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Protection of the individual from state denial of due process requires that federal courts be empowered to intervene in state criminal matters through the writ of habeas corpus.[1] On the other hand, comity in our dual judiciary system requires that this power be exercised sparingly and with utmost self-restraint.[2] A balance of these conflicting interests—due process versus comity—has led to the doctrine[3] that, absent "exceptional circumstances of peculiar urgency,"[4] a district court will not entertain a state prisoner's application for habeas corpus until all available state remedies have been exhausted.[5]

The exhaustion doctrine was considerably expanded by two dicta appearing in Ex Parte *Hawk*,[6] a 1944 Supreme Court per curiam opinion. Each raised an issue that has been a bone of contention in the federal courts ever since: 1) is a petition for certiorari to the Supreme Court also a prerequisite? 2) and if so, what is the effect of the denial of certiorari on the prisoner's subsequent application for habeas corpus?

According to the first *Hawk* dictum, raising the federal question in only state tribunals was insufficient to establish eligibility for the federal remedy. The prisoner must also petition the United States Supreme Court for

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1. 28 U.S.C. §2241 (Supp. III 1950). For sketch of expanding use of the writ in recent years, see Holtzoff, *Collateral Review of Convictions in Federal Courts,* 25 B.U.L. Rev. 26 (1945). For concise history and general discussion, see Longsdorf, *Habeas Corpus: A Protean Writ and Remedy,* 8 F.R.D. 179 (1949); Note, 61 Harv. L. Rev. 657 (1948).

2. Baker v. Grice, 169 U.S. 284, 291 (1898); Covell v. Heyman, 111 U.S. 176, 182 (1884). See Warren, *Federal and State Court Interference,* 43 Harv. L. Rev. 345 (1930).

3. See *Ex Parte* Hawk, 321 U.S. 114 (1944), and Mooney v. Holohon, 294 U.S. 103 (1935). Now codified as 28 U.S.C. §2254 (Supp. III 1950): "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."

4. United States *ex rel.* Kennedy v. Tyler, 269 U.S. 13 (1925). An example is Moore v. Dempsey, 261 U.S. 86 (1923), involving a mob-dominated trial. Exhaustion of remedies is similarly unnecessary in a situation where a state attempts to interfere improperly with the federal government. *E.g., In re* Neagle, 135 U.S. 1 (1889) (federal officer held in state custody for homicide committed in scope of duty). See Mr. Justice Reed dissenting in Wade v. Mayo, 334 U.S. 672, 692-693 (1948). The exhaustion requirement is of course satisfied if the state provides no remedy. Young v. Ragen, 337 U.S. 235 (1949); Hawk v. Olson, 326 U.S. 271 (1945).

5. Thus resort to federal habeas corpus will not be allowed unless state courts have adjudicated the precise point, *e.g., Ex Parte* Williams, 317 U.S. 604 (1943), in the light of the latest controlling decision, *e.g.,* Mackey v. Kaiser, 323 U.S. 683 (1945), despite the apparent futility of applying again for state relief, *e.g.,* Mooney v. Holohon, 294 U.S. 103 (1935).

6. 321 U.S. 114 (1944). The Court affirmed the denial of the writ by lower federal courts, on the ground that Nebraska state remedies could not be deemed exhausted until coram nobis had been attempted. Statements relating to the requirement that the prisoner must also apply to the Supreme Court for certiorari and the effect of its denial were irrelevant to the holding and consequently obiter dicta. For history of the extensive *Hawk* litigation, see Note, *The Judicial Obstacle Course,* 29 Neb. L. Rev. 445 (1950).

certiorari[7] to review the highest state court decision.[8] The extra step in the exhaustion process could be skipped only if the state decision might be deemed to rest on some adequate non-federal ground. In that event, the prisoner could apply directly to the district courts since the Supreme Court would lack jurisdiction to grant certiorari.[9]

The general rule and its lone exception governed federal habeas corpus practice[10] until *Wade v. Mayo*[11] in 1948. The Court there rejected the strict requirement of the extra step as often "futile procedure," but conceded that the prisoner's failure to apply for certiorari might be a relevant consideration for the district court in determining whether to take jurisdiction.[12] The authority of *Wade v. Mayo* was destined to be short-lived, however. Only two years later it was impliedly over-ruled by *Darr v. Burford*,[13] which re-established the mandatory certiorari rule in all its force and vigor. Basic to *Darr v. Burford* is a lurking fear of disturbing delicate federal-state relations by permitting a single judge of the lowest federal court to upset judgments of the highest state court.[14] To avoid such embarrassing reversals, the Court insisted, it should be given the "first crack" at passing upon charges of state violations of federal constitutional rights.[15]

