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Alternative Approaches to Exhaustion of State Remedies in Federal Habeas Corpus

FOURTH CIRCUIT REVIEW

ALTERNATIVE APPROACHES TO EXHAUSTION OF STATE REMEDIES IN FEDERAL HABEAS CORPUS

A prisoner, confined pursuant to a judgment of a state court, who seeks federal habeas corpus relief must allege the deprivation of a right guaranteed by the Federal Constitution or the statutes or treaties of the United States.[1] In order for a federal court to exercise its remedial power to grant the writ of habeas corpus, the prisoner must also have met the exhaustion of state remedies requirement of 28 U.S.C. § 2254.[2] This statute provides that the prisoner must either have presented the alleged deprivation of right to the courts of the state in which he is confined, or show in his federal habeas corpus petition that there is no state corrective process available to him or that the available state corrective process would be ineffective because of special circumstances.[3] The exhaustion requirement is designed not to frustrate the acquisition of relief in the federal courts but rather to afford the state courts an opportunity to correct any errors made in the state criminal process.[4] In practice, however, the doctrine has often confused federal courts[5] and has been misapplied by many to the detriment of the state prisoner.[6]

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[1]28 U.S.C. § 2241(c) (1970). This statute pertains to the power of federal courts to grant the writ of habeas corpus and provides in relevant part:

> (c) The writ of habeas corpus shall not extend to a prisoner unless—
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> . . .
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States. . . . 006

Id.

Habeas corpus relief for federal prisoners is provided for in 28 U.S.C. § 2255 (1970).

[2]This requirement was originally judge-made but was eventually codified in 1948. See text accompanying notes 59-67.

[3]28 U.S.C. § 2254(b) (1970). The statute provides:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

Id. See note 62 *infra.*

[4]R. SOKOL, FEDERAL HABEAS CORPUS 164 (2d ed. 1969).

[5]*E.g.*, United States *ex rel.* Murdaugh v. Murphy, 183 F. Supp. 440 (N.D.N.Y. 1960). The court commented: "I am never certain that we have any rigidity or definiteness in the procedures of [the application of the exhaustion requirement]." *Id.* at 442.

[6]*See, e.g.*, Hammond v. North Carolina, 227 F. Supp. 1 (E.D.N.C. 1964); Monroe v.

In *Young v. Maryland*,[7] the Fourth Circuit Court of Appeals divided on the question of whether a state prisoner had sufficiently presented in the state courts certain of his alleged deprivations of right. The majority and dissent in *Young* disagreed about whether the contentions of the petitioner should be categorized as claims or arguments within the structure of section 2254.[8] The majority held that two contentions asserted in the circuit court, which could have been legitimate constitutional claims in a separate habeas corpus petition, were new constitutional claims and thus required a prior presentation in the state courts.[9] While not denying that the contentions could have been independent constitutional claims in some other petition, the dissent maintained that these contentions were merely supporting arguments for the basic constitutional claim of Young's habeas corpus petition and as arguments did not require prior presentation to the state courts.[10] It would seem that the crux of the difference between the two opinions in *Young* is whether a contention which invokes a constitutional provision and could thereby qualify as an independent but "unexhausted" habeas corpus claim must therefore be asserted *exclusively* as a constitutional "claim," or whether in some contexts such a contention can be utilized flexibly by the petitioner in a lesser role as part of a supporting "argument" for his "exhausted" constitutional claim. *Young* is particularly appropriate for demonstrating the uncertainty in the exhaustion area of the law of habeas corpus in that to

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Director, 227 F. Supp. 295 (D. Md. 1964). In these cases, the courts applied the exhaustion of state remedies requirement as a prerequisite to their jurisdiction to grant the writ. The Supreme Court has clearly stated that the exhaustion requirement is not a jurisdictional limitation on federal courts. Fay v. Noia, 372 U.S. 391, 418 (1963); Bowen v. Johnston, 306 U.S. 19, 27 (1939).

[7]455 F.2d 679 (4th Cir.), *cert. denied*, 407 U.S. 915 (1972).

[8]The words "claim" and "argument" are not part of the statutory language of either § 2241 or § 2254. However, "custody in violation of the Constitution" is the basis for virtually all habeas corpus cases today and the type of issue that can be raised under this provision runs the entire gamut of constitutional law. R. SOKOL, FEDERAL HABEAS CORPUS 38-39 (2d ed. 1969). It is clear from the Supreme Court cases that the phrase "constitutional claim" means an allegation of deprivation of right guaranteed by some constitutional provision. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 394 (1963).

