ADOPTION—RELIGIOUS FAITH OF ADOPTING PARENTS AS A BAR TO ADOPTION

Plaintiffs, Presbyterians, petitioned to adopt twin children approximately five months old who were baptized Roman Catholics, with the intention of raising the children as Presbyterians. Lower courts denied petition because of religious differences. Illinois Supreme Court reversed and remanded holding statute is discretionary and religious differences do not *per se* bar adoption. Religious faith of adopting parents is a factor for consideration, but primary importance is to be given to the best interests of the children. *Cooper v. Hinrichs*, 10 Ill. 2d 269, 140 N.E. 2d 293 (1957).

From the standpoint of the child's future[1] and the significance to society,[2] the importance of proper adoption is apparent; therefore the problem of differences in religion between the adopting parents and the child merits careful consideration. The number of states with statutes on the subject indicates a legislative acceptance of the general public's desire to have religious influences respected in adoption proceedings.[3] Nevertheless, courts have differed in their determination of the emphasis to be given to these statutes and this divergence may not be completely attributable to the varied language of the statutes. The issue may be phrased: when there is a difference in religion between the child and the couple desiring to adopt, is it permissible under these statutes to allow adoption? This issue necessitates determining whether the legislation requires that religious dissimilarity alone should be conclusive. Consequently, involved here are typical questions of statutory interpretation: legislative intent, purpose of legislation, reasonableness ascribed to the legislature or the manipulative nexus the court might choose, i.e., the child's welfare.[4]

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[1] ". . . There is a substantial and growing body of evidence, all of which points to the desirability of placing a child in a permanent home as early, chronologically, as possible . . . the lack of attention, stimulation and stable relationships with one dependable person seems to be harmful to intellectual and personality development." Martire and McCandless, *Psychological Aspects of Adoption Process*, 40 IOWA L.R. 350, 359 (1955).

[2] "Its importance may be traced directly to sound public policy in providing a home for the homeless child and a child for the childless couple, as well as relieving natural parents of responsibilities they are unable to meet and the community oft he burden of caring for the child." Taft, Robert, Jr., *Some Problems Under the Adoption Law of Ohio*, 13 OHIO STATE L.J. 48 (1952).

[3] Note, *Religion as a Factor in Adoption, Guardianship and Custody*, 54 COL. L.R. 376 (1954), contains an exhaustive listing of pertinent state statutes and comprehensive discussion of the problem in this area.

[4] "Modern social science, especially with the growth of child psychology, provides the courts with tools enabling them to make the decision in the child's best interests . . . The existence of scientific methods whereby it may be determined rationally what is in the child's best interests militates in favor of increased and intensive judicial effort to insure the most desirable future for any child who

The Illinois Statute provides: "The court in entering a decree of adoption shall, whenever possible, give custody through adoption to a petitioner or petitioners of the same religious belief as that of the child."[5] The principal case clearly enunciates a discretionary interpretation of this type statute. The theme of this decision accents the overall best interests of the child to the extent that it would permit adoption even with the clearly expressed intention of raising the child in a different faith. This interpretation indicates that the statute requires religion to be considered along with other factors; religion alone is not determinative.

The adoption statutes of two states[6] are express on the matter of religious affiliation; adoption is only permitted where the faiths are the same. However, other states with statutes similar in tenor to the Illinois statute have followed a mandatory interpretation. In construing their then new statute,[7] the Supreme Judicial Court of Massachusetts, in *Petition of Gally*,[8] held that the court was "bound to give controlling effect to identity of religious faith when practicable, but not otherwise," as there was no intent that identity of religion should be the sole or necessarily the principal consideration. Later Massachusetts opinions distinguished the *Gally* case *e.g.*, the court denied adoption by members of a different religious faith where evidence was presented of adoption applications by members of the same faith.[9] In the widely publicized case of *Ellis v. McCoy*,[10] the Massachusetts court permitted the child's mother to withdraw her consent to the adoption. In the latter case the court recognized the statute as establishing the weight of the religious factor on the merits of the natural mother's request to withdraw consent. The child was then about two years old and had been in the Ellis' possession since shortly after birth.

