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in the lower court's opinion: "[*Erie R. R. v. Tompkins*] did not in any way alter the wholly distinct doctrine relating to equitable remedial rights. . . . There is no doubt that today, as before *Erie R. R. Co. v. Tompkins*, a federal court sitting in a given state will, for instance, refuse to appoint a receiver at the suit of an unsecured creditor although the statute of that state authorizes such an action."⁴⁰

In any event, even if the doctrine of equitable remedial rights has been abolished, the litigant in a federal diversity jurisdiction case must still resolve the general dilemma of "substance" and "procedure."

HENRY E. COLTON.

Habeas Corpus—A Method of Federal Review of State Decisions?

There has been an increasing number of applications for writs of habeas corpus in the federal courts to review the administration of justice by the state courts. Such applications present a complex problem to the federal judge. He is torn between the traditional reluctance of the federal courts to interfere with the states' administration of justice and the urgent desire to assure an accused of a fair trial.

In *Stonebreaker v. Smyth*,¹ recently decided by the Fourth Circuit Court of Appeals, the problem was aptly illustrated. The appellant, Stonebreaker, was serving a sentence of fifty years in the Virginia State Penitentiary, imposed by a Virginia court in 1931 upon pleas of guilty to three indictments charging armed robbery. In 1943, Stonebreaker had presented his petition for writ of habeas corpus to the trial court, alleging that he had been denied due process of law guaranteed by the Fourteenth Amendment of the Federal Constitution, in that, at the time he was sentenced he was a minor twenty years of age, ignorant and uninformed as to his right to counsel, and incapable of representing himself, and that he had pleaded guilty because of a confession that had been unfairly obtained from him. After full hearing on the merits, the trial court discharged the writ and dismissed the petition; and a writ of error was denied by the Supreme Court of Appeals of Virginia. Then, in 1944, an application for writ of certiorari to the United States Supreme Court was denied.²

After more than two years, the petitioner filed his petition for writ of habeas corpus in the United States District Court for the Eastern District of Virginia, relying on the identical grounds urged in the state court in 1943. The district court, relying on *White v. Ragen*,³ dismissed the petition without an examination into the substance of the allegations,

⁴⁰ *York v. Guaranty Trust Co.*, 143 F. 2d 503, 522 (C. C. A. 2d 1944).

¹ 163 F. 2d 498 (C. C. A. 4th 1947).

² *Stonebreaker v. Smyth*, 323 U. S. 754 (1944).

³ 324 U. S. 760 (1944).

on the ground that the matter had been fully heard in the state courts on habeas corpus and that the Supreme Court of the United States had denied certiorari.

On appeal, the circuit court, in a two to one decision, affirmed the decision of the district court, also relying on *White v. Ragen* and upon *Ex parte Hawk*.⁴

Before going into the actual decision of the district and circuit courts, a review of some of the basic rules governing the issuance of writs of habeas corpus by the federal courts may be of some value.

There is no doubt that a writ of habeas corpus may be granted by a federal court to a prisoner held or imprisoned by state authority, where he is in custody in violation of the Constitution or laws of the United States.⁵ But there are certain guiding rules which have been set out to govern the federal courts in passing upon such applications for habeas corpus. Some of these rules follow:

1. Federal courts should be hesitant about any interference with the administration of justice in the state courts, and, except in "rare" cases of "peculiar urgency," should not entertain petitions for habeas corpus, unless it clearly appears that the petitioner has exhausted his remedies in the courts of the state.⁶

Just what cases present circumstances of "peculiar urgency" so as to justify a federal courts' intervention prior to an exhaustion of state remedies obviously cannot be stated within any precise boundaries. Whether or not the particular case presents such circumstances must, of course, depend upon its own facts.⁷

⁴ 321 U. S. 114 (1943).

⁵ Rev. STAT. §§751 *et seq.* (1875), 28 U. S. C. §§451-455 (1940).

⁶ *White v. Ragen*, 324 U. S. 760 (1944); *House v. Mayo*, 324 U. S. 42 (1944); *Ex parte Hawk*, 321 U. S. 114 (1943); *Ex parte Davis*, 318 U. S. 412 (1943); *Mooney v. Holohan*, 294 U. S. 103 (1935); *Urquhart v. Brown*, 205 U. S. 179 (1907); *Ex parte Royall*, 117 U. S. 241 (1885).

