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for appointed counsel to submit expense itemizations to the judge for approval and concurrent order to pay. This gives the lawyer a degree of freedom to operate depending upon the facts of the particular case, which is better than having him bound by strictly interpreted terms as to what is acceptable and what is not. The method allows the judge to use his discretion in fixing reimbursement at a fair rate for the work done so that no one will be able to collect for clearly unjustified expenditures.

Where there is a public defender system, expenses should be paid on the basis of an annual budget to assure use of funds in the cases where they are most needed. A permanent, salaried investigator might help to reduce the cost of the entire operation.

A further reduction of costs would result if public defenders and assigned counsel were allowed the free use of the State Crime Laboratory and the assistance of its personnel. This should produce a substantial saving. In addition, some form of discovery device in criminal trials[39] would reduce expenditures for investigators and further diminish the cost of defending indigents.

All these suggestions can be used in Louisiana to create a program for the defense of indigents at a reasonable cost to the state. The hope of change from present practices seems to lie with a legislature responsive to public opinion that is sufficiently educated in the realities of administering criminal justice. A change is imperative in order to secure a fair system of criminal justice for both the indigent accused and the attorney selected to aid him in his defense.

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POST-CONVICTION REMEDIES AND WAIVER OF CONSTITUTIONAL RIGHTS

INTRODUCTION

Each of the states and the federal government has its own system of criminal procedure. One of the most important and most publicized aspects of criminal procedure is that which

39. *Cf.* Louisell, *Criminal Discovery: Dilemma Real or Apparent?* 49 CALIF. L. REV. 56 (1961).

deals with post-conviction remedies. Closely related is the right of state prisoners to invoke federal jurisdiction to enforce their rights under the Constitution of the United States. In our federal system of government, most areas of criminal law and procedure have properly been within the control of the states. However, federal constitutional claims arising from a state criminal conviction may ultimately be decided in a federal forum.

The Bill of Rights established rules governing criminal proceedings in federal courts.[1] In a significant development of recent years, the United States Supreme Court has held that many of the protections enumerated in the Bill of Rights are so essential to a fair trial that they are applicable to state criminal proceedings through the due process clause of the fourteenth amendment.[2] By carefully scrutinizing cases that may call for application of these safeguards, the United States Supreme Court affords criminal defendants procedural due process to a degree never before attained in this country.

As a result of the work of the United States Supreme Court, stricter standards are imposed on both the federal and the state courts and more judgments are attacked directly by appropriate appellate procedure and collaterally by habeas corpus. The administration of justice demands fair and orderly procedure and a sense of definiteness. Attempts to meet these requirements and, at the same time, to maintain adequately the defendant's constitutional rights, have caused conflicts not only between the states and the federal government, but also to some extent among the members of the United States Supreme Court themselves.

> "Habeas Corpus is one of the precious heritages of Anglo-American civilization. We do no more today than confirm its continuing efficacy."[3]

> "This decision, both in its abrupt break with the past and in its consequences for the future, is one of the most disquieting that the Court has rendered in a long time."[4]

1. See U.S. CONST. amends. IV, V, VI.
2. See Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963).
3. Fay v. Noia, 372 U.S. 391, 441 (1963), Justice Brennan speaking for the majority.
4. *Id.* at 448. Justice Harlan speaking for the dissent.

Fay v. Noia,[5] from which both the preceding quotations are taken, is one of the most significant decisions in recent years concerning the grant of federal relief to a state prisoner. The United States Supreme Court was faced with what at first appeared a simple problem. Noia and two others had been tried separately and convicted in a New York court for felony-murder in the perpetration of a robbery. The principal evidence relied on by the state in each case was the confession of Noia. After conviction, it was revealed by the state's own admission that the confession had been coerced in violation of Noia's rights under the fourteenth amendment. Noia's confederates appealed in time and subsequent legal proceedings resulted in their release; but Noia failed to appeal. His subsequent attempts at post-conviction relief afforded by state procedure were denied because of his failure to appeal.[6] Noia then sought relief through federal habeas corpus.

