Michigan Law Review

Volume 38 | Issue 6

1940

CRIMINAL LAW AND PROCEDURE-FEDERAL COURTS - SUBSTITUTION BY SUPREME COURT OF ITS INFERENCES OF FACT FOR THOSE OF THE STATE COURT

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CRIMINAL LAW AND PROCEDURE — FEDERAL COURTS — SUBSTITUTION BY SUPREME COURT OF ITS INFERENCES OF FACT FOR THOSE OF THE STATE COURT — The recent cases of *Avery v. Alabama*[1] and *Chambers v. Florida*[2] raise the interesting question of the conclusiveness of a fact finding of a state court upon the United States Supreme Court in a criminal trial when the accused claims that one of his constitutional rights has been impaired, and the holding of the state court is to the effect that on the facts presented such right has not been impaired. The case may arise in the United States Supreme Court in either of two ways. It may come up on appeal from a lower federal court denying a petition for a writ of habeas corpus, as in *Moore v. Dempsey*.[3] Or it may arise under a writ of certiorari to the state court.[4]

[1] (U. S. 1940) 60 S. Ct. 321. Petitioner was arrested in Alabama and charged with murder committed six years previously. He was arraigned on March 21, 1938, two attorneys appointed to aid him, and his trial set for March 23. The case was reached on March 24, at which time a motion for a continuance was filed on the ground that petitioner's counsel had been involved in other cases and had not had time to prepare the case. The motion was denied, the case was tried, and verdict of guilty entered, all on the same day. Petitioner moved for a new trial on the ground that the denial of his motion for continuance was a practical denial of the right to counsel, and thus a deprivation of due process. The motion was denied, and on appeal to the state supreme court the ruling was affirmed. Certiorari was granted by the United States Supreme Court, and the decree of the state court affirmed. The Court stated that on the facts the petitioner had not been denied the benefit of counsel, thus there had been no violation of the Fourteenth Amendment to the Federal Constitution.

[2] (U. S. 1940) 60 S. Ct. 472. Petitioners, negroes, were arrested in Florida for the murder of a white man. After their arrest they were moved from one jail to another numerous times due to the presence of a hostile populace. They were questioned continuously for five days before the trial, and at the end of the fifth day the questioning was continued all night. Towards morning the petitioners finally "broke" and confessions were obtained upon which the petitioners were convicted of the murder. The trial court found that the confessions had not been illegally obtained, and the state appellate court affirmed. The United States Supreme Court granted certiorari and reversed. The Court stated that on the facts the confessions were illegally obtained, and thus there was a denial of due process of law.

[3] 261 U. S. 86, 43 S. Ct. 265 (1922).

[4] Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55 (1932); Snyder v. Massachusetts, 291 U. S. 97, 54 S. Ct. 330 (1933); Norris v. Alabama, 294 U. S. 587, 55

Certiorari is the most common method, but even if habeas corpus is used, the Supreme Court does not feel itself bound by res judicata, this being stated in Justice Holmes' dissenting opinion to *Frank v. Mangum.*[5]

The Supreme Court has not seemed inclined to state a basis for its action in reaching a different conclusion upon a given state of facts from that reached by the state court. The scope of this comment is to attempt to determine: (1) the basis of federal interference with the findings of fact of the state court; (2) which portion of that fact picture interests the federal Court; (3) in what situations the federal Court will review the findings of fact made by the state courts; and (4) to what extent the federal Court will substitute its own inferences of fact for those of the state court.

I.

The actual basis for interference by the federal courts in the findings of fact made by state courts in a criminal proceeding is the dissenting opinion of Justices Holmes and Hughes in *Frank v. Mangum,*[6] and the majority opinion of Justice Hughes in *Moore v. Dempsey.*[7] Both cases involved situations where it was claimed that the defendant in a criminal trial in a state court was deprived of due process of law because the court which tried him was intimidated by a mob. In the *Frank* case the Supreme Court held that as the state appellate court, sitting in an atmosphere wherein there was no mob interference, had found that on the record there had been no mob domination of the trial court, that decision was binding on the federal Court. The reasoning was that it was a matter that was more fundamental than comity[8] that required the federal courts to refrain from inquiring into the proceedings

S. Ct. 579 (1935); Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461 (1935); Pierre v. Louisiana, 306 U. S. 354, 59 S. Ct. 536 (1939); Avery v. Alabama, (U. S. 1940) 60 S. Ct. 321; Chambers v. Florida, (U. S. 1940) 60 S. Ct. 472.

[5] 237 U. S. 309, 35 S. Ct. 582 (1914).

[6] 237 U. S. 309 at 345, 35 S. Ct. 582 (1914). See 28 HARV. L. REV. 793 (1915).

[7] 261 U. S. 86, 43 S. Ct. 275 (1922). See 7 MINN. L. REV. 513 (1923). It is interesting to note that certiorari was denied on October 11, 1920, Hicks v. Arkansas, 254 U. S. 630, 41 S. Ct. 7 (1920), but that habeas corpus was later granted. See 33 YALE L. J. 82 (1923); 35 COL. L. REV. 404 (1935); 1 UNIV. CHI. L. REV. 307 (1933).

