CRIMINAL PROCESSES AND HABEAS CORPUS: A REMEDY IN THE FEDERAL COURTS

In *Moore v. Dempsey*[1] the United States Supreme Court held that habeas corpus would lie to attack a state court conviction following a mob dominated trial. Shortly afterwards, it was established that the doctrine of res judicata does not apply to habeas corpus proceedings.[2] The ultimate effect of these decisions was a great abuse of the writ, the most flagrant being the practice of submitting to the federal courts successive applications for release from state custody though a thorough consideration had been given the petitioner's previous application.[3] For under the *Dempsey* ruling, an applicant could initiate an attack with nothing more than his verified petition, and support it by parol evidence of any matter going to a violation of his constitutional rights by the state.[4] As a result the federal courts were overwhelmed by a constant flood of petitions for habeas corpus.[5] Moreover, federal district courts were required to examine convictions upheld by the highest state courts; and often state trial judges were summoned to appear as witnesses to defend the regularity of proceedings in their courts.[6]

In Ex parte *Hawk*[7] the Supreme Court established the doctrine that ordinarily a petitioner must exhaust all available remedies in the state courts and seek review in the United States Supreme Court by appeal or writ of certiorari, before a lower federal court will entertain an application for habeas corpus.[8] Shortly after *Hawk* Congress enacted, as Chapter 153 of the Revised

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1. 261 U.S. 86 (1922).

2. Salinger v. Loisel, 265 U.S. 224 (1923).

3. See Parker, *Limiting the Abuse of Habeas Corpus,* 8 F.R.D. 171 (1949). See note 28 *infra.*

4. MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 423 (1940); Parker, *supra* note 3.

5. The Administrative Office of the United States Courts has compiled the following statistics:

Fiscal Years	1945-46	1946-47	1947-48	1948-49
Habeas corpus cases involving state prisoners disposed of by district courts	503	481	487	610
Cases in which petitions were successful	14	13	11	10
Percentage of cases in which petitioners were successful....	2.8%	2.7%	2.3%	1.6%

Speck, *Statistics on Federal Habeas Corpus,* 10 Ohio St. L.J. 337, 357 (1949).

6. Parker, *supra* note 3, at 172-173.

7. 321 U.S. 114 (1944).

8. The foundation of the *Hawk* doctrine appears to have been laid in *Ex parte* Royall, 117 U.S. 241 (1886), which held that a federal court had jurisdiction to release before trial a state prisoner who was held in violation of federal constitutional rights, but as a matter of discretion it approved denial of the writ. This case was followed in the same term by *Ex parte* Fonda, 117 U.S. 516 (1886), which advanced the doctrine to its next stage. In that case a state prisoner sought relief in the Supreme Court after his conviction, but before appeal to the appellate tribunal of the state. The Court denied the writ on the ground that even if the trial court had violated the petitioner's constitutional rights,

Judicial Code, a statute governing habeas corpus in the federal courts.[9] Section 2254 requires exhaustion of state remedies before the petitioner may seek relief in the federal courts, with the exception that where either an absence of such state corrective process appears, or circumstances indicate that such process is ineffective, relief may be sought directly in the federal courts. And it is further provided that:

> 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.[10]

Commenting on this provision of the Code, Judge Parker, one of its drafters,[11] has said that its effect "is to eliminate, for all practical purposes, the right to apply to the lower federal courts for habeas corpus in all states in which successive applications may be made for habeas corpus to the state courts. . . ."[12] Under this interpretation a petitioner detained by the state ordinarily would be allowed access to the federal courts only in cases in which there was an absence of state corrective process or circumstances indicating that such process is ineffective. Such a construction of section 2254 is a marked extension of the *Hawk* ruling; for under that doctrine exhaustion of state remedies is complete, and the requisites for lower federal court consideration of petitioner's claim met, after all available remedies in the state courts and application for certiorari have once been denied.[13]

To the argument that it would be futile, after a petitioner has once applied for and been denied all available state remedies, to start the process again, Judge Parker answers that such further application is not futile because it "lays the foundation upon which application can be made to the Supreme Court of the United States for certiorari."[14] It is possible to infer from this language that certiorari is considered to be an adequate remedy

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there was no indication that the appellate tribunal would fail to correct the error. *In re* Wood, 140 U.S. 291 (1891), established that it was no error for a federal circuit court to refuse an application for habeas corpus on the ground that petitioner had not sought review by the Supreme Court on a writ of error. Finally Mooney v. Holohan, 294 U.S. 103 (1935), established the rule that available collateral remedies provided by the state must be exhausted. For an excellent discussion of the background and history surrounding the doctrine of exhaustion of state remedies see Darr v. Burford, 399 U.S. 200, 205-208 (1950).