The right Noia asserted was clear. The state had admitted the unlawfulness of his confession and had released his confederates. The federal district court held that Noia must be denied relief on his writ because of the provisions of 28 USC section 2254,[7] finding that by failing to appeal his conviction, Noia had failed to exhaust state remedies.[8] The court of appeals reversed, one judge dissenting, and ordered that Noia's conviction be set aside and that he be discharged from custody or given a new trial.[9]

The United States Supreme Court was confronted with three basic issues. The first involved the doctrine, theretofore generally applied, under which a defendant's state procedural default, there the failure to appeal, was held to constitute an ade-

5. 372 U.S. 391 (1963).

6. Noia, unable to employ a motion for reargument as he had not appealed his conviction, had made an application to the sentencing court in the nature of *coram nobis*. The Kings County Court set aside his conviction. The Appellate Division of the Supreme Court reversed and reinstated the judgment of conviction. The New York Court of Appeals, in affirming the Appellate Division, held that Noia's failure to pursue the usual and accepted appellate procedure to gain a review of the conviction did not entitle him to utilize *coram nobis*, even though the asserted error related to a violation of constitutional rights. People v. Noia, 3 N.Y.2d 596, 170 N.Y.S.2d 799, 148 N.E.2d 139 (1958).

7. "An application for a writ of habeas corpus in behalf of a person in custody pursuant to a 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 . . . ."

8. Noia v. Fay, 183 F. Supp. 222 (S.D.N.Y. 1960).

9. 300 F.2d 345 (2d Cir. 1962).

quate and independent ground for barring direct review by the United States Supreme Court. The Court found that this doctrine was only a limitation on *appellate* review and was a consequence of the Court's obligation to refrain from rendering advisory opinions or passing upon moot questions, since, regardless of the federal issue, the prisoner was detained upon valid state law grounds.[10] The Court reasoned that a different situation was presented on federal habeas corpus where the federal court was not reviewing the state court judgment, but was determining the basic issue whether petitioner's detention was constitutionally valid. In such an inquiry, federal law is the only relevant substantive law, and as between the state's interest in vindicating its rules of procedure and the interest in vindicating federal constitutional rights, the paramount interest is the latter. The Court concluded that the separate and adequate state ground doctrine could not serve as a limitation on the habeas corpus authority of the federal courts under the appropriate statutes.[11]

In denying relief, the district court had also relied upon the federal statute[12] which requires a petitioner to exhaust the remedies available in the courts of the state before seeking federal relief through habeas corpus. The United States Supreme Court held that this statute was limited in its application to a failure to exhaust state remedies *still open* to the applicant at the time his petition is filed in federal court.[13] At the time of Noia's habeas corpus application he had no further state remedies.

A third issue which faced the Supreme Court was that of waiver. The Supreme Court ruled that waiver of a federal claim is a federal question and a state court's finding would not automatically bar an independent federal examination. In so holding,

10. See Memphis v. Murdock, 87 U.S. (20 Wall.) 590, 634-36 (1875); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961); Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961).

11. 28 U.S.C. §§ 2241-2255 (1948).

12. *Id.* § 2254.

13. The Court noted the pertinent provisions as incorporated in the revision of the Judicial Code in 1948 and further stated: "Plainly, the words of section 2254 favor a construction limited to presently available remedies. The only two decisions of this Court prior to 1948 in which past exhaustion was strongly suggested were Ex parte Spencer . . . and Frank v. Mangum . . . . The latter of course, was substantially overruled in Moore v. Dempsey . . . , the language of which does not support a notion of forfeitures. On the other hand, Mooney v. Holohan . . . is typical of decisions plainly implying a rule limited to presently available remedies." Fay v. Noia, 372 U.S. 391, 433 (1963).