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is unfortunate enough to have his fate left to a court." *Id.* at 395.

It is suggested in a parallel problem that, "When custody is contested, a social study should be mandatory to enable the court to have adequate information for determining which, if either, parent should be granted custody or whether it should be given to another person or agency." Sheridan, *The Family Court*, CHILDREN, Vol. 4, No. 267, 70 (March-April 1957).

[5] Ill. Rev. Stat. 1953 c. 4 ss 4-2.

[6] DEL. CODE ANN. Tit. 13, s. 911 (1953): Religious Affiliations: "No child born out of wedlock shall be placed for adoption unless at least one of the prospective adopting parents shall be of the same religion as the natural mother, or of the religion in which she has reared the child or allowed it to be reared . . ." Nevertheless, this section further provides that the mother can execute a notarized statement specifying religion in which it is desired the child be reared or that the mother is indifferent to this matter. Also, R. I. PUB. LAWS c. 1772, s. 1 (1496) amending P.L. (1944) c. 1441, s. 26.

[7] MASS. ANN. LAWS c. 210, s 5B (1954): "In making orders for adoption the judge when practicable must give custody only to persons of the same religious faith as that of the child. In the event that there is a dispute as to religion of

A mandatory construction[11] of their pertinent statutes[12] has been pursued by the courts of New York.[13] The case of *In re Santos*[14] was widely noted when the New York Court honored the natural mother's objection even though the children had been raised in the other religion for approximately four years and the mother had apparently originally agreed to such upbringing.

In general, it would appear that the pertinent statutory language does not require a construction that the faith of the child and the adopting parents always be the same. First, permissive words are employed, *e.g.*, "whenever possible," or "whenever practicable." Second, remembering that adoption is purely a statutory procedure it would be essential for the legislature to set forth factors to be considered in decreeing an adoption. In view of these facts it is highly likely that "the purpose behind the passage of the religious clause is to assure that religion will be rendered proper consideration in adoption proceedings."[15]

The necessity of a discretionary construction of such a statute appears from the widely divergent possibilities that may arise. That a great many of the states' adoption laws provide for investigation of the prospective adopting parents' home and a report by welfare agencies with a recommendation to the court in itself indicates that this is a situation fraught with variables and an intention to promote the welfare of the

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said child, its religion shall be deemed to be that of its mother. . . ."

[8] Petition of Gally, 329 Mass. 143, 107 N.E. 2d 21 (1952). Child's mother consented to the adoption and did not object to the change in religion.

[9] Petition of Goldman, 331 Mass. 647, 121 N.E. 2d 843 (1954); cert. denied, 348 U.S. 942 (1955).

[10] Ellis v. McCoy, 332 Mass. 254, 124 N.E. 2d 266 (1955); Ellis v. Doherty (same case but pertains to disregard of order in Ellis v. McCoy), ___ Mass. ___, 136 N.E. 2d 203 (1956). The Ellis family disregarded the court order and kept the child. They moved to Florida where a court recently permitted adoption. N.Y. Times, July 11, 1957, p. 52, col. 1.

[11] In re Adoption of Anonymous, 88 N.Y.S. 829 (1949); Adoption of Anonymous, 137 N.Y.S. 2d 720 (1955).

[12] N.Y. DOMESTIC RELATIONS LAW § 113: ". . . In making orders of adoption the judge . . . when practicable must give custody only to persons of the same religious faith as that of the child in accordance with Art VI of Social Welfare Law."

N. Y. SOCIAL WELFARE LAW §373, sub. 4: "The provisions of subdivisions 1, 2, 3, of this section shall be so interpreted as to assure that in the care, protection, adoption, guardianship, discipline and control of any child, its religious faith shall be preserved and protected."

