HABEAS CORPUS: REQUIREMENT OF EXHAUSTION OF STATE REMEDIES BEFORE ISSUANCE OF WRIT LIMITED TO STATE OF DETENTION

IT is well settled that before a federal court will issue a writ of habeas corpus to a prisoner in a state penal institution,[1] the petitioner must first exhaust the remedies afforded to him by state law.[2] However, because of the uncertainty as to what constitutes exhaustion of state remedies, this requirement has been the source of much litigation.[3] Typically the issue of exhaustion is confined to a determination of whether the petitioning state prisoner has exhausted all remedies of the state of incarceration. In the last few years, in the State of New York, a new dimension has developed. Under a multiple offender statute,[4] the New York state courts have taken notice of prior out-of-state convictions to increase sentences awarded in criminal proceedings. The problem of what constitutes exhaustion of state remedies is thus compounded when a prisoner bases his petition for a writ of habeas corpus on the ground that the previous out-of-state conviction was unconstitutional and cannot support a longer sentence. New York federal courts have consistently implied, in such instances, that the petitioner must show exhaustion of remedies in both the state of original conviction and the state of present detention.[5] In the recent case of *United States ex rel. LaNear v. LaVallee*,[6] however, the Court of Appeals for the Second Circuit refused to follow this line of precedent.

Petitioner was convicted of second degree burglarly in a New York state court, and, because of a prior Missouri conviction,[7] was

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[1] Jurisdictional authority to issue writs of habeas corpus to state prisoners stems from 28 U.S.C. § 2241 (1958).

The early cases held that habeas corpus would issue only if the committing tribunal lacked jurisdiction. However, as time passed, the federal courts, under the guise of a jurisdictional defect in the committing tribunal, began to issue the writ when a basic question of procedural fairness was involved. Today, courts customarily ignore the jurisdictional question and proceed directly to the constitutional issue alleged in the petition. See Note, 61 HARV. L. REV. 657 (1948).

[2] 28 U.S.C. § 2254 (1958). (This requirement originally a judicial development.) See note 13 *infra*.

[3] See, *e.g.*, Irvin v. Dowd, 359 U.S. 394 (1959); Brown v. Allen, 344 U.S. 443 (1953); *Ex parte* Hawk, 321 U.S. 114 (1944); Note, 61 HARV. L. REV. 657 (1948).

[4] N.Y. PEN. LAW § 1941.

[5] See cases cited note 16 *infra*.

[6] 306 F.2d 417 (2d Cir. 1962).

[7] Petitioner's prior conviction was for burglary. For an out-of-state conviction to

sentenced to a longer term than he would have received as a first offender.[8] Petition for a writ of habeas corpus was filed[9] on the ground that the Missouri conviction violated the due process clause of the federal constitution,[10] and hence could not serve to support an extended sentence. No allegation was made concerning any attempt to exhaust state remedies in Missouri, and as a result, the district court denied the petition, holding that exhaustion requirements included " 'reasonable efforts of a state court prisoner to obtain relief in the court of a sister state wherein it is claimed that the requirement of due process has been violated.' "[11] The Second Circuit, in reversing and remanding, held that the exhaustion requirement applied only to the state of present detention.[12]

Although the present requirement that state remedies must be exhausted prior to a petition for a federal writ of habeas corpus is statutory, originally it was a judicially developed doctrine[13] based

support punishment under the multiple offender statute, the accused must have been convicted "of a crime which, if committed within this state, would be a felony...." N.Y. PEN. LAW § 1941. Designation of the crime by another state does not determine the nature of the offense for the purpose of the New York statute. See People v. Stovali, 172 Misc. 469, 15 N.Y.S.2d 498 (Kings County Ct. 1939) (recital of acts must conclusively establish their felonious character under New York law).

[8] Had it been his first offense, the sentence would have been "for a term not exceeding fifteen years," with no minimum stipulated. N.Y. PEN. LAWS § 407. However, the multiple offender statute required that he be sentenced "for an indeterminate term, the minimum of which shall be not less than one-half of the longest term prescribed upon a first conviction, and the maximum of which shall be not longer than twice such longest term." N.Y. PEN. LAW § 1941. As a result, the sentence was for an indeterminate term of fifteen to thirty years. 306 F.2d at 418.

