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state courts with federal rules of procedure or evidence in criminal cases.[27] A further ground for refusing application of the federal rule of exclusion that the Court could conceivably employ is that that rule is based in part at least on the privilege against self-incrimination contained in the Fifth Amendment,[28] and it has been recently held that this privilege is not granted by the due process clause of the Fourteenth Amendment.[29] In view of these holdings, the court might merely indicate that the methods of enforcing the protection are to be left to the state courts.

Of course the mere fact that the Supreme Court has granted *certiorari* in these cases does not mean that they must decide the constitutional question involved in them. It is possible that the court will find that a federal question has not been properly raised in the court below. However, since this problem has never been decided by the court, and the constitutional issue is the only federal question presented on appeal, they may be ready to decide this important issue. Of the alternative dispositions discussed, the more probable would seem to be that the court will hold that freedom from unreasonable search and seizure is guaranteed by the due process clause of the Fourteenth Amendment, but that the means of making that protection effective will be left to the individual states.

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Exhaustion of State Remedies as Affecting Habeas Corpus Writs in Federal Courts

(A Recent Modification of the Requirement)

The recent decision of the Supreme Court of the United States in the case of *Wade v. Mayo*[1] would seem to give new hope to persons who have been incarcerated and who are seeking release through the medium of a writ of *habeas corpus* in the federal courts because of a denial of their constitutional rights. Prior to this decision, many persons with possible meritorious claims had been denied relief by *habeas corpus* because of a failure to exhaust the state remedies available—in particular, a failure to petition for *certiorari* after the decision of the state supreme court.[2] The prior rule as to the exhaustion of state remedies, enunciated in *Ex Parte Hawk*,[3] was that "Ordinarily an application for *habeas corpus* by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all the state remedies

27 Bute v. Illinois, 333 U.S. 640, 649-654 (1947); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (Jackson, J., dissenting).

28 Boyd v. United States, 116 U.S. 616 (1886); Davis v. United States, 328 U.S. 528 (1945); *cf.* Shapiro v. United States, 335 U.S. 1 (1948) (Rutledge, J., dissenting). *But see,* Hale v. Haenkel, 201 U.S. 43 (1905); Silverthorn v. United States, 251 U.S. 385 (1919); Grant, Constitutional Basis of the Rule Forbidding the Use of Illegally Obtained Evidence in a National Prosecution (1944) 15 So. Cal. L. Rev. 60.

29 Adamson v. California, 332 U.S. 46 (1946).

1 ___ U.S. ___, 68 S. Ct. 1270 (1948).

2 Gordon v. Scudder, (C.C.A. 9th, 1947), 163 F. (2d) 518; Monsky v. Warden of Clinton State Prison, (C.C.A. 2d, 1947), 163 F. (2d) 978; Stonebreaker v. Smyth (C.C.A. 4th, 1947), 163 F. (2d) 501.

3 321 U.S. 114 (1943).

available, including all appellate remedies in the state courts and in this court by appeal or writ of certiorari, have been exhausted."

In *Wade v. Mayo*, the petitioner, Wade, had been arrested in Florida on a charge of breaking and entering. At the trial, Wade requested that the trial judge appoint counsel to represent him because of his own financial disability. The judge refused, and Wade was sentenced to serve five years in the penitentiary. Wade subsequently obtained counsel, who filed a petition for a writ of *habeas corpus* in the Circuit Court of Palm Beach County, on the ground that the refusal of the trial judge to appoint counsel for Wade was in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. The writ was quashed in that court on the authority of Florida cases holding that under Florida law, a trial judge has no duty to appoint counsel for the accused in non-capital cases. An appeal to the Supreme Court of Florida was dismissed in that court without opinion. Counsel for Wade did not petition for *certiorari* to the Supreme Court of the United States after that decision, but a year later filed a petition for a writ of *habeas corpus* in the Federal District Court for the Southern District of Florida, alleging a denial of due process, and pointing out that in order to exhaust state remedies, Wade had pursued a writ of *habeas corpus* through the Supreme Court of Florida. The district court granted the writ, and, after hearing, discharged the petitioner. The Circuit Court of Appeals for the Fifth Circuit reversed, and the case came before the Supreme Court of the United States on *certiorari*.

It is clear that under the rule as set forth in *Ex Parte Hawk* as to the requirements of exhaustion of state remedies, the failure of Wade to petition the Supreme Court of the United States for certiorari after the decision of the Supreme Court of Florida dismissing the writ of *habeas corpus* in the state courts would preclude relief by *habeas corpus* in the federal court. Such a petition had been considered a necessity in order for the federal courts to entertain a petition for a writ of *habeas corpus*.[4]

However, in the instant case, the Supreme Court saw fit to re-examine the rule of *Ex Parte Hawk*, and modified that rule, largely on grounds of policy. The Court expressed the view that the requirement of exhaustion of state remedies is not based upon a lack of power in the federal courts to entertain petitions for *habeas corpus* before state remedies had been exhausted, but rather on principles of comity between state and federal judicial systems, and administrative necessity. However, the reasons for the principle cease after the highest state court has rendered a decision on the merits. The review at that point in the federal court is not a part of the state procedure, but an invocation of federal authority growing out of the supremacy of the Constitution and the necessity of giving effect to that supremacy where the state courts have failed to do so. Thus, since there is no longer any danger of collision between state and federal judicial systems after the question has been pursued through the highest court in the state, the district court should then have discretion to entertain the writ of *habeas corpus*, even though the petitioner had failed to petition for *certiorari* after the decision of the highest court of the state. The Court then enunciated the rule that it is within the discretion of the federal court to weigh the reasons for

4 Tinsley v. Anderson, 171 U.S. 101 (1898); Urquhart v. Brown, 205 U.S. 179 (1906); Mooney v. Holohan, 294 U.S. 103 (1935).