term 1949, petitioner made a timely motion to set aside the array of special veniremen called from Vance County, alleging discrimination against Negroes 'solely and wholly on account of their race and/or color' in the selection of the veniremen in contravention of the guarantees of the Fourteenth Amendment of the Federal Constitution. (Transcript of Record, State v. Speller, August Term 1949, Bertie N.C. Superior Court at 12, Item 91, Clerks Record, Supreme Court of the United States.) Evidence was taken at length on this issue, although some evidence deemed material by petitioner was excluded. In particular, the trial judge, on the ground that it would be immaterial, infra, 344 U.S. 480, 73 S.Ct. 419, refused to

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permit petitioner to produce evidence as to all the scrolls in the jury box for the purpose of showing the existence of dots on the scrolls bearing the names of Negroes. The jury box was produced in court, opened, and ****418** counsel for defendant permitted to examine the scrolls. The trial judge made findings relating to the manner of selecting the veniremen, determining that no discrimination was practiced, and on these findings denied the motion to set aside the array. Petitioner was thereafter convicted for the third time, and sentenced to death.

On appeal petitioner asserted that his conviction violated the Equal Protection Clause of the Fourteenth ***478** Amendment, assigning the denial of his motion to set aside the array as error, and also assigning as error the trial court's ruling on his request for permission to examine into all the scrolls in the jury box. The Supreme Court of North Carolina had before it on that appeal as part of the record a mimeographed, narrative-style transcript of the entire proceedings below; petitioner makes no objection to the absence of any relevant evidence on that appeal, except that relating to all the scrolls which had been excluded by the trial court. Upholding the rulings of the trial court, the Supreme Court of North Carolina affirmed the conviction, 231 N.C. 549, 57 S.E.2d 759.

Petitioner filed this petition for a writ of habeas corpus in the Federal District Court for the Eastern District of North Carolina after we denied certiorari on direct review of the state proceedings. The petition summarily recited the prior history of the litigation, and raised again the same federal question which had been passed upon by both North Carolina courts, and which had been offered to this Court on petition for certiorari, racial discrimination. The District Court heard all additional evidence the petitioner offered. This was in its discretion. Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543; Darr v. Burford, 339 U.S. at page 214, 70 S.Ct. at page 595, 94 L.Ed. 761, cases which establish the power of federal district courts to protect the constitutional rights of state prisoners after the exhaustion of state remedies. It better enabled that court to determine whether any violation of the Fourteenth Amendment occurred.

Petitioner's charge of discrimination against Negroes in the selection of petit jurors in violation of his constitutional rights attacks the operation of the system used by the North Carolina authorities to select juries in Vance County, from which county a special venire was obtained to try petitioner. The charge rests on petitioner's contentions (1) that no Negro within recent ***479** years had served on a jury in Vance County before this case, (2) that no Negro had been summoned to serve on a jury before this case, and (3) that the jury box in this case was so heavily loaded with names of white persons that the drawing could not fairly reflect a cross-section of those persons in the community qualified for jury service. Petitioner offered evidence to support each of these three contentions.

[32] The evidence establishes the correctness of contentions [1] and (2). They are inapplicable to this case, however, under the circumstances of the filling of this particular jury box. As is pointed out in Brown v. Allen, supra, at page 21, North Carolina in 1947 enlarged its pool of citizens eligible for jury service. General Statutes, North Carolina, s 9-1. In Vance County, where the special venire for Speller's trial was drawn, the names of substantial numbers of Negroes appeared thereafter in the jury box. 145 Negroes out of a total of 2,126 names were in this jury box. As this venire was the first drawing of jurors from the box after its purge in July 1949, following the new statute and Brunson v. State of North Carolina, 333 U.S. 851, 68 S.Ct. 634, 92 L.Ed. 1132, decided here, March 15, 1948, the long history of alleged discrimination against its Negro citizens by Vance County jury commissioners is not decisive of discrimination in the present case. Former errors cannot invalidate future trials. Our problem is whether this venire was drawn from a jury box, invalidly filled as to Speller because names were selected by discriminating against Negroes 'solely on account of race and/or color.' ****419** It is this particular box that is decisive, cf. Cassel v. State of Texas, 339 U.S. 282, 290 and 295, 70 S.Ct. 629, 633, 635, 94 L.Ed. 839. Past practice is evidence of past attitude of mind. That attitude is shown to no longer control the action of officials by the present

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fact of colored citizens' names in the jury box.

[33][34][35][36][37][38] ***480** It is suggested that the record shows that the names of colored persons in the jury box were marked with a dot or period on the scroll. This could be used for unlawful disposition of such scrolls when drawn. Such a scheme would be useless in the circumstances of this case. The record shows that the defendant and his counsel were present when the venire was drawn by a child, aged 5. All of the names drawn were given to the sheriff and summonses were issued. As a matter of fact the special venire contained the names of seven Negroes. Four appeared. None sat as jurors. Therefore the assertion as to the dots, even if true, means no more than that some unknown person desired to interfere with the fair drawing of juries in Vance County. The trial court found against petitioner on this question. The District Court pointed out its immateriality. 99 F.Supp. at page 97.

This box was filled by names selected by the clerk of the jury commissioners and corrected by the commissioners. The names put in were substantially those selected by the clerk, who chose them from those on the tax lists who had 'the most property.' The clerk testified no racial discrimination entered into his selection. Since the effect of this possible objection to the selection of jurors on an economic basis was not raised or developed at the trial, on appeal to the State Supreme Court, on the former certiorari to this Court, or in the petition or brief on the present certiorari to this Court, it is not open to consideration here.FN24 Such an important ***481** national asset as state autonomy in local law enforcement must not be eroded through indefinite charges of unconstitutional actions.

FN24. Evidence in state criminal proceedings to support objections on federal constitutional grounds, known to state defendants and their counsel, or easily ascertainable, cannot be withheld or neglected at the state trial and used later to support habeas corpus. State criminal proceedings would be unreasonably hampered. Ex parte Spencer, 228 U.S. 652, 660, 33 S.Ct. 709, 711, 57 L.Ed. 1010; In re Wood, 140 U.S. 278, 285, 11 S.Ct. 738, 741, 35 L.Ed. 505; Crowe v. United States, 4 Cir., 175 F.2d 799; Price v. Johnston, 334 U.S. 266, 289, 68 S.Ct. 1049, 1061, 92 L.Ed. 1356, and the dissent.

As we have stated above in discussing the Brown case, 344 U.S. 473, 73 S.Ct. 415, et seq., supra, our conclusion that selection of prospective jurors may be made from such tax lists as those required under North Carolina statutes without violation of the Federal Constitution, this point needs no further elaboration. The fact that causes further consideration in this case of the selection of prospective jurors is that the tax lists show 8,233 individual taxpayers in Vance County of whom 3,136 or 38% are Negroes. In the jury box involved, selected from that list, there were 2,126 names. Of that number 145 were Negroes, 7%. This disparity between the races would not be accepted by this Court solely on the evidence of the clerk of the commissioners that he selected names of citizens of 'good moral character and qualified to serve as jurors, and who had paid their taxes.'FN25 It would not be assumed that in Vance County there is not a much larger percentage of Negroes with qualifications of jurymen.FN26 The action of the commissioners' clerk, however, ****420** in selecting those with 'the most property,' an economic basis not attacked here, might well account for the few Negroes appearing in the box. Evidence of discrimination based solely on race on the selection actually made is lacking.

FN25. We understand his last basis of qualification was not required. See Brown v. Allen, supra, 73 S.Ct. 413, and General Statutes of North Carolina, s 9-1 as amended 1947.

FN26. Moral character and intelligence sufficient to serve as jurors is the statutory test. N.C.Gen.Stat., 1943, s 9-1. Even in 1930 only 18.5% over 10 years of age were illiterate. 1930 Census, Vol. III, part 2, p. 359. See Hill v. State of Texas, 316 U.S. 400, 404, 62 S.Ct. 1159, 1161, 86 L.Ed. 1559.