[9] A prisoner is not required to serve the maximum sentence he might have received as a first offender before he may apply for a writ. It is only necessary that the petitioner might have been sentenced to a term which would have already expired. For a summary of decisions, see United States *ex rel.* Foreman v. Fay, 184 F. Supp. 535, 538-39 (S.D.N.Y. 1960).

[10] In support of his contention of denial of due process, petitioner alleged that prior to arraignment in his previous Missouri conviction, he had been confined for over a month without being apprised of the precise nature of the offense with which he was charged; and that although he was destitute and thus unable to hire a lawyer, the court failed to inquire concerning assignment of counsel. Moreover, petitioner related that at the time of his conviction, which was based upon his plea of gnilty, he was under seventeen years of age and was barely literate due to having acquired only a fourth grade education. 306 F.2d at 418.

[11] 306 F.2d at 419 (quoting district court).

[12] 306 F.2d at 419. The court further stated that since New York provided no method for testing the validity of out-of-state convictions used to support a multiple offender sentence, the petitioner could proceed directly in a federal court. *Id.* at 42I. Thus the result of this case is that in New York petitioner need not establish that he has been in either state court.

[13] The stautory requirement of exhaustion is embodied in 28 U.S.C. § 2254 (1958). As indicated by the revisers' notes, this section gives legislative recognition to the

primarily on two policy considerations. Foremost is the importance of preserving harmonious relations or comity between state and federal court systems. The essential principle behind the comity doctrine is that a court currently cognizant of an issue in question should defer action until another court with prior jurisdiction has had an opportunity to act on the matter.[14] Another policy factor involves practical recognition of the limited administrative capacities of the federal judiciary; were it not for the exhaustion requirement, the federal court would be overwhelmed with petitions.[15]

In nearly all of the small number of cases which have arisen involving the problem presented in the instant case, New York federal courts have assumed, without explicitly deciding, that the petitioner was required to exhaust the remedies of the sister state.[16] But in two cases, New York federal courts have unqualifiedly held that a petition for issuance of a writ should be denied if the petitioner failed to exhaust his remedies in the state of the first conviction.[17] Refusing to follow these precedents in the instant case,

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exhaustion rule formulated in *Ex parte* Hawk, 321 U.S. 114 (1944). In the *Hawk* case, the Supreme Court stated 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 available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted." *Id.* at 116-17. See also Darr v. Burford, 339 U.S. 200, 204-14 (1950), for a discussion of the background of the exhaustion requirement and the legislative history of § 2254.

[14] For a discussion of comity and its relation to the problem of exhaustion of remedies, see Darr v. Burford, 339 U.S. 200, 204-08 (1950), and cases cited therein.

[15] This limitation was recognized in Wade v. Mayo, 334 U.S. 672, 679 (1948).

[16] See United States *ex rel.* Cutrone v. Fay, 289 F.2d 470 (2d Cir. 1961); United States *ex rel.* Moore v. Martin, 273 F.2d 344 (2d Cir. 1959), *cert. denied*, 363 U.S. 821 (1960); United States *ex rel.* Farnsworth v. Murphy, 254 F.2d 438 (2d Cir.), *vacated and remanded on other grounds*, 358 U.S. 48 (1958); United States *ex rel.* Savini v. Jackson, 250 F.2d 349 (2d Cir. 1957); United States *ex rel.* Smith v. Jackson, 234 F.2d 742 (2d Cir. 1956); United States *ex rel.* Atkins v. Martin, 228 F.2d 188, 189 (2d Cir. 1955) (dictum); United States *ex rel.* Farnsworth v. Murphy, 207 F.2d 885, 887 (2d Cir. 1953) (alternative holding); United States *ex rel.* Turpin v. Snyder, 183 F.2d 742 (2d Cir. 1950). However, there has been no requirement of exhaustion of the remedies of a foreign jurisdiction. See United States *ex rel.* Dennis v. Murphy, 265 F.2d 57 (2d Cir. 1959); United States *ex rel.* Foreman v. Fay, 184 F. Supp. 535 (S.D.N.Y. 1960).

[17] Davis v. Jackson, 246 F.2d 268 (2d Cir. 1957); United States *ex rel.* Toler v. Martin, 186 F. Supp. 267 (E.D.N.Y. 1960). In the *Davis* case, petition for rehearing was granted when petitioner demonstrated a lack of an available remedy in Florida. This reversed the previous unrecorded order of the circuit court in which the court, assuming *coram nobis* was available in Florida, required the petitioner to exhaust the remedies in that state. 246 F.2d at 269.

the court found support both in the language of the statute and its underlying policies.