[13] *Cf.* Martin v. Martin, 308 N.Y. 136, 123 N.E. 2d 812 (1954). Mother granted separation and custody of child on condition child be raised as Roman Catholic in accordance with an antenuptial agreement. Judgment modified to permit child to attend church of his choice and to transfer from parochial school to public school on basis of referee's finding that this was necessary for the boy's welfare.

[14] In re Santos, 105 N.Y.S. 2d 716 (1951).

[15] Note, *Religious Factors in Adoption,* 28 IND. L.J. 401, 406 (1953).

child. Individual situations varying according to the child's age, environmental background, and faith are manifestly apparent. Where the child has received religious indoctrination, it might well be inadvisable to permit adoption by members of a different faith on the ground of best interest of the child, for to do otherwise might create conflict and confusion in the child. But, where no religious training has been received (perhaps because the child is too young to understand and appreciate its significance) it would seem tenuous to say a court can only permit adoption by people of the same faith. In a situation where the natural parent favors the adoption by the members of the different religion, the court has another factor to consider.

In the instant case the natural father of the children is Lutheran and their three older children were baptized Lutheran. The natural father consented to the adoption, but the natural mother did not. There was conflicting evidence as to whether the natural mother was in fact a Catholic (although the twins were baptized Catholic) and on her fitness as a mother. Were it not for the baptism of the twins it would be difficult to determine their religion because of the divergent faiths[16] of the parents. As the Illinois statute speaks of adoption by a petitioner of the same religious belief as that "of the child" it may well be asked whether the child has a religious belief. It is apparent in this instance that the court considers the baptism of the twins as establishing the children's religious belief. Here again is a variable in the adoption problem. In some faiths the baptism establishes the child's religion; in others, the child's faith is considered to be that of the natural parents until the child is himself able to accept the church's doctrine.[17]

In parallel situations courts have emphasized the child's welfare. In *Kuntz v. Stackhouse*[18] the trial court recognized that no statute required that a child's custody be given to a member of the same religion as the child and found the requirement by analogy to the requirement of the adoption law. The upper court reversed, holding that paramount consideration in cases of this nature is at all times the welfare of the child, which includes its physical, intellectual, moral and spiritual well-being, and that religion is not a determining factor. Other cases[19] varying from the instant case because of the type of action (custody or guardianship) or intent to raise the child in its own faith, nevertheless

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[16] St. George's Adoption, 45 Pa. D. & C. 387 (1942). Not possible to have an adoption by members of the same faith as the parents because although the petitioner's faith was the same as the natural mother's; the natural father was of another faith. Adoption permitted.

[17] Note, 65 HARV. L. REV. 694, 695 (1952).

[18] Commonwealth of Pa. *ex rel* Kuntz v. Stackhouse, 176 Pa. Super 361, 108 A. 2d 73, (1954). Commonwealth of Pa. *ex rel* Donie v. Ferree, 175 Pa. Super. 586, 106 A. 2d 681 (1954).

[19] In re Butcher's Estate, 266 Pa. 479, 109 A. 683 (1920). Guardianship.

emphasizes the child's welfare over and above the question of religion alone. From an Ohio standpoint, emphasis is placed on the best interests of the child by statute.[20]

Even the dissent in the instant case agrees that the court has discretion, but finds in the record a disregard of the statute by the probation officer and that there were qualified families of the same faith available to adopt the children. The dissent feels that the trial court was therefore within its discretion in dismissing the petition. Under the majority position it would seem that these matters would be considered by the lower courts along with religion in finding what will be best for the child.

In summary, from the standpoint of the person most to be affected by such a decision, the adoptee, it would seem that where the statute is not explicit the court should exercise its discretion.

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Paternal grandfather indicated willingness to raise children in their faith. In re McKenzie, 197 Minn. 234, 266 N.W. 746 (1936). Petitioners had child for three years and agreed to raise child in its faith.

[20] OHIO REV. CODE (1953) §3107.09: ". . . If after hearing the court is satisfied . . . that the petitioner is suitably qualified to care for and rear the child, and that the best interests of the child will be promoted by the adoption . . ." OHIO REV. CODE (1953) §3107.05 (E) Provides for the inclusion in the investigation report of "The suitability of the adoption of the child by the petitioner, taking into account their respective racial, religious, and cultural backgrounds, and the child's own attitude toward the adoption in any case in which the child's age makes this feasible." Also, OHIO REV. CODE (1953) §3107.11.