The trial and district courts, after hearing witnesses, found no racial discrimination in the selection of the prospective jurors. The conviction was upheld as

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nondiscriminatory***482** by the State Supreme Court, which had once acted to reverse a conviction of this defendant by a jury deemed tainted with racial discrimination, State v. Speller, 229 N.C. 67, 68, 47 S.E.2d 537, and again to reverse a conviction when adequate time for investigation of discrimination had not been given. State v. Speller, 230 N.C. 345, 53 S.E.2d 294. It would require a conviction, by this Court, of violation of equal protection through racial discrimination to set aside this trial. Our delicate and serious responsibility of compelling state conformity to the Constitution by overturning state criminal convictions, should not be exercised without clear evidence of violation.

Disregarding, as we think we should, the clerk's unchallenged selections based on taxable property, there is no evidence of racial discrimination. Negroes names now appear in the jury box. If the requirement of comparative wealth is eliminated, and the statutory standards employed, the number would increase to the equality justified by their moral and educational qualification for jury service as compared with the white race. We do not think the small number, by comparison, of Negro names in this one jury box, is, in itself, enough to establish racial discrimination.

[39][40] Third. We have the problems presented by No. 20, Daniels v. Allen. The two petitioners, Negroes, were indicted and convicted in the North Carolina courts on a charge of murder. Their trial in the Superior Court of Pitt County resulted in a verdict of guilty, and each petitioner was thereafter sentenced to death. There is no issue over guilt under the evidence introduced. In addition to the objections stated above, 344 U.S. 453, 73 S.Ct. 405, 406,-discrimination in jury lists, coerced confessions and refusal to hear on the merits-there is also objection here to the procedure for determination of the voluntariness of the confessions.***483** As the failure to serve the statement of the case on appeal seems to us decisive, we do not discuss in detail the other constitutional issues tendered and only point out that they were resolved against the petitioners by the sentencing state court and the Federal District Court after full hearing of the evidence offered. It is also to be noted that the Supreme Court of North Carolina refused certiorari to review the alleged invasions of constitutional rights by the sentencing court and two efforts of petitioners to secure an order permitting them to apply for coram nobis.[FN27] The writ of coram nobis is available in North Carolina to test constitutional rights extraneous of the record. In re Taylor, 230 N.C. 566, 53 S.E.2d 857. In the first coram nobis case the Court said, speaking of its refusal of certiorari:

FN27. State v. Daniels, 231 N.C. 17, 56 S.E.2d 2; Id., 231 N.C. 341, 56 S.E.2d 646; Id., 232 N.C. 196, 59 S.E.2d 430.

'Counsel for petitioners were advised, however, that petition might be filed here for permission to apply to the Superior Court of Pitt County, where the cause was tried, for a writ of error coram nobis, through which, if allowed there, they might be heard on the main features on which they asked for relief, which included matters dehors the record, and that appeal would lie to the Supreme Court in the event of its unfavorable action. State v. Deniels, (231 N.C. 17, 56 S.E.2d 2) supra; In re Taylor (230 N.C. 566, 53 S.E.2d 857), supra; In re Taylor (229 N.C. 297, 49 S.E.2d 749), supra.

'The defendants now file a petition for permission to apply to the Superior Court for such a writ. Their petition does not make a prima facie showing of substance which is necessary to ****421** bring themselves within the purview of the writ.'[FN28] 231 N.C. 341, 56 S.E.2d 646, 647.

FN28. Compare Taylor v. State of Alabama, 335 U.S. 252, 68 S.Ct. 1415, 92 L.Ed. 1935.

***484** After the refusal of the first coram nobis petition, the Supreme Court of North Carolina dismissed petitioner's attempted appeal on the record proper on the ground that no case on appeal had been filed. 231 N.C. 509, 57 S.E.2d 653; Rule 17, 4 N.C.Gen.Stat., App.; id., Vol. 1, s 1-282. Such action accords with well-settled practice in that state. 'Rules requiring service to be made of case on appeal * * * are mandatory'. 231 N.C. 17, 24, 56 S.E.2d 2, 7. They are applied alike to all appellants.[FN29] The first application for certiorari to this

Court raised federal constitutional objections to the judgments of the Supreme Court of North Carolina on both direct and collateral attack by certiorari and coram nobis on the judgment of the trial court. 339 U.S. 954, 70 S.Ct. 837, 94 L.Ed. 1366.

FN29. State v. Watson, 208 N.C. 70, 71, 179 S.E. 455, 456, is a capital case where the prisoner 'failed to make out and serve statement of case on appeal within the statutory period'. He lost his right to prosecute the appeal, and it was dismissed. The court pointed out, however, that it was customary in capital cases to examine the record to see that no error appeared on its face. In State v. Morrow, 220 N.C. 441, 17 S.E.2d 507, the identical procedure was followed. In State v. Moore, 210 N.C. 686, 687, 188 S.E. 421, and State v. Lampkin, 227 N.C. 620, 44 S.E.2d 30, also capital cases, writs of certiorari were denied when the statement of the case on appeal had not been filed within the statutory period.

The failure to perfect the appeal came in this way. Upon the coming in of the verdict on June 6, 1949, the petitioners several times moved for a new trial, in each motion reiterating one or the other of the aforementioned federal questions. These motions were denied, and the trial court pronounced its sentence. Petitioners excepted to the judgments and noted appeals therefrom to the State Supreme Court. In response to petitioners' notice, the trial judge granted petitioners 60 days in which to make and serve a statement of the case on appeal. When counsel failed to serve this statement until 61 days had expired, the trial judge struck the appeal as out of ***485** time. This action precluded an appeal as of right to the State Supreme Court.

This situation confronts us. North Carolina furnished a criminal court for the trial of those charged with crime. Petitioners at all times had counsel, chosen by themselves and recognized by North Carolina as competent to conduct the defense. In that court all petitioners' objections and proposals whether of jury discrimination, admission of confessions, instructions or otherwise were heard and decided against petitioners. The state furnished an adequate and easily complied-with method of appeal. This included a means to serve the statement of the case on appeal in the absence of the prosecutor from his office. State v. Daniels, 231 N.C. 17, 24, 56 S.E.2d 2. Yet petitioners' appeal was not taken and the State of North Carolina, although the full trial record and statement on appeal were before it, refused to consider the appeal on its merits.FN30

FN30. State v. Daniels, 231 N.C. 17, 20(11), 56 S.E.2d 2; 1 Gen.Stat. of N.C.1943, s 1-587.

[41] 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. 28 U.S.C. s 2241, 28 U.S.C.A. s 2241. That fact is not to be tested by the use of habeas corpus in lieu of an appeal.FN31 To allow habeas corpus in such circumstances would ****422** subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime.

FN31. Sunal v. Large, 332 U.S. 174, 180, 67 S.Ct. 1588, 1591, 91 L.Ed. 1982; Eagles v. U.S. ex rel. Samuels, 329 U.S. 304, 311, 67 S.Ct. 313, 317, 91 L.Ed. 308; In re Yamashita, 327 U.S. 1, 8, 66 S.Ct. 340, 344, 90 L.Ed. 499; Johnson v. Zerbst, 304 U.S. 458, 465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461; Goto v. Lane, 265 U.S. 393, 44 S.Ct. 525, 68 L.Ed. 1070.

[42][43][44] 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, ***486** incapacity, or some interference by officials.FN32 Also, this Court will review state habeas corpus proceedings even though no appeal was taken, if the state treated habeas corpus as permissible.FN33 Federal habeas corpus is available following our refusal to review such state habeas corpus proceedings.FN34 Failure to appeal is much like a 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.FN35

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FN32. Dowd v. U.S. ex rel. Cook, 340 U.S. 206, 71 S.Ct. 262, 95 L.Ed. 215; see De Meerleer v. People of State of Michigan, 329 U.S. 663, 67 S.Ct. 596, 91 L.Ed. 584; Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461.

