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## Civil Procedure—Habeas Corpus—Exhaustion of State Remedies

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## RECENT DECISIONS

### CIVIL PROCEDURE—HABEAS CORPUS—EXHAUSTION OF STATE REMEDIES.

—In early 1946, Oliver Smith, a Negro boy eighteen years of age and of limited education, was arrested in Virginia on a charge of robbery, convicted and sentenced to a term of nine years. In June, 1946, he escaped from the Virginia prison and was next heard of in New York in April, 1947, when he pleaded guilty to a charge of robbery and was sentenced as a second felony offender to a maximum sentence of fifteen years, five years more than he could have been given had he been sentenced as a first offender. Prior to July, 1955, Smith filed numerous petitions in Virginia courts to have his 1946 conviction set aside, alleging that before the conviction he had been held incommunicado for over a month, was coerced and forced into giving a confession and pleading guilty when, in truth, he was innocent, and that he was not represented by counsel nor advised as to his rights to counsel by the court. The Virginia Supreme Court of Appeals, reviewing his petitions, found no jurisdiction to consider the matter because the petitioner was not present in Virginia, and added that there was no merit to his petitions. New York had no remedy whereby a second offender could attack his out-of-state conviction for the first offense. Smith also filed four petitions for habeas corpus in a federal district court in New York, which were denied without hearing, but the district judge granted a certificate of probable cause after dismissing the fourth petition. On review by the United States Court of Appeals for the Second Circuit, *held*, reversed and remanded to the federal district court for a hearing on the merits. The petitioner alleged a substantial constitutional claim which he could not, at that time, vindicate in the courts of any state. Though one might ordinarily have forfeited his right to attack a state conviction by becoming a fugitive from justice from that state, "an untutored eighteen year old boy, without benefit of counsel, could not have been aware of what he was forfeiting by his flight." *United States ex rel. Smith v. Jackson*, 234 F.2d 742 (2d Cir. 1956).

Although the Constitution provides that the writ of habeas corpus shall not be suspended,<sup>2</sup> there is no constitutional grant to federal courts of habeas corpus jurisdiction as such. Article III does provide, "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States. . . ." It was on this basis that habeas corpus jurisdiction is expressly conferred on the lower federal courts by Congress in cases where the illegal restraint involves some question of federal law.<sup>3</sup>

<sup>1</sup>On petition for rehearing, alleging that the Virginia Supreme Court of Appeals *had* considered Smith's petition on the merits, *held*, petition denied. Since the Virginia court had no jurisdiction, its comments as to the merits were gratuitous, and even if that court had rejected Smith's claim on the merits, still, certiorari having been denied by the Supreme Court, petitioner had exhausted his state remedies and resort to the federal district court was now appropriate. *United States ex rel. Smith v. Jackson*, 234 F.2d 742, 749-50 (2d Cir. 1956).

<sup>2</sup>U. S. CONST. art. I, § 9, cl. 2.

<sup>3</sup>See 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 21 (1950) ; 1 *id.*, § 21 (Supp. 1956). See 28 U.S.C. §§ 2241-2255 (1952) for present provisions. The Judiciary Act of 1789, 1 STAT. 81, was passed to give affirmatively to the federal courts jurisdiction to issue the writ. The Act of 1867, 14 STAT. 385, made the writ avail-

The prerequisites for federal habeas corpus jurisdiction in cases where a prisoner is held in state custody have always been two-fold: (1) It must appear that "he is in custody in violation of the Constitution . . . of the United States . . .," and (2) he must have exhausted all available state remedies prior to petitioning for the federal writ.<sup>5</sup> Prior to 1948, however, the "exhaustion" prerequisite was uncodified.