When discussing exhaustion of state remedies in federal habeas corpus, the choice of an appropriate word with which to label an issue presented to a court is difficult, since fundamentally different consequences flow from whether the issue is a "claim" or an "argument." Use of either of these two readily available words would tend to imply conclusions about the nature of that issue and its resulting treatment under the exhaustion doctrine. In order to avoid this threshold semantic problem, the word "contention" will be used as a neutral label when no implications about an issue's treatment under the exhaustion doctrine are intended.

[9]455 F.2d at 681, 686. Note 22 *infra*.

[10]455 F.2d at 686.

support their respective positions both majority and dissent cited *Picard v. Connor*,[11] a recent Supreme Court opinion dealing with the exhaustion requirement.

The petitioner in *Young* was convicted of burglary and rape in 1960 and received a ten year prison sentence for burglary and a death sentence for rape, although the latter was commuted by executive action to confinement for life.[12] During post-conviction appeal in the state courts, Young asserted a deprivation of his fourth amendment right[13] in that after his arrest police had seized evidence from a room which Young rented in his father's home by explaining to his father that they merely wanted to gather some clothing for Young to wear while in jail.[14] Young maintained on appeal that the admission of the evidence in question, a trenchcoat upon which there were spermatozoa stains, prejudiced his trial in that it tended to prove forcible rape when the only issue had been Young's credibility in insisting that the intercourse had been consensual.[15] This argument, rooted in the fourth amendment, was found to be without merit by the Supreme Court of Maryland, whereupon Young petitioned the federal district court for habeas corpus relief. The district court found the petitioner's claim meritorious and granted relief. The State of Maryland then appealed the grant of habeas relief to the Fourth Circuit.

In the circuit court, Young asserted for the first time[16] the contentions upon which the exhaustion disagreement centered. There Young articulated a contention that his trial had been prejudiced because the police had expoited the illegally seized trenchcoat to coerce an admission of the intercourse.[17] Young further contended that the introduction of the coat into evidence compelled him to take the stand to repeat his denial of

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[11]404 U.S. 270 (1971).

[12]455 F.2d at 680.

[13]The fourth amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the pesons or things to be seized.

U.S. CONST. amend. IV.

[14]455 F.2d at 682.

[15]*Id.* at 680-81.

[16]*Id.* at 681. The court commented:

> During the argument in this Court, the possibility that the trenchcoat may have been improperly used by police to induce the appellee's confession was suggested. Until that time, there has not been even a remote contention either in the State Court or in the District Court that appellee's confession has been induced by the seizure of the trenchcoat.

Id.

[17]455 F.2d at 685.

forcible rape, a decision which he would not have made had the coat not been admitted into evidence.[18] The circuit court reversed the grant of habeas relief but its grounds for doing so were not based entirely on lack of prior presentation of these two contentions.

The circuit court went through a two-step process to reach its decision. First, the court determined that it need not deal with the merits of Young's fourth amendment claim because the "admission of the trenchcoat was harmless error beyond a reasonable doubt, and it was accordingly immaterial whether the trenchcoat had been illegally seized."[19] However, the court added parenthetically that there was some support for finding that the search was constitutional.[20] The finding of harmless error was based on the fact that Young confessed to the act of intercourse as well as having worn the trenchcoat during the act. The court reasoned that the admission of the trenchcoat into evidence was not prejudicial because the only act it could possibly tend to prove was one which the petitioner admitted.[21] The court's second step was contained in a brief discussion of the nature of the newly asserted contentions. Judge Russell's opinion for the majority concluded that, since Young's induced admission contention constituted a "claim" which had not even been raised remotely in the state courts, this claim was unexhausted.[22]

The majority believed the case of *Picard v. Connor*[23] to be analogous to the exhaustion of remedies question in *Young* and cited *Picard* as authority for its finding that Young had not adequately raised the claim of coerced admission in the state courts. *Picard* is a case in which the Supreme Court apparently attempted to dispel confusion over how sufficiently a state prisoner must present his claims of deprivation to a state court in order to be eligible for federal habeas corpus relief. The precise holding of *Picard* is that the "substance of a federal habeas corpus claim must first be presented to the state courts."[24] An examination of the facts in *Picard* is necessary for an understanding of the test for which the case seems to stand and its application to the exhaustion controversy in *Young*.

In *Picard*, the Court reversed the First Circuit Court of Appeals which

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[18]*Id.*

[19]*Id.* at 680.

[20]*Id.* The court cited no authority for this statement.