⁷ In *Potter v. Dowd*, 146 F. 2d 244 (C. C. A. 7th 1944), allegations that the petitioner had been denied counsel in a trial for rape, was too poor to employ one, was a man of little education and that a confession had been obtained by duress, were held sufficient to warrant the intervention of a federal district court on petition for habeas corpus, prior to an exhaustion of state remedies.

In *Mitchell v. Youell*, 130 F. 2d 880 (C. C. A. 4th 1942), where the petitioner was serving a sentence of 18 years imposed by a state court upon a conviction of burglary, a hearing on habeas corpus in the district court had disclosed that the accused was illiterate, had no funds to employ counsel and none was appointed for him. The state criminal court judge had testified at the hearing that he had thought during the trial that the accused was being represented by counsel of his codefendants, and that he would not have sentenced the accused to more than two years had jury trial been waived. It also appeared that jury trial could not be waived, by state law, except where the defendant was represented by counsel. The circuit court held that the petitioner was entitled to relief by habeas corpus in the federal courts, but did not mention that it did not appear that the petitioner had sought review of the state court's denial of relief by the United States Supreme Court.

In *Jones v. Commonwealth of Kentucky*, 97 F. 2d 335 (C. C. A. 6th 1938), the petitioner had been convicted of murder and sentenced to death and had

2. The usual remedies to be exhausted in the state courts are whatever review is provided by the state⁸ and any proceeding in the nature of habeas corpus,⁹ including a writ of error *coram nobis*, if that is the prescribed state remedy.¹⁰

3. On adverse decision of the highest state court on his petition for writ of habeas corpus, the petitioner, if dissatisfied, must have sought to have that decision reviewed by the Supreme Court of the United States by appeal or certiorari, else his state remedies are not so far exhausted as to permit the filing of a petition for habeas corpus in a federal district court.¹¹

4. After the petitioner has exhausted his state remedies, including application for review by appeal or certiorari to the United States Supreme Court, his petition for habeas corpus may then be entertained by a federal district court. But at this point, the petitioner is confronted with the rule relied upon in the principal case: "Where the state courts have adjudicated the merits of his contentions, and this [United States Supreme] Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon habeas corpus the questions thus adjudicated."¹²

appealed and petitioned for new trial in the state courts. His petitions for habeas corpus and writ of error *coram nobis* to the highest state court on grounds that his counsel had not been granted adequate time to prepare his defense at trial and that he had newly discovered evidence that he was convicted on perjured testimony, had been denied on jurisdictional grounds. And, at the hearing on habeas corpus, the Attorney General of Kentucky stated that he was "strongly inclined to the view that Tom Jones was convicted on perjured testimony." These were held sufficiently peculiarly urgent circumstances to warrant the interference by the district court on habeas corpus, although no application had been made to the United States Supreme Court for review of the state court decisions.

In *Downer v. Dunaway*, 53 F. 2d 586 (C. C. A. 5th 1931), a prisoner, who was under sentence to be executed within two days and who could not make application to the proper state court which would not hold regular term for some time, was held entitled to habeas corpus by a federal court without exhaustion of his state remedies.

In *Boske v. Comingore*, 177 U. S. 459 (1900), it was held that the detention by state authority of a federal revenue officer whose presence at his post of duty was important to the public welfare presented a case of such urgency as to warrant the issuance of a writ of habeas corpus by the federal court, even before final action by the state court.

⁸ *Ex parte Davis*, 318 U. S. 412 (1943). *But cf.* *Williams v. Kaiser*, 323 U. S. 471, 477 (1944), wherein it was said, in a case where denial of counsel was the alleged violation of the Constitutional rights, that: "Heretofore we have not considered a failure to appeal an adequate defense to habeas corpus in this type of case . . . the failure to appeal only emphasizes the need of counsel." *Smith v. O'Grady*, 312 U. S. 329 (1940).

⁹ *Mooney v. Holohan*, 294 U. S. 103 (1935).

¹⁰ *Ex parte Hawk*, 321 U. S. 114 (1943).