the Supreme Court enunciated a federal waiver standard adopted from the test previously set forth in *Johnson v. Zerbst.*[14] The Court acknowledged in *Noia* that the exigencies of federalism warrant a limitation whereby the federal judge has discretion to deny relief to one who has intentionally waived or deliberately by-passed state procedures. The Supreme Court stated, however, that a decision made by petitioner's counsel without consulting his client will not be considered an intentional relinquishment of a right or privilege, but that a waiver depends on the considered choice of the petitioner. The Supreme Court concluded that Noia's failure to appeal was not an intelligent waiver of his constitutional rights.[15] Finding no other bar to the grant of federal relief, the Supreme Court affirmed the appellate court's decision granting relief to Noia.

The decision was attacked in strong dissents, principally on the basis of 28 USC section 2241, which provides that habeas corpus shall not extend to a prisoner unless he is in custody in violation of the Constitution or treaties of the United States. This statute is the basis of the "separate and adequate state ground" doctrine discussed above. Issue was also taken with the majority's interpretation of 28 USC section 2254 and the "exhaustion of state remedies" doctrine. It was pointed out that Noia was not imprisoned in violation of any federal law, but by a perfectly valid state law as a result of his procedural default, and that federal power did not extend on direct review or habeas corpus to grant relief to a state prisoner whose detention was based on an adequate state ground.[16] Justice Clark, in his dissent, showed great concern for the effect this decision would have on the administration of criminal justice in the state courts. Noting that the Supreme Court's consideration of Noia's application came some twenty years after his conviction, Clark argued that the decision relegated state court judgments to a "judicial limbo" where they would be subject to federal collateral attack years later. Justice Clark also predicted that there would

14. 304 U.S. 458, 464 (1938): "[A]n intentional relinquishment or abandonment of a known right or privilege."

15. Fay v. Noia, 372 U.S. 391, 439-40 (1963): "Under no reasonable view can the state's version of Noia's reason for not appealing support an inference of deliberate by-passing of the state court system. For Noia to have appealed in 1942 would have been to run a substantial risk of electrocution. His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence."

16. See note 10 *supra.*

be a great influx of new applications from state prisoners, and because he expected ninety-eight percent to be frivolous, he foresaw an adverse effect on the few meritorious applications.[17]

Henry v. Mississippi[18] is another significant decision in this area. The defendant was convicted in a Mississippi state court of disturbing the peace. His conviction was based mainly on the testimony of a police officer regarding evidence obtained in an illegal search. Mississippi law requires objection to the admissibility of evidence to be made at the time it is offered, but defense counsel failed to object to the officer's testimony until the end of the prosecution's case. There seemed to be some question whether defense counsel purposely omitted timely objection to the testimony.[19] The Supreme Court of Mississippi affirmed the conviction, by applying the "contemporaneous objection" rule even though it acknowledged that the search had been in violation of defendant's constitutional rights.[20] The United States Supreme Court granted certiorari.

In its decision the Court recognized the general principle that it will decline to review state court judgments which rest on adequate state grounds, even though those judgments also decide federal questions.[21] But the Court stated that whether a failure to comply with state procedural rules can preclude its consideration of the federal question is itself a federal question. In *Henry*, the basis of the state decision was procedural: failure to object contemporaneously to the introduction of evidence. The Supreme Court held that to preserve such a system of defaults in the state procedure a strong state interest must be found. The Court found that the particular rule served an important state interest and that if the failure to object in time was strategic and deliberate it would constitute a waiver of possible constitutional rights.[22] Since the Court found some evidence of deliberateness, the case was remanded to the state court to consider the issue of waiver. It was pointed out that the defendant could still use

17. 372 U.S. 391, 446 (1963), quoting from Brown v. Allen, 344 U.S. 443, 537 (1953): "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."

18. 379 U.S. 443 (1965).