CONSTITUTIONAL LAW—CONGRESSIONAL PRE-EMPTION OF THE FIELD OF SEDITION—CONCURRENT JURISDICTION OF FEDERAL AND STATE STATUTES

Defendant was convicted of violating the Pennsylvania Sedition Act. After affirmance by the Superior Court, and reversal by the Pennsylvania Supreme Court, the State of Pennsylvania was granted certiorari. The United States Supreme Court, considering only the narrow issue of supersedure, found that the Smith Act superseded the Pennsylvania Sedition Act. Decision was based upon three factors: (a) evident congressional intent to pre-empt the field of anti-sedition legislation, (b) predominant federal interest in the field of sedition, (c) the danger of conflict between the enforcement of state and of federal anti-sedition programs. *Pennsylvania v. Nelson*, 350 U. S. 497 (1956); reh. den. 351 U.S. 934 (1957).

Under the division of power between Nation and State as effected by the Constitution of the United States, some matters are within the exclusive jurisdiction of Congress.[1] Whether or not, therefore, Con-

[1] See Halter v. Nebraska, 205 U.S. 34, 42 (1907), (control over the flag of the United States); Gilbert v. Minnesota, 254 U.S. 325, 331 (1920), (the power

gress acts, the States have no power to legislate. Issues of supersedure arise where a state may act in the absence of any occupation of the field by the Congress, which by the Supremacy Clause of Article VI has the ultimate, paramount authority to act.[2] Whether in these situations Congress has intended to supersede State action is thus the controlling question.[3] In a few cases Congressional desire can be determined by referral to express provisions in the federal statute;[4] but more commonly the question must be resolved by resorting to less conclusive means for ascertaining the will of Congress.[5]

The Supreme Court of the United States resolves the problems arising from legislative competition of this type by invoking one of two doctrines of statutory interpretation. These are *conflict* and *pre-emption.* In *conflict* the Court looks to the substantive content of the enactments finding the state act to be inoperative only if there is direct conflict between it and the purposes and objectives of the federal statute.[6] Under this doctrine either the terms of the statutes are contradictory, or compliance with one act would constitute a violation of the other. The problem which usually confronts the courts is determining "degree," for black and white cases are the exception rather than the rule. In *pre-emption* the Court compares the state statute with the federal legislation touching upon the same subject in the light of pre-determined judicial criteria, or yardsticks.[7] Under this doctrine the federal legislation is considered from its four corners, taking into account its content, objectives, legislative history, and its effectiveness.[8] If the state statute falls within the scope of any one of the prescribed criteria, as determined by the federal legislation, it must be declared inoperative.[9]

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to raise and maintain armies); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 320 (1952), (the right to regulate commerce).

[2] U.S. Const., Art. VI, cl. 2.

[3] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824); U.S. v. Mayo, 47 F. Supp. 552 (D.C. Fla. 1942), Aff'd., 319 U.S. 441, 445 (1943).

[4] See Sinnot v. Davenport, 63 U.S. (22 How. 1859) 227, 243; McDermott v. Wisconsin, 228 U.S. 115, 132 (1913); Southern Ry. v. Reid, 222 U.S. 424 (1912).

[5] Hines v. Davidowitz, 312 U. S. 52, 67 (1941); Hill v. Florida *ex rel.* Watson, 325 U.S. 538, 542 (1945); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 167 (1942).

[6] See *supra* note 4.

[7] See Rice v. Santa Fe Elevator Co., 331 U.S. 218, 230 (1947). Compare Napier v. Atl. Coastline R.R., 272 U.S. 605, 612 (1926) with Terminal Ass'n. v. Trainmen, 318 U.S. 1, 7 (1943). The former holds that the physical circumstances should be considered, regardless of the ends sought, while the latter differentiates state and federal acts by the somewhat vague and frequently overlapping ends of "safety" and "health."