If the first *Hawk* dictum makes federal habeas corpus relief more difficult for the state prisoner, the second *Hawk* dictum would make such relief nearly

7. Cases come to the Supreme Court by two main routes: appeal and certiorari. Appeal is theoretically of right, while certiorari is totally discretionary. ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (2d ed., Wolfson and Kurland, 1951) is the most comprehensive work on this subject. See also Boskey, *Mechanics of the Supreme Court's Certiorari Jurisdiction*, 46 COL. L. REV. 255 (1946).

8. *Ex Parte* Hawk, 321 U.S. 114, 117 (1944). Five cases were cited in support of this dictum. Two are authority only for the doctrine of exhaustion of remedies available in *state* courts. *Ex Parte* Abernathy, 320 U.S. 219 (1943); Mooney v. Holohon, 294 U.S. 103 (1935). The other three required that a petitioner be "put to his writ of error." United States *ex rel.* Kennedy v. Tyler, 269 U.S. 13 (1925); Urquhart v. Brown, 205 U.S. 179 (1907); Tinsley v. Anderson, 171 U.S. 101 (1898). But there is considerable difference between the now-obsolete writ of error and a writ of certiorari. A writ of error was a writ of right and would be granted automatically. A writ of certiorari, on the other hand, is a writ of grace and is wholly discretionary with the Supreme Court.

9. *Ex Parte* Hawk, 321 U. S. 114, 118 (1944). *Cf.* Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945); Williams v. Kaiser, 323 U.S. 471, 477-8 (1945). ROBERTSON AND KIRKHAM, *op. cit. supra* note 7, at 163.

10. The Supreme Court caused copies of the *Hawk* opinion to be distributed among inmates of state penitentiaries. See Darr v. Burford, 339 U.S. 200, 211 (1950). The dictum was approved in House v. Mayo, 324 U.S. 42 (1945), and White v. Ragen, 324 U.S. 760 (1945). The result was to flood the Supreme Court with prison-drawn petitions for certiorari from state convicts. ROBERTSON AND KIRKHAM, *op. cit. supra* note 7, at 749.

11. 334 U.S. 672 (1948).

12. 334 U.S. 672, 681 (1948).

13. 339 U.S. 200, 210 (1950): "Whatever deviation *Wade* may imply from the established rule will be corrected by this decision."

14. 339 U.S. 200, 206-207 (1950).

15. 339 U.S. 200, 216 (1950). The Court rationalized that Congress gave this policy legislative sanction by enacting Section 2254 of the 1948 revision of the Judicial Code. See note 3 *supra*. This appears to have been the intention of the Judicial Conference committee that drafted the section. See Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 176-177 (1949). But this statute states only the undoubted rule that a state prisoner must exhaust "the remedies available *in the courts of the State*." (Italics added.) Unless the Supreme Court of the United States could somehow be placed in the category of "courts of the State," there is nothing in the statute itself to indicate that certiorari is also a prerequisite step. The Reviser's Note is similarly ambiguous: "This new section is declaratory

impossible: "Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated."[16] The rule is undoubtedly correct in those cases in which the Supreme Court had granted certiorari and adjudicated the issues on their merits,[17] even though res judicata is inapplicable in habeas corpus cases.[18] But it is much more likely that certiorari will be denied,[19] and, under present Supreme Court procedure,

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of existing law as affirmed by the Supreme Court. (See Ex Parte Hawk . . .)" It is true that a dictum in *Hawk* required certiorari, but the case actually turned on the failure of the prisoner to exhaust a remedy available in *state* courts. See note 6 *supra*. Furthermore, *Wade v. Mayo* came down only two days before the enactment of the statute, and its effect on the *Hawk* rule could not have been considered by the draftsmen, the Reviser, or either House of Congress. During the two-year span between *Wade v. Mayo* and *Darr v. Burford*, lower federal courts interpreted Section 2254 to mean that certiorari was not part of the exhaustion process Miller v. Hudspeth, 176 F.2d 111 (10th Cir. 1949); Collingsworth v. Mayo, 173 F.2d 695 (5th Cir. 1949). In view of the unmistakably plain language of the statute, unchallenged by any convincing proof of a contrary Congressional intent, the latter interpretation would seem to be correct. See MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE 449 (1949).