19. When the prosecutor sought to introduce the testimony in question, one of petitioner's attorneys stood up as if to object, but the other one pulled him down by his "coat-tails." No objection was then made.

20. 154 So. 2d 289 (Miss. 1963).

21. See note 10 *supra*.

22. Significantly, the Court cited Fay v. Noia, 372 U.S. 391 (1963), as authority for this proposition.

habeas corpus after state adjudication unless it was clearly shown that he had deliberately by-passed the state procedure. The Supreme Court relied heavily on *Fay v. Noia*. Justice Brennan asserted that allowing the state court to reconsider the question would create harmony between the federal and state systems and would also relieve the federal dockets.[23]

In his dissent, Justice Black maintained that the issue should have been decided in the United States Supreme Court. He saw no evidence of intentional waiver, only an honest mistake by defense counsel, and argued that the Mississippi rule should not serve as an adequate state ground in view of the obvious violation of due process. He concluded that the Mississippi Supreme Court, by relying on its own decisions, could have ruled for defendant and that remanding would only serve to confuse and cloud the issue.

Justice Harlan's strong dissent was based on his dissent in *Fay v. Noia*.[24] He asserted that the adequate state ground rule should prevent Supreme Court review, and that *Henry* extended *Fay v. Noia* from habeas corpus to direct review. He further argued that the states must maintain the integrity of their procedure to insure orderly administration of justice. Harlan concluded that the threat of collateral attack through federal habeas corpus would leave states little choice but to reverse in cases such as this.

Though there has been no subsequent Supreme Court case directly in point, the Court on several occasions has approved *Noia*.[25] Especially significant was *Townsend v. Sain*,[26] which virtually assured a full evidentiary hearing for petitioners in federal habeas corpus proceedings.

From the above cases it seems apparent that the constitutional rights of criminal defendants will not be defeated by the "separate and adequate state ground" doctrine. This doctrine will not be applied as a bar to federal relief on direct review or in habeas corpus. It also seems clear from *Noia* that habeas corpus petitioners in the federal courts need exhaust only those

23. The Supreme Court cited the *1964 Annual Report of the Director, Administrative Office of the United States Courts*, which reflects an 85% increase in habeas corpus petitions filed by state prisoners from fiscal 1963 to 1964.

24. 372 U.S. 391, 448 (1963).

25. *E.g.*, Parden v. Terminal Ry., 377 U.S. 184 (1964); Sanders v. United States, 373 U.S. 1 (1963); Smith v. Mississippi, 373 U.S. 238 (1963).

26. 372 U.S. 293 (1963).

state remedies available at the time of the petition to qualify for federal relief. A review of recent decisions in the lower federal courts shows that where state remedies were available at the time federal relief was sought, the federal courts have not hesitated to remand the case to the state courts but without prejudice to the prisoner's right of invoking federal habeas corpus after final state adjudication of the matter.[27] This result has been reached even though it appeared that the state court would deny the relief sought or even fail to consider the case on the merits.[28] On the other hand, where it was clear that the prisoner had exhausted his existing state remedies, the lower federal courts have entertained the case. This procedure seems correct because it affords the states an opportunity to adjudicate the criminal cases within their jurisdiction, and also assures defendants a fair hearing on their federal claims. There are rumblings of "anticipatory removal" and of changes in habeas corpus which would allow federal claims, especially in civil rights cases, to be adjudicated in the federal courts without remand to the states.[29] Such proposals would seem to draw support from Justice Black's dissent in *Henry*.[30]

WAIVER

While these procedures seem now fairly well established, the issue of waiver enunciated in *Noia* and *Henry* may cause difficulties. In *Noia* the Court recognized the states' legitimate interest in promoting the proper use of state procedures, but reasoned that those interests could be adequately protected by empowering the federal district courts to refuse relief if an applicant had "deliberately by-passed" state procedure. Evidently this requires "an intentional relinquishment or abandonment of a known right or privilege."[31] The federal district judge, however, is granted a discretionary power which would enable him to hear federal claims despite a deliberate by-pass.[32] Clearly,

27. See Cyronne-DeVirgin v. Missouri, 341 F.2d 568 (8th Cir. 1965); Martin v. Spradley, 341 F.2d 89 (5th Cir. 1965); Brown v. North Carolina, 341 F.2d 87 (4th Cir. 1965).

