

**In the Matter of the Application of  
HSU DENG SHUNG and HSU DANG BOO  
for a Writ of Habeas Corpus**

Civil Action No. 575

Trial Division of the High Court

Palau District

June 19, 1972

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Application for writ of habeas corpus. The Trial Division of the High Court, Harold W. Burnett, Chief Justice, held that the application would be refused where orderly procedures, including the right to appeal, were present.

**1. Habeas Corpus—Availability of Writ**

Application for writ of habeas corpus would be refused where orderly procedures, including the right to appeal, were present. (9 T.T.C. § 101)

**2. Habeas Corpus—Availability of Writ**

A challenge to the constitutionality of a statute can best be determined by full orderly appellate consideration, not by a petition for a writ of habeas corpus. (9 T.T.C. § 101)

**BURNETT, *Chief Justice***

Defendants herein were convicted in the Trial Division of the High Court, sitting in Palau, of two counts of unlawful entry and unlawful entry of a vessel, and one count of unlawful removal of marine resources. They have filed this application for writ of habeas corpus in lieu of an appeal from that judgment, based upon the contention that their conviction and current restraint of liberty result from the reception of unconstitutionally obtained evidence.

The writ is before me for determination pursuant to 9 T.T.C. 101. Section 104 of that title requires issuance of an order to show cause why the writ should not be granted, "unless it appears from the application that the person detained is not entitled thereto." I have determined that the writ should not issue, and deny the application.

[1] Initially I conclude that while the writ may be available in a proper case at any subsequent time, it should not be utilized in lieu of the orderly procedures provided, which include appellate consideration.

This principle is well established with respect to the power of a federal court to grant the writ to an applicant who has been convicted in a state court.

“Although we hold that the jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings, we recognize a limited discretion in the federal judge to deny relief to an applicant under certain circumstances. Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, ‘dispose of the matter as law and justice require,’ 28 U.S.C. Sec. 2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 573, 73 S.Ct. 391, 397, 97 L.Ed. 549 (dissenting opinion). Among them is the principle that a suitor’s conduct in relation to the matter at hand may disentitle him to the relief he seeks. Narrowly circumscribed, in conformity to the historical role of the writ of habeas corpus as an effective and imperative remedy for detentions contrary to fundamental law, the principle is unexceptionable. We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.” *Fay v. Noia*, 83 S.Ct. 822.

The same conclusion has been reached with respect to federal prisoners in *Kaufman v. United States*, 89 S.Ct. 1068, which dealt with a request for post conviction relief under Title 28, U.S.C.A. 2255. The court there held, that while a federal prisoner would not be barred by a finding that the constitutional issue had been already dealt with by the district court and the court of appeals, that in a proper case relief could be denied one who had deliberately

bypassed the orderly federal procedures provided at or before trial, and by way of appeal.

Both *Kaufman* and *Fay* had to do with situations in which appellate relief was no longer available to the applicant. I find no case in either state or federal courts in which immediate access to habeas corpus was allowed in lieu of appeal, while the right to appeal was still present.

As a further consideration, I note from the record of hearing that the search warrant which the applicants challenge was quashed by the trial court. While there appears, among the government exhibits, a list of properties seized under the search warrant, it is noted "for identification" only, and does not appear to have been received in evidence.

The application seeks also to have declared unconstitutional the authorization contained in Section 104, Title 19, Trust Territory Code, for the boarding of an unlicensed vessel found within the territorial waters, its inspection and search. The same authority is found, in Section 105 of that title, to board and examine any "hovering vessel." A hovering vessel is defined by Section 101 as an unlicensed vessel which is either "found or kept off any island, islet, atoll, or reef of the Trust Territory, within the territorial waters of the Trust Territory, if, from the history, conduct, character, or location of the vessel, it is reasonable to believe that such vessel is being used or may be used to violate any of the provisions of this Chapter or any law or regulation of the Trust Territory."

[2] A challenge to the constitutionality of a statute of the Trust Territory can best be determined by full orderly appellate consideration.

The application is therefore denied.

In consideration of delays incident to consideration of this application, time for appeal from judgment of convic-

tion in Palau High Court Criminal Case No. 430, is extended to July 15, 1972.