5-2-1963

Memorandum of Petitioner

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SAMUEL H. SHEPPARD,)
)
Petitioner,)
)
v.) Civil No. 6640
)
E. L. MAXWELL,)
)
Respondent,)

MEMORANDUM OF PETITIONER
****

On April~~1~~11, 1963 the petition and affidavit in forma pauperis were filed herein by leave of Court. At that time the Court ruled that both petitioner and respondent should file their memoranda by April 25, 1963 to shed light on the question of the discretion of the District Court to grant or refuse issuance of the writ upon a reading of the petition. Because respondent's memorandum seems to suggest that Townsend v. Sain, ____ U. S. ____, 83 Sup. Ct. 745 and Fay v. Noia, ____ U. S. ____, 83 Sup. Ct. 822, both decided March 18, 1963, are claimed by petitioner to have changed the law applicable; that by reason of those decisions, this petitioner has rights which did not exist prior to March 18, 1963, leave is asked to present the consideration herein contained by this further memorandum.

Petitioner here asserts that the said two decisions are significant here for their instructions to United States District Courts on the mode of procedure in applications for writs of habeas corpus which may come before them. Mr. Justice Goldberg states in his concurring opinion in Townsend v. Sain, supra,

> "...The setting of certain standards is essential to disposition of this case and a definition of their scope and application is an appropriate exercise of this Court's adjudicatory obligations. Particularly when, as here, the Court is directing the federal judiciary as to its role in applying the historic remedy in a difficult and sensitive area involving large issues of federalism, the careful discharge of

> our function counsels that, 'in order to preclude individualized enforcement of the Constitution in different parts of the Nation, /we/... lay down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State Courts.' Brown v. Allen, 344 U. S. 443, 501 - 502 (separate opinion of Mr. Justice Frankfurter)."
>
> (final paragraph of the concurring opinion in Townsend v. Sain, supra.)

On the matter of the consistency of the law of habeas corpus; that it is now stated more clearly in order to show what it has always been, Mr. Justice Brennan states at p. 21 of the Supreme Courts advance report of Fay v. Noia, supra.,

> " And so, although almost 300 years have elapsed since Bushell's Case, changed conceptions of the kind of criminal proceedings so fundamentally defective as to make imprisonment pursuant to them constitutionally intolerable should not be allowed to obscure the basic continuity in the conception of the writ as the remedy for such imprisonments."

Townsend v. Sain, supra., at the subdivision of the opinion which has been designated, III, states,

> " We turn now to the considerations which in certain cases may make exercise of that power /to receive evidence and try the facts anew/ mandatory.....
>
> " We hold that a federal court must grant an evidentiary hearing to a habeas corpus applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

Under the instructions conveyed by the portion of the said opinion quoted, the discretion which the District Court undoubtedly has to refuse the application for a writ of habeas corpus now before us surely will not be so used, for the record made by the State Court herein discloses failure to give full consideration to the matters presented to the Supreme Court of Ohio on appeal as of right. Sheppard v. Ohio, 165 O. S. 293, 294. Such failure is further disclosed by the criticism of it in dissent by Taft, J. (now Chief Justice of the Court), at p. 302,

> " The majority opinion points out that the 29 assignments of error were combined into seven questions of law and that only three of those were stressed in oral argument..... In my opinion, the mere fact, that such limita-

> tion of time prevented defendant's counsel from discussing some of those questions of law in argument before this court, does not excuse this court from its obligation to give them serious consideration..."

Moreover it cannot be disputed before this Court that there is no evidentiary, post-trial procedure in Ohio's appellate system in criminal matters.

In view of all of the foregoing, it is respectfully urged that the writ prayed for in the petition herein should issue.

Respectfully submitted,

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ACKNOWLEDGEMENT OF SERVICE

Receipt of a copy of the foregoing Memorandum of Petitioner this 2d day of May, 1963 is hereby acknowledged.

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