[8] "This is not a mere matter of comity, as seems to be supposed. The rule stands upon a higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and Federal governments." Frank v. Mangum, 237 U. S. 309 at 329, 35 S. Ct. 582 (1914). See also: Ex parte Royall, 117 U. S. 241 at 252, 6 S. Ct. 734 (1886); Covell v. Heyman, 111 U. S. 176, 4 S. Ct. 355 (1884); In re Tyler, 149 U. S. 164, 13 S. Ct. 785 (1893).

of the state court, and from substituting their judgment for that of the state court when the fundamental rights of the defendant had not been denied him; and that these rights had not been denied the defendant, since the impartial review granted by the appellate court was a sufficient corrective process to correct any denial of due process by the trial court. The dissenting opinion[9] in that case, and the majority opinion in the *Moore* case indicate that the presence of a state corrective procedure is not sufficient to prevent a review of the facts by the federal Court if it feels that the trial was in reality just a mask, and if the state corrective procedure has not given to the prisoner the benefit of the federal right denied to him by the trial court. The Supreme Court agrees that the corrective procedure may be so adequate as to prevent federal interference. This concession seems to have been little more than the payment of lip service to the decision in *Frank v. Mangum*, because neither in the *Moore* case, nor in the subsequent cases involving this point, has the Court felt that the state corrective process has been adequate. From this beginning has sprung the increased interference by the federal courts in the state criminal proceedings.[10]

2.

In all of the cases in this field in which the United States Supreme Court has evinced an interest in the fact situation, this interest is not upon the accepted and basic facts. Instead, the interest of the Court is directed towards what may be called "inferences drawn from facts."[11] These inferences are the conclusions drawn from the operation of the mind on accepted facts. Thus in the *Moore* case, the Supreme Court accepted without argument the findings of fact made by the state court as regards the presence of a mob at the trial, and the actuality of their actions. However, the point of disagreement was as to the effect the presence of the mob had on the trial court. The state appellate court drew the inference from these facts that there had been no mob domination at the trial. The Supreme Court drew the opposite inference and said that there was mob domination. The same situation is true in most of the cases in this particular field. In *Pierre v. Louisiana*,[12] the Supreme Court accepted the finding of the state court as to the method used to pick the jury, but felt that this method constituted

[9] Cf. Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 S. Ct. 527 (1920), where Holmes, J., argued that the decision of an administrative tribunal should be conclusive on the facts, and not open to review.

[10] Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55 (1932); Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579 (1935); Pierre v. Louisiana, 306 U. S. 354, 59 S. Ct. 536 (1939); Chambers v. Florida, (U. S. 1940) 60 S. Ct. 472.

[11] Another term that might be used is "ultimate fact."

[12] 306 U. S. 354, 59 S. Ct. 536 (1939).

discrimination against negroes, whereas the state appellate court had felt that it did not. And it was this view that was expressed in *Chambers v. Florida*[13] where the findings of fact of the state court as to the method used in obtaining confessions were accepted, but the conclusions of the state court as to whether this did or did not constitute torture was not followed. It is in this narrow field between questions of basic fact and pure questions of law that the federal courts intervene, and substitute for the inference of fact made by the state court, their own inference of fact. And there is no invasion of the constitutional right to a trial by jury in a criminal action[14] because trial by jury has been granted.

3.

That the Supreme Court will review the findings of fact of the state court, we are certain. In what situations this will be done is a mystery. The only safe method of determining these situations seems to be to wait until the particular case is decided by the Court. The closest approach to a test to be applied is that stated by Justices Holmes and Hughes in the dissenting opinion to *Frank v. Mangum*[15] and reiterated in the majority opinion by Justice Hughes in *Norris v. Alabama*.[16] This test is that whenever a question of fact is so intermingled with a question of constitutional right that the consideration of one necessarily involves the consideration of the other, then the federal Court will review the fact finding of the state court. The borders of the doctrine of review viewed in the light of this test are very hazy. Yet an attempt to find a more definite basis is quite fruitless. Despite *Moore v. Dempsey*, where the Court refused certiorari but took the case on appeal from its own district court, there is no discrimination against a review direct from the state court on certiorari, most of the later cases having come up in this fashion.[17] So that is no test for determining the situations in which the Supreme Court will review. The fact situations themselves offer no basis for discrimination, the federal Court having taken cases wherein the complaint has to do with the right to counsel,[18] the right to accompany the jury to the scene of the crime,[19] obtaining confessions by torture,[20] mob domina-

[13] (U. S. 1940) 60 S. Ct. 472.

[14] U. S. Constitution, art. 3, § 2.

[15] 237 U. S. 309 at 347, 35 S. Ct. 582 (1914).

[16] 294 U. S. 587 at 590, 55 S. Ct. 579 (1935).

[17] See cases cited in note 4, supra.

[18] Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55 (1932); Avery v. Alabama, (U. S. 1940) 60 S. Ct. 321.

[19] Snyder v. Massachusetts, 291 U. S. 97, 54 S. Ct. 330 (1933).

