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HABEAS CORPUS-EXHAUSTION OF STATE REMEDIES-DENIAL OF CERTIORARI BY SUPREME COURT AS CONDITION TO OBTAINING ORIGINAL WRIT IN FEDERAL DISTRICT COURT

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HABEAS CORPUS—EXHAUSTION OF STATE REMEDIES—DENIAL OF CERTIORARI BY SUPREME COURT AS CONDITION TO OBTAINING ORIGINAL WRIT IN FEDERAL DISTRICT COURT—The expanded concept of due process of law under the Fourteenth Amendment during the past thirty years has brought increased inquiry by the federal courts into state criminal procedure.[1] A common method of bringing such matters to the Supreme Court's attention has been the use of habeas corpus, particularly following confinement.[2] But this increased vigilance over state criminal procedure has wrought an increasingly tender conscience on the part of the federal courts over resulting interference with state court systems. The theoretical problem has been further amplified on

[1] E.g., Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265 (1923); Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340 (1935); Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472 (1940); Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938).

[2] E.g., Waley v. Johnson, 316 U.S. 101, 62 S.Ct. 964 (1942); Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265 (1923); Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340 (1935).

the practical level by the flood of petitions, largely frivolous or perjured,[3] by persons in state custody alleging convictions in violation of constitutional safeguards. The result has been a series of cases wherein these conflicting motivations and considerations have produced a confusing pattern for persons seeking relief by habeas corpus.

I

Statutory and Case Development of Scope and Application of Habeas Corpus

The first Judiciary Act of 1789[4] provided that federal judges and justices should have the power to grant writs of habeas corpus whenever a prisoner was held in federal custody or was to be brought into court to testify, a concept essentially that of the common law. But in the post-Civil War period Congress greatly expanded the scope of the writ to "all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States . . .,"[5] and this concept is embodied in the present United States Code.[6]

In analyzing the course of Supreme Court decisions in this field, one must consider the development of mode of appeal of constitutional questions from state tribunals to the Supreme Court, for today the most troublesome questions involving application of habeas corpus are procedural in nature. In the first Judiciary Act[7] appeal was by writ of error where a decision of a state appellate court was against any right, title, privilege or "exemption" set up under the Constitution, or any treaty, statute or commission of the United States. This concept was retained through various re-enactments of the Judiciary Act[8] until 1925, when review in such cases was made available only by certiorari.[9] This represented a change from review as a matter of right to review as a matter of discretion, a concept enacted into current procedural law.[10]

Around these statutory provisions the Supreme Court gradually built up a body of case law going beyond the simple statutory require-

[3] See 8 F.R.D. 171, 172 (1948); 7 F.R.D. 313 (1947); Jackson's dissent in Price v. Johnson, 334 U.S. 266 at 296, 68 S.Ct. 1049 (1948).
[4] 1 Stat. L. 86 (1789).
[5] 14 Stat. L. 385 (1867).
[6] 28 U.S.C. (1948) §2241.
[7] 1 Stat. L. 86 (1789).
[8] E.g., 14 Stat. L. 386 (1867); 36 Stat. L. 1156 (1911); 39 Stat. L. 726 (1916).
[9] 43 Stat. L. 937 (1925).
[10] 28 U.S.C. (1948) §1257.

ments. At first, as a matter of discretion, when solicited on the basis of pre-trial pleadings, federal courts refused to issue writs in favor of one held in state custody.[11] This was extended to cover cases where no appeal had been taken to state appellate courts,[12] from which the doctrine of exhaustion of state remedies as a condition precedent to federal relief was derived.[13] Meanwhile, the Court had refused to permit original habeas corpus proceedings in lower federal courts unless, pursuant to statute, writ of error from adverse decisions of the highest state courts having jurisdiction over the matter had been sought.[14] But it was not until *Ex parte Hawk*[15] that the Court finally combined these two lines of decisions. Hawk, alleging denial of due process through failure to provide counsel in a capital case, had previously attempted to gain a hearing on the merits of his case having been refused on procedural grounds several times.[16] The Court, determining that yet another route lay open to him under Nebraska procedure, refused his petition, using in the course of the opinion the following language:

> "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 state remedies available, including all appellate remedies in the state courts and in this court by appeal or writ of certiorari have been exhausted."[17]

[11] Ex parte Royall, 117 U.S. 241, 6 S.Ct. 734 (1886).