[8] See Rice v. Santa Fe Elevator Co., *supra* note 7.

[9] *Id.* (warehousing licensing); Hines v. Davidowitz (alien registration), *supra* note 5; International Shoe Co. v. Pinkus (Bankruptcy proceedings), 278 U.S. 261 (1926).

Both the majority and the dissenting justices in the *Nelson* case approached the problem through use of pre-emption doctrines. There seems to be no apparent explanation of the reasons why one court will resort to a conflict doctrine and another, e.g. *Nelson*, will decide the case in terms of pre-emption. Perhaps the answer lies in the clarity and directness of the terms of the statutes; the more obvious the fact pattern, the more prone the courts are to resolve the issues in terms of conflict.[10] The majority based their findings upon the tests of pre-emption articulated by the U. S. Supreme Court in the case of *Rice v. Santa Fe Elevator Corp*,[11] wherein the Court found the necessity for strict uniformity in the area of warehouse licensing. The principal criteria recognized in the *Rice* decision are: (1) *pervasiveness of federal regulations*—calling for strict uniformity and pre-emption of concurrent state acts; this criterion should be considered satisfied only upon judicial determination that the legislature, after thorough study of the breadth of the problem has exhaustively treated the area; (2) *dominant federal interest*—resulting in statutes that are inseparable from the responsibilities of the national government; (3) *duplication of purpose*—creating independent state and federal legislation to accomplish the same ends or operate upon the same object; (4) *inconsistency of result*—caused by the interference with, or execution of, the federal act by operation of the state statute.

In the light of the *Rice* criteria the majority's reasoning in the *Nelson* case appears to have little merit. The majority's finding of an "evident purpose to pre-empt" seems short of the "pervasiveness" required in *Rice*. It seems to be stretching to an extreme the power of an inference, to find that the existence of two statutes, the Internal Security Act of 1950[12] and the Communist Control Act of 1954,[13] enacted from ten to fifteen years after the Smith Act,[14] and related solely to the narrow scope of "Communist" activities (in comparison with the breadth of sedition),[15] should satisfy the requiste "clear and direct" expression of congressional intent to place all control of sedition in the hands of

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[10] Compare the cases cited in note 4, *supra* with those cited in note 5, *supra*.

[11] See *supra* note 7.

[12] 50 U.S.C.A. §§781-798.

[13] 50 U.S.C.A. §841.

[14] 54 STAT. 670, as amended in 1948, 18 U.S.C.A. §2385. This statute was enacted in 1940, and is formally known as the Alien Registration Act. It established a national criminal policy which proscribes the advocacy of the overthrow of any United States government (local, state, or federal) by force and violence.

[15] The crime of sedition does not require any overt act of violence, or actual arising against the government. It is sufficient that an act of advocacy is likely to incite. This distinguishes Sedition from Rebellion or Insurrection. See GELLHORN, THE STATES AND SUBVERSION, Appendix A, 396-7 (1952).

[16] Fox v. Ohio, 46 U.S. (5 How.) 410 (1847). Cf. Gilbert v. Minnesota, 254 U.S. 325, 331 (1920).

federal authority.[16] This doubt is strengthened when considered with the fact that when the Smith Act was amended, eight years after its adoption, no expression of dominant federal responsibility was suggested,[17] although by that date there had already been a pronounced movement by the individual states to enact their own sedition laws.[18] This reasoning applies with equal effect to the majority's finding of "predominant federal interest" as the result of the supposed similarity of purpose between the Internal Security and Communist Control Acts, on the one hand, and the Smith Act on the other. Although the legislative history of the Smith Act reveals strong national interest in subversion, there were no indications that the Act was intended to exclude state activity.[19] There is even some expert opinion to the effect that federal-state cooperation in controlling subversion would not only be beneficial, but necessary.[20]