[21]The majority did not answer the dissent's argument that there may have been prejudicial results from the inflammatory use of the trenchcoat at trial. See note 41 *infra*.

[22]455 F.2d at 681. For a reason not explained in either the majority or dissenting opinions, the majority recognized only one new "claim," the coercion of the admission, and did not deal with the contention that Young was prejudicially forced to take the witness stand.

[23]404 U.S. 270 (1971).

[24]*Id.* at 278.

had granted relief to a state prisoner[25] on an equal protection ground which the circuit court admitted had not been urged in the state courts or in the respondent's habeas corpus petition.[26] In the state courts, Connor's principal ground for seeking relief had been a contention that the Massachusetts "fictitious name" statute[27] violated the fifth amendment's requirement of a grand jury indictment. This statute authorized his name to be inserted in an indictment after the indictment had been delivered in "John Doe" form by a grand jury. The Supreme Court examined the pretrial, trial, appellate, and habeas corpus papers without finding a hint of any attack on the indictment as violative of the equal protection clause of the fourteenth amendment. The Court concluded that the issue entered the case solely because the First Circuit injected it[28] and obviously could not have been presented in the state courts.

As both the First Circuit and the Supreme Court pointed out, *Picard* was not a case in which factual allegations were made in the federal courts which were not made in the state courts.[29] The issue, simply stated, was whether the state courts had a fair opportunity to rule on the equal

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[25]Connor v. Picard, 434 F.2d 673 (1st Cir. 1970), *rev'd.*, 404 U.S. 270 (1971).

[26]434 F.2d at 674. As the First Circuit stated:

> Petitioner did not present the constitutional question to the Massachusetts court in the *particular focus* in which this opinion is directed. We suggested it when the case reached us, and invited the Commonwealth to file a supplemental brief (emphasis added).

Id.

[27]MASS. ANN. LAWS ch. 277, § 19 (1968).

[28]404 U.S. at 277.

[29]*Id.* at 276. Introduction of new facts in a federal court which are relevant to the disposition of a petitioner's constitutional claim will cause a federal court to require a presentation of these facts to a state court. *See, e.g.*, Buffalo Chief v. South Dakota, 425 F.2d 271 (8th Cir. 1970); Schiers v. California, 333 F.2d 173 (9th Cir. 1964).

In order for the circuit court in *Young* to have ruled on the coerced admission and involuntary testimony contentions, there must have been enough facts in the record for these contentions to be more than mere conclusory allegations. In light of standards set up by the Fourth Circuit for the sufficiency of factual support in the record, Young's two contentions could possibly have been disposed of without reaching their merits because of inadequate factual development.

In Thompson v. Peyton, 406 F.2d 473, 474-75 (4th Cir. 1968), it was held that factual matters necessary for determination of exhaustion questions are sufficiently presented if a state court could rule on them as a matter of law without the necessity of a further evidentiary hearing. The dissent in *Young*, in an attempt to show that the petitioner had sufficiently developed the facts behind his coerced admission contention, pointed out that the record indicated that Young had been held incommunicado for seventeen hours without admitting intercourse but then admitted the sexual contact less than one hour after the coat was seized. 455 F.2d at 686. In addition, the confession itself contained a reference to the coat. 455 F.2d at 686 & n.4. Under the *Thompson* standard it is possible that the Fourth Circuit would have held these facts insufficient.

protection claim. The Court held that this claim had not been fairly presented to the state courts even though facts pointing to a denial of equal protection were evident on the record.[30] Since the equal protection claim was not the substantial equivalent of the fifth amendment claim, it was a completely new constitutional claim requiring presentation in the state courts.

The Court qualified its holding in *Picard* by expressly approving of the results in *United States ex rel. Kemp v. Pate.*[31] It followed the Seventh Circuit's reasoning that there are instances in which " 'the ultimate question for disposition' . . . will be the same despite variations in the legal theory or factual allegations urged in its support."[32] The circuit court in *Kemp* used the phrase "ultimate question for disposition" to mean the basic issue which is the reason behind the attempt to acquire habeas corpus relief.[33] The *Kemp* petitioner's ultimate question for disposition was a fifth amendment claim of coerced confession. In the state court, Kemp supported his claim by emphasizing physical coercion but in his federal habeas corpus petition, the emphasis changed to psychological coercion and the totality of the circumstances.[34] The Court in *Picard* concluded from the approved *Kemp* language that it would not have been necessary for the petitioner in *Picard* to have cited "book and verse" from the Federal Constitution in the state courts regarding his equal protection claim to be eligible to present it to the federal courts.[35] But to benefit from this limitation to the exhaustion doctrine, the contention in the federal court, taking into account all new supporting legal theories advanced there, must have been the substantial equivalent of the contention in the state court. The Court was unable to find such a relationship between the *Picard* petitioner's fifth amendment and equal protection

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[30]404 U.S. at 277. The Court commented:

> To be sure, respondent presented all facts. Yet the constitutional claim the Court of Appeals found inherent in those facts was never brought to the attention of the state courts.