[12] Ex parte Fonda, 117 U.S. 516, 6 S.Ct. 848 (1886).

[13] Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340 (1935); Ex parte Davis, 318 U.S. 412, 63 S.Ct. 679 (1943); Ex parte Abernathy, 320 U.S. 219, 64 S.Ct. 13 (1943); Woods v. Nierstheimer, 328 U.S. 211, 66 S.Ct. 996 (1946); Loftus v. Illinois, 334 U.S. 804, 68 S.Ct. 1212 (1948). These latter cases discuss the question of adequacy of state remedies to test constitutional issues. See in general 48 MICH. L. REV. 369 (1950).

[14] E.g. In re Wood, 140 U.S. 278, 11 S.Ct. 738 (1891); Tinsley v. Anderson, 171 U.S. 101, 18 S.Ct. 805 (1898); Urquhart v. Brown, 205 U.S. 179, 27 S.Ct. 459 (1907); United States ex rel. Kennedy v. Tyler, 269 U.S. 13, 46 S.Ct. 1 (1925).

[15] 321 U.S. 114, 64 S.Ct. 448 (1944).

[16] The history of Hawk's litigation may be summarized as follows: Habeas corpus refused in Nebraska district court, affirmed Nebraska Supreme Court in Hawk v. O'Grady, 137 Neb. 639, 290 N.W. 911 (1940), cert. den. 311 U.S. 645, 61 S.Ct. 11 (1940); federal district court refused habeas corpus, affirmed (8th Cir. 1942) 130 F. (2d) 910, cert. den. 317 U.S. 697, 63 S.Ct. 435 (1943); Nebraska Supreme Court refused original writ without opinion; United States Supreme Court denied original petition, Ex parte Hawk, 318 U.S. 746, 63 S.Ct. 991 (1943); after the principal case Nebraska Supreme Court affirmed denial of writ by lower state court, Hawk v. Olson, 145 Neb. 306, 16 N.W. (2d) 181 (1944), reversed on merits, 326 U.S. 271, 66 S.Ct. 116 (1945); Nebraska Supreme Court explained former opinion to mean only that habeas corpus not proper remedy, Hawk v. Olson, 146 Neb. 875, 22 N.W. (2d) 136 (1946); federal district court refused writ because coram nobis available (D.C. Neb. 1946) 66 F. Supp. 195, affirmed (8th Cir. 1947) 160 F. (2d) 807; coram nobis denied on merits and affirmed by Nebraska Supreme Court, Hawk v. State, 151 Neb. 717, 39 N.W. (2d) 561 (1949); cert. den. 339 U.S. 923, 70 S.Ct. 984 (1950).

[17] Ex parte Hawk, 321 U.S. 114 at 116, 64 S.Ct. 448 (1944), citing Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340 (1935); Ex parte Abernathy, 320 U.S. 219, 64

But the Court, speaking through Justice Murphy, retreated from this position in *Wade v. Mayo*.[18] Wade had not sought certiorari following denial of habeas corpus by the Florida Supreme Court. Yet a later application for habeas corpus in federal district court was granted, the court of appeals reversing in part because no application for certiorari had been made to the Supreme Court subsequent to the adverse state court decision.[19] On review the Supreme Court held that at the discretion of the district judge the writ could be granted, despite failure to seek certiorari. All available state court remedies had been exhausted; thus federal-state conflict was not a relevant issue. The sole remaining question was determination of the proper federal forum, with failure to seek certiorari merely an element to be considered in exercise of discretion. "Good judicial administration is not furthered by insistence on futile procedure."[20] Denial of certiorari did not necessarily rest on the merits, and should not be a requirement in seeking review of conviction, particularly since the Supreme Court retained the ultimate power of review and decision.