The "danger of conflict," which is the majority's third and last reason for upholding pre-emption (not to be confused with the "conflict" theory of supersedure, referred to earlier) is, by its own terms, a simple example of preventative adjudication. The legal history of the Smith Act provides no record of either a past or present conflict with state sedition statutes.[21] Thus, while the *Nelson* decision is framed in terms of *Rice* criteria, and consequently appears valid on its face, its underlying facts raise doubtful questions of the substantiality of the *Nelson* hypothesis, particularly when viewed in the light of the substantive principles upon which the *Rice* criteria were established. The only *Rice* criterion upon which the *Nelson* decision could validly have been predicated is that of "duplication of purpose." However, the Court gives no indication that it had this criterion in mind when it arrived at the decision.

The dissenters, refuting the majority's supersedure argument solely in terms of pre-emption and without any reference to the "conflict" theory, find fault with the majority's attempt to "lead" the Congress. The strength of the dissenting opinion lies in combining the refutation of the majority's weakest grounds, (lack of sufficient criteria for finding either exclusiveness or dominant federal interest, plus an unwillingness, based solely on fear, to permit preventative adjudication) with two of the strongest arguments that can be advanced for concurrent legislation of both state and federal acts (the right of the states to exercise their police power over local criminal matters, and the requirement that

[17] H.R. Rep. No. 2980, 81st Cong. 2d Sess. 225-46 (1950) (The Un-American Activities Comm.).

[18] See Digest of the Public Record of Communism in the United States 266-306 (Fund for the Republic, 1955).

[19] See, Hearings before the Senate Judiciary Committee on H.R. 5138, 76th Cong. 3d Sess., 5-12 (1940); 86 Cong. Rec. 9031-32 (1940).

[20] See New York Times (*Nelson* case), Sept. 15, 1955, p. 19.

[21] Cf., Brief of the Department of Justice, amicus curiae, p. 30-31, cited in the *Nelson* case, 350 U. S. at 518.

Congressional intent be "clear and definite" before existing state legislation is prescribed). Perhaps the most decisive point of the dissenters is one that is of late receiving too little consideration by the Court. They assert that this case should be governed by the "Savings Clause" of Title 18 of the United States Code, in which the Smith Act appears.[22] Prior rulings of the Court interpreting this clause indicate that in the absence of express Congressional intent to the contrary, the states should have the freedom to engage in concurrent legislation.[23] It would seem that the deference normally afforded "express Congressional provisions" by the Court demanded a contrary decision in the instant case, or at least a greater consideration than the majority apparently gave it.

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[22] 18 U.S.C.A. §3231. This Title codifies the federal criminal laws. Section 3231 provides: "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof."

[23] Sexton v. California, 189 U.S. 319, 324-5 (1903).

HABEAS CORPUS—INTERACTION BETWEEN STATE AND FEDERAL COURTS—DENIAL OF CERTIORARI AS RES JUDICATA

Petitioner under sentence of death for causing his 13 year old son to murder petitioner's wife filed identical habeas corpus petitions simultaneously in the California Supreme Court and in the United States District Court for the Northern District of California, Southern Division. The petitions contained general allegations that a material witness had given perjured testimony under coercion from a deputy district attorney. The state court denied the petition without opinion the same day it was filed. Subsequently, the United States Supreme Court refused to grant certiorari, also without filing an opinion.

The District Court, which had been holding the twin petition in abeyance pending exhaustion of the state remedies, promptly dismissed the petition on the ground that the Supreme Court of California had "fully and adequately considered all matters presented to it by petitioner."

The United States Court of Appeals for the Ninth Circuit affirmed by a two to one decision on the grounds that an identical petition had been denied by the state court and that the United States Supreme Court had refused certiorari. This time the United States Supreme Court granted certiorari. *Held: per curiam,* the judgment of the circuit court vacated and remanded to the district court for a hearing on the allegations of the petition. *Simpson v. Teets,* 353 U. S. 926 (1957).

By failing to comment on the circuit court opinion, the United States Supreme Court missed an opportunity to clarify two major points in a field that has been labeled "an untidy area of our law that calls for more systematic consideration than it has thus far received."[1]

[1] Simal v. Large, 332 U.S. 174, 184 (1947).