The rule of "exhaustion of state remedies" has been explained by the Supreme Court in terms of comity between the courts. When a state court first secures jurisdiction there is a presumption that it will follow the law of the land, and there is a delicate federal-state relations problem created if a federal court intervenes before the state procedure has ended.<sup>6</sup> It has also been submitted by at least one author that, habeas corpus being a remedy for illegal detention, it would be a contradiction in terms to allow it where another remedy has not been exhausted, and that certainly to require exhaustion of other remedies is no suspension of the writ in violation of the Constitution.<sup>7</sup>

It early became apparent that an exception was necessary in cases of special circumstances where to require exhaustion of state remedies before allowing access to the federal procedure would work undue hardship and effectually prevent vindication of fundamental rights. These were commonly referred to as "exceptional cases of peculiar urgency." Each case had to be determined on its own facts, and only broad principles or classifications could be laid down to aid in determining whether a given case fell into the exception.<sup>8</sup>

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able to state prisoners, and eventually became the basis for a series of holdings that, where a denial of a constitutional right was asserted, judgments of conviction by state and federal courts could be reexamined on habeas corpus, and evidence *outside of the original criminal record* taken on the question of violation of constitutional rights. The acts of 1789 and 1867, along with two other acts (1833 and 1842) as they affected habeas corpus, were codified in the REVISED STATUTES of 1874 and 1878, and, with the exception of the addition of the Supreme Court's appellate power, remained static until 1948. See 28 U.S.C. §§ 451-466 (1946). See generally Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 345, 349, 351-54 (1952); United States v. Hayman, 342 U.S. 205, 210-13 (1952).

<sup>5</sup>28 U.S.C. § 2241 (c) (3) (1952).

<sup>6</sup>28 U.S.C. § 2254 (1952).

<sup>7</sup>Darr v. Burford, 339 U.S. 200, 217 (1950); Wade v. Mayo, 334 U.S. 672, 679-80; Bute v. Illinois, 333 U.S. 640, 671-72 (1948); Shapley v. Cohoon, 258 Fed. 752, 755 (D.C. Mass. 1918); Note, 49 MICH. L. REV. 611, 615-16 (1951).

<sup>8</sup>Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 358 (1952).

<sup>9</sup>Note, 34 MINN. L. REV. 653, 656-57 (1950). In *Ex parte Hawk*, 321 U.S. 114, 118 (1944), the Supreme Court concluded that where a petitioner's resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate [*cf.* Moore v. Dempsey, 261 U. S. 86 (1923)], a federal court should entertain his petition for habeas corpus, else he would be remediless. Compare Wade v. Mayo, 334 U.S. 672, 684, 692-93 (1948) (dissenting opinion), with Washington v. Smyth, 167 F.2d 658 (4th Cir. 1948).

In *Boyd v. O'Grady*, 121 F.2d 146 (8th Cir. 1941), where the facts were similar to the instant case (except that the petitioner was not a fugitive), it was held that if the allegations of denial of counsel were true, the detention was unlawful and it would be a "rare case of peculiar urgency" in which the federal court could entertain the writ of habeas corpus. See also *Smith v. O'Grady*, 312 U.S. 329 (1941).

Abuse of the writ of habeas corpus by convicts to test the "constitutionality" of their convictions was getting serious by 1942, and almost every person convicted of a crime who was willing to take an oath that he had been denied a fair trial could seek review by way of federal habeas corpus.<sup>9</sup> Therefore, the Judicial Conference of the United States appointed a committee to investigate and report on this problem. Its recommendations, for the most part, were embodied in the 1948 revision of title 28 of the United States Code. In this revision, the principle of exhaustion of state remedies was codified for the first time.<sup>10</sup>

Section 2254 imposes definite conditions as to the exhaustion of state remedies. One of three requirements must be met before habeas corpus will be granted by a federal court. They are: (1) The applicant must have exhausted the remedies available in the courts of the state, and he will not be deemed to have done this if he has the right, by any available state procedure, to raise the question presented, or, (2) he must show that there is no state corrective process available to him or (3) that such process is rendered ineffective to protect his rights due to the existence of special circumstances.

From the wording of the statute it is apparent that the same factors as before are to be considered in determining when the state remedies fail to afford the petitioner a complete adjudication of his constitutional rights, and the Supreme Court has held that section 2254 does not make the rule of "exhaustion" inflexible.<sup>11</sup>

Thus it seems that the protection of a petitioner's constitutional rights is uppermost in the minds of the federal courts. It would certainly follow that no waiver<sup>12</sup> of these rights is to be lightly implied or presumed.<sup>13</sup> Any

<sup>9</sup>Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1948).