Id.

[31]359 F.2d 749 (7th Cir. 1966).

[32]404 U.S. at 277.

[33]The court explained:

> The involuntary confession question presented to the district court by the petitioner was submitted in a substantially similar fashion to the Illinois Supreme Court. The evidence in the record before the state court was essentially the same. *The ultimate question for disposition—the voluntariness of the petitioner's confession—was precisely the same* (emphasis added).

359 F.2d at 751.

[34]*Id.* at 750.

[35]404 U.S. at 277-78.

claims.[36] Thus it would seem clear that if the ultimate question for disposition remains constant between the state and federal courts, the "substance" of a petitioner's habeas corpus claim will have been presented to the state court sufficiently enough to meet the *Picard* test.[37]

In *Young*, the majority cited *Picard* as sufficiently analogous to be support for the proposition that the petitioner's claim of coerced admission was not presented to the state courts.[38] It would seem that the circuit court did not see this claim as in any way supporting the basic fourth amendment claim made by Young, just as Connor's fourteenth amendment claim was found by the Supreme Court in *Picard* to be a new claim and not support for his fifth amendment claim.[39] The coerced admission

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[36]*Id.* at 278.

[37]Although the Court apparently intended the *Kemp* language to be a modification of its holding in *Picard*, it is not entirely clear how dissimilar two contentions can be and yet still be considered supportive of the same ultimate question for disposition under the *Kemp* modification. The two legal theories in *Kemp*, physical and psychological coercion of a confession, are both matters relating to the fifth amendment's privilege against self-incrimination. The Court in *Picard* cited the two legal theories espoused by the petitioner in Sanders v. United States, 373 U.S. 1 (1963), as ready examples of the permissible variations in legal theory under the *Kemp* holding. 404 U.S. at 277. *Sanders* involved successive applications for habeas corpus relief by a federal prisoner under § 2255. However, the *Sanders* example does not shed light on how dissimilar two legal theories can be since the legal theories in *Sanders* were identical to those in *Kemp*: physical and psychological coercion. "But a claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on alleged physical coercion." 373 U.S. at 16.

[38]455 F.2d at 681. There are two viewpoints implicit in the *Young* opinion. The first, adopted by the majority, is that at some point a contention in a federal court becomes so dissimilar from a contention made in the state courts that it can be characterized as either supporting a new claim or becoming itself a new claim. Applied to the specific facts in *Young*, this viewpoint dictated that the coerced admission contention, on its face a fifth amendment consideration and thus dissimilar from the fourth amendment claim urged in the state courts, was itself a new constitutional claim. A second viewpoint, seemingly espoused by the *Young* dissent, is that as long as the petitioner presents the two contentions within the context of the same basic claim and as long as they can be characterized as supporting arguments for this claim, the apparent dissimilarity on the face of the two contentions is not relevant. Thus a contention which might on its face be a fifth amendment consideration could be legitimately asserted in the federal courts in support of a fourth amendment claim as long as the basic nature of the fourth amendment claim is not somehow altered.

[39]It is difficult to imagine how a petitioner could present a contention that he was denied the equal protection of the law in such a way that it became a supporting argument for a claim that his indictment was illegal because it failed to comport with the fifth amendment's requirement of a grand jury indictment. However, a fifth amendment supporting argument for a fourth amendment claim is not an improbable combination and in light of several Supreme Court cases, the Fourth Circuit should have been at least somewhat sensitive to their close relationship. In Boyd v. United States, 116 U.S. 616 (1886), Mr. Justice Bradley commented:

claim evidently appeared to be an independent constitutional claim requiring prior presentation to the state courts. By divorcing the coerced admission claim from the fourth amendment claim, the circuit court was thus able to dispose of the latter through a harmless error finding, a disposition which would not have been possible had the majority admitted the possibility that a contention could be either an independent claim or an argument supporting a claim, depending on how it is presented.[40] The finding of harmless error was sufficient to overcome the argument of prejudice from the probative value of the trenchcoat's admission; but it is doubtful that arguments emphasizing the trenchcoat's inflammatory effect[41] or the prejudice resulting from the coerced admission of the intercourse itself could have been blunted by the harmless error rule.[42]

Standing independently of the fourth amendment claim, the facts and arguments bearing upon Young's coerced admission contention would fit nicely within the general focus of the fifth amendment.[43] In fact, in order

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> We have already noticed the intimate relation between the [fourth amendment and fifth amendment]. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment. . . . And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.