28. Pate v. Holman, 343 F.2d 546 (5th Cir. 1965); United States v. Pate, 341 F.2d 885 (7th Cir. 1965).

29. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965).

30. 379 U.S. 443, 453 (1965).

31. This rule originated in Johnson v. Zerbst, 304 U.S. 458 (1938) and was followed in Fay v. Noia, 372 U.S. 391 (1963).

32. 372 U.S. 391, 438 (1963).

where a defendant has by-passed state procedure, the facts and circumstances involved must be carefully scrutinized. In addition, it is to be remembered from *Noia* that the defendant is not necessarily bound by the acts of his attorney. Considering these limitations on waiver by the defendant, it seems that in situations other than those involving an intentional strategy it is quite doubtful whether a finding of waiver by a state court will be upheld in a federal hearing.

The question of waiver has often arisen in the right to counsel area, where the defendant has been convicted without an attorney.[33] The defendant's appearance in court with counsel suggests other serious questions. If counsel fails to raise a pertinent issue, whether negligently or strategically, how is *Noia* to be applied? Must the attorney consult with the defendant even on matters which are strictly technical, such as rules of evidence? Must the state prove that petitioner was aware that his constitutional rights were being violated but nevertheless, after discussion with his attorney, decided to remain silent?

A review of some of the cases in both the Supreme Court and the lower federal courts will indicate the confusion and lack of uniformity in interpretation of the federal waiver standard enunciated in *Noia*. It is not necessary to look beyond *Henry* to begin the inquiry. Henry's attorney failed to object contemporaneously to the admission of allegedly unconstitutional evidence, as required by state procedure. After settling several other issues,[34] the Court remanded the case to the state courts to determine if the failure to object was a strategic and deliberate by-pass of state procedure, indicating that if it was, the defendant would be deemed to have waived his right to object. The Supreme Court noted that such acts of counsel would bind the defendant as part of the hazards of trial. It is submitted that the practical problem of determining what is deliberate strategy is almost insurmountable, and, more important, that this definition of waiver falls short of that set forth in *Noia*.

Another problem arises where the systematic exclusion of Negroes from jury service is not raised until the petitioner asks for post-conviction relief. Generally, states require that objections to the composition of a jury venire be raised by pre-trial

33. See Comment, 26 LA. L. REV. 666 (1966).
34. See discussion of *Henry*, notes 18-24 and accompanying text *supra*.

motion and that a petitioner who does not file a timely objection waives his right to assert it in a post-conviction hearing. Federal courts have held that this rule will not satisfy *Noia* even though counsel was present at the trial.[35] Thus, the defendant is in an enviable position. He is not bound by the acts of his attorney and can refrain from objecting pending the outcome of the case; if he loses, he can then assert the alleged violation of his rights. Waiver by strategic non-assertion of the objection would, it is submitted, be almost impossible to establish.

In *Harvey v. Mississippi*,[36] an indigent was convicted of a misdemeanor without the benefit of counsel. The petitioner informally pleaded guilty to a justice of the peace after he had been advised that the penalty would only involve a fine. Petitioner was advised that he would subsequently be notified of the actual penalty. Petitioner was notified on his subsequent arrest that the penalty was a fine and ninety days imprisonment. The arrest came after the forty-day statutory delay allowed for taking an appeal and thereby precluded the petitioner from exercising this right. The Fifth Circuit Court of Appeals, on habeas corpus, followed *Noia* and found that petitioner had exhausted his state remedies and the failure to appeal was no bar to federal relief on habeas corpus. The court required that only existing remedies in state courts be exhausted. Petitioner was granted a federal hearing and relief followed based on the absence of counsel at defendant's trial even though petitioner had been convicted of a misdemeanor.

