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William L. Mills Jr.

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Habeas Corpus—Right of State Prisoner to Seek Writ in Federal Courts

When a North Carolina prisoner, during the course of his trial, raises a constitutional question based on denial of due process, it is well established that this question may be presented to the state supreme court on appeal.¹ Upon failure to raise the question during the trial, he may, by timely motion, move for a new trial² at which time the question may be raised. Only until recently, however, was there a "judicial intimation" of the procedure which he should follow once he failed to make such timely motion. This suggestion by the court was to petition for a writ of error *coram nobis*.³ The uncertainty encompassing the propriety of this petition has since been removed,⁴ and an old common law writ of procedure has been revived, through which such questions may now reach the state's highest court. But if relief is denied there, then what?

It is settled law that state prisoners must exhaust their state remedies before petitioning the federal courts for a writ of habeas corpus, based upon a question of due process; and where more than one procedural remedy is available in the state court, only one need be exhausted before relief is sought in the federal courts.⁵ What constitutes an exhaustion of one's state remedies, however, has not been so clear.

In *Ex parte Hawk*⁶ it was held that the state remedy included an application for a writ of certiorari to the Supreme Court of the United States, and that *ordinarily* a petition for a writ of habeas corpus would not be entertained by the lower federal courts until all the state remedies had been exhausted. The Judicial Conference of Senior Circuit Judges later proposed a statute, which since has been enacted into law,⁷ in which the Conference intended to incorporate this doctrine.⁸ Actually the Conference intended that the statute should close the doors of the

¹ N. C. GEN. STAT. §15-180 (1943).

² N. C. GEN. STAT. §§15-174, 1-207 (1943).

³ *In re Taylor*, 229 N. C. 297, 49 S. E. 2d 749 (1948), Note, 27 N. C. L. REV. 254 (1949).

⁴ *State v. Daniels*, 231 N. C. 17, 56 S. E. 2d 2 (1949) (application must be made to the supreme court for permission to apply for writ in the superior court in which case was tried); *State v. Daniels*, 231 N. C. 341, 56 S. E. 2d 646 (1949) (petition must present prima facie substantial merit sufficient to bring it within purview of writ); *State v. Daniels*, 232 N. C. 196, 59 S. E. 2d 430 (1950) (petition must be based on matters "extraneous to the record").

⁵ *Wade v. Mayo*, 334 U. S. 672 (1947); see *Application of Middlebrooks*, 88 F. Supp. 943 (S. D. Cal. 1950) (where prisoner is in custody of one state for extradition to another, he need exhaust only the remedies of one state).

⁶ 321 U. S. 114 (1944); accord, *White v. Ragen*, 324 U. S. 760 (1945).

⁷ 62 STAT. 967 (1948), 28 U. S. C. §2254 (Supp. 1949) (Reviser's note—"This new section is declaratory of existing law as affirmed by the Supreme Court.").

⁸ See *Parker, Limiting the Abuse of Habeas Corpus*, 8 F. R. D. 171, 177 (1948) ("One of the incidents of the state remedy is right to apply to the Supreme Court for certiorari."); accord, *Holiday v. Maryland*, 177 F. 2d 844 (4th Cir. 1949).

lower federal courts in all cases to state prisoners petitioning for a writ of habeas corpus based on denial of due process,⁹ until the state remedies had been exhausted,¹⁰ except in cases where no adequate state remedy was available. Eleven days prior to the passage of this statute the Court, in *Wade v. Mayo*,¹¹ handed down a decision contrary to its holding in *Ex parte Hawk*, indicating that a petition for certiorari from the judgment in the state court would no longer be a prerequisite to the filing of an application for habeas corpus in the federal district court.¹² But recently in *Darr v. Burford*,¹³ the Court, when faced with the new statute for the first time, interpreted it as requiring an application for certiorari to the Supreme Court before a prisoner may petition a lower federal court,¹⁴ except in cases of "exceptional circumstances."¹⁵ Although *Wade v. Mayo* was not overruled, the majority opinion made it clear that any deviation in the *Wade* case from the now established rule was to be abandoned.

Thus it seems that a state prisoner seeking a writ of habeas corpus in the federal courts, must first petition the Supreme Court for a writ of certiorari.^{16a} But where does the prisoner stand when the Supreme

⁹ 28 U. S. C. C. S. 1684 (1948); see Parker, *supra* note 7, at 178 ("... there should be no more cases where proceedings of state courts, affirmed by the highest courts of the state, with denial of certiorari by the Supreme Court of the United States, will be reviewed by federal circuit or district judges.")