Id. at 633. More recently, in Mapp v. Ohio, 367 U.S. 643, 656-57 (1961), the Court found that the fourth and fifth amendments enjoy an "intimate relation." *See* Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 414 (1971) (Burger, C.J., dissenting).

[40]It is unclear from Judge Russell's opinion exactly how the majority saw this contention. In the paragraph of the opinion which discusses the contention, it is first treated as if it might be a contingent claim depending upon the validity of the fourth amendment claim: "During argument in this Court, the possibility that the trenchcoat may have been improperly used by the police to *induce* the appellee's confession was suggested." 455 F.2d at 681 (emphasis added). Yet further in the same paragraph, the coerced admission contention is treated as if it were a completely independent fifth amendment claim: "The appellee has never testified he was *coerced* in giving his confession . . . . This Court, on a record barren of any evidence *that the confession was coerced,* may not assume its involuntariness." *Id.* at 681 (emphasis added).

[41]Judge Sobeloff maintained that the fact that Young's trial was before a judge did not alter the pervasive prejudicial effects of the trenchcoat. He pointed out that the not unlikely impact of the physical production of the coat at trial was to divert the fact finder from a true assessment of its evidentiary value. *Id.* at 686-87.

[42]In Chapman v. California, 386 U.S. 18, 23 (1967), it was stated that any error which "possibly influenced the jury adversely to a litigant" could not be harmless.

[43]The fifth amendment to the United States Constitution provides in part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

U.S. CONST. amend. V.

to maintain a federal habeas corpus proceeding, a petitioner must be able to portray his claimed deprivation as a deprivation of a right or privilege guaranteed by a statutory or constitutional provision,[44] such as the fifth amendment's privilege against self-incrimination. Where a federal habeas corpus petitioner has been unable to do this, as where the petitioner alleged a violation of a state statute[45] or a defect in procedure of less than constitutional stature,[46] the writ has been held unavailable. It may be that the Fourth Circuit's finding that Young's coerced admission contention was a constitutional claim, wholly independent from his fourth amendment claim, was facilitated by the fact that his contention could have stood on its own as a constitutional claim had it been the sole allegation of a deprivation of a constitutional right made in the petition.

The dissent in *Young* disagreed with the majority in both steps of the majority's two-step decisional process. Judge Sobeloff pointed out initially that the search made by the police, when tested against the well-settled standards in the consent-to-search area of the law,[47] violated the petitioner's right under the fourth amendment. He then proceeded to show how the illegally seized evidence had been both directly and indirectly prejudicial.[48] The opinion emphasized that because the coat was the only piece of evidence introduced against Young on the rape charge[49] and because judges' minds are not impervious to misleading influences such as a dramatic flourishing of the stained trenchcoat at trial,[50] there was a reasonable possibility that the admission of the trenchcoat into evidence was directly prejudicial and contributed to the conviction. The majority opinion appears to treat the coerced admission claim as independent of

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[44]See note 1 *supra.*

[45]McCord v. Henderson, 384 F.2d 135 (6th Cir. 1967).

[46]Garrison v. Johnston, 104 F.2d 128 (9th Cir.), *cert. denied,* 308 U.S. 553 (1939).

[47]The dissent relied on Reeves v. Warden, 346 F.2d 915 (4th Cir. 1965), which held that evidence seized from a habeas corpus petitioner's room after his mother had consented to the search was improperly admitted at trial because the bureau from which the evidence was seized was set aside exclusively for the petitioner and thus only he could give constitutionally effective permission for the search.

[48]In Wong Sun v. United States, 371 U.S. 471 (1962), it was held that evidence seized unlawfully could neither be proof against the victim of the search nor against one who might be indirectly prejudiced by the evidence, though not the victim of the search. That the exclusionary rule extends to both the direct and indirect products of an illegal search was settled in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), in which Mr. Justice Holmes commented:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall be used before the Court but that it shall not be used at all.

251 U.S. at 392.

[49]455 F.2d at 684.