The court held, as a matter of statutory construction, that the provisions of the statute refer only to the state pursuant to whose judgment the petitioner is being detained.[18] The validity of this conclusion seems to be supported by the language of the statute for it implies that Congress envisioned only the situation where the state of contested conviction and the state of detention are the same. Furthermore, the court concluded that its interpretation of the statute fully satisfied the policy considerations that are the basis for the exhaustion requirement.[19]

At first blush it might appear that by so construing the statute the comity doctrine was ignored since, upon remand, the Missouri conviction may be declared void without the Missouri courts being given the opportunity to hear the question. However, a closer analysis reveals that this is not the usual situation in which the comity doctrine is applied. Missouri's situation is not that of an offended state whose judgment has been overturned by a federal court and whose prisioner has been released. On the contrary, the judgment has been fulfilled and the sentence served. As the court pointed out, petitioner's real complaint was not against Missouri, rather "in every practical sense his grievance [was] . . . over what New York [was] . . . doing with what Missouri did."[20] Furthermore, any judgment that the conviction is void should have no effect in Missouri since it will merely be a determination that the conviction is an impermissable basis for a more severe sentence in New York. Whatever indignity a determination that the conviction is void may inflict on Missouri would seem to be balanced by the fact that the state is spared the trouble of resurrecting an old conviction whose sentence has probably been served.[21]

[18] "An application for a writ of habeas corpus in 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,* or that there is either an absence of available *State corrective process* or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the *remedies available in the courts of the State,* within the meaning of this section, if he has the right under *the law of the State* to raise, by any available procedure, the question presented." 28 U.S.C. § 2254 (1958). (Emphasis added.)

[19] 306 F.2d at 420.

[20] *Ibid.*

[21] There is always the possibility that defendant was under suspended sentence for the prior conviction.

However, even if it were deemed that the comity doctrine had some application in the instant case, it is submitted that the court decided wisely. Such recognition would have brought the comity doctrine into direct conflict with the traditional concept of the remedy of habeas corpus as a means of securing speedy relief from wrongful detention. In a larger context, this historical function of the writ impliedly involves the duty of the federal courts under the fourteenth amendment to protect individuals from state denial of due process of law. In this situation the restraint imposed by the comity doctrine must yield to the stronger policy considerations implicit in the remedy of habeas corpus.[22]

There is ample justification for the supremacy of the comity doctrine in the single state situations where the interest of the state is great, and the exhaustion requirement imposes no unreasonable delay. However, nothing warrants its extension into the two-state situation. Not only are the policy reasons for applying comity much weaker where two states are involved, but also the additional burdens placed on the petitioner run counter to basic policy underlying the habeas corpus proceeding. This is evidenced by the fact that attempts to seek post conviction relief in the state courts even in the single state situation have resulted in fruitless wastes of time and eventual resort to the federal courts usually becomes necessary before relief can be obtained.[23]

To extend the exhaustion requirement to the state of prior conviction in the instant case would have required not only an illogical reading of the statutory exhaustion requirements and a misconception of the underlying policy factors of the comity doc-

[22] For an analogous situation in bankruptcy proceedings see *In re* Agawam Racing & Breeders Ass'n, 65 F. Supp. 755 (D. Mass. 1946), where the comity principle of allowing a state court to adjudicate a valid claim over which the state court had assumed jurisdiction prior to bankruptcy proceedings yielded under the particular fact situation to the Federal Bankruptcy Act's stronger policy of protecting general creditors.

[23] See Reitz, *Federal Habeas Corpus: Post-Conviction Remedy For State Prisoners*, 108 U. PA. L. REV. 461 (1960). Conceivably, however, because of a greater availability of evidence, it might be advantageous to instigate *coram nobis* proceedings in the state of original conviction. In the instant case the court specifically stated that in no way is this decision to affect such a possibility. 306 F.2d at 421 n.5. Thus, the practical result is to furnish the petitioner with alternatives from which to choose. This is a complete reversal of the court's position in Davis v. Jackson, 246 F.2d 268 (2d Cir. 1957), where, because it was believed *coram nobis* was available, petitioner was required to pursue it. See also note 17 *supra*.

trine, but also a willingness to ignore the traditional rights of the individual. By refusing to employ such tortured construction, the court in *LaNear v. LaVallee* thereby manifested once again the increasing concern of federal courts in the preservation of constitutional rights in state criminal proceedings.