For two years the law stood thus. But in the recent case of *Darr v. Burford*[21] the Court re-examined its position, and while not overruling *Wade v. Mayo* outright, adopted a position inconsistent with that case by reaffirming statements made in *Ex parte Hawk*. Rejecting the arguments advanced in the *Wade* case, Justice Reed insisted, as in his dissent to *Wade v. Mayo*, that certiorari is and has been a step in state procedure within the meaning of the exhaustion of remedies rule; failure to seek certiorari following the adverse state court decision destroys any opportunity for the constitutional issue to be raised by original petition in federal district court. Since Darr had not appealed the adverse ruling of the Oklahoma Supreme Court on his petition, further federal relief was precluded.

II

Basic Principles Underlying Darr v. Burford

The basic principle by which the Court justifies its present position is that of federal-state comity. Under the dual system of government

S.Ct. 13 (1943); Tinsley v. Anderson, 171 U.S. 101, 18 S.Ct. 805 (1898); Urquhart v. Brown, 205 U.S. 179, 27 S.Ct. 459 (1907); United States ex rel. Kennedy v. Tyler, 269 U.S. 13, 46 S.Ct. 1 (1925).

[18] 334 U.S. 672, 68 S.Ct. 1270 (1948).
[19] Mayo v. Wade, (5th Cir. 1946) 158 F. (2d) 614.
[20] Wade v. Mayo, 334 U.S. 672 at 681, 68 S.Ct. 1270 (1948).
[21] 339 U.S. 200, 70 S.Ct. 587 (1950).

under the Constitution federal courts are desirous of avoiding conflict with a state judicial system until it has finally disposed of a matter. In particular, no inferior federal court should overrule a superior state court, a primary consideration in the early *Royall*[22] and *Fonda*[23] cases and their successors. But opposed to this restraining influence on exercise of federal power is the duty of the federal courts to protect the individual against state denial of due process of law, which results in an inevitable interference with the exercise of state power. *Ex parte Hawk, Wade v. Mayo,* and *Darr v. Burford* illustrate the inconsistencies which occur when emphasis of the Court shifts from one consideration to the other.

As the first definitive case, *Ex parte Hawk* concerned itself primarily with state-federal conflict. Federal courts will "interfere with administration of justice in the state courts only 'in rare cases where exceptional circumstances of peculiar urgency are shown to exist.' "[24]

However, in *Wade v. Mayo* emphasis lay on safeguarding the rights of the individual. To Justice Murphy, only the Court's own procedural requirements were an issue at the post-state level. "Moreover, the flexible nature of the writ of habeas corpus counsels against erecting a rigid procedural rule that has the effect of imposing a new jurisdictional limitation on the writ. Habeas corpus is presently available for use by a district court within its recognized jurisdiction whenever necessary to prevent an unjust and illegal deprivation of human liberty."[25] Comity was insufficient reason for erecting yet another procedural barrier between the habeas corpus petitioner and adjudication of the merits of his claim.

But in *Darr v. Burford* comity has again become controlling. ". . . since the 1867 statute granted jurisdiction to federal courts to examine into alleged unconstitutional restraint of prisoners by state power it created an area of potential conflict between state and federal courts. Solution was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have

[22] Ex parte Royall, 117 U.S. 241, 6 S.Ct. 734 (1886).

[23] Ex parte Fonda, 117 U.S. 516, 6 S.Ct. 848 (1886).