16. *Ex Parte* Hawk, 321 U.S. 114, 118 (1944). The only case cited in support of this dictum was Salinger v. Loisel, 265 U.S. 224, 230-232 (1924). This case held that, although res judicata does not extend to a decision refusing to discharge the prisoner on an application for habeas corpus raising the same contentions, a district court may in its discretion give that decision controlling weight, depending on "the character of the court or officer to whom the first application was made, and the fullness of the consideration given to it." In the light of the quoted proviso, a denial of certiorari could hardly be deemed equivalent to a decision based on a full-dress hearing on the merits. Certiorari is frequently denied for reasons quite unrelated to the merits, and a district judge may at best only speculate as to the reasons for the Court's action. See note 20 *infra*.

17. If the conviction is reversed, the prisoner has won at least a new trial; and if the conviction is sustained, proper respect for the superior tribunal would probably bar relitigation.

18. *See* Darr v. Burford, 339 U.S. 200, 214 (1950); Waley v. Johnston, 316 U.S. 101, 105 (1942). A district court may, however, refuse to entertain a petition for habeas corpus if a federal court had previously denied a similar petition on its merits, and if "the ends of justice will not be served by such inquiry." 28 U.S.C. §2244 (Supp. III 1950), codifying the principle laid down in Salinger v. Loisel, *supra* note 16.

19. Petitioners for certiorari must either (1) pay the regular docketing fee and printing costs or (2) accompany their petition with a motion *in forma pauperis*. Of the first category, the Court granted only 14.9% of the 652 petitions filed in 1947-48, 21.6% of the 667 petitions filed in 1948-49, and 13.3% of the 640 petitions filed in 1949-50. Petitions in the second category are considered together with the motion *in forma pauperis*. If the petition for certiorari is denied, no ruling on the motion is made. STERN AND GRESSMAN, SUPREME COURT PRACTICE 150 (1950). The Court granted only 17 (4%) of 417 such petitions filed in 1947-48, 18 (4%) of the 443 filed in 1948-49, and 7 (1.6%) of the 436 filed in 1949-50. ROBERTSON AND KIRKHAM, *op. cit. supra* note 7, at 580-81; Note, 64 HARV. L. REV. 114, 158 (1950). Most *in forma pauperis* petitions come from state prisoners who challenge the legality of their convictions. During the three years preceding the 1949 October Term, for example, 49% came from Illinois State prisoners alone. Chief Justice Vinson, *Work of the Federal Courts*, an address before the American Bar Association, Sept. 7, 1949, printed in 69 Sup. Ct. V, VII-VIII (1949). For the reasons underlying the "procedural morass" in Illinois, see Marino v. Ragen, 332 U.S. 561, 563 (1947) (concurring opinion); Comment, *Collateral Relief from Convictions in Violation of Due Process in Illinois*, 42 ILL. L. REV. 329 (1947). This Illinois situation has presumably been improved by the passage of the Post Conviction Act. ILL. REV. STAT. c. 38, §§826-832 (1949). See Notes, 10 J. CRIM. L. & CRIMINOLOGY 606 (1950), 41 J. CRIM. L. & CRIMINOLOGY 335 (1950).

for reasons quite unrelated to the merits of the case.[20] Furthermore, these reasons are usually not made explicit.[21] What legal significance, then, should a lower federal court attach to such denial when the prisoner later applies for habeas corpus?

