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02-26-1974 Preliminary Memorandum

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***A response has been filed by the State of Virginia. Petr has been given an opportunity under the USDC order in question here to proceed in state habeas on the claim referred by USDC. Petr refused to proceed, desiring to await this Court's determination in this appeal.

The State contends that petr's claim has never been fairly presented to the state courts. Sharp was decided after petr filed his appeal contesting the validity of the statutory presumption. Thus, there has not been a fair opportunity for the state to consider petr's claim. Citing Picard v. Connor, 404 U.S. 270 (1971). I don't think Picard is controlling. There, the Court said: "[I]t is not sufficient merely that the federal habeas applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies."

✓ It seems to me that petr did present the exact claim upon which he seeks relief in federal court to the state court. ✓ Thus, Roberts v. LaVallee is controlling. It is likely anyway that resort to state courts would make no difference ~~////~~ since the Va Sup Ct has summarily denied writs of petition on claims similar to petr's, despite the Sharp case.

I think the Court ought to summarily reverse on the authority of Roberts.

JJK 2/26/74