9. 28 U.S.C. 2241 *et seq.* (Supp. 1950).

10. 28 U.S.C. 2254 (Supp. 1950).

11. Prior to *Hawk* the Judicial Conference appointed a committee to investigate this area of the law and report. The report became the basis for the new statute. The members of the committee were: Circuit Judges Stone and Stephens, of the Eighth and Ninth Circuits respectively; and District Judges Vaught of Oklahoma, Underwood of Georgia, and Wyzanski of Massachusetts. Circuit Judge Parker was chairman. See Parker, *supra* note 3, at 173.

12. Parker, *supra* note 3, at 176.

13. See Darr v. Burford, 339 U.S. 200 (1950).

14. Parker, *supra* note 3, at 176.

for the protection of federal constitutional rights. Implicit in such a position is the argument that the merits of petitioner's case must be an important element in the Court's determination of whether certiorari will be granted; and even though certiorari is first denied, if petitioner will persist in his attempts to get a review by the Courts, eventually it will be granted if his claim is truly meritorious.

However, the Court has insisted vigorously that certiorari may be denied, though petitioner's claim has great merit.[15] Mr. Justice Frankfurter has been particularly emphatic on this point, and has gone to great lengths to make it clear. For instance, in *Maryland v. Baltimore Radio Show*[16] he pointed out that, "A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result."[17] Continuing, he stated that even after all the technical requirements for Supreme Court review are met, a decision "yet may commend itself for review to fewer than four members of the Court."[18] It should be recalled, moreover, that the very purpose of certiorari jurisdiction is to permit the Court to dispose of many cases without lengthy consideration and research.[19] Under the pressure of a docket constantly crowded great reliance is placed upon the briefs, petitions, and lower court opinions; the Justices seldom have time to study or familiarize themselves with a record of any considerable length.[20] And it seems a fair inference that once a petition for certiorari has been refused, it is accorded even more perfunctory treatment upon reapplication.[21]

Of course, Judge Parker is aware of the varying principles underlying the Court's disposition of a petition for certiorari, and the limitations of the

15. As long ago as 1923 it was stated by Mr. Justice Holmes that, "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." United States v. Carver, 260 U.S. 482, 490 (1923). In Deputy v. Du Pont, 308 U.S. 488, 500 (1940), Mr. Justice Roberts said, "Our rules adopted to carry out the policy of the statutes granting the power to bring cases here by certiorari have apprised the Bar and the public that we will not take cases fully heard and adjudicated below for the mere purpose of reexamining the correctness of the result." And Mr. Justice Frankfurter, dissenting in Darr v. Burford, 339 U.S. 200, 227-228 (1950), stated that, "To attach significance to a denial of a certiorari petition regarding the merits of the issues raised by the petition would be to transform a mechanism for keeping cases out of this Court into a means of bringing them in. It would contradict all that led to the adoption of certiorari jurisdiction and would reject the whole course of the Court's treatment of such petitions, both in practice and profession." See also Sunal v. Large, 332 U.S. 174, 181 (1947); House v. Mayo, 324 U.S. 42, 48 (1944); Atlantic Coast Line R. Co. v. Powe, 283 U.S. 401, 403 (1932). *Cf.* Schechtman v. Foster, 172 F.2d 339, 342, 343 (2d Cir. 1949).

16. 338 U.S. 912 (1950).

17. *Id.* at 917.

18. *Id.* at 918.

19. STERN AND GRESSMAN, SUPREME COURT PRACTICE 126 (1951).

20. STERN AND GRESSMAN, SUPREME COURT PRACTICE 126 (1951).

21. See Boskey, *Mechanics of the Supreme Court's Certiorari Jurisdiction*, 46 COL. L. REV. 255, 261 (1946).

writ as a remedy to protect federal constitutional rights. His construction of section 2254, to the effect that state remedies can never be exhausted so long as successive applications may be made for habeas corpus to the state courts, may be interpreted as a means of advancing the thesis that since state courts are fully competent tribunals, protection of constitutional rights in this area should be confined principally to the states, with federal review limited to the possibility that it may be accorded by the Supreme Court.