The Court has traditionally insisted that ". . . the denial of certiorari imports no expression of opinion on the merits. . . ."[22] Despite an occasional note of skepticism,[23] this had been the generally accepted rule—at least until Ex Parte *Hawk*.[24] The dictum was later approved in Supreme Court decisions[25] and generally followed in the lower federal courts.[26] In *Darr v.*

20. "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions . . . The function of the Supreme Court is, therefore, to resolve conflict of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts." Chief Justice Vinson, *supra* note 19, at VI. See Revised Rules of the Supreme Court of the United States, 28 U.S.C. Rule 38.5 (1946). Reasons which may motivate a Justice to vote against a petition include: (1) the time may not be favorable for a decision on a particular issue of national concern; (2) the issue may appear too moribund for adjudication, or it might become so later on; (3) it may appear desirable to have different aspects of an issue further illumined by the lower courts; (4) a certiorari petition may have already been granted in a case involving the same issue presented more clearly or in conjunction with other issues the Court feels should also be considered; (5) the constitutional issue may be so entangled with non-constitutional issues so as to raise doubt whether the constitutional issue could be effectively isolated; (6) the record may be cloudy; (7) the condition of the Court calendar; (8) fear that if certiorari were granted, five or more Justices might decide the issue wrongly and set a bad precedent! ROBERTSON AND KIRKHAM, *op. cit. supra* note 7, at 603-605; STERN AND GRESSMAN, SUPREME COURT PRACTICE 132-133 (1950); Harper and Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari*, 99 U. of PA. L. REV. 293, 299-300 (1950).

21. "It has been suggested from time to time that the Court indicate its reasons for denial. Practical considerations preclude . . . If the Court is to do its work, it would not be feasible to give reasons, however brief, for refusing to take these cases. The time that would be required is prohibitive, apart from the fact . . . that different reasons not infrequently move different members of the Court in concluding that a particular case at a particular time makes review undesirable." Mr. Justice Frankfurter in State v. Baltimore Radio Show, 338 U.S. 912, 918 (1950).

22. Mr. Justice Holmes in United States v. Carver, 260 U.S. 482, 490 (1923). *See also* Sunal v. Large, 332 U.S. 174, 181 (1947); Atlantic Coast Line R. Co. v. Powe, 283 U.S. 401, 403-404 (1931); Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). Mr. Justice Frankfurter has emphasized that ". . . all that a denial of a petition for certiorari means is that fewer than four members of the Court thought it should be granted." State v. Baltimore Radio Show, 338 U.S. 912, 919 (1950). For background of this "rule of four," see Boskey, *supra* note 7, at 257.

23. At least one commentator on Supreme Court practice contends that the denial of certiorari is coming to mean tacit approval of the decision below. Frank, *The United States Supreme Court: 1947-48*, 16 U. OF CHI. L. REV. 1, 34-35 (1948); Frank, *The United States Supreme Court: 1948-49*, 17 U. OF CHI. L. REV. 1, 38-39 (1949). But "(a)lthough it be true that the Supreme Court may frequently refuse to review a case because a quick examination of the record indicates that the decision is not erroneous, it is extremely hazardous to conclude *in any particular case* that the reason for denying certiorari was the correctness of the decision." (Italics added.) ROBERTSON AND KIRKHAM, *op. cit. supra* note 7, at 604-605.

24. 321 U.S. 114 (1944). "Only in one instance—where certiorari has been denied as a result of an attempt to exhaust the state remedies—is there any possibility that the denial of certiorari may have an effect of which a lower court should be cognizant." ROBERTSON AND KIRKHAM, *op. cit. supra* note 7, at 605.

25. White v. Ragen, 324 U.S. 760, 764-765 (1945); House v. Mayo, 324 U.S. 42, 48 (1945) *semble*. In the latter opinion, the *Hawk* dictum was preceded by a statement of the orthodox rule on the effect of a certiorari denial. These two propo-

Burford,[27] although ostensibly sidestepping the issue on the ground its disposition would be only dictum, the Opinion of the Court included language intimating that the denial of certiorari may subsequently guide district court action.[28] Both concurring Justices refused to accept the implication of this language and joined the three dissenters, together constituting a majority, in repudiating any deviation from the orthodox rule on the effect of a certiorari denial.[29]

This division of the Court and the ambiguous language in the opinion made confusion in the lower federal courts inevitable. Three different theories have evolved: 1) that a denial of certiorari is conclusive on the merits of a subsequent application for habeas corpus; 2) that a denial may be given substantive weight in the discretion of the district court; 3) that a denial is to be given no substantive weight whatever.