[24] Ex parte Hawk, 321 U.S. 114 at 117, 64 S.Ct. 448 (1944), quoting from United States ex rel. Kennedy v. Tyler, 269 U.S. 13, 46 S.Ct. 1 (1925). Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265 (1923), involving a mob-dominated trial, is cited as such a rare and exceptional case in both Ex parte Hawk and Darr v. Burford.

[25] Wade v. Mayo, 334 U.S. 672 at 681, 68 S.Ct. 1270 (1948).

had an opportunity to pass upon the matter."[26] If the procedural steps depending on the principle have not been followed, relief on the merits is thereby precluded.

Since the position of the Court seems to vary with acceptance or repudiation of the comity principle, the validity of its application to the certiorari problem must be determined to evaluate the correctness of the Court's present position. The objection to granting the writ in the *Hawk-Wade-Darr* situation is that a lower federal court by its action is thus overruling a high state court. But the highest state court having jurisdiction has acted on the matter, and presumably in these cases all available remedies in state courts have been exhausted. If, therefore, under state procedure no further state relief is available, and the petition has been denied on the merits, federal courts should be free to exercise their constitutional authority and examine into whether or not petitioner has been deprived of his rights. Statutory requirements for federal habeas corpus have been met. Nor have the district courts usurped the activities of the Supreme Court, for they merely screen such cases for higher federal courts by establishing the facts and merits of the claim. Since the Supreme Court ultimately has the power to overturn a state court decision on constitutional grounds, the federal-state comity problem remains the same whether the Supreme Court reverses on certiorari from the state court, or by certiorari from lesser federal courts. There is much to be said for Justice Murphy's view in *Wade v. Mayo* that when state procedure has once ended, the problem becomes one of appropriate federal tribunal. Comity is a factor in any constitutional review, and since the district court does not in any case have final authority to overrule a state decision, it should not prevent such district court from having the constitutional authority to grant habeas corpus. If this reasoning is correct in principle, then comity should not effect an insurmountable barrier by requiring certiorari in any case before district courts can entertain habeas corpus petitions.

Furthermore, though comity has produced the exhaustion of remedies rule, one must determine if in fact certiorari is a part of the state remedy for comity purposes. *Ex parte Hawk* made the first categorical statement to this effect.[27] But among supporting authority cited, two cases[28] dealt solely with exhaustion of state remedies within the state

[26] Darr v. Burford, 339 U.S. 200 at 204, 70 S.Ct. 587 (1950).

[27] Ex parte Hawk, 321 U.S. 114 at 116, 64 S.Ct. 448 (1944).

[28] Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340 (1935); Ex parte Abernathy, 320 U.S. 219, 64 S.Ct. 13 (1943).

courts, while three cases[29] required that a writ of error be sued out before relief could be sought independently in district court. But a writ of error was a writ of right,[30] and it was reasonable to require that the Supreme Court be solicited to fulfill its statutory duty before independent relief was sought. The reasoning of these writ of error cases does not necessarily apply to discretionary review by certiorari. Disposition on writ of error was conclusive on the merits; reasons for refusal of certiorari are myriad and indeterminable in any given case.[31] Furthermore, the statements of *Ex parte Hawk* concerning certiorari may be considered gratuitous, for the final disposition of Hawk's petition was based on his failure to seek coram nobis, and consequently his failure to exhaust available state remedies. If so, then failure to seek certiorari was irrelevant to the issue;[32] the statement may well be dictum. If dictum, then *Ex parte Hawk* is not a precedent for "reaffirmance" by *Darr v. Burford*,[33] and *Wade v. Mayo* has been overruled.

III

Effect of the 1948 Judicial Code

The foregoing discussion has ignored the possible effect of section 2254 of Title 28 of the United States Code, which provides:

> "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State. . . ."

In the reviser's note to the section it is stated:

> "This new section is declaratory of existing law as affirmed by the Supreme Court. (See Ex parte Hawk, 1944, 64 S.Ct. 448, 321 U.S. 114, 88 L. Ed. 572)."[34]

[29] Tinsley v. Anderson, 171 U.S. 101, 18 S.Ct. 805 (1898); Urquhart v. Brown, 205 U.S. 179, 27 S.Ct. 459 (1907); United States ex rel. Kennedy v. Tyler, 269 U.S. 13, 46 S.Ct. 1 (1925).