The primary purpose of a habeas corpus proceeding is to make certain that one who was unable to assert his rights or was unaware of the significance of relevant facts prior to conviction is not unjustly imprisoned.[2] The court is restricted in its function to an examination of the legality of the commitment in light of due process requirements.[3] Federal courts may interfere by habeas corpus with a state in the administration of its criminal law only where fundamental rights particularly secured by the federal constitution are invaded.[4]

Justification for denying petitioner's writ was attempted by the circuit court on two grounds. The first of these is that an identical writ had already been denied by the state court system. The majority position on this point is best summed up by the concurring opinion as follows:

> It would be presumptious for this court to order the district court to take testimony upon the same petition which the highest California court had denied, especially since certiorari to that tribunal was refused by the supreme court of the federal system.[5]

The United States Supreme Court has repeatedly indicated that it is the duty of a federal court to review facts in a habeas corpus proceeding even though a state tribunal has already given them the most careful consideration.[6] The dissent points out that the federal court could have given consideration to the state court's decision had it given "fair consideration to the issues and offered evidence."[7] However, in the present case there was no state court transcript available since petitioner did not receive a hearing on the merits. Since the state court failed to reach the constitutional issue the denial of the writ is not binding on the district court.[8] Further, petitioner is entitled to a hearing on an issue raised for the first time on habeas corpus proceedings where the allegations, if true, would be such as to show a denial of due process of law in the trial at which he was convicted.[9] Where there is no denial of these allegations they must be assumed to be true for the purpose of the hearing.[10] The

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[2] 28 U.S.C. §377, (later incorporated into 28 U.S.C. §1651).

[3] *In re* Metzger, 46 U. S. 176 (1847); Eagles v. U. S., 329 U. S. 304 (1946); Heikkila v. Barber, 345 U.S. 229 (1952).

[4] Rogers v. Peck, 199 U.S. 425 (1905); *Ex parte* Hull, 312 U.S. 546 (1941).

[5] Simpson v. Teets, 239 F. 2d 890, 892 (9th Cir. 1956).

[6] "Whatever anomaly there may be in demanding that a bench of one or more federal judges sitting in review on facts to which a state tribunal has already given the most careful and conscientious consideration, there is no doubt of its duty to do so." U.S. v. Denno, 288 F. 2d 605, (2d Cir. 1953) citing Brown v. Allen, 344 U.S. 443 (1952), and Stein v. New York, 346 U.S. 156 (1952).

[7] Simpson v. Teets, 239 F. 2d 890, 893 (9th Cir. 1956).

[8] Brown v. Allen, 344 U.S. 443 (1952).

[9] Massey v. Moore, 348 U.S. 105 (1954); Price v. Johnston, 334 U.S. 266 (1948); Pyle v. State of Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103 (1935).

[10] Thomas v. Teets, 205 F. 2d 236 (9th Cir. 1953); White v. Ragen, 324

United States Supreme Court has recently held that failure to grant a hearing on a prisoner's allegation of denial of due process is grounds for reversal "no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be."[11]

The circuit court concurring opinion attempts to justify the reliance on the state court's dismissal of the petition even though there was no hearing granted petitioner. It reasoned as follows: the state supreme court was thoroughly familiar with the facts in the case since it had heard petitioner's appeal from his conviction prior to the filing of the habeas corpus petition.[12] At that trial the state court had accepted the testimony, now declared to be perjured, as true. Therefore it merely looked to the original trial record to see if it still thought this testimony to be true. The court still believed the truth of this testimony and therefore dismissed the petition for the writ of habeas corpus as groundless.[13]

This reasoning is subject to two flaws. First, there is nothing to show that the state court even looked into the action in this cursory manner. Since there was no state court record, and the petition was dismissed peremptorily the same day it was filed, the more reasonable inference is that the state court neglected to give the petition even this slight consideration. This would squarely conflict with *Chessman v. Teets*,[14] which held that it is error to dismiss a prisoner's petition summarily where it sets forth a denial of due process.