1) *Giving denial conclusive effect.* The first is illustrated by *Goodwin v. Smyth*.[30] The Fourth Circuit Court of Appeals affirmed a district court's denial of habeas corpus on the ground there was no allegation of "unusual circumstances" as would justify a lower federal court in granting the writ when that relief had been denied by the highest court of the state and certiorari had been refused by the Supreme Court.[31] Such "unusual circumstances"[32] would arise in cases where the state corrective process had failed to afford the prisoner a full and fair adjudication of his federal contentions.[33] In

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sitions cannot be reconciled. If a denial of certiorari imports no opinion on the merits, why then should it bar district courts from subsequently re-examining the prisoner's contentions on petition for habeas corpus?

26. *E.g.*, Schechtman v. Foster, 172 F.2d 339 (2d Cir. 1949); Stonebreaker v. Smyth, 163 F.2d 498 (4th Cir. 1947); Bird v. Smith, 175 F.2d 260 (9th Cir. 1949); United States *ex rel.* Weber v. Ragen, 176 F.2d 579 (7th Cir. 1949). The opinion in the latter case was written by Judge Sherman Minton, then of the Seventh Circuit Court of Appeals. Shortly after his elevation to the Supreme Court, the case was overruled by United States *ex rel.* Cook v. Dowd, 180 F.2d 212 (7th Cir. 1950), which held that a denial of certiorari should be given no substantive effect whatever.

27. 339 U.S. 200 (1950).

28. *Id.* at 215: "Even after this Court has declined to review a state judgment denying relief, other federal courts have power to act on a new application by the prisoner. On that application, the court may require a showing of the record and action on prior applications, and may decline to examine further into the merits because they have already been decided against the petitioner. Thus, there is avoided abuse of the writ by repeated attempts to secure a hearing on frivolous grounds, and repeated adjudications of the same issues by courts of co-ordinate powers. In this way the record on certiorari in this Court is brought to the attention of the trial court." *Id.* at 214: "Whether a refusal to grant certiorari imports an opinion on any issue or not, the reason persists for requiring an application here from the state refusal before application to another federal court."

29. Mr. Justice Douglas took no part in the case. Thus, of the eight Justices sitting, five (JJ's Reed, Vinson, Minton, Clark, and Burton) officially approved the first *Hawk* dictum that a petition for certiorari is a prerequisite to federal habeas corpus; while five (Frankfurter, Black, Jackson, Clark, and Burton), although not speaking for the Court, refused to follow the second *Hawk* dictum on the effect of a certiorari denial.

30. 181 F.2d 498 (4th Cir. 1950).

31. Stonebreaker v. Smyth, 163 F.2d 498 (4th Cir. 1947), is the leading Fourth Circuit decision applying this principle. Others: Holiday v. State of Maryland, 177 F.2d 844 (4th Cir. 1949); Goodman v. Swenson, 173 F.2d 349 (4th Cir. 1949); Davis v. Smyth, 167 F.2d 221 (4th Cir. 1948).

32. Compare with the "exceptional circumstances" needed to avoid the exhaustion requirement altogether (note 4 *supra*) and the circumstances necessary to avoid the certiorari step in the exhaustion process (note 9 *supra*).

33. Stonebreaker v. Smyth, 163 F.2d 498 (4th Cir. 1947), relying on House v. Mayo, 324 U.S. 42 (1945), and White v. Ragen, 324 U.S. 760 (1945). Section 2254

that event, the denial of certiorari would be meaningless since the Supreme Court lacks jurisdiction to review a state decision which might be deemed to rest on adequate non-federal grounds.[34] Absent such circumstances, the denial would be conclusive.[35]

This approach, as extreme as it might appear to be, simply carries the two *Hawk* dicta to their logical conclusion. After all, the basic purpose of the "first crack" policy is to dispose of valid charges of state denial of due process before they reach the district court level where a reversal of the state conviction might prove embarrassing.[36] To accomplish this purpose, the policy presupposes that the Supreme Court will scrutinize each state prisoner's application for certiorari on its merits, sift out the wheat from the chaff, grant certiorari if federal relief is indicated, and then adjudicate the constitutional issues itself. An inescapable corollary is that certiorari will be denied if the Supreme Court finds that federal relief should not be granted. And of course if the denial of certiorari constitutes a rejection of the prisoner's contentions on the merits, it would be presumptuous for a lower federal court to re-examine those contentions in habeas corpus proceedings.