A rationale of this position is the doctrine of comity, a principle designed to govern and regulate the relations between all courts of concurrent jurisdiction.[22] For it is this doctrine which forms the basis of the argument that a lower federal court should not be allowed to overrule a state appellate tribunal comprised of several competent judges.[23] However, it is not an inexorable bar to a federal court's granting a writ of habeas corpus to a state detained prisoner. It need only cause the court to exercise restraint, until the state has had opportunity to correct an infringement of petitioner's constitutional rights. In *Darr v. Burford,*[24] a recent case in which the Supreme Court had before it section 2254, comity was explicitly stated to require no more than this, the Court there saying:

> As it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, the federal courts sought a means to avoid such collisions. Solution was found in the doctrine of comity. . . .
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> . . . Through this comity, the doctrine of exhaustion of state remedies has developed . . . to a statutory direction that federal courts shall not grant the writ to a state prisoner until state remedies have been exhausted.[25]

Such judicial restraint is comprehended by the *Hawk* doctrine,[26] expressly approved by the Court in this case, that state remedies are considered to be exhausted when all avenues of relief, including application for certiorari, have once been denied to the petitioner.[27]

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

23. "It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of *habeas corpus,* be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a State be finally prevented." Mr. Justice Peckham in Baker v. Grice, 169 U.S. 284, 291 (1897), discussing the principle of comity where the petitioner is detained under a state indictment, rather than a state conviction.

24. 339 U.S. 200 (1950).

25. *Id.* 204-205.

26. See note 8 *supra.*

27. It was expressly recognized by Mr. Justice Reed, writing the opinion of the Court, that Congress adopted the *Hawk* rule when it enacted section 2254. Darr v. Burford, 339 U.S. 200, 210-214 (1950).

Without regard to the doctrine of comity, it may be contended that protection of constitutional rights should be confined to the state courts because of the necessity of maintaining a federal judiciary free from the time consuming abuses attending habeas corpus in the federal courts.[28] However, this reasoning is no longer meritorious, for the federal habeas corpus statute contains provisions designed to alleviate these abuses.[29] Section 2244 seeks to eliminate the most vexing practice, the submission of successive petitions, by introducing a modified principle of res judicata. Once the legality of a prisoner's detention has been determined in a federal habeas corpus proceeding, the judge is given discretion to determine whether or not to entertain his petition upon a reapplication.[30] Section 2245 permits the receipt in evidence of a certificate filed by the trial judge containing pertinent facts regarding the regularity of the trial proceedings, and relieving him of the duty of appearing in person as a witness.[31] And section 2247 permits records made upon both the trial and previous applications for habeas corpus to be introduced in evidence, eliminating the necessity in many cases for a lengthy hearing necessary to redetermine the facts.[32]

Accepting the premise that lower federal courts may review, through habeas corpus, the constitutional regnlarity of state criminal processes, a question which may arise upon such review is whether the federal court must accept state findings of fact, or whether it may make such a determination independently. The State of Indiana in *Dowd v. United States* ex rel. *Cook*,[33] a case involving the denial of equal protection in that a prisoner was not allowed to appeal, argued that such state findings were res judicata in a subsequent habeas corpus proceeding brought in the federal courts.[34] The

28. "Here petitions for the writ are used not only as they should be to protect unfortunate persons against miscarriages of justice, but also as a device for harassing court, custodial and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1939 and April 1944, presented in the District Court 50 petitions for writs of habeas corpus. . . ." Judge Miller in Dorsey v. Gill, 148 F.2d 857, 862 (D.C. Cir. 1945).

29. It should be noted that these provisions are merely a codification of existing practice, that in reality nothing new has been introduced. But Judge Parker has stated that, "Even so, they are important in clarifying matters which were subject to misunderstanding and in pointing out how the abuses which have arisen in connection with habeas corpus may be avoided." Parker, *supra* note 3, at 178.

30. 28 U.S.C. 2244 (Supp. 1950).

31. 28 U.S.C. 2245 (Supp. 1950).

32. 28 U.S.C. 2247 (Supp. 1950).

33. 71 Sup. Ct. 262 (1951).