¹⁰ 62 STAT. 967 (1948), 28 U. S. C. §2254 (Supp. 1949) provides that a prisoner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented."

¹¹ 334 U. S. 672 (1948).

¹² *Wade v. Mayo*, 334 U. S. 672, 681 (1948) ("Where it is apparent or even possible that such [denial] would be the disposition of a petition for certiorari from the state court's judgment, failure to file a petition should not prejudice the right to file a habeas corpus application in a district court."); *accord*, Miller v. Hudspeth, 176 F. 2d 111 (10th Cir. 1949) (The court here says that an analysis of *Wade v. Mayo* leads to the conclusion that a petition for writ of certiorari to the Supreme Court is not part of the state remedy and that 28 U. S. C. §2254 does not contain anything which would require a different decision.)

¹³ 70 Sup. Ct. 587 (1950).

¹⁴ *Darr v. Burford*, 70 Sup. Ct. 587, 594 (1950). The court says that it is immaterial as a matter of terminology whether review in the Supreme Court is considered a part of the state judicial process or a part of the federal procedure.

¹⁵ See *White v. Ragen*, 324 U. S. 760 (1945) (conviction obtained by false testimony, and prisoner denied assistance of counsel); *Chambers v. Florida*, 309 U. S. 227 (1940) (confession obtained by coercion); *Brown v. Mississippi*, 297 U. S. 278 (1936) (confession obtained by coercion and brutality); *Moore v. Dempsey*, 261 U. S. 86 (1923) (trial conducted under influence of mob violence); *Sharpe v. Kentucky*, 135 F. 2d 974 (6th Cir. 1943) (death sentence had been imposed); *Murphy v. Murphy*, 108 F. 2d 861 (2nd Cir. 1940) (Court says, "Exceptional circumstances of peculiar urgency" alone can justify intervention" of a federal district court.); *but cf.* *Frank v. Mangum*, 237 U. S. 309 (1915) (trial conducted under influence of mob violence, but second trial conducted under different conditions and circumstances).

^{16a} Of course the prisoner may appeal as a matter of right where the question involves the validity of a treaty or statute of the United States and the decision is against its validity, or where the question involves the validity of a state statute on the grounds that it is repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity. 62 STAT. 929 (1948), 28 U. S. C. §1257 (Supp. 1949).

Court denies his writ? In *Darr v. Burford* the court refused to answer this question.¹⁶

It is universally recognized that *res judicata* does not apply to applications for writs of habeas corpus;¹⁷ yet, upon filing a petition in the district court for a writ of habeas corpus the record undoubtedly will reveal the prior denial of certiorari by the Supreme Court, and the district court might well refuse to entertain the petition in the absence of a new basis for relief. Should the petitioner find additional grounds for his claim, it would then be mandatory that he start over in the state courts, for he would not have exhausted his state remedies.¹⁸ This procedural circle would therefore in effect, negative the habeas corpus jurisdiction which the federal courts have had since 1867,¹⁹ and leave the prisoner in somewhat of a dilemma.

The argument favoring inclusion of a petition for a writ of certiorari from the final state judgment in the "state remedy" is based on the preservation and amelioration of the doctrine of comity, which, as between the state and federal courts, has become "a principle of right and of law."²⁰ Those who would abolish certiorari as part of the "state remedy," including the dissenters in *Darr v. Burford*, contend that the final result of a denial of certiorari by the Supreme Court must be one of two unsatisfactory alternatives: either (1) the Supreme Court must consider the case as if it had granted the request for certiorari, and its decision be based on the merits of the case; or (2) the denial, as in other cases, would have no legal significance.²¹ It is readily apparent that under the first alternative the work load of the Supreme Court would become so burdensome that this alone makes such a procedure prohibitive.²² Whereas, under the second alternative the result would

¹⁶ *Darr v. Burford*, 70 Sup. Ct. 587, 595 (1950).

¹⁷ *Darr v. Burford*, 70 Sup. Ct. 587 (1950); *Salinger v. Loisel*, 265 U. S. 224 (1923); *Rosso v. Aderhold*, 67 F. 2d 315 (5th Cir. 1933); *Carter v. McClaughry*, 105 F. 614 (C. C. D. Ka. 1900).