<sup>10</sup>28 U.S.C. § 2254 (1952). Section 2254 was intended, among other things, 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. Such successive 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. Under this section, certiorari to the Supreme Court is ordinarily one of the necessary steps in the exhaustion of state remedies. Cases may arise, of course, where a lower federal court should be allowed to entertain the petition, even though state remedies have not been exhausted, but this is taken care of by the "special circumstances" section of the statute. For a more extensive discussion see Parker, *supra* note 8. Judge Parker was the Chairman of the Judicial Conference Committee which drafted the new Habeas Corpus Act. See also Darr v. Burford, 339 U.S. 200 (1950).

<sup>11</sup>In *Frisbee v. Collins*, 342 U.S. 519, 520-21 (1952), the Court stated that the general rule is not rigid, and that district courts may deviate from it and grant relief in special circumstances. Whether such circumstances exist calls for a factual appraisal by the court in each special situation. Determination of this issue, like others, is largely left to the trial courts, subject to appropriate review by courts of appeal. See also Darr v. Burford, 339 U.S. 200, 210 (1950); *Wade v. Mayo*, 334 U.S. 672, 681 (1948).

<sup>12</sup>Waiver is generally defined as the voluntary relinquishment of a known right. 56 AM. JUR., *Waiver* § 2 (1947). See also §§ 6, 9, 12.

<sup>13</sup>Courts indulge every reasonable presumption against waiver of fundamental constitutional rights and they do not presume acquiescence in the loss of fundamental rights. *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938). See *Von Moltke v. Gillies*, 332 U.S. 708 (1948), for a discussion showing that the Supreme Court is suspicious of any waiver of constitutional rights. ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 300 (1947).

such "waiver" would have to be intelligently and voluntarily made by an accused who knew the full legal effect of his actions.<sup>14</sup>

*United States ex rel. Turpin v. Snyder*<sup>15</sup> is analogous to the principal case. There a petitioner sought, while imprisoned in the State of New York as a second offender, to attack the constitutionality of his first conviction in Wisconsin, where, he alleged, he had not been advised of his right to counsel. He failed to attack the Wisconsin conviction until after his detention in New York, at which time there were no state remedies available to him as he was in the wrong state to raise them. Petitioner alleged that his failure to attack the first conviction sooner was due to the fact that he was not advised of his right to do so. The court held that the failure of the relator to attack the Wisconsin conviction until such time as he was unable to do so by state procedure should not be regarded as a waiver or forfeiture of any objection to his Wisconsin conviction, and that he had complied with section 2254 so as to entitle him to proceed in federal court.<sup>16</sup>

No cases have been found that answer in so many words the question raised by the principal case as to how far federal courts will go in entertaining habeas corpus from a state prisoner who, *by his own acts* (i.e., by becoming a fugitive from justice), has precluded himself from exhausting the normally available state remedies. Nevertheless, it appears that the requisite federal jurisdiction in cases of this type can be derived from section 2254, following the doctrine of "exceptional cases of peculiar urgency" developed by the cases prior to the 1948 amendment.

The court in the instant case, taking into account the age and intelligence of the boy and the harsh treatment he had received, concluded that there was no voluntary relinquishment of a known right which would con-

<sup>14</sup>The determination whether there has been an intelligent waiver of the right (e.g., to counsel) must depend, in each case, upon the peculiar facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. The burden of proof is on the defendant to establish that he did not competently and intelligently waive his constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 464-65, 468-69 (1938). Failure to request counsel does not constitute a waiver when the defendant does not know of his right to it. *Uveges v. Pennsylvania*, 335 U.S. 437, 441-42 (1948). A plea of guilty is not a waiver of constitutional rights if the defendant did not understand the consequences of such plea. *Herman v. Claudy*, 350 U.S. 116 (1956); *Gibbs v. Burke*, 337 U.S. 773 (1949). A request for counsel is not necessary to preserve the right. *Tompkins v. Missouri*, 323 U.S. 485 (1944). See generally Annot., 149 A.L.R. 1403, 1409-16 (1944); 14 AM. JUR., *Criminal Law* § 173 (Supp. 1955). In a case where a seventeen year old boy was arraigned, convicted, and sentenced in one day after a plea of guilty to first degree murder, with no advice as to his constitutional rights, the Supreme Court reversed the conviction asserting, in essence, that the application, by the state court, of a rule that a plea of guilty is a strong implication of a waiver of the right to counsel, was error. *DeMeerleer v. Michigan*, 329 U.S. 663 (1947), *reversing* *People v. DeMeerleer*, 313 Mich. 548, 21 N.W.2d 849 (1946). See also *Rice v. Olson*, 324 U.S. 786, 788-89 (1945); *Williams v. Kaiser*, 323 U.S. 471, 474-76 (1945).