FN33. Hawk v. Olson, 326 U.S. 271, 278, 66 S.Ct. 116, 120, 90 L.Ed. 61; Herndon v. Lowry, 301 U.S. 242, 247, 57 S.Ct. 732, 734, 81 L.Ed. 1066.

FN34. Smith v. Baldi, 344 U.S. 561, 569-570, 73 S.Ct. 391, 395.

FN35. Darr v. Burford, supra, 339 U.S. at page 203, 70 S.Ct. at page 589, 94 L.Ed. 761; Ex parte Spencer, 228 U.S. 652, 660, 33 S.Ct. 709, 711, 57 L.Ed. 1010. See In re Wood, 140 U.S. 278, 11 S.Ct. 738, 35 L.Ed. 505.

[45][46] North Carolina has applied its law in refusing this out-of-time review.FN36 This Court applies its jurisdictional statute in the same manner. Preston v. State of Texas, 343 U.S. 917, 72 S.Ct. 649; cf. Paonessa v. People of State of New York, 344 U.S. 860, 73 S.Ct. 99, certiorari denied October 20, 1952, because 'application therefor was not made within the time provided by law'. We cannot say that North Carolina's action in refusing review after failure to perfect the case on appeal violates the Federal Constitution. A period of limitation accords with our conception of proper procedure.

FN36. See McKane v. Durston, 153 U.S. 684, 687, 14 S.Ct. 913, 914, 915, 38 L.Ed. 867, where this Court said: 'An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however, grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.'

[47] Finally, federal courts may not grant habeas corpus for those convicted by the state except pursuant to s 2254. ***487** See note 17, supra. See also note 2, supra. We have interpreted s 2254 as not requiring repetitious applications to state courts for collateral relief, p. 2, supra, but clearly the state's procedure for relief must be employed in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rulings. A failure to use a state's available remedy, in the absence of some interference or incapacity, such as is referred to just above at notes 32 and 33, 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. The judgment must be affirmed.

We have spoken in this opinion of the change of practice in North Carolina in the selection of jurors. Our conclusions have been reached without regard to earlier incidents not connected with these juries or trials that suggest past discriminations. Since the states are the real guardians of peace and order within their boundaries, it is hoped that our consideration of these records will tend to clarify the requirements****423** of the Federal Constitution in the selection of juries. Our Constitution requires that jurors be selected without inclusion or exclusion because of race. There must be neither limitation nor representation for color. By that practice, harmony has an opportunity to maintain essential discipline, without that objectionable domination which is so inconsistent with our constitutional democracy.

The judgments are affirmed.

***532** Mr. Justice JACKSON concurs in this result for the reasons stated in a separate opinion.
For separate opinion of Mr. Justice FRANKFURTER, see 73 S.Ct. 437.Mr. Justice JACKSON, concurring in the result.
Controversy as to the undiscriminating use of the writ of habeas corpus by federal judges to set aside state court convictions is traceable to three principal causes: (1) this Court's use of the generality of the Fourteenth

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Amendment to subject state courts to increasing federal control, especially in the criminal law field; (2) ad hoc determination of due process of law issues by personal notions of justice instead of by known rules of law; and (3) the breakdown of procedural safeguards against abuse of the writ.

1. In 1867, Congress authorized federal courts to issue writs of habeas corpus to prisoners 'in custody in violation***533** of the Constitution or laws or treaties of the United States.'[FN1] At that time, the writ was not available here nor in England to challenge any sentence imposed by a court of competent jurisdiction.[FN2] The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.[FN3] It might have been expected that if Congress intended a reversal of this traditional concept of habeas corpus it would have said so. However, this one sentence in the Act eventually was construed as authority for federal judges to entertain collateral attacks on state court criminal judgments.[FN4] Whatever its justification, it created potentialities for conflict certain to lead to the antagonisms we have now, unless the power given to federal judges were responsibly used according to lawyerly procedures and with genuine respect for state court fact finding.

FN1. 28 U.S.C. s 2241(c)(3), 28 U.S.C.A. s 2241(c)(3).

FN2. Ex parte Ferguson, 1 K.B. 176, 179 (1917); Ex parte Lees, E.B. & E. 828, 120 E.R. 718; In re Dunn, 5 C.B. 215, 136 E.R. 859; Habeas Corpus Act of 1679, 31 Car. II, c. 2; Ex parte Watkins, 3 Pet. 193, 202, 7 L.Ed. 650.

FN3. Darnel's Case, 3 State Trials 1 (1627). For this purpose, the writ has not been conspicuously successful in the United States. I have reviewed its failures, especially in wartimes, in Wartime Security and Liberty under Law, 1 Buff.L.R. 103; United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 70 S.Ct. 309, 94 L.Ed. 317.

FN4. See the equivocal discussion of the question in Frank v. Magnum, 237 U.S. 309, 326-332, 35 S.Ct. 582, 586-589, 59 L.Ed. 969, and the more explicit assumption of the dissent, id., 237 U.S. at page 348, 35 S.Ct. at page 595. An earlier case, Ex parte Royall, 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868, contained a dictum to the effect that legislative jurisdiction-the validity of the statute under which conviction was had in the state court-could be challenged on habeas corpus in the federal courts. While this represents a certain expansion of traditional notions of jurisdiction in the judicial sense, it by no means supports the broad reach given to federal habeas corpus by recent cases. See also Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543; Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791.

But, once established, this jurisdiction obviously would grow with each expansion of the substantive grounds ***534** for habeas corpus. The generalities of the Fourteenth Amendment are so indeterminate as to what state actions are forbidden that this Court has found it a ready instrument, in one field or another, to magnify federal, and incidentally its own, authority over ****424** the states. The expansion now has reached a point where any state court conviction, disapproved by a majority of this Court, thereby becomes unconstitutional and subject to nullification by habeas corpus.[FN5]

FN5. An idea of the uncertainty and diversity of views in this field may be gleaned from a comparison of Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, with Wolf v. People of State of Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782, and Adamson v. People of State of California, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903.

This might not be so demoralizing if state judges could anticipate, and so comply with, this Court's due process requirements or ascertain any standards to which this Court will adhere in prescribing them. But they cannot. Of course, considerable uncertainty is inherent in decisional law which, in changing times, purports to interpret implications of constitutional provisions so cryptic

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and vagrant. How much obscurity is inevitable will be a matter of opinion. However, in considering a remedy for habeas corpus problems, it is prudent to assume that the scope and reach of the Fourteenth Amendment will continue to be unknown and unknowable, that what seems established by one decision is apt to be unsettled by another, and that its interpretation will be more or less swayed by contemporary intellectual fashions and political currents.

We may look upon this unstable prospect complacently, but state judges cannot. They are not only being gradually subordinated to the federal judiciary but federal courts have declared that state judicial and other officers are personally liable to federal prosecution and to ***535** civil suit by convicts if they fail to carry out this Court's constitutional doctrines. FN6

FN6. This Court's decision in Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495, as the dissenters anticipated, has led a Federal Court of Appeals to hold that federal law enforced in federal courts imposes personal liability upon state judicial officers, though that court admits that 'The result is of fateful portent to the judiciary of the several states.' Picking v. Pennsylvania R. Co., 3 Cir., 151 F.2d 240, 250. Contrast to this the absolute immunity from suit enjoyed by federal officials, even in administrative capacities. Gregoire v. Biddle, 2 Cir., 177 F.2d 579. While the Screws decision held out promise of protection for state officials by requiring that any denial of constitutional right must be proved to be wilful in the sense of knowing and intentional, that protection has since been withdrawn. Another Court of Appeals upheld a conviction based on a charge that wilfulness and intent are 'presumed and inferred from the result of the action.' 5 Cir., 189 F.2d 711, 714. This Court, against my written dissent calling attention to its effect, refused review. Koehler v. United States, 342 U.S. 852, 72 S.Ct. 75, 96 L.Ed. 643.

2. Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of Justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles.

A manifestation of this is seen in the diminishing respect shown for state court adjudications of fact. Of course, this Court never has considered itself foreclosed by a state court's decision as to the facts when that determination results in alleged denial of a federal right. But captious use of this power was restrained by observance of a rule, elementary in all appellate procedure, that the findings of fact on a trial are to be accepted by an appellate court in absence of clear showing of error. The ***536** trial court, seeing the demeanor of witnesses, hearing the parties, giving to each case far more time than an appellate court can give, is in a better position to unravel disputes of fact than is an appellate court on a printed transcript. ****425** Recent decisions avow no candid alteration of these rules, but revision of state fact finding has grown by emphasis, and respect for it has withered by disregard. FN7

FN7. See, e.g., United States v. Oregon State Medical Society, 343 U.S. 326, 72 S.Ct. 690, 96 L.Ed. 978, for a recent example of the application of the presumption in favor of a lower federal court's finding of fact. Compare Watts v. State of Indiana, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801; Turner v. Com. of Pennsylvania, 338 U.S. 62, 69 S.Ct. 1352, 93 L.Ed. 1810; Harris v. State of South Carolina, 338 U.S. 68, 69 S.Ct. 1354, 93 L.Ed. 1815; and Malinski v. People of State of New York, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029, with the above for illustrations of cases in which this salutary presumption in favor of state court findings was disregarded in fact if not in theory.

3. The fact that the substantive law of due process is

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and probably must remain so vague and unsettled as to invite farfetched or border-line petitions makes it important to adhere to procedures which enable courts readily to distinguish a probable constitutional grievance from a convict's mere gamble on persuading some indulgent judge to let him out of jail. Instead, this Court has sanctioned progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own.FN8 Judged by our own disposition of habeas corpus matters, ***537** they have, as a class, become peculiarly undeserving.FN9 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.FN10 That is the condemnation of the procedure which has encourged 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. FN11 State Attorneys General ****426** recently have come habitually to ignore these proceedings, responding only when specially requested and sometimes ***538** not then. Some state courts have wearied of our repeated demands upon them and have declined to further elucidate grounds for their decisions.FN12 The assembled ***539** Chief Justices of the highest courts of the states have taken the unusual step of condemning the present practice by resolution. FN13

FN8. There were filed in federal district courts during 1941 one hundred twenty-seven petitions for habeas corpus challenging state convictions; in 1943 there were two hundred sixty-nine; in 1948 five hundred forty-three; in 1952 five hundred forty-one. Speck, Statistics on Federal Habeas Corpus, 10 Ohio St.L.J. 337, shows that during the period from 1943 through 1945 there were a high number of petitions filed by those convicts who had filed at least one such petition in federal court before. In federal courts in New Hampshire and South Dakota, the percentage of the total petitions made up by repeaters was 50%. The percentages for the larger states on which statistics were then available are as follows: California, 12%; Illinois, 19%; Massachusetts, 20%; , Missouri, 21%: New Jersey, 17%; New York, 18%; Pennsylvania, 22%; Texas, 25%. These figures show an unnecessary burden on the federal courts by quantitive as well as dramatic tests.

FN9. See Speck, supra, Table 3.

FN10. Statistics of the administrative Office of the United States Courts for the period 1946-1952 show that, in 1946, 2.8% of the petitioners were successful; in 1952, 1.8% were successful.

FN11. Pages full of numbers fail to indicate what the states must contend with as vividly as the history of particular litigation. The Wells litigation in California is an object lesson in conflict. Wells was sentenced to death by the California trial court, and this judgment was affirmed by the Supreme Court of California in an opinion which gave extended consideration to the appellant's contentions. People v. Wells, 33 Cal.2d 330, 202 P.2d 53. This Court denied certiorari, Wells v. People of State of California, 338 U.S. 836, 70 S.Ct. 43, 94 L.Ed. 510. Wells, without seeking habeas corpus in state court, then petitioned a federal district judge in California for habeas corpus. That judge took the unusual step of passing on the merits of the case in spite of the fact that state remedies had not been exhausted and the prisoner had to be remitted to the state courts. The district judge held on the merits that the California courts had misapplied California law. Ex parte Wells, D.C., 90 F.Supp. 855. When the petitioner applied to the Supreme Court of California for a writ of habeas corpus, as he was instructed to do by the district judge, that court adhered to its prior view as to what the law of California was. Ex parte Wells, 35 Cal.2d 889, 221 P.2d 947. This Court again

denied certiorari. Wells v. State of California, 340 U.S. 937, 71 S.Ct. 483, 95 L.Ed. 676. Thereafter the same federal judge, although now conceding that he must take California law from California courts, voided the conviction on a federal ground not even mentioned in his earlier opinion. Ex parte Wells, D.C., 99 F.Supp. 320. The opinions of the district judge show that he was well aware of the difficulties presented by the procedure, but felt he had no alternative in the light of this Court's decisions. Indeed, he has contributed the lessons of his own experience in this field in Goodman, Use and Abuse of the Writ of Habeas Corpus, 7 F.R.D. 313. Another caricature of the great writ in action is the Adamson litigation in California. Adamson was sentenced to death in the California trial court in 1944. The Supreme Court of California affirmed the judgment of conviction in 1946. People v. Adamson, 27 Cal.2d 478, 165 P.2d 3. This Court granted certiorari, heard the case on the merits, and affirmed. Adamson v. People of State of California, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903. On January 30, 1948, just one week before the date set for his execution, Adamson petitioned the Supreme Court of California for habeas corpus, and this petition was denied. This Court denied application for a stay and denied certiorari to the Supreme Court of California. Adamson v. People of State of California, 333 U.S. 831, 68 S.Ct. 610, 92 L.Ed. 1115. Later on the same day that this Court denied certiorari, a judge of the United States District Court for the Northern District of California issued a stay of execution of the sentence. Then the District Court denied the writ and denied a certificate of probable cause to appeal. In Ex parte Adamson, 9 Cir., 167 F.2d 996, a judge of the United States Court of Appeals denied an application for a certificate of probable cause. This Court again denied certiorari. Ex parte Adamson, 334 U.S. 834, 68 S.Ct. 1342, 92 L.Ed. 1761. Even this was not the end, however, for in 1949 we find Adamson appealing to the Supreme Court of California from a denial of an application for a writ of coram nobis. That court then took occasion to question the good faith of the proceedings. 34 Cal.2d 320, 338, 210 P.2d 13. Certainly the use of the federal courts as aids in such delaying tactics as are evidenced here does not elevate the statute of the writ of habeas corpus. We have no mythical abuse here but a very real problem of harassment of the state.

FN12. Dixon v. Duffy, 344 U.S. 143, 73 S.Ct. 193.

FN13. Conference of Chief Justices-1952, 25 State Government, No. 11, p. 249 (Nov. 1952):

'Whereas it appears that by reason of certain principles enunciated in certain recent federal decisions, a person whose conviction in a criminal proceeding in a State Court has thereafter been affirmed by the highest court of that State, and whose petition for a review of the State Court's proceedings has been denied by the Supreme Court of the United States, may nevertheless obtain from a Federal district judge or Court, under a writ of habeas corpus, new, independent, and successive hearings based upon a petition supported only by the oath of the petitioner and containing only such statement of facts as were, or could have been, presented in the original proceedings in the State Courts;

'And whereas the multiplicity of these procedures available in the inferior Federal Courts to such convicted persons, and the consequent inordinate delays in the enforcement of criminal justice as the result of said Federal decisions will tend toward the dilution of the judicial sense of responsibility, may create grave and undesirable conflicts between Federal and State laws respecting fair trial and due process, and must inevitably lead to the impairment of the public confidence in our judicial institutions;

'Now therefore be it resolved that it is the con-

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sidered view of the Chief Justices of the States of the Union, in conference duly assembled, that orderly Federal procedure under our dual system of government should require that a final judgment of a State's highest court be subject to review or reversal only by the Supreme Court of the United States.