¹⁸ *Stonebreaker v. Smyth*, 163 F. 2d 498 (4th Cir. 1947), Note, 26 N. C. L. REV. 217 (1948).

¹⁹ 14 STAT. 385 c. XXVIII (1867), now incorporated into 62 STAT. 964 (1948), 28 U. S. C. §2241 (Supp. 1949), as amended, 63 STAT. 105 (1949), 28 U. S. C. §2241 (Supp. 1950).

²⁰ See *Covell v. Heyman*, 111 U. S. 176, 182 (1884).

²¹ *Darr v. Burford*, 70 Sup. Ct. 587, 607 (1950) (dissenting opinion).

²² See *Parker*, *supra* note 7, at 172. "Statistics compiled by the Administrative Office of the United States Courts show that in the years 1943, 1944, and 1945, there were filed in the lower federal courts 1556 petitions by federal prisoners and 1570 by state prisoners." 18 U. S. L. WEEK 3019 (July 5, 1949) and 3345 (June 20, 1950) gives the following statistical summary of the Supreme Court's work for the period 1946-1949:

October Term	1946	1947	1948	1949
Total cases	1524	891	903	880
Cases disposed of	1366	772	748	757
Cases remaining	158	119	155	123

seem to amount to an unnecessary procedural delay caused by an absurd prerequisite.

Yet, perhaps it is best that the Supreme Court be given the opportunity in every case to review the record on these important questions of due process which so often involve fundamental rights. But, since a denial of certiorari simply means that fewer than four members of the court deemed it desirable to review a decision of a lower court, and in no way is an adjudication on the merits,²³ the discretionary power of the lower federal courts to entertain petitions for writs of habeas corpus should not be disturbed. By keeping the doors of the lower federal courts open the chances of injustice are thereby reduced to a minimum. Therefore, if a state prisoner believes his case still has merit after certiorari has been denied, he should not hesitate to petition the lower federal courts for a writ of habeas corpus. But, if in the meantime, new evidence has been discovered, then it would be advisable for him to first seek a determination of the question in the state court as suggested in *Stonebreaker v. Smyth*.²⁴

Thus, it would seem, that if this procedure is left open for a state prisoner to follow, not only will the doctrine of comity be promoted, but also the benefits of the "great writ" will be preserved.

WILLIAM L. MILLS, JR.

Limitation of Actions—Effect of Part Payment of Principal or Interest on Non-Paying Obligor

In North Carolina a part payment by one of a number jointly or jointly and severally bound, will start the statute of limitations running anew as to all others of the same class,¹ but if the payment is made after the remedy is barred it will not bind those not making the pay-

²³ *Agoston v. Pennsylvania*, 71 Sup. Ct. 9 (1950); *Maryland v. Baltimore Radio Show*, 338 U. S. 912, 917 (1950) (denial of certiorari means "that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter 'of sound judicial discretion.' . . . The court has said this again, and again; again and again the admonition has to be repeated.").

²⁴ 163 F. 2d 498 (4th Cir. 1947).

¹ *Davis v. Alexander*, 207 N. C. 417, 177 S. E. 417 (1934) (payment by maker); *Dillard v. Farmer's Mercantile Co.*, 190 N. C. 225, 129 S. E. 598 (1925) (part payment by maker); *Barber v. Absher Co.*, 175 N. C. 602, 96 S. E. 43 (1918) (part payment by maker); *Houser v. Fayssoux*, 168 N. C. 1, 83 S. E. 692 (1914) (part payment by principal); *Garrett v. Reeves*, 125 N. C. 529, 34 S. E. 636 (1899) (part payment by principal); *Copeland v. Collins*, 122 N. C. 619, 30 S. E. 315 (1898) (part payment by maker); *Le Duc v. Butler*, 112 N. C. 458, 17 S. E. 428 (1893); *Moore v. Beaman*, 111 N. C. 328, 16 S. E. 177 (1892) (part payment by one obligor); *Moore v. Goodwin*, 109 N. C. 218, 13 S. E. 772 (1891) (part payment by principal); *Green v. Greensboro College*, 83 N. C. 449 (1880) (payment of interest by principal). See also *McINTOSH*, NORTH CAROLINA PRACTICE AND PROCEDURE §134 (1929).