34. Actually, the case was not a good one in which to make such an argument for the state findings of fact were inadequate. They consisted of an order book entry, made upon a refusal by the Indiana Supreme Court of a petition for a delayed appeal, stating only that, "The court having examined and considered said petition, the answer thereto, and petitioner's reply and all of said affidavits and being duly advised in the premises, finds that the basic allegation of said petition to wit: that petitioner's counsel refused, without pay, to take an appeal is not true; and that petitioner is entitled to no relief herein." United States *ex rel.* Cook v. Dowd, 180 F.2d 212, 214 (7th Cir. 1950), Tr. of R. p. 173, Par. 299.

prisoner in this case had been denied a writ of certiorari by the Supreme Court after having failed in his attempt to obtain a delayed appeal in the highest court of the state. It was contended by the state that denial of this application for certiorari was an affirmance by the Supreme Court of those facts found by Indiana's highest appellate tribunal, therefore, the lower federal court must accept those findings. The Supreme Court avoided the question thus sought to be raised.[35] But the contention obviously is unmeritorious, for it rests on the wholly unwarranted assumption that denial of certiorari constitutes a significant pronouncement by the Court.[36]

A second argument advanced by the state, and similarly disregarded by the Court,[37] is that the doctrine of comity requires lower federal courts to adopt state findings of fact. However, just as comity does not prevent a federal court's granting a petition for habeas corpus once state remedies have been exhausted,[38] neither should it constitute an unqualified bar against the court's redetermining the facts in such a proceeding; it should only require that initial deference be paid to state findings. An analogy may be drawn from the practice in a recent group of "coerced confession" cases decided by the Supreme Court. In those cases state resolution of factual issues was accepted, but this did not preclude review of those conclusions in themselves determinative of constitutional rights. Thus if uncontroverted evidence indicated, in the opinion of the Court, that coercion was present, the state finding to the contrary was disregarded.[39] It is suggested, therefore, that comity should require a lower federal court in a habeas corpus proceeding to adopt initially state determination of factual questions; but if the record contains undisputed evidence disclosing to the court a deprivation of constitutional rights, it should be permitted to formulate its own conclusion on that issue. Otherwise, review of state findings in themselves decisive of constitutional rights would be foreclosed.

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35. The Supreme Court found that there had been a denial of equal protection, and stated that this could be cured by nothing less than an actual appellate determination of the merits of the conviction. Accordingly, the District Court for the Northern District of Indiana was instructed to allow the state a reasonable time in which to afford the prisoner a full appellate review of his conviction. Dowd v. United States *ex rel.* Cook, 71 Sup. Ct. 262 (1951).

36. It seems axiomatic that a denial of certiorari would go no further to import Supreme Court approval of state findings than it does to indicate an opinion respecting the merits. See note 15 *supra.*

37. See note 35 *supra.*

38. See note 27 *supra.*

39. See, *e.g.,* Watts v. Indiana, 338 U.S. 49, 50-52 (1949), where Mr. Justice Frankfurter says, "On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. . . . But 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria . . . are issues for this Court's adjudication."

It should be noted that such deference to state findings would not be required except in the event the trial court record has been introduced in evidence, for only with the bases for those findings available should comity demand that they be respected. And if the record has not been made available, the federal court in a habeas corpus proceeding should be free to redetermine the facts relating to the alleged violation of petitioner's constitutional rights.

It is no doubt true, as a general rule, that state appellate tribunals are competent to ensure the constitutional regularity of state criminal processes. However, states may be more alert to protect individual rights if federal surveillance can be invoked in the event of their violation. The certiorari jurisdiction of the Supreme Court does not assure this alertness. Moreover, it should be remembered that it is federal constitutional rights which are sought to be protected. Where necessary, lower federal courts should enforce these rights and prevent illegal detention of persons confined under state authority.

THE BAR AND THE UNAUTHORIZED PRACTICE OF LAW: A SURVEY

Traditionally, the legal profession has required of its members close adherence to a rigid code of ethical ideals. But while intent on maintaining their own high standards of professional demeanor, lawyers have failed to combat effectively the rendition of services legal in nature by persons and business groups not authorized to engage in the practice of law. Of course, the close relationship of legal concepts to modern business transactions makes difficult an absolute description of the lawyer's function. It may be impossible to perceive, for example, the point at which a tax accountant ceases to advise in the preparation of a tax return, and begins to give legal advice. Hence, there exists a twilight zone between those obligations manifestly within the responsibility of lawyers to perform, and those clearly within the prerogative of some other profession or business group. But the twilight zone does not comprise the entire unauthorized practice of law problem; services unquestionably legal in their nature are performed by persons without warrant to do so.[1]

The Bar has unwittingly aided this development of unauthorized practice by taking a lethargic attitude toward public relations. It has failed to instill public understanding of the tremendous range of services which lawyers are obligated to render and the necessity of consultation on every problem in a legal context. Indeed, it is of paramount importance that a campaign against unauthorized practice be founded on the premise that the public interest de-

1. See *Report of the Standing Committee on Unauthorized Practice of the Law*, 70 A.B.A. REP. 257, 261 (1945).