'Be it further resolved that the Chairman of the Conference of Chief Justices be authorized, and he is hereby directed, to appoint a special committee to give study to the grave questions and potential complications likely to ensue if the power to review or void state court judgments continues to be recognized as lying in any courts of the Federal judicial system, save and except the Supreme Court of the United States: and that said special committee report its findings and recommendations at the next regular meeting of the Conference.'

****427** It cannot be denied that the trend of our decisions is to abandon rules of pleading or procedure which would ***540** protect the writ against abuse. Once upon a time the writ could not be substituted for appeal or other reviewing process but challenged only the legal competence or jurisdiction of the committing court.[FN14] We have so departed from this principle that the profession now believes that the issues we actually consider on a federal prisoner's habeas corpus are substantially the same as would be considered on appeal.[FN15]

FN14. Ex parte Watkins, 3 Pet. 193, 202, 7 L.Ed. 650.

FN15. Such was the view expressed by the Solicitor General of the United States at the Bar of this Court during argument of Martinez v. Neely, affirmed by an equally divided Court, 344 U.S. 916, 73 S.Ct. 345. His adversary agreed.

Conflict with state courts is the inevitable result of giving the convict a virtual new trial before a federal court sitting without a jury. Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

As to the pleading requirements in habeas corpus, what has happened may best be learned by comparison of the meticulously pleaded facts and circumstances relied upon by this Court's opinion in Moore v. Dempsey, 1923, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543, and in Mooney v. Holohan, 1935, 294 U.S. 103, 55 S.Ct. 294, 79 L.Ed. 791, with condonation of their absence in Price v. Johnston, 1948, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356. It really has become necessary to plead nothing more than that the prisoner is in jail, wants to get out, and thinks it is illegal to hold ***541** him.[FN16] If he fails, he may make the same plea over and over again.[FN17]

FN16. Price v. Johnston, supra.

FN17. In Price v. Johnston, supra, the lower federal courts were reversed for dismissing the convict's fourth petition. See also statistics as to repeaters in note 8, supra.

Since the Constitution and laws made pursuant to it are the supreme law and since the supremacy and uniformity of federal law are attainable only by a centralized source of authority, denial by a state of a claimed federal right must give some access to the federal judicial system. But federal interference with state administration of its criminal law should not be premature and should not occur where it is not needed. Therefore, we have ruled that a state convict must exhaust all remedies which the state affords for his alleged grievance before he can take it to any federal court by habeas corpus.

The states all allow some appeal from a judgment of conviction which permits review of any question of law, state or federal, raised upon the record. No state is obliged to furnish multiple remedies for the same griev-

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ance. Most states, and with good reason, will not suffer a collateral attack such as habeas corpus to be used as a substitute for or duplication of the appeal. A state properly may deny habeas corpus to raise either state or federal issues that were or could have been considered on appeal. Such restriction by the state should be respected by federal courts.

Assuming that a federal question not reachable on appeal is properly presented by habeas corpus and decided adversely by the highest competent court of the state, should the prisoner then come to this Court and ask us to review the record by certiorari****428** or should he go to the district court and institute a new federal habeas corpus proceeding? Darr v. Burford, 339 U.S. 200, 70 S.Ct. 587, 94 L.Ed. 761, as ***542** I understand it, held that in these circumstances the prisoner must apply to this Court for certiorari before he can go to any other federal court, because only by so doing could he exhaust his state remedy. Whatever one may think of that result, it does not seem logical to support it by asserting that this Court's certiorari power is any part of a state's remedy. An authority outside of the state imposes a duty upon the state to turn the case over to it, in a proceeding which makes the state virtually a defendant. To say that our command to certify the case to us is a state remedy is to indulge in fiction, and the difficulty with fictions is that those they are most apt to mislead are those who proclaim them.

But now it is proposed to neutralize the artificiality of the process and counterbalance the fiction that our certiorari is a state remedy by holding that this step which the prisoner must take means nothing to him or the state when it fails, as in most cases it does.

The Court is not quite of one mind on the subject. Some say denial means nothing, others say it means nothing much. Realistically, the first position is untenable and the second is unintelligible. How can we say that the prisoner must present his case to us and at the same time say that what we do with it means nothing to anybody. We might conceivably take either position but not, rationally, both, for the two will not only burden our own docket and harass the state authorities but it makes a prisoner's legitimate quest for federal justice an endurance contest.

True, neither those outside of the Court, nor on many occasions those inside of it, know just what reasons led six Justices to withhold consent to a certiorari. But all know that a majority, larger than can be mustered for a good many decisions, has found reason for not reviewing the case here. Because no one knows all that a denial means, does it mean that it means nothing? ***543** Perhaps the profession could accept denial as meaningless before the custom was introduced of noting dissents from them. Lawyers and lower judges will not readily believe that Justices of this Court are taking the trouble to signal a meaningless division of opinion about a meaningless act.[FN18] It is just one of the facts of life that today every lower court does attach importance to denials and to presence or absence of dissents from denials, as judicial opinions and lawyers' arguments show.

FN18. When petitioner in Brown v. Allen sought certiorari here after his appeal to the state court failed, two Justices dissented from the denial of certiorari. Brown v. State of North Carolina, 341 U.S. 943, 71 S.Ct. 997, 95 L.Ed. 1369.

The fatal sentence that in real life writes finis to many causes cannot in legal theory be a complete blank. I can see order in the confusion as to its meaning only by distinguishing its significance under the doctrine of stare decisis, from its effect under the doctrine of res judicata. I agree that, as stare decisis, denial of certiorari should be given no significance whatever. It creates no precedent and approves no statement of principle entitled to weight in any other case. But, for the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of res judicata as applied either by state or federal courts. A civil or criminal judgment usually becomes res judicata in the sense that it is binding and conclusive even if new facts are discovered and even if a new theory of law were thought up, except for some provision for granting a new trial, which usually is discretionary with the trial court and

limited in time.

It is sometimes said that res judicata has no application whatever in habeas corpus cases and surely it does not apply with all of its conventional severity. Habeas corpus differs from the ordinary judgment ****429** in that, although an adjudication has become final, the application ***544** is renewable, at least if new evidence and material is discovered or if, perhaps as the result of a new decision, a new law becomes applicable to the case. This is quite proper so long as its issues relate to jurisdiction. But call it res judicata or what one will, courts ought not to be obliged to allow a convict to litigate again and again exactly the same question on the same evidence. Nor is there any good reason why an identical contention rejected by a higher court should be reviewed on the same facts in a lower one.

The chief objection to giving this limited finality to our denial of certiorari is that we pass upon these writs of habeas corpus so casually or upon grounds so unrelated to their merits that our decision should not have the weight of finality. No very close personal consideration can be given by each Justice to such a multiplicity of these petitions as we have had and, as a class, they are so frivolous, so meaningless, and often so unintelligible that this worthlessness of the class discredits each individual application. If this deluge were reduced by observance of procedural safeguards to manageable proportions so that it would be possible to examine the cases with some care and to hear those that show merit, I think this objection would largely disappear. The fact is that superficial consideration of these cases is the inevitable result of depreciation of the writ. The writ has no enemies so deadly as those who sanction the abuse of it, whatever their intent.