In *Linkletter v. Walker*[37] the Supreme Court seemed to digress from the basic theories of *Noia*. Petitioner was convicted of burglary by a Louisiana court and his conviction was affirmed by the highest state court.[38] After *Mapp v. Ohio*,[39] in which the Supreme Court held that evidence illegally seized was inadmissible in a state criminal trial, petitioner applied for a writ of habeas corpus. The Supreme Court denied relief, holding that the exclusionary rule announced in *Mapp* does not apply to state court convictions which had become final before its rendition. In a lengthy dissent, Justice Black asserted that this holding

35. Cobb v. Balkcom, 339 F.2d 95 (5th Cir. 1965); Whitus v. Balkcom, 333 F.2d 496 (5th Cir. 1964).
36. 340 F.2d 263 (5th Cir. 1965).
37. 381 U.S. 618 (1965).
38. 239 La. 1000, 120 So. 2d 835 (1960).
39. 367 U.S. 643 (1961).

was contrary to *Noia* in that a person held in state prison on unconstitutional grounds should be afforded relief unless there was an intentional waiver. Since the exclusionary rule of *Mapp* was not in force at the time of trial, neither Linkletter nor his counsel could have intelligently waived rights created by *Mapp*. However, the majority indicated that the primary purpose of *Mapp* was enforcement of the fourth amendment through exclusion of illegally obtained evidence and that this purpose would not be advanced by making the rule retroactive. The decision, in the final analysis, seems to be based on policy and on that basis it is probably correct.

A review of cases in the lower federal courts indicates that the *Noia* waiver doctrine has been frequently considered. The courts, on a close analysis of the facts of each case, have decided the issues sometimes for[40] and sometimes against[41] the petitioner.

EFFECTS ON LOUISIANA CRIMINAL PROCEDURE

In *State v. Davidson*,[42] defendant pleaded not guilty at arraignment. On the same day, the court appointed counsel for him and granted a fifteen-day delay to file pleadings. No special pleas were filed prior to trial. After testimony by one witness, the state marked for identification certain incriminating articles found by police officers in defendant's automobile and defense counsel moved to suppress. The motion was denied as premature; the court ruled that defendant must wait until the state had offered the articles in evidence. The state subsequently questioned certain witnesses concerning these articles, but through inadvertence the articles were never offered as evidence. Later, while the state was questioning a police officer concerning defendant's arrest, defense counsel again moved to suppress. The court denied the motion on the ground that it came too late, holding that appellant's failure to file a formal motion to suppress in advance of trial constituted a waiver of his right to question the legality of the search and seizure and to assert that it violated his constitutional rights. Defendant was convicted and appealed. The Louisiana Supreme Court af-

40. Dillon v. Peters, 341 F.2d 337 (10th Cir. 1965).
41. Eskridge v. Rhay, 345 F.2d 778 (9th Cir. 1965); United States v. Ball, 344 F.2d 925 (6th Cir. 1965).
42. 248 La. 161, 177 So. 2d 273 (1965). See State v. Rasheed, 248 La. 309, 178 So. 2d 261 (1965), where the same result was reached.