[30] Darr v. Burford, 339 U.S. 200 at 237, 70 S.Ct. 587 (1950).

[31] Wade v. Mayo, 334 U.S. 672 at 680, 68 S.Ct. 1270 (1948); Darr v. Burford, 339 U.S. 200 at 227, 70 S.Ct. 587 (1950).

[32] The same could have been said of Wade v. Mayo had it been brought up immediately, since it was not until later Florida decisions that it became apparent that there had been a decision on the federal constitutional issue. See Syllabus of the Court, Wade v. Mayo, 334 U.S. 672, 68 S.Ct. 1270 (1948).

[33] Young v. Ragen, 337 U.S. 235, 69 S.Ct. 1073 (1948), which also "affirmed" the Hawk statement, also turned on exhaustion of state court remedies and may be open to the same objection.

[34] H. Rep. 308 on H.R. 3214, 80th Cong., 1st sess., p. A180 (1947). See also S. Rep. 1559, 80th Cong., 2d sess., p. 9 (1948).

However, prior to the passage of the Code, but following submission of committee reports, *Wade v. Mayo* was decided, so that the *Hawk* rule had been thus modified at the time of actual passage. Nevertheless, in *Darr v. Burford* the majority based their opinion somewhat heavily on the effect of this section on the Court's freedom to change what it considered to be the Hawk rule, for they did not consider *Wade v. Mayo* as a clear modification of *Ex parte Hawk.*[35] The dissent disagreed that any such retention of the certiorari rule was required by section 2254. Perhaps this reliance on the statute by the majority was unwarranted. In the first place, the statutory language says nothing about remedies other than those "available in the courts of the State"; it would be stretching the statutory language to say the Supreme Court for any purpose is a state court. Nor is certiorari anywhere indicated as a state remedy. In the second place, even though the pre-enactment materials indicate a desire to perpetuate the rule of *Ex parte Hawk,* in light of the language and ultimate disposition of the case, Congress could well have been concerned solely with exhaustion of intra-state procedural remedies. If the language dealing with certiorari as a condition to relief is in fact dictum, one can justify a position that the reviser's note endorsed the actual disposition of the case, and not all incidental statements by the Court, of which the certiorari rule is one. In the third place, since *Wade v. Mayo* was handed down prior to passage of the act, it cannot be said with certainty—if indeed in the determination of legislative intent anything can be said with certainty—that both *Wade* and *Hawk* were not in the collective mind of Congress at time of passage. The Court, as it has done in the past,[36] might well have considered evidence of legislative intent too ambiguous and indeterminate to be helpful.[37] One might with some justification conclude that, under the guise of stare decisis and expression of legislative intent as a limitation on judicial power, a bit of judicial legislation has been engrafted onto section 2254.

[35] "Whatever deviation Wade may imply from the established rule will be corrected by this decision." Darr v. Burford, 339 U.S. 200 at 210, 70 S.Ct. 587 (1950).

[36] Western Union Telegraph Co. v. Lenroot, 323 U.S. 490, 65 S.Ct. 335 (1945).

[37] Furthermore, the Court changed a judicial rule where there was stronger indication that Congress had considered the ruling and failed to take action, in Girouard v. United States, 328 U.S. 61, 66 S.Ct. 826 (1946), when it repudiated its interpretation of the naturalization oath laid down in United States v. Schwimmer, 279 U.S. 644, 49 S.Ct. 448 (1929) and United States v. Macintosh, 283 U.S. 605, 51 S.Ct. 570 (1931) after Congress had several times re-enacted the oath without change after being strongly urged to do so. The specific matter of certiorari as a part of state remedies was apparently never before Congress during consideration of §2254.