If a state is really obtaining conviction by laws or procedures which violate the Federal Constitution, it is always a serious wrong, not only to a particular convict, but to federal law. It is not probable that six Justices would pass up a case which intelligibly presented this situation. But an examination of these petitions will show that few of them, tested by any rational rules of pleading, actually raise any question of law on which ***545** the state court has differed from the understanding prevailing in this Court. The point on which we are urged to overrule state courts almost invariably is in their appraisal of facts. For example, the jury, the trial judge, and one or more appellate courts below have held that conflicting evidence proves a confession was voluntary; the prisoner wants us to say the evidence proves it was coerced. The court below found that the prisoner waived counsel and voluntarily pleaded guilty; he wants us to find that he did not. The jury and the trial judge below believed one set of witnesses whose testimony showed his guilt; he wants us to believe the other and to hold that he has been convicted by perjury. That is the type of factual issue upon which this Court and other federal courts are asked to intervene and upset state court convictions. There are plenty of good reasons why we should rarely do that, and even better reasons why the district court should not undertake to do it after we have declined to.

My conclusion is that whether or not this Court has denied certiorari from a state court's judgment in a habeas corpus proceeding, no lower federal court should entertain a petition except on the following conditions: (1) that the petition raises a jurisdictional question involving federal law on which the state law allowed no access to its courts, either by habeas corpus or appeal from the conviction and that he therefore has no state remedy; or (2) that the petition shows that although the law allows a remedy, he was actually improperly obstructed from making a record upon which the question could be presented, so that his remedy by way of ultimate application to this Court for certiorari has been frustrated. There may be circumstances so extraordinary that I do not now think of them which would justify a departure from this rule, but the run-of-the-mill case certainly does not.

***546** Whether one will agree with this general proposition will depend, I suppose, on the latitude he thinks federal courts should exercise in retrying de novo state court criminal issues. If the federal courts are ****430** to test a state court's decision by hearing new evidence in a new proceeding, the pretense of exhaustion of state remedies is a sham, for the state courts could not have given a remedy on evidence which they had no chance

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to hear. I cannot see why federal courts should hear evidence that was not presented to the state court unless the prisoner has been prevented from making a record of his grievance, with the result that there is no record of it to bring here on certiorari. Such circumstances would seem to call for an original remedy in the district courts which would be in a position to take evidence and make the record on which we ultimately must pass if there develops a conflict of law between a federal and state court.

If this Court were willing to adopt this doctrine of federal self-restraint, it could settle some procedures, rules of pleading and practices which would weed out the abuses and frivolous causes and identify the worthy ones. I know the difficulty of formulating practice rules and their pitfalls. Nor do I underestimate the argument that the writ often is petitioned for by prisoners without counsel and that they should not be held to the artificialities in pleading that we expect in lawyers. But I know of no way that we can have equal justice under law except we have some law. I suggest some general principles which, if adhered to, would reduce the number of frivolous petitions, make decision upon them possible at an earlier time and alleviate some of the irritation that is developing over ill-considered federal use of the writ to slap down state courts.

First, habeas corpus shall not (in absence of state law to the contrary) raise any question which was, or could have been, decided by appeal or other procedure for review***547** of conviction. In the absence of showing to the contrary, habeas corpus will be deemed to lie only for defects not disclosed on the record, going to the power, legal competence or jurisdiction of the committing state court.

Second, every petition to a federal court is required and those to a state court may be required by state law to contain a plain but full statement of the facts on which it is based. Unless it states facts which, if proved, would warrant relief, the applicant is not entitled as of right to a hearing. Technical forms or artificialities of pleading will not be required.

Presumably a federal court will not release a convict until he proves facts which show invalidity of his conviction. If proof is to be required, it is no hardship to require a simple statement of what it will be. A petitioner should be given benefit of liberal construction, of all usual privileges of amendment, and, if the court finds a probably worthy case, appointment of counsel to aid in amending the petition and presenting the case.

Third, petitions to federal courts are required, and those to state courts may be required, to set forth every previous application to any court for relief on any grounds. If the current petition is made upon the same grounds as an earlier one, it should state fully any evidence now available in its support that was not offered before and explain failure to present it. On the jurisdictional questions appropriate for habeas corpus, the petitioner may not be barred from proof by newly discovered evidence, but it is not asking too much that his petition disclose that he has it and a basis for appraising its relevance and effect. He should not be precluded from raising new grounds of unconstitutionality in a later petition, especially in view of the unsettled character of our constitutional doctrines of due process. But the facts that make the new grounds applicable should appear. If federal ***548** relief is sought on the grounds that state law affords no remedy, or his resort thereto has been obstructed and he has been unable to present his case to a state court, the facts relied on should be clearly and fully set forth.

Much probably may be said in criticism of my statement of these principles but ****431** nothing, I am convinced, against their historical authenticity as part of the traditional law of habeas corpus or against their application now to stop abuses so grave that they foreshadow legislative restriction of the writ. They do not foreclose worthy causes but earmark them for the serious treatment they deserve. They will not even wholly eliminate frivolous petitions but will discourage them by exposing their frivolity at an earlier stage.

Society has no interest in maintaining an unconstitutional conviction and every interest in preserving the writ of habeas corpus to nullify them when they occur. But the Constitution does not prevent the state courts from determining the facts in criminal cases. It does not make it

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unconstitutional for them to have a different opinion than a federal judge about the weight to be given to evidence. My votes in the cases under review and on other petitions and reviews will be guided as nearly as I can by the principles set forth herein.

I concur in the result announced by My. Justice REED in these three cases.

Mr. Justice BURTON, and Mr. Justice CLARK adhere to their position as stated in Darr v. Burford, 339 U.S. 200, at page 219, 70 S.Ct. 587, at page 598, 94 L.Ed. 761. They believe that the nature of the proceeding upon a petition for certiorari 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.
They join in the judgment of the Court in these cases and they concur in the opinion of the Court except insofar as it may contain, in Part II, Subdivision A, 344 U.S. 456-457, 73 S.Ct. 407, or elsewhere, any indication that, although the reasons for a denial of certiorari be not stated, those reasons nevertheless may be inferred from the record. They also recognize the propriety of the considerations to which Mr. Justice Frankfurter, 344 U.S. 443, 73 S.Ct. 437, invites the attention of a federal court when confronted with a petition for a writ of habeas corpus under the circumstances stated.

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS concurs, dissenting.
The four petitioners in these cases are under sentences of death imposed by North Carolina state courts. All are Negroes. Brown and Speller were convicted of raping white women; the two Daniels, aged 17 when arrested, were convicted of murdering a white man. The State Supreme Court affirmed and we denied certiorari in all ***549** the cases. These are habeas corpus proceedings which challenge the validity of the convictions.

I agree with the Court that the District Court had habeas corpus jurisdiction in all the cases including power to release either or all of the prisoners if held as a result of violation of constitutional rights. This I understand to be a reaffirmance of the principle embodied in Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543. I also agree that in the exercise of this jurisdiction the District Court had power to hear and consider all relevant facts bearing on the constitutional contentions asserted in these cases. I disagree with the Court's conclusion that petitioners failed to establish those contentions. The chief constitutional claims throughout have been and are: (a) extorted confessions were used to convict; (b) Negroes were deliberately excluded from service as jurors on account of their race. For the following reasons I would reverse each of the judgments denying habeas corpus.

First. In denying habeas corpus in all the cases, the District Court felt constrained to give and did give weight to our prior denials of certiorari. So did the Court of Appeals. I agree with the Court that this was error but disagree with its holding that the error was harmless. It is true that after considering our denials of certiorari as a reason for refusing habeas corpus, the district****432** judge attempted to pass upon the constitutional questions just as if we had not declined to review the convictions. But the record shows the difficulty of his attempt to erase this fact from his mind and I am not willing to act on the assumption that he succeeded in doing so. Both the jury and confession questions raised in these death cases have entirely too much record support to refuse relief on such a questionable assumption. I would therefore reverse and remand all the cases for the district judge to consider and appraise the issues free from his erroneous ***550** belief that this Court decided them against petitioners by denying certiorari.