[50]*Id.* at 686-87.

the main fourth amendment claim even though the admission was allegedly coerced by the fruits of the seizure. Rather than characterizing the coerced admission and involuntary testimony contentions made by Young as independent claims, the dissent interpreted these as arguments indicating indirect prejudicial effects of the illegal seizure of the trenchcoat. Judge Sobeloff pointed out that it was not necessary for the petitioner to prove beyond a reasonable doubt that prejudice existed,[51] as the majority seemed to require. Rather, the burden was on the state to prove that any error was harmless beyond a reasonable doubt, a burden which the state had failed to sustain.[52]

It would seem that the dissent's most fundamental difference with the majority lies in its interpretation of *Picard* and the resulting application of the *Picard* test to the situation in *Young*. Judge Sobeloff evidently read *Picard* as allowing arguments which might, on their face, fit under a constitutional provision different than the one articulated in the state courts as long as the basic, ultimate claim for disposition was not changed as the result of the assertion of the new arguments in the federal courts.[53] That Young's new contentions could possibly qualify as constitutional claims should not functionally fix them as "claims" to the exclusion of their use as supporting "arguments" in the total scheme of the petitioner's fourth amendment thrust. Thus the majority was accused of indulging in an overly technical view of the exhaustion requirement[54] in that it evidently set up a mutually exclusive dichotomy between those contentions which can be characterized as claims and those which can be characterized as arguments supporting claims.

The dissenting opinion stated that the exhaustion of state remedies doctrine requires *only* that the substance of a federal habeas corpus claim must first be presented to a state court.[55] Judge Sobeloff's use of the word

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[51] *Id.* at 684.

[52] *Id.*

[53] In this reading of the *Picard* case, the dissent is joined by the Seventh Circuit Court of Appeals. In Macon v. Lash, 458 F.2d 942 (7th Cir. 1972), the Seventh Circuit held that a claim in the state courts, that the petitioner was denied his right to appeal because his court-appointed counsel filed a futile motion for an extension of time instead of filing a timely motion for a new trial, was not changed simply because he framed his claim in the federal courts as one of incompetence of counsel. As the court posed the issue:

> Our question then is whether petitioner's emphasis on the incompetence of counsel in the federal court is a mere variation of the legal theory presented to the Indiana Supreme Court or should be regarded as a different claim. In view of the holding in *Picard*, the question is not free of doubt, but in our judgment we are dealing with a variation of the same claim rather than a different legal ground.

Id. at 948.

[54] 455 F.2d at 686.

[55] *Id.* at 685 & n.2a.

"only" to preface the *Picard* holding would seem to indicate that he interpreted the word "substance" to mean "basic thrust" of the ultimate claim for disposition. This basic thrust, without the polish of all the legal arguments which may be used in a federal habeas corpus proceeding, is all the state court should need in order to apply controlling legal principles.[56] Accordingly, the substance of Young's habeas corpus claim, that he was the victim of an unconstitutional search and seizure, was not changed by the addition of new arguments in the federal courts. The dissent had no difficulty distinguishing *Young* from *Picard,* in which the fifth amendment indictment question posed to the state courts was transformed into an entirely distinct equal protection question in the federal courts.[57] Instead, the whole tenor of Judge Sobeloff's opinion implies that *Young* fits within the *Kemp* limitation of *Picard.*

It is not entirely clear from the procedural facts of *Young* and *Kemp,* however, that these two cases actually belong in the same category. In *Kemp,* the petitioner's ultimate question for disposition was a fifth amendment claim of coerced confession. The two legal theories which Kemp asserted bore directly upon the question of a possible constitutional violation in procuring the confession. But once this coercion was shown, no question of prejudice or harmless error could have arisen since admission of a coerced confession into evidence is prejudicial *per se.*[58] In *Young,* on the other hand, the petitioner needed to show both a constitutional violation in the search and sufficient prejudice resulting from the admission of the tainted evidence to render his trial unfair. The new contentions in *Young,* which the majority determined to be new claims, were directed at strengthening the petitioner's showing of total prejudice and not at the basic constitutional violation as were those in *Kemp.* Therefore, *Young* would seem *sui generis* on its facts and not subject to categorization with *Kemp* since in the latter case the distinction between the constitutional violation and the effects flowing from that violation was of no importance.

It may be that the dissent felt it unnecessary to point out that the new contentions raised in the federal courts by Young and Kemp applied to different steps in proof. Taking a broader view of the *Picard* and *Kemp* language than is implicit in this sort of distinction, Young may have satisfied the requirement that he present the substance of his claim to the state courts even though his arguments as to the effect of the alleged constitutional violation on the fairness of his trial were not as completely articulated at the state level as they were at the federal level. Although

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[56]*Cf.* Sullivan v. Scafati, 428 F.2d 1023 (1st Cir. 1970), *cert. denied,* 400 U.S. 1001 (1971); Wilbur v. Maine, 421 F.2d 1327 (1st Cir. 1970).