The *Goodwin* approach has several obvious advantages. The danger of what might be deemed unseemly interference in state criminal matters by lower federal courts is avoided. Also, heavily-docketed district courts would be relieved of an onerous administrative burden.[37]

But the net effect of such a doctrine, coupled with the mandatory certiorari rule, is to divest lower federal courts of a large part of their habeas corpus jurisdiction over state prisoners.[38] For, until the prisoner has applied for certiorari, his petition for habeas corpus will not be entertained; and if certiorari is denied, the writ will not be granted. Presumably the only exceptions, aside from "unusual circumstances," would be those rare instances where the Supreme Court expressly indicates its reason for denying certiorari,[39] or stated that its denial was "without prejudice" to the petitioner's right to later invoke the habeas corpus remedy in the district courts.[40] The "unusual circumstances" exception would of course probably cover all cases where the prisoner has been unable to obtain a hearing in the state courts on

(note 3 *supra*) forbids a district court from granting habeas corpus except in one of three situations: (1) where the prisoner has exhausted all available state remedies; (2) where the state provides no remedy; (3) where circumstances exist rendering such a remedy ineffective. Under the stricter *Goodwin* approach, a district court is barred from granting such relief except in only the second or third situations.

34. See citations in note 9 *supra*.

35. In Schechtman v. Foster, 172 F.2d 339 (2d Cir. 1949), Judge Learned Hand took the same position. *Accord:* Bird v. Smith, 175 F.2nd 260 (9th Cir. 1949); Jones v. Mayo, 86 F. Supp. 849 (S.D. Fla. 1949).

36. *See* Darr v. Burford, 339 U.S. 200, 217 (1950): "It is this Court's conviction that orderly federal procedure under our dual system of government demands that the states' highest courts should ordinarily be subject to reversal only by this Court . . ."

37. See statistics at note 57 *infra*.

38. This is the admitted aim of this approach. See *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 176-178 (1949), written by the Hon. John J. Parker, Chief Judge of the Fourth Circuit Court of Appeals.

39. See note 21 *supra*.

40. If certiorari is denied "without prejudice," the effect is to reaffirm in that particular case the orthodox rule on the effect of a certiorari denial. In the absence of such a phrase, however, there is no negative implication that the denial is *with* prejudice, and the prisoner is not thereby prevented from seeking other avenues of relief. See Mr. Justice Frankfurter dissenting in Darr v. Burford, 339 U.S. 200, 232 (1950).

the factual issues involved because of the inadequacy of the state remedies afforded.[41]

In all other cases,[42] the Supreme Court's "first crack" at the constitutional question would also be the prisoner's last chance for federal relief. Confronted with this now-or-never plight of the prisoner, the Court would be compelled to either ignore many instances of state denial of due process, or else radically alter its methods of disposing of certiorari applications. For, under present practice, contrary to the basic assumption of the *Goodwin* approach, certiorari is frequently denied for reasons immaterial to the merits of the claim.[43] If district courts could not thereafter grant habeas corpus relief, the Court would have to pass on the merits of each petition for certiorari that attacked the constitutionality of a state criminal conviction. In addition, there would be strong pressure to grant certiorari in borderline cases. Such a drastic increase in the court's volume of business would be directly contrary to its recent marked tendency to reduce its work load.[44]

2) *Giving the denial discretionary weight.* Other courts have taken a more equivocal position. An example is *Holland v. Eidson.*[45] Apparently relying in part on the discretionary nature of habeas corpus and in part on the prior denial of certiorari, the court refused the writ without even inquiring into the merits of the petition.[46]

Under this approach, which seems most in accord with the *Darr* opinion,[47] giving a certiorari denial any substantive weight is discretionary with the district court; under the *Goodwin* approach, giving the denial a conclusive effect is mandatory. Despite the apparent dissimilarity, the two theories are likely to yield the same results. The state prisoner must already contend with a number of subterranean influences tending to predispose a federal judge to deny the writ: the extreme abuse of the writ by state convicts,[48] the small percentage of claims which have proved valid,[49] the generally over-crowded district court dockets, the previous adjudications of the prisoner's claim in state courts, the desire to minimize interference in state matters, perhaps a previous denial of habeas corpus by a federal court.[50] If the Supreme Court's denial of certiorari is added to these considerations, most lower federal courts would probably exercise their discretionary authority adversely to the prisoner. No glaring procedural defect appearing that might otherwise

41. See note 33 *supra.*

42. In these cases, the prisoner has presumably had a fair hearing on the facts in the state courts, but either contests the ruling of the state court on the factual issues or alleges that his detention is illegal because of an error of law committed by the state court.