Second. Brown v. Allen, No. 32. Brown's death sentence for rape rests on an indictment returned by a Forsyth County grand jury. We recently reversed five North Carolina convictions on the ground that there had been a systematic racial exclusion of Negroes from Forsyth County's juries for many years prior to 1947. Brunson v. State of North Carolina, 1948, 333 U.S. 851, 68 S.Ct. 634, 92 L.Ed. 1132. Upon a review of the evidence in Brown's habeas corpus proceeding this Court holds that Forsyth County's discriminatory jury practice was abandoned in 1949 when the old jury boxes were refilled. The testimony on which the Court relies is that

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the names put in the 1949 box were taken indiscriminately from the list of county taxpayers, 16% of whom were Negroes, 84% whites. Other evidence relied on was that since 1949 four to seven Negroes have been included in each jury venire of 44 to 60. The concrete effect of the new box in this case was stated by the North Carolina Supreme Court to be this:

'One Negro woman served on the grand jury and at least one prospective Negro juror was tendered to the defendant for the petit jury and was excused or rejected by his counsel.' State v. Brown, 233 N.C. 202, 205, 63 S.E.2d 99, 101.

The foregoing evidence does show a partial abandonment of the old discriminatory jury practices-since 1949 a small number of Negroes have regularly been summoned for jury duty. But proof of a lesser degree of discrimination now than before 1949 is insufficient to show that impartial selection of jurors which the Constitution requires. Negroes are about one-third of Forsyth County's population. Consequently, the number of Negroes now called for jury duty is still glaringly disproportionate to their percentage of citizenship. It is not possible to attribute***551** either the pre-1949 or the post-1949 disproportions entirely to accident. And the state has not produced evidence to show that the partial continuation of the long-standing failure to use Negro jurors is due to some cause other than racial discrimination. Cf. Patton v. State of Mississippi, 332 U.S. 463, 466, 468-469, 69 S.Ct. 184, 186, 187, 92 L.Ed. 76. Recognizing this difficulty the Court sanctions the continued disproportions because they were the result of selecting jurors exclusively from the county tax list. But even this questionable method of selection falls short of showing a genuine abandonment of old discriminatory practices. Certainly discriminatory results remained. I do not believe the Court should permit this tax list technique to be treated as a complete neutralizer of racial discrimination.

Third. Speller v. Allen, No. 22. The jury that tried Speller was drawn from Vance County, North Carolina. Before this trial no Negro had served on a Vance County jury in recent years. No Negro had even been summoned. That this was the result of unconstitutional discrimination is made clear by the fact that Negroes constitute 45% of the county's population and 38% of its taxpayers. The Court holds, however, that this discrimination was completely cured by refilling the jury box with the names of 145 Negroes and 1,981 whites. Such a small number of Negro jurors is difficult to explain except on the basis of racial discrimination. The Court attempts to explain it by relying upon another discrimination, one which can hardly be classified as most appealing ****433** in a democratic society. What the Court apparently finds is that Negroes were excluded from this new jury box not because they were Negroes but because they happened to own less property than white people. In other words, the Court finds as a fact that the discrimination, if any, was based not on race but on wealth-the jurors were selected from taxpayers with 'the most property.' The Court ***552** then even declines to pass on the constitutionality of this property discrimination on the ground that petitioner's objections were based on racial, not on property, discriminations. I cannot agree to such a narrow restriction of petitioner's objections to the jury that brought in the death verdict. Jury discriminations here seem plain to me and I would not by-pass them.

Fourth. Daniels v. Allen, No. 20. Here also evidence establishes an unlawful exclusion of Negroes from juries because of race. The State Supreme Court refused to review this evidence on state procedural grounds. Absence of state court review on this ground is now held to cut off review in federal habeas corpus proceedings. But in the two preceding cases where the State Supreme Court did review the evidence, this Court has also reviewed it. I find it difficult to agree with the soundness of a philosophy which prompts this Court to grant a second review where the state has granted one but to deny any review at all where the state has granted none.

The following facts indicate the obviousness of discriminatory Negro exclusion from jury service in Pitt County where this case was tried.

Negroes constituted about 47% of the population of the county and about one-third of the taxpayers. But the jury box of 10,000 names included at most 185 Negroes. And up to and including the Daniels' trial no

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Negro had ever served on a grand jury in modern times. Petitioners made objection in ample time to juries so discriminatorily chosen.

The Court's conclusion not to consider and act on this manifest racial discrimination rests on these facts: After petitioners' death sentence they were granted an appeal in forma pauperis to the State Supreme Court. June 6th the trial judge granted 60 days for their lawyers to make up and serve their 'statement of case on appeal.' Preparation of this statement (comparable to a bill of exceptions)***553** consumed valuable time because of difficulty in getting the stenographic transcript. On completion petitioners' counsel on Friday, August 5th, called the prosecuting attorney's office to serve him but found he was out of town. According to the record he and his family were away for the weekend at a beach. They returned home Sunday, but he did not get back to his office until Monday, August 8th. Had the statement been delivered at his office by a sheriff on Friday the 60th day, apparently there would have been compliance with North Carolina law. Instead it was receipted for at his office on the 61st day, two days before his return from the beach. In the State Supreme Court the Attorney General moved to dismiss on the ground that the notice was one day late. Although admittedly the court had discretionary authority to hear the appeal, it dismissed the case. petitioners were thereby prevented from arguing the point of racial discrimination and consequently it has never been passed on by an appellate court. This denial of state appellate review plus the obvious racial discrimination thus left uncorrected should be enough to make one of those 'extraordinary situations' which the Court says authorizes federal courts to protect the constitutional rights of state prisoners. Cf. Frisbie v. Collins, 342 U.S. 519, 520-521, 72 S.Ct. 509, 510-511, 96 L.Ed. 541.

The Court thinks that to review this question and grant petitioners the protections guaranteed by the Constitution would 'subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime.' I cannot agree. State systems are not so feeble. And the object of habeas corpus is to search records to prevent illegal imprisonments. To hold it unavailable under the circumstances****434** here is to degrade it. I think Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543, forbids this. In that case Negroes had been convicted and sentenced to death by an all-white jury selected under a practice of systematic exclusion of Negroes from juries. The State ***554** Supreme Court had refused to consider this discrimination on the ground that the objection to it had come too late. This Court had denied certiorari. Later a federal district court summarily dismissed a petition for habeas corpus alleging the foregoing and other very serious acts of trial unfairness, all of which had been urged upon this Court in the prior certiorari petition. This Court nevertheless held that the District Court had committed error in refusing to examine the facts alleged. I read Moore v. Dempsey, supra, as standing for the principle that it is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution. Cf. United States ex rel. Kulick v. Kennedy, 2 Cir., 157 F.2d 811, 813. Perhaps there is no more exalted judicial function. I am willing to agree that it should not be exercised in cases like these except under special circumstances or in extraordinary situations. But I cannot join in any opinion that attempts to confine the Great Writ within rigid formalistic boundaries.

Mr. Justice FRANKFURTER, whom Mr. Justice BLACK and Mr. Justice DOUGLAS join, dissenting.

Nos. 22 and 32.

The Court is holding today that a denial of certiorari in habeas corpus cases is without substantive significance. The Court of Appeals sustained denials of applications for writs of habeas corpus chiefly because it treated our denial of a petition for certiorari from the original conviction in each of these cases as a review on the merits and a rejection of the constitutional claims asserted by these petitioners. In short, while the only significance of the denials of certiorari was a refusal to review, the Court of Appeals for all practical purposes, though disavowing the full technical import of res judicata, treated substantively empty denials as though this Court had ***555** examined and approved the holdings of the Su-

preme Court of North Carolina that there was no purposeful discrimination against Negroes in the selection of juries in these cases.