[57]455 F.2d at 685 & n.2a.

[58]*See, e.g.,* Miranda v. Arizona, 384 U.S. 436 (1966).

not explicitly stated in his opinion, it can be assumed that Judge Sobeloff saw no practical or important difference between new legal theories bearing on an alleged constitutional violation and new legal theories bearing on the effect of an alleged constitutional violation so long as the ultimate question for disposition remained unaltered in either case. If this assumption is correct, the dissent has, in effect, pointed out that the important distinction for a habeas corpus petitioner to make is the one between those arguments which change the nature of his claim and those arguments which do not, regardless of the stage of proof at which they are made or any other collateral characteristic.

The history and policy behind the exhaustion of state remedies doctrine lend support to the dissent's position in *Young*, which seems to be a more flexible interpretation of section 2254 than is evidenced by the majority opinion. The doctrine had its beginning in *Ex parte Royall*,[59] a case which held that federal courts had the power to grant a writ of habeas corpus to a state prisoner even in advance of a trial. The Court cautioned, however, that this power should be tempered by discretion as to the time and mode of its exercise. Considerations of comity between the state and federal court system would be paramount in exercising this discretion,[60] but federal court abstention would be subordinated to any special circumstances requiring immediate action. What was originally a flexible principle encompassing discretion *not* to grant the writ gradually became hardened into a rule that, in the absence of exceptional circumstances, the lower federal courts *must* refuse to grant a writ of habeas corpus unless state remedies have been exhausted.[61] The codification of the exhaustion doctrine in section 2254 then followed,[62] coming at a time when the doctrine was being rigidly applied. It was not until the trilogy of cases[63] beginning with *Fay v. Noia*[64] in 1963 that the Supreme Court

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[59]117 U.S. 241 (1886). The exhaustion of state remedies doctrine was further elaborated upon in Whitten v. Tomlinson, 160 U.S. 231 (1895), and Davis v. Burke, 179 U.S. 399 (1900).

[60]In United States *ex rel.* Drury v. Lewis, 200 U.S. 1, 7 (1906), the Supreme Court commented on the reason for this deference to comity:

> It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of *habeas corpus*, be taken out of the custody of the officers of the State and finally discharged therefrom. . . .

Id.

[61]*Ex parte* Hawk, 321 U.S. 114 (1944).

[62]The original statute, Act of June 25, 1948, Ch. 153, § 2254, 62 Stat. 967, was enacted four years after *Ex parte* Hawk, 321 U.S. 114 (1944), but was amended to its present form in 1958.

[63]Fay v. Noia, 372 U.S. 391 (1963) (federal courts have power under the federal habeas corpus statutes to grant relief despite the applicant's failure to have pursued a state remedy

reaffirmed the flexibility of the exhaustion doctrine and federal courts began giving full consideration to policies of timely vindication[65] and judicial efficiency[66] as well as to the oft-invoked policy of comity.[67]

A flexible interpretation of section 2254 is also consistent with decisions stating that habeas corpus was never intended to be a narrow, formalistic remedy.[68] Mr. Justice Douglas, in his dissent in *Picard,* recognized that nicety of analysis is not a valuable or functional concept in the area of exhaustion of state remedies.[69] By concerning itself with how a legal argument appeared on its face rather than looking to the argument's actual substantive effect on the total scheme of petitioner's claimed deprivation of right, the majority in *Young* seems to indulge in

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not available to him at the time he applies), Townsend v. Sain, 372 U.S. 293 (1963) (where facts are in dispute, federal courts in habeas corpus cases must hold evidentiary hearing in a state court), and Sanders v. United States, 373 U.S. 1 (1963) (controlling weight must not be given to denial of prior habeas applications if not adjudicated on the merits or if a new ground is presented) are said to be the liberalizing trilogy. Laubach, *Exhaustion of State Remedies as a Prerequisite to Federal Habeas Corpus: A Summary,* 1966-1971, 7 GONZAGA L. REV. 34 (1971).

[64]372 U.S. 391 (1963).

[65]*See* Dixon v. Florida, 388 F.2d 424 (5th Cir. 1968); United States *ex rel.* Davis v. Henderson, 330 F. Supp. 797 (W.D. La. 1971).