IV

Conclusions

In evaluating the present view of the Supreme Court it would seem that one must first determine which position he prefers — stressing availability of remedy to persons in need of it at risk of their abusing the privilege, or setting up rigid procedural rules which bar the innocent with the guilty. Perhaps the present certiorari requirement in truth represents more a fear of being overburdened by a rash of spurious habeas corpus petitions than a genuine fear of interference with state procedure. If the former, then to add a mandatory certiorari requirement, useless or not,[38] tends to increase the Court's own case load instead of screening out numerous applicants, for once *Darr v. Burford* has made its effect felt, convicts will be careful to include the Supreme Court on their roster of tribunals before which relief will be sought. Discretion might well be left to district courts in order to ease some of this burden. Insofar as the comity rule is in fact a real and basic reason in the Court's thinking, it does not require the result of *Darr v. Burford.* On the practical level district courts have not been lavish in granting writs of habeas corpus.[39] On the theoretical plane, despite the procedural hurdle of *Darr v. Burford,* district courts may interfere with state court decisions eventually when certiorari has been denied. Indeed, as due process concepts under the Fourteenth Amendment are expanded, conflict between state and federal courts will be inevitable and increasing. Despite *Darr v. Burford,* the conflict problem remains, and emphasis on comity may be misplaced. Furthermore, some confusion is bound to occur among lower federal courts as a result of the opinion, for language in the majority opinion intimates that denial of certiorari may guide district court action subsequently,[40] another indication of the lurking fear of interference with superior state tribunals on the part of district courts. A district judge must thus speculate on the possible reasons for denial of the writ, even though the Court itself may have been in disagreement as to the reason.[41] Nor would a specific statement in the denial of certiorari, allowing the district court to

[38] Darr v. Burford, 339 U.S. 200 at 216, 238, 70 S.Ct. 587 (1950).

[39] Darr v. Burford, 339 U.S. 200 at 233, note 3, 70 S.Ct. 587 (1950); 10 OHIO STATE L.J. 337 at 357 (1949).

[40] Darr v. Burford, 339 U.S. 200 at 215, 70 S.Ct. 587 (1950). Justices Clark and Burton, concurring, refused to accept this implication of the majority opinion.

[41] Darr v. Burford, 339 U.S. 200 at 227, 70 S.Ct. 587 (1950); Wade v. Mayo, 334 U.S. 672 at 680, 68 S.Ct. 1270 (1948).

proceed, aid in the problem, for no implication that such action should not be undertaken may be drawn from the failure to include such language in a denial.[42] The rule of *Wade v. Mayo*, it is submitted, provided a desirable flexibility in procedure[43] and would not seem to be contrary to the language or even the probable legislative intent of section 2254. In its desire to reduce the number of habeas corpus petitions in federal courts, the Court ought not erect rigid procedural requirements which bar the worthy as well as the unworthy.

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[42] Such a statement was used in Burke v. Georgia, 338 U.S. 941, 70 S.Ct. 422 (1949). "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told so many times," Holmes, J. in United States v. Carver, 260 U.S. 482 at 490, 43 S.Ct. 181 (1923). See also Darr v. Burford, 339 U.S. 200 at 232, note 2, 70 S.Ct. 587 (1950).

[43] ". . . I would not bolt the door to such an undesirable practice as a matter of law, but merely leave it as a rigorous rule of practice. . . . The power to depart from this rule ought not to be wholly foreclosed, even though opportunity for its exercise is left for contingencies not wholly foreseeable." Frankfurter, J., dissenting in Price v. Johnson, 334 U.S. 266 at 295, 68 S.Ct. 1049 (1948), where the Court upheld the right of a habeas corpus petitioner to have a hearing on allegations of his petition in every case. See also MOORE, COMMENTARY ON THE UNITED STATES JUDICIAL CODE 466 (1949).