This Court could have reached the constitutional claims in controversy had it seen fit to review the cases. It declined to do so, and that is all that the orders in Speller v. Allen, 340 U.S. 835, 71 S.Ct. 18, 95 L.Ed. 613 and Brown v. State, 341 U.S. 943, 71 S.Ct. 997, 95 L.Ed. 1369 signify. Accordingly, the proceedings were left precisely as though the petitions for certiorari had not been filed here and habeas corpus had been brought initially in the District Court, as in Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541. If that had been the case, could it be held that the District Court was foreclosed from going into the merits and was barred from determining whether these cases came within our decisions finding systematic discrimination against Negroes in five North Carolina trials? Brunson v. State of North Carolina, 333 U.S. 851, 68 S.Ct. 634, 92 L.Ed. 1132.

Suppose that the District Court in these circumstances had found against Brown and Speller. What basis is there for assuming that on appeal the Court of Appeals for the Fourth Circuit, with its specialized local knowledge about such matters, would not have decided in favor of the petitioners? And what basis in reason have we for assuming, if the cases had come here with a powerful opinion from Judge Parker, let us say, finding that there was systematic discrimination, that this Court would have deemed it appropriate to review so weighty a conclusion, or, if we had taken the case, that we would have found the facts and their meaning to be different from those which the Court of Appeals for the Fourth Circuit found? Such assumptions are unwarranted, especially in light of the impressive showing by Mr. Justice Black that ****435** in fact there was unconstitutional discrimination in the make-up of the juries in these two cases where life is at stake.

***556** I cannot protest too strongly against affirming a decision of the Court of Appeals patently based on the ground that that court was foreclosed on procedural grounds from considering the merits of constitutional claims, when we now decide that the court was wrong in believing that it was so foreclosed. The affirmance by this Court of the District Court's denial of writs of habeas corpus in these cases is all the more vulnerable in that this Court, without guidance from the Court of Appeals, proceeds to consider the merits of the constitutional claim. This Court concludes that there was not a systematic discrimination in keepint Negroes off juries. If this Court deemed it necessary to consider the merits, the merits should equally have been open to the Court of Appeals. As I have already indicated, that court is far better situated than we are to assess the circumstances of jury selection in North Carolina and to draw the appropriate inferences.

No. 20.

In this case the Court of Appeals for the Fourth Circuit, 192 F.2d 477, also sustained the District Court in dismissing applications for writs of habeas corpus based on the claim by the two petitioners here that their convictions for murder in the North Carolina court were vitiated by disregard of rights guaranteed by the United States Constitution. But this case is unlike the Brown and Speller cases; here the Court of Appeals did not find itself foreclosed to consider the merits by deeming itself bound by an adjudication of the merits in the Supreme Court of North Carolina followed by a denial of a petition for certiorari in this Court.[FN1] And the Court here does not sustain***557** the District Court's dismissal by contending that the North Carolina Supreme Court had already adjudicated the merits, not does this Court pass on the merits.

> FN1. Although there was such a denial in this Court, no petition for certiorari was sought from the latest of the three decisions by the North Carolina Supreme Court prior to the initiation of the habeas corpus proceedings now under review. It is not inappropriate to say that the certiorari that was denied here affords a good illustration of the reason for holding that no legal significance attaches to such a denial. It would be beyond the wit of the wisest panel of judges to determine on what ground, for what reason, the petition was denied. The pa-

pers in the case do not afford a rational foundation for saying that it was this ground rather than that. The conflicting bases for rejection not only may well have influenced different members of the Court; it is not at all unlikely that individual members of the Court did not feel it necessary to determine which of two grounds was decisive.

This Court sustains the lower courts on the ground that the right of review on the merits was foreclosed because the petitioners lost their right of review through failure to comply with the requirements of North Carolina law for perfecting an appeal in the Supreme Court of North Carolina. State v. Daniels, 231 N.C. 17, 56 S.E.2d 2; Id., 231 N.C. 341, 56 S.E.2d 646; Id., 232 N.C. 196, 59 S.E.2d 430.

We were given to understand on the argument that if petitioners' lawyer had mailed his ‘statement of the case on appeal’ on the 60th day and the prosecutor's office had received it on the 61st day the law of North Carolina would clearly have been complied with, but because he delivered it by hand on the 61st day all opportunities for appeal, both in the North Carolina courts and in the federal courts, are cut off although the North Carolina courts had discretion to hear this appeal. For me it is important to emphasize the fact that North Carolina does not have a fixed period for taking an appeal. The decisive question is whether a refusal to exercise a discretion which the Legislature of North Carolina has vested in its judges is an act so arbitrary and so cruel in its operation, considering that life is at stake, that in the circumstances***558** of this case it constitutes a denial of due process in its rudimentary procedural aspect.

****436** For here we are not dealing with a frivolous or even a tenuous claim of a denial of rights guaranteed under the United States Constitution in the proceedings that led to a death sentence. It suffices to quote what was said in dissent by Circuit Judge Soper, one of the most experienced and hardheaded of federal judges:

‘There is no attempt on the part of the State of North Carolina in the pending appeal to show that there was not a gross violation of the constitutional rights of the prisoners in the trial court.’ Daniels v. Allen, 4 Cir., 192 F.2d 763, 770, 771.

And this statement was not questioned by the Court of Appeals.

The basic reason for closing both the federal and State courts to the petitioners on such serious claims and under these circumstances is the jejune abstraction that habeas corpus cannot be used for an appeal. Judge Soper dealt with the deceptiveness of this formula by quoting what Judge Learned Hand had found to be the truth in regard to this generality thirty years ago:

‘We shall not discuss at length the occasions which will justify resort to the writ, where the objection has been open on appeal. After a somewhat extensive review of the authorities twenty-four years ago, I concluded that the law was in great confusion; and the decisions since then have scarcely tended to sharpen the lines. We can find no more definite rule than that the writ is available, not only to determine points of jurisdiction, stricti juris, and constitutional questions; but whenever else resort to it is necessary to prevent a complete miscarriage of justice.’ Kulick v. U.S. ex rel. Kennedy, 2 Cir., 157 F.2d 811, 813.

***559** The reasons for finding that we have here so complete a miscarriage of justice are so powerfully stated by Judge Soper that I cannot do better than to adopt them as my own:
‘The (trial) court's strict application of the procedural rules in a capital case in these two instances (of rulings by that court preventing defendants' attorneys from raising the jury question) can hardly be approved as a proper exercise of judicial discretion. The defendants merely asked for rulings which would have enabled them to obtain a review by the highest court of the state of the trial court's action on a grave constitutional question; and the relief could have been granted without interfering with the enforcement of the criminal laws of the state. It can hardly be doubted that the decision in each case lay within the discretion of the judge, but once it was taken, the Supreme Court of the state deemed itself powerless to interfere. Thus there is presented an impasse which can be surmounted only by a proceeding like that before

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this court. We have been told time and again that legalistic requirements should be disregarded in examining applications for the writ of habeas corpus and the rules have been relaxed in cases when the trial court has acted under duress or perjured testimony has been knowingly used by the prosecution, or a plea of guilty has been obtained by trick, or the defendant has been inadequately represented by counsel.[FN2] Hawk v. Olsen, 326 U.S. 271, 66 S.Ct. 116, 90 L.Ed. 61; ***560** Darr v. Bu(r)ford, 339 U.S. 200, 203, 70 S.Ct. 587 (589), 94 L.Ed. 761. It is difficult to see any material distinction in practical effect between these circumstances and the plight of the prisoners in the pending case who have been caught in the technicalities of local procedure and in consequence have been denied their constitutional right.' 192 F.2d at page 773.

FN2. This language is of course not to be read to mean that constitutional rights may not be freely waived. Under appropriate circumstances, conscious failure to appeal may constitute such waiver; the very question here is whether there has been a failure to appeal.

U.S. 1953.
Brown v. Allen
344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469

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