firmed. The court recognized the exclusionary rule of *Mapp*, but pointed out that the Louisiana Code of Criminal Procedure enacted prior to *Mapp* did not provide the necessary vehicle for excluding such evidence. The court noted that where there was no state procedure by which evidence could be suppressed a majority of states have followed the procedure of Federal Rule 41(e),[43] which provides that the court in its discretion may entertain the motion at the hearing or the trial. Asserting the procedural desirability of a pre-trial motion, the court held that since the exclusionary rule must be applied in all state criminal cases under *Mapp*, the procedural rights of the accused should also conform to the federal standard, and that the states should not provide any less onerous procedure than would have been applied in a federal court. It added that in applying the exclusionary rule it is the policy of the Louisiana Supreme Court to adopt the procedural rule of the court from which the exclusionary requirement emanated. In conclusion, the court held that "in order for an accused to invoke the exclusionary rule in this state, it is necessary for him to file a pre-trial motion either to quash a search warrant or to suppress evidence obtained by the prosecution and that failure to do so, in the absence of a showing of surprise or lack of opportunity to file such a motion, operates as a waiver of any claimed violations of his constitutional rights against illegal search and seizure."[44]

It is submitted that this falls far short of the federal waiver standard. Since the proper procedure for a motion to suppress illegally obtained evidence was not settled in Louisiana prior to this case, it seems impossible that the defendant or his counsel could have made an intelligent waiver as prescribed by *Noia*, or a strategic waiver as envisioned in *Henry*. Despite the adoption by the Louisiana Supreme Court of the pertinent federal rule, the result does not seem to be in conformity with the federal rule because it takes no account of the discretion contemplated by rule 41(e),[45] which clearly allows the motion to be made

43. FED. R. CIV. P. 41(e): "Motion shall be made before the trial or hearing unless the opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, *but the Court in its discretion may entertain the motion at the trial or hearing.*" See Henry v. State, 174 So. 2d 348 (Miss. 1965), which is the *Henry* case on remand to the state court from the United States Supreme Court. The Mississippi Supreme Court adopts the federal rule granting discretion to the court to grant the motion at any time, even after defendant has presented his case.

44. 248 La. 161, 177 So. 2d 273, 275 (1965).

45. See note 43 *supra*.

during trial even in the absence of surprise or lack of opportunity to file, in the court's discretion. The proposed revision of the Louisiana Code of Criminal Procedure includes procedure patterned after the federal rule,[46] under which the Louisiana courts should have little difficulty in satisfying the federal standards in this area.

Statistics show that a disturbing number of cases which originated in state courts are being brought before federal courts for adjudication. This is not merely unfortunate; it is unnecessary. The states can retain control over the administration of criminal justice by the adoption of necessary procedures. One of the most effective measures would be the enforcement of proper state habeas corpus procedures in accordance with federal standards. State judicial machinery must be equipped to adjudicate, after final conviction, all the federal claims which a prisoner might assert on federal habeas corpus. Obviously, this machinery does not now exist in many states, including Louisiana.

Violation of due process is not a ground for habeas corpus relief in Louisiana.[47] Therefore, at present, a state prisoner who seeks post-conviction relief on these broad grounds must depend upon the federal courts. In the proposed revision of the Louisiana Code of Criminal Procedure denial of due process is listed as a ground for habeas corpus relief, and if this provision is adopted, Louisiana courts will then be equipped to hear these claims.[48] Further, the state must permit its convictions to be collaterally attacked in its own courts on all federal grounds; otherwise many of the cases will be tried, at least in part, in the federal courts. Several states have adopted the Uniform Post-Conviction Procedure Act,[49] which provides liberal and effective measures for final settlement of constitutional claims in the state courts, if the courts can avoid excessive narrowness in their treatment of waiver.[50]

As it is evident that the power of the federal courts is as broad as the concept of due process itself, it is important to have state procedures that will enable defendants to assert their due

46. Proposed Louisiana Code of Criminal Procedure art. 703 (1966).
47. LA. R.S. 15:137 (1950).
48. Proposed Louisiana Code of Criminal Procedure art. 362(9) (1966).
49. 9B U.L.A. §§ 1-14.
50. See Young v. Warden, 233 Md. 596, 195 A.2d 713 (1963); Jordon v. Maryland, 221 Md. 134, 156 A.2d 453 (1959).

process claims in the state courts. However, state post-conviction remedies must be liberally applied if they are to serve as a substitute for the well-trodden path to the federal courts.

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