¹¹ *See White v. Ragen*, 324 U. S. 760, 764 (1944); *Ex parte Hawk*, 321 U. S. 114, 117 (1943); *Urquhart v. Brown*, 205 U. S. 179, 181, 182 (1906).

¹² *See White v. Ragen*, 324 U. S. 760, 764-765 (1944); *House v. Mayo*, 324 U. S. 42, 48 (1944); *Ex parte Hawk*, 321 U. S. 114, 118 (1943); *Salinger v. Loisel*, 265 U. S. 224, 230-232 (1923); *United States ex rel. Parker v. Carey*, 135 F. 2d 205 (C. C. A. 7th 1943).

There are "exceptions" to the latter rule, in that, if the state affords no remedy,¹³ or if, in the particular case, the remedy is inadequate or in practice unavailable,¹⁴ a denial of certiorari by the United States Supreme Court does not preclude a re-examination by the federal district court upon habeas corpus.¹⁵ These are not actually exceptions to the rule, for, if the state affords no remedy, or if in the particular case the remedy is inadequate or in practice unavailable, the state courts have not "adjudicated the merits of his contentions" within the meaning of the rule. Obviously, if the state courts' denial of habeas corpus is based on the ground that no such remedy is available under state law, or that the contentions of the petitioner were not properly presented, or upon some other adequate non-federal ground, the denial of certiorari by the Supreme Court of the United States is based merely on the ground that it has no jurisdiction to review, and can have no bearing on the merits of the petitioner's contentions.¹⁶

If the denial of certiorari by the United States Supreme Court is grounded upon want of jurisdiction, then the federal district court may entertain the petition for habeas corpus. But even then, in the usual case, there will remain some other state court remedy which has not been exhausted; so that the district court might dismiss the petition on that ground.

The net result of the above decisions appears to be that, when the remedy of habeas corpus is readily available in the courts of the state, as it is in Virginia,¹⁷ a federal district court is not justified in interfering with state custody by the issuance of habeas corpus, except in those "rare cases" of "peculiar urgency," in which cases the interference may be procured prior to an exhaustion of the state remedies. This for the reason that, until the petitioner has first exhausted his remedies in the state courts and has sought review in the United States Supreme Court, a federal district court is not justified in issuing habeas corpus;

¹³ House v. Mayo, 324 U. S. 42 (1944) where the Florida Supreme Court had denied a writ of error from petitioner's conviction, an application for leave to file a *coram nobis* proceeding, and three petitions for habeas corpus, all without a hearing and on the ground that the remedies sought were not appropriate to the Florida state law. See Mooney v. Holohan, 294 U. S. 103, 115 (1934).

¹⁴ White v. Ragen, 324 U. S. 760 (1944) where the Missouri Supreme Court had dismissed the petitions for habeas corpus without requiring an answer and without a hearing, and without an opinion, save an announcement that: "Any petition which raises a question of fact only will not be considered." The United States Supreme Court deemed this an announcement that no petition for habeas corpus would be entertained by the Missouri Supreme Court unless, on its face, it precluded any possibility of a trial of any issue of fact in that court.

¹⁵ See *Ex parte Hawk*, 321 U. S. 114, 118 (1943).

¹⁶ See White v. Ragen, 324 U. S. 760, 765 (1944); House v. Mayo, 324 U. S. 42, 48 (1944); Williams v. Kaiser, 323 U. S. 471, 477 (1944); New York *ex rel. Whitman v. Wilson*, 318 U. S. 688, 690 (1942); Woolsey v. Best, 299 U. S. 1, 2 (1936).

¹⁷ VA. CODE (1942) §§5848-5861.

and, after denial of habeas corpus by the state court and a refusal to review by the United States Supreme Court, the weight of those decisions, while not *res judicata*,¹⁸ will effectively prevent a federal district court from proceeding upon an independent inquiry into the very questions already adjudicated.¹⁹

In view of this apparent result, there may be a choice facing the person who is imprisoned by state authority and who alleges a deprivation of his constitutional rights. If he has a case the facts of which may possibly be interpreted as presenting circumstances of "peculiar urgency"²⁰ and the state courts have "adjudicated the merits of his contentions," it seems that he should directly petition the federal district court for writ of habeas corpus. Then, if the district court should dismiss the petition on the ground that no review had been sought in the United States Supreme Court, the petitioner still has the chance that the United States Supreme Court will grant relief on certiorari or appeal. However, if he first seeks review by the United States Supreme Court, and that review is denied, there seems little, if any, hope of his getting a re-examination by the district court.