43. See note 20 *supra.*

44. See Frank, *The United States Supreme Court: 1949-50,* 18 U. OF CHI. L. REV. 1, 39-40 (1950); Harper and Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari,* 99 U. OF PA. L. REV. 293, 296-297 (1950).

45. 90 F. Supp. 314 (W.D. Mo. 1950).

46. *Id.* at 315: "The same reasons that prompted the Supreme Court of the United States to deny certiorari would warrant this court in refusing to entertain the application." *Accord:* Commonwealth of Pennsylvania *ex rel.* Gibbs v. Ashe, 93 F. Supp. 542 (W.D. Pa. 1950).

47. See note 28 *supra.* Note that *Darr* disavows any intent to attach a *conclusive* effect to a denial of certiorari, but suggests rather that substantive reasons for the denial might be inferred from the record.

48. See Goodman, *Use and Abuse of the Writ of Habeas Corpus,* 7 F.R.D. 313 (1948); Parker, *Limiting the Abuse of Habeas Corpus,* 8 F.R.D. 171 (1949).

49. See statistics in note 57 *infra.*

50. See note 18 *supra.*

account for the Supreme Court's action, it would be a simple matter to take the path of least resistance and refuse relief.

The difficulty with the *Holland* approach stems from its fundamental premise—that a district court judge is sufficiently clairvoyant to infer from the record the reasons for the Supreme Court's denial of certiorari.[51] Under present Supreme Court procedure this premise is simply not true;[52] and to make it true would entail the same administrative problems inherent in the *Goodwin* approach. The Supreme Court would have to either pass on the merits of each petition for certiorari or explain its reasons for each denial of certiorari. Without such a radical change in certiorari procedure, relief for many deserving petitioners would be effectively foreclosed.

3) *Giving the denial no substantive weight whatever.* A third group of courts have adhered to the orthodox rule on the effect of a certiorari denial. An example is *Coggins v. O'Brien.*[53] The court refused to attach any legal significance whatever to a prior denial of certiorari, except to note that the prisoner had satisfied a procedural prerequisite to eligibility for federal habeas corpus.[54]

If then a denial of certiorari is to be ignored as to the merits of the prisoner's claim, why require certiorari at all? Surely a reversal of the highest state court by a single federal district judge *after* the Supreme Court has denied certiorari is no less detrimental to federal-state comity than a reversal *before* the denial. An outraged state judiciary would hardly be placated by assurance that the prisoner was at least compelled to go through some extra red tape before being given his freedom.

Of course, in those few cases in which certiorari is granted, the prisoner's claim will be settled once and for all. But it is likely under present Supreme Court procedure that most state prisoners who are entitled to federal relief are nevertheless denied certiorari, and must still seek redress on the district court level, if at all.

The result of the *Coggins* approach then is to vastly increase the number of petitions to the Supreme Court for certiorari without appreciably reducing the frequency of district court reversals of state convictions.

Conclusions. However, if a choice must be made between the three theories, the *Coggins* approach appears to be the least noxious. By adhering to the orthodox rule on the effect of a certiorari denial, it does the best it can with a difficult situation created by making a petition for certiorari a condition precedent to federal habeas corpus.

This is the dilemma: Either 1) a denial of certiorari may be given substantive weight, or 2) it may not be given substantive weight. The first alternative would oblige the Supreme Court to examine each petition for certiorari on its merits or make explicit its reasons for denying certiorari. The consequences would be an almost impossible burden on the Court. The second alternative, illustrated by *Coggins,* would simply add a meaningless

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51. *See* Holland v. Eidson, 90 F. Supp. 314, 315 (1950): "The Supreme Court, always solicitous of the rights of the individual, did not perceive upon the record presented to it any grounds for the issuance of a writ of certiorari."

52. See note 20 *supra.*

53. 188 F.2d 130 (1st Cir. 1951).