Assuming that the state court did give this limited consideration to the petition the dissent points out that it still could not justify refusal to grant a hearing on the averments of the petition. The question of coercion by the district attorney was not an issue in the original trial. Obviously, then, no amount of perusal of the trial transcript could determine the truth or falsity of petitioner's charge of denial of due process. The United States Supreme Court long ago pointed out that the question brought forward on habeas corpus is always distinct from that which is involved in the cause itself.[15] Therefore, it is difficult not to accept the reasoning of the dissent which points out that, far from receiving "fair consideration" in the state court, petitioner received no consideration whatsoever.

The second ground advanced by the circuit court is that the refusal of the United States Supreme Court to grant certiorari to the state supreme court indicated approval of the state court's disposition of the

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U.S. 760 (1945); House v. Mayo, 324 U.S. 42 (1945); Moore v. Dempsey, 261 U.S. 86 (1923).

[11] Chessman v. Teets, 353 U. S. 928 (1957).

[12] People v. Simpson, 43 Cal. 2d 553, 275 P. 2d 31 (1954).

[13] Simpson v. Teets, 239 F. 2d 890, 892 (9th Cir. 1956).

[14] 350 U.S. 3 (1955).

[15] *Ex parte* Bollman, 8 U. S. (4 Cranch) 75 (1804).

petition. In spite of the fact that certiorari was denied without opinion, the circuit court held the denial to be entitled to *res judicata.*

The effect to be given a denial of certiorari without opinion by the United States Supreme Court was placed in doubt by *Darr v. Buford.*[16] That decision held that ordinarily certiorari must be invoked in an attempt to secure review of a state court's refusal of relief prior to application for habeas corpus in the federal system. This established the proposition that application for writ of certiorari was essential to exhaust the state remedies. Unfortunately, it also indicated to some courts that a denial of certiorari gave a *res judicata* effect to the state court decision.[17] Subsequently, however, *Brown v. Allen,*[18] firmly established that a prior denial of certiorari could have no meaning whatsoever on a later petition for habeas corpus and must be taken as without prejudice to an application to any other court for the relief sought.[19] The logic of this rule is obvious from the fact that frequently the United States Supreme Court does not have to reach the merits of a case to decide to deny certiorari. Further, where there is no opinion written the lower court has no way of knowing whether or not the court reached the merits of the case.[20] In the absence of any records of the certiorari proceedings, it is difficult to see how the circuit court justified its conclusion that the United States Supreme Court disregarded the matter alleged in the petition before it "apparently owing to the previous complete review of the trial by the state court."[21]

The circuit court not only ran contrary to well established decisions in the field of habeas corpus, but the concurring opinion served to compound the error by attempting to justify the result by rationalization rather than by legal principles.

By vacating the judgment of the circuit court, the United States Supreme Court has prevented a complete circumvention of the purposes of habeas corpus proceedings. To hold otherwise would deny petitioner a hearing in either the state or federal court system on his charge that he has been deprived of his constitutional right to due process of law. However, it is to be regretted that the high court did not grasp the opportunity to specifically expose the fallaciousness of the circuit court majority opinion so that subsequent tribunals may be better guided through this very fundamental area of law.

Don R. Work

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[16] 339 U. S. 200 (1950).

[17] Speller v. Allen, 192 F. 2d 477, 478 (4th Cir. 1951); Adkins v. Smyth, 188 F. 2d 452 (4th Cir. 1951).

[18] 344 U.S. 443, 488-497 (1952).

[19] U.S. *ex rel.* Smith v. Baldi, 344 U.S. 561 (1952); *Ex parte* Abernathy, 320 U.S. 219 (1942); Salinger v. Loisel, 265 U.S. 224 (1924); U.S. v. Carver, 260 U.S. 482 (1922).

[20] Brown v. Allen, *supra* note 18.

[21] Simpson v. Teets, 239 F. 2d 890, 892 (9th Cir. 1956).