If this is the true picture to be gleaned from the stated rules, it seems clear that, in the principal case, the district court and the majority of the circuit court were correct in discharging the writ of habeas corpus. But it is equally apparent that the crux of the question, as pointed out by Judge Soper, is, what situations are sufficiently extraordinary or unusual as to justify a re-examination by a federal district court on habeas corpus of questions adjudicated on the merits by the state courts and reviewed or declined by the United States Supreme Court? The writer has been unable to find any cases in which the lower federal courts have taken it upon themselves to re-examine on habeas corpus upon such a state of the record. Perhaps the answer to the question and the reason for the dearth of authority is, as already suggested, that there are no such extraordinary or unusual situations. Certainly it seems that, when a person convicted of crime in a state court has pressed his contentions of a violation of his constitutional rights through the state courts, has had a full hearing there, and has also sought review by the United States Supreme Court, it is not too great an assumption that there is no merit in his contentions. But if that is the answer,

¹⁸ *Ex parte Abernathy*, 320 U. S. 219 (1943); *Waley v. Johnston*, 316 U. S. 101 (1942); *Salinger v. Loisel*, 265 U. S. 224 (1924).

¹⁹ It should be noted that, while the United States Supreme Court may, by REV. STAT. §716 (1911), 28 U. S. C. §377 and REV. STAT. §751 *et seq.* (1875), 28 U. S. C. §§451-455 issue original writs of habeas corpus, that Court will not ordinarily do so, even after exhaustion of state remedies, before it has been sought and denied in a district court or denied by a circuit or district court judge. See *Ex parte Hawk*, 321 U. S. 114, 117 (1943); *Ex parte Abernathy*, 320 U. S. 219 (1943).

²⁰ See Note 7 *supra*.

why did the United States Supreme Court say that a federal court would not "ordinarily" re-examine such questions?

In the principal case, the contention of the petitioner was that his was not an "ordinary" case, within the meaning of the rule because, since his contentions were passed upon by the state court and since certiorari was denied by the United States Supreme Court, decisions had been handed down by the United States Supreme Court that brought about a "change or at least a clarification of the law with respect to the necessity of counsel."²¹ And, he contended, in the light of these decisions, he was entitled to a rehearing. To this contention the majority of the circuit court replied that the petitioner was probably correct, but that, since the decisions mentioned could not have been before the state court at the time his former petition for habeas corpus was presented, he *had not exhausted his state remedies*, and should file another petition in the state court.

Obviously, in this reply of the majority there is a clear recognition of at least prima facie merit to the petitioner's contentions that he has been deprived of his constitutional rights. Thus, support is lent to the conclusion that there are no cases so extraordinary or unusual as to justify the issuance of habeas corpus by a federal district court after a full hearing by the state court and a denial of or review by certiorari or appeal by the United States Supreme Court.

Also, by way of lending support to their decision, the majority of the circuit court argue that the state courts can give the petitioner relief more expeditiously than would a reversal of the decision of the district court, since an application for certiorari "would almost certainly be made if we were to take the habeas corpus matter out of the hands of the state courts."²² Judge Soper, in his dissent, contends that the circuit court should act immediately, since there is no assurance that the state court will change its mind. Of course, whether a further petition to the Virginia courts will result in more immediate relief to the petitioner depends entirely upon the action of that court.

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²¹ *De Meerleer v. Michigan*, 329 U. S. 663 (1946); *Canzio v. New York*, 327 U. S. 82 (1945), *rehearing denied*, 327 U. S. 816 (1945); *Rice v. Olson*, 324 U. S. 786 (1944)—in all of which cases it was held that a plea of guilty did not necessarily involve an "intelligent waiver" of right to counsel. *Tompkins v. Missouri*, 323 U. S. 485 (1944) in which it was held that a request for counsel was not necessary to preserve the right.

²² *Stonebreaker v. Smyth*, 163 F. 2d 498, 502 (C. C. A. 4th 1947).