<sup>15</sup>183 F.2d 742 (2d Cir. 1950).

<sup>16</sup>*Cf. Michel v. Louisiana*, 350 U.S. 91 (1955), where it was held that a defendant in a criminal prosecution who fled the state before indictment and did not file a motion challenging the grand jury until long after the statutory time for filing had passed had forfeited his right to do so. The Court stated, however, that they were not holding that the act of fleeing and becoming a fugitive deprives one of federal rights, but only that a state has an interest in prescribing time limitations for attacking its inquisitorial process, and that the present case was not one in which this interest must bow to essential considerations of fairness to individual defendants.

stitute a waiver. It then weighed the public and private interests to arrive at the result that Smith had not forfeited his right to attack his Virginia conviction by becoming a fugitive from justice.

The court considered that its decision might result in an increased flow of habeas corpus petitions (which was one thing that the 1948 revision sought to cut down); that the decision certainly would not deter escapes from prison; and that it would be desirable that Smith's conviction be reviewed by a Virginia court or a federal court sitting in Virginia, which would have a familiarity with the customs and practices in Virginia, enabling it better to evaluate the testimony and records. Against these considerations stood the prospects that, if the court denied the petitioner's writ and if Smith's allegations were true—a thing which could only be determined by a hearing on the merits—an innocent man convicted of crime in violation of substantial constitutional rights would unjustly suffer the severer penalties meted out in New York to second offenders. Further a state court's laxity in the protection of constitutional rights would be sanctioned.<sup>17</sup>

It would seem harsh and unjust under circumstances like those of this case to apply a mechanical and inflexible rule so as to deny at least a hearing on the merits. The federal district court may always deny relief after the facts are considered.

But, would the decision in the case have been different if a few, half, or most of the factors which the court considered in entertaining the petition had not been present? How substantial must be the constitutional right which is claimed? Where is the dividing line past which a petitioner's prior conduct will estop him from claiming that he has been denied a constitutional rights? These questions, and others, remain to be answered.

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CONSTITUTIONAL LAW—EQUAL PROTECTION AND DUE PROCESS OF LAW—APPEAL BY INDIGENTS.—Petitioners were convicted of armed robbery in Illinois. Immediately upon conviction they filed a motion in the trial court asking that a certified copy of the entire record, including a stenographic transcript of the proceedings, be furnished them without cost, alleging that they were "poor persons with no means of paying the necessary fees to acquire the Transcript and Court Records needed to prosecute an appeal. . . ." Under Illinois law it is necessary for a defendant to furnish a bill of exceptions or a report of proceedings at the trial certified by the trial judge in order to get an appellate review.<sup>1</sup> These are often impossible to prepare without a stenographic transcript of the trial proceedings, and counsel for Illinois did not deny that one was needed by petitioners. Indigent defendants sentenced to death are afforded a free transcript, but the others must pay for their own.<sup>2</sup> Upon denial of their motion by the trial court, the petitioners filed under the Illinois Post-Conviction Hearing Act,<sup>3</sup> which pro-

<sup>17</sup>United States *ex rel.* Smith v. Jackson, 234 F.2d 742, 748 (2d Cir. 1956).

<sup>1</sup>ILL. REV. STAT., c. 110, § 101.65 (Supreme Court Rule 65) (1955).

<sup>2</sup>ILL. REV. STAT., c. 38, § 769a (1955).

<sup>3</sup>ILL. REV. STAT., c. 38, §§ 826-32 (1955).