54. This seems to be the position taken by the two concurring Justices in *Darr v. Burford*: require an application for certiorari, but attach no substantive weight to its denial. See also United States *ex rel.* Smith v. Baldi, 96 F. Supp. 100 (E.D. Pa. 1951). *Accord:* Goodman v. Lainson, 182 F.2d 814 (8th Cir. 1950) ("special circumstances" not necessary for habeas corpus after prisoner has exhausted state remedies and applied for certiorari).

and cumbersome step to the routine of establishing eligibility for federal habeas corpus.

The "first crack" policy has an admittedly worthwhile purpose—the avoidance of friction in federal-state relations. Implicit in such a policy, however, is the dubious assumption that the release of a prisoner by the Supreme Court is less obnoxious to the states than a release ordered by a district court.[55] The ultimate decision rests with the higher federal courts anyway, since a state can appeal the granting of the writ.[56] But if the fears of its proponents are at all justified,[57] a better solution might lie in the proposal of past Conferences of Senior Circuit Judges that a three-judge district court be used where federal habeas corpus is sought attacking a state commitment.[58] This would at least spare state appellate tribunals the supposed indignity of being reversed by a single federal district judge. Furthermore, even under *Wade v. Mayo*,[59] a district court that felt its release of a state prisoner on writ of habeas corpus would touch a state sore spot could in its discretion dismiss the petition because of the prisoner's failure to first apply for certiorari. In such cases, the Supreme Court would in effect have its highly desired "first crack" at the prisoner's claim, and, if it refused to take jurisdiction, the district court could then grant the necessary relief as a last resort.

It seems inevitable that the Supreme Court will soon be called upon to resolve this three-cornered conflict in the lower courts.[60] When that time comes, the two *Hawk* dicta should finally be put to rest, and the more flexible *Wade* doctrine re-established.

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55. See, *e.g.*, Darr v. Burford, 339 U.S. 200, 217 (1950).

56. 28 U.S.C. §2253 (Supp. III 1950).

57. Federal district judges have not yet shown any propensity to "open wide the State prison doors." During the five fiscal years from 1945 through 1950, there were 2,723 habeas corpus cases involving state prisoners disposed of by district courts. Of this number, only 66, or 2.4%, of all petitioners were successful. Nor was there any marked increase in this proportion during the two years in which *Wade v. Mayo* governed federal habeas corpus practice. District courts released only 10 (1.6%) of 610 state applicants in 1948-49, and 18 (2.8%) of 642 state applicants in 1949-50. It is also probable that some of these few successful petitioners were retried and then properly recommitted. Data taken from Speck, *Statistics on Federal Habeas Corpus Cases,* 10 OHIO ST. L.J. 337, 357 (1949), and letter from W. H. Speck, Division of Procedural Studies and Statistics, Administrative Office of the United States Courts, dated August 1, 1951.

58. *Report of the Judicial Conference,* Rep. Att'y Gen. 67-68 (1943).

59. 334 U.S. 672, 681 (1948).

60. First Circuit: No substantive effect. Coggins v. O'Brien, 188 F.2d 130 (1951).

Second Circuit: Conclusive. Schechtman v. Foster, 172 F.2d 339 (1949).

Third Circuit: Eastern District of Pennsylvania, no substantive effect. United States *ex rel.* Smith v. Baldi, 96 F. Supp. 100 (1951). Western District of Pennsylvania, discretionary substantive effect. Commonwealth of Pennsylvania *ex rel.* Gibbs v. Ashe, 93 F. Supp. 542 (1950).

Fourth Circuit: Conclusive. Goodwin v. Smyth, 181 F.2d 498 (1950).

Fifth Circuit: Southern District of Florida, conclusive. Jones v. Mayo, 86 F. Supp. 849 (1949). See also Bailey v. Stoutamire, 155 F.2d 754 (5th Cir. 1946) *semble.*

Sixth Circuit: No reported cases in point.

Seventh Circuit: No substantive effect. United States *ex rel.* Cook v. Dowd, 180 F.2d 212 (1950).

Eighth Circuit: No substantive effect. Goodman v. Lainson, 182 F.2d 814 (1950). *But cf.* Holland v. Eidson, 90 F. Supp. 314 (W.D. Mo. 1950) (discretionary substantive effect).

Ninth Circuit: Conclusive. Bird v. Smith, 175 F.2d 260 (1949).

Tenth Circuit: No reported cases in point.