[20] Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461 (1935); Chambers v. Florida, (U. S. 1940) 60 S. Ct. 472.

tion,[21] and discrimination because of race.[22] The one point that all of these cases have in common is that they all deal with rights asserted under the Fourteenth Amendment to the Federal Constitution. But this serves as no basis for determining which cases the federal Court will review, inasmuch as it is practically the only ground that may be used by a defendant in a criminal action to have his case brought into a federal court. It is clear that in rape cases[23] and murder cases[24] the federal court has reviewed the case. Thus perhaps it is the severity of the punishment to be imposed on the defendant—the extent to which he will be deprived of his life or liberty, allegedly without due process of law—that determines the question whether or not the Supreme Court will make a review of the facts.[25] Perhaps the only possible and workable test is the one that puts the situation on a basis of a Gordian knot composed of questions of fact and questions of law. Certainly this is advantageous to the Court in that it is given a wide latitude for accepting or rejecting a case.

4.

To attempt to predict the extent to which the Supreme Court will substitute its inferences of fact for those of the state court is little more than pure conjecture. In *Avery v. Alabama*[26] the federal Court accepted the inference of the state court to the effect that the denial of a motion for continuance made by defense counsel to give them added time in which to prepare the case was not a denial of the right to have the benefit of counsel. Thus it would seem that as regards a matter of procedure, or the discretion of the trial judge, the federal Court will not substitute its inference for that of the state court. However, the pertinent question at this point is, will the fact that it is a matter of discretion prevent the federal Court from interfering if counsel is given only one day, or two hours, or one hour in which to prepare his case,

[21] Frank v. Mangum, 237 U. S. 309, 35 S. Ct. 582 (1914); Moore v. Dempsey, 261 U. S. 86, 43 S. Ct. 265 (1922).

[22] Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579 (1935); Pierre v. Louisiana, 306 U. S. 354, 59 S. Ct. 536 (1939).

[23] Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579 (1935); Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55 (1932).

[24] Moore v. Dempsey, 261 U. S. 86, 43 S. Ct. 265 (1922); Snyder v. Massachusetts, 291 U. S. 97, 54 S. Ct. 330 (1933); Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461 (1935); Pierre v. Louisiana, 306 U. S. 354, 59 S. Ct. 536 (1939); Chambers v. Florida, (U. S. 1940) 60 S. Ct. 472.

[25] This theory would seem to be supported by the concurring opinion of Brandeis, J., in St. Joseph Stockyards Co. v. United States, 298 U. S. 38 at 77, 56 S. Ct. 720 (1936), where it is said, "A citizen who claims that his liberty is being infringed is entitled, upon habeas corpus to the opportunity of a judicial determination of the facts. . . . But a multitude of decisions tells us that when dealing with property a much more liberal rule applies."

[26] (U. S. 1940) 60 S. Ct. 321.

rather than three days? It would seem that if such were the case, the inference of the federal Court as to whether the right to counsel had been denied might well have been different. In *Pierre v. Louisiana*,[27] Justice Black said, "In our consideration of the facts the conclusions reached by the [state] Supreme Court . . . are entitled to great respect." Yet this respect did not prevent the federal Court from disregarding those conclusions. Nor did it prevent the Court, speaking through Justice Black in *Chambers v. Florida*,[28] from saying that confessions had been obtained illegally, thus overturning the inference drawn by both the state appellate court and the jury in the state trial court. The Court has disregarded the inference of the state court where it clearly appears that the right to counsel has been denied,[29] that persons have been excluded from a jury because of race,[30] or that confessions have been obtained by torture,[31] indicating that the Court is more willing to interfere where the matter is so flagrant as to shock its collective conscience, than to interfere when it is merely a matter of procedure or discretion, like granting a continuance. But it would seem that due process of law is not any the more denied in these flagrant cases than it is through the use of the unbridled discretion of a trial judge in denying a motion of continuance, if such a denial in fact does preclude the possibility of preparing a case for trial. Perhaps a distinction will not be drawn on such a basis as this. Perhaps the only guide to the action of the Court is that it will interfere when it feels that the defendant is not being dealt with in a fair manner by the state courts. To leave this question with such an unsatisfactory answer creates a sense of incompleteness that is disturbing. Yet at the present writing, nothing more definite can be offered.

Whether this trend of the federal courts to extend their surveillance over state criminal procedure is considered favorably or not depends upon one's particular viewpoint. There is little doubt but that it is an opening wedge in the direction of a greater subduing of state's rights in favor of national rights. Yet on the other hand, it is a step toward a guarantee of greater safety to a defendant who finds that his trial is being conducted in such a hotbed of adverse prejudice that his possibilities of a fair trial are negligible, whether he be guilty or innocent.

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[27] 306 U. S. 354 at 358, 59 S. Ct. 536 (1939).

[28] (U. S. 1940) 60 S. Ct. 472.

[29] Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55 (1932).

[30] Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579 (1935); Pierre v. Louisiana, 306 U. S. 354, 59 S. Ct. 536 (1939).

[31] Chambers v. Florida, (U. S. 1940) 60 S. Ct. 472.