[66]*See* United States *ex rel.* Newman v. Brierly, 420 F.2d 781 (3rd Cir. 1970); Phelper v. Decker, 401 F.2d 232 (5th Cir. 1968); Kennedy v. Sigler, 397 F.2d 556 (8th Cir. 1968); United States *ex rel.* Levy v. McMann, 394 F.2d 402 (2d Cir. 1968).

[67]Given the Fourth Circuit's handling of exhaustion of state remedies issues in cases spanning the past five years, it is somewhat surprising that it would take a narrow view of the requirement in its disposition of *Young.* The Fourth Circuit has been characterized as having a moderate to liberal approach to exhaustion matters. Laubach, *supra* note 63, at 48. A review of some Fourth Circuit cases bears out this characterization.

In Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969), the Fourth Circuit determined that raising a new issue in the final paragraph of an addendum to petitioner's application should not, from the standpoint of comity, require an exhaustion of the new claim before a federal court could address itself to the fully exhausted claim. Other federal courts have been reluctant to hear fewer than all the issues asserted in a habeas corpus petition. *See* Morgan v. Beto, 313 F. Supp. 1265 (S.D. Tex. 1970); Howard v. Craven, 306 F. Supp. 730 (C.D. Cal. 1969).

In Sheftic v. Boles, 377 F.2d 423 (4th Cir.), *cert. denied,* 389 U.S. 986 (1967), the court held that the real benefit derived from allowing prisoners, who had presented the same claims in a state court three years earlier, to present their claims in the federal courts would outweigh any tangential benefits which might accrue to the cause of federalism by sending the petitioners back to the state courts. Similarly, in Rowe v. Peyton, 383 F.2d 709 (4th Cir. 1967), the court was willing to find exhaustion in the state courts even though the state argued that the issue had not been lucidly presented there. In dicta, the court brushed aside the state's objections by saying that judges must not depend on the arguments of lawyers for the limits of their perception and analysis but must know and understand many things not intelligently presented by lawyers in a particular case.

[68]Jones v. Cunningham, 371 U.S. 236 (1963).

[69]404 U.S. at 281.

the very type of academic analysis against which Mr. Justice Douglas warned.

An inclination to read *Picard* as a device with which to foreclose somewhat the availability of habeas corpus relief is understandable in light of the barrage of habeas corpus applications that federal courts in general,[70] and the Fourth Circuit in particular,[71] have received in recent years. However, making the vindication of constitutional guarantees more difficult is a questionable means of easing the burden at best.[72] In reality, both state and federal courts are responsible for the administration of the criminal justice system in the United States. Thus, at least in terms of judicial economy, it should make no difference whether a federal court or a state court ultimately decides a prisoner's claim. To base a justification for returning a state prisoner who has made a colorable attempt to exhaust state remedies upon a desire for federal judicial economy would seem to ignore the fact that reviewing the petition of a prisoner such as Young and subsequently sending him back to the state courts itself wastes judicial energy.

What would seem to be the most unfortunate aspect of a formalistic application of the exhaustion of state remedies doctrine is that the petitioner with a meritorious claim remains confined, at least during the time needed for the claimed deprivation of right to be heard in a state court. The decision in *Young* may have the effect of making it more difficult for a state prisoner to achieve a hearing on a claimed deprivation of right in a forum which, in terms of orientation toward federal constitutional matters, is preferable to a state court. A prisoner who seeks habeas corpus relief in the Fourth Circuit and refashions his legal arguments in the federal courts runs the risk that his arguments may be found to be unexhausted constitutional claims. It would seem that a speedy vindication of constitutional deprivations in the criminal justice process cannot countenance the impediment of a formalistic view of section 2254. Otherwise the federal courts would "make a trap out of the exhaustion doctrine which promises to exhaust the litigant and his resources, not the remedies."[73] Thus it is submitted that between the majority and dissenting viewpoints in *Young* the flexibility of the latter is far more desirable.

A. NEAL BARKUS

[70]Of the 10,798 appeals filed in the United States courts of appeals during the fiscal year ending June 30, 1971, the largest single source was federal question habeas corpus petitions amounting to a total of 1,261. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 252-53 (1971).

[71]Of the total civil cases pending in the United States district courts on June 30, 1971, only the district courts in the Fifth Circuit had a greater number of habeas corpus petitions from state prisoners than did the district courts in the Fourth Circuit. *Id.* at 272-73.

[72]An obvious alternative solution is to increase the number of federal judgeships. *See* Washington Post, Oct. 28, 1972 at A 13, col. 7.

[73]404 U.S. at 281.