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Criminal Law—Jurisdiction—Habeas Corpus—State Jurisdiction over Constitutional Questions Pending in Federal Court

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a person unlawfully on premises where a search occurs can not complain if evidence obtained during the search is used against him. Anyone else is, and should be, protected from unlawful official invasion of privacy.

Jurisdiction—Habeas Corpus—State Jurisdiction Over Constitutional Questions Pending in Federal Court. In July, 1960, petitioner Don Anthony White was convicted of murder in the first degree and sentenced to death. The Washington Supreme Court affirmed the conviction,¹ and certiorari was denied by the United States Supreme Court.² In February 1964, the Washington court denied petitioner's application for writ of habeas corpus.³ Petitioner then applied for writ of habeas corpus in the federal district court. This petition raised a new issue based on facts asserted to have come to the attention of petitioner's counsel subsequent to the denial of the application by the Washington court.⁴ Respondent penitentiary superintendant maintained that petitioner had failed to exhaust his state remedies in regard to this issue pursuant to 28 U.S.C. section 2254.⁵ The district court ordered that the cause be held in abeyance subject to petitioner's submission of a new application to the state supreme court. Upon petitioner's application to the Washington Supreme Court for writ of habeas

¹ State v. White, 60 Wn.2d 551, 374 P.2d 942 (1962).

² White v. Washington, 375 U.S. 883 (1963).

³ *In re* White v. Rhay, 64 Wn.2d 15, 390 P.2d 535 (1964).

⁴ The petition, as quoted in Judge Finley's opinion, read in part as follows:

"4. Petitioner was held in police custody, and questioned over a period of eleven days before he was provided with counsel; and because of his weakened mental and physical condition during such custody, without counsel, and without having had a hearing before a magistrate, the entire circumstance of the police procedure was intimidating and coercive.

VII. Petitioner was denied due process and the guarantees of the Sixth Amendment to the Constitution of the United States because he was not provided counsel when needed, and because his physical and mental condition was so debilitated and diseased that he could not intelligently or competently waive the right to counsel, about which he was not informed and which the record discloses, he knew nothing about. The admission and confessions of petitioner, made without advice of counsel, and introduced at trial, violated petitioner's Sixth Amendment rights.

1. The record discloses that petitioner was at no time advised that he did not have to give a statement or to submit to interrogation, and there are no facts from which any inference can be drawn that petitioner knew or understood that he had a right to remain silent." 65 Wash. Dec.2d at 714, 399 P.2d at 537.

⁵ 28 U.S.C. § 2254 (1958), provides in part: "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. . ." In *Duffy v. Wells*, 201 F.2d 503, 504 (9th Cir. 1952), it was stated: "Section 2254 does not *deny jurisdiction* where the state remedies have not been exhausted. That section provides only that the application shall not be 'granted' unless it appears that the state remedies have been exhausted. . ." (Emphasis added.)

corpus, held: When a federal district court assumes and retains jurisdiction over a petition for writ of habeas corpus, the Washington Supreme Court will decline to consider the petition. *In re White v. Rhay*, 65 Wash. Dec.2d 688, 399 P.2d 522 (1965).

Although seven of the nine members of the Washington court voted for dismissal, no more than four judges could agree on a basis of decision.⁶ Judge Donworth, writing the opinion of the court, reasoned for four judges that, when the federal court has assumed jurisdiction, the state court can no longer have jurisdiction;⁷ furthermore, even if the state court did have jurisdiction in such a situation, it should decline to exercise it.⁸ Chief Justice Rosellini concurred in the result reached in this opinion. Judge Hamilton found state jurisdiction, but concurred on the ground that comity requires deference to the invoked jurisdiction of the federal court.⁹ Chief Justice Rosellini joined in an opinion written by Judge Hale which concurred on the basis that petitioner had exhausted his state remedies.¹⁰ Two members of the court, in an

⁶ The opinion of the court stated: "[A] majority of the court is of the opinion that . . . this court presently has no jurisdiction of the subject matter of this proceeding." 65 Wash. Dec.2d at 689, 399 P.2d at 522. The alignment of the judges does not support this statement. Chief Justice Rosellini concurred in the result of the opinion of the court, but he also apparently concurred, without reservation, in an opinion in which Judge Hale concluded that the Washington court had jurisdiction. *Id.* at 712, 399 P.2d at 531.

⁷ The conclusions in this opinion, as to the exclusive jurisdiction of the district court and its lack of authority to hold the cause in abeyance, were inferred from the language of 28 U.S.C. § 2254 (1958), note 4 *supra*, and 28 U.S.C. 2243 (1958), the latter providing in part:

"A court . . . entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant . . . is not entitled thereto. . . . The court shall summarily hear and determine the facts and dispose of the matter as law and justice require."

In *Duffy v. Wells*, 201 F.2d 503 (9th Cir. 1952), the district court retained jurisdiction of an application for writ of habeas corpus while the applicant petitioned the California court. Following denial of the petition by the state court, the district court granted the writ. On appeal from the district court's decision, the Ninth Circuit stated:

"Section 2243 provides that 'The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.' We think that [the district court's] action in so retaining jurisdiction is what law and justice required." 201 F.2d at 504-05.

⁸ "It seems to us that the only way to settle the issues raised by the petitioner once and for all is in *one direct and complete proceeding* in the *only* court with the final authority to hold the necessary hearings and decide the questions of fact and law, namely the federal district court. . . ." (emphasis in original) 65 Wash. Dec.2d at 701, 399 P.2d at 530.

⁹ Judge Hamilton's primary concern was avoiding "an Alphonse and Gaston approach in bouncing the 'evidentiary hearing ball' back and forth." 65 Wash. Dec.2d at 703, 399 P.2d at 531.

¹⁰ Judge Hale found continued jurisdiction over habeas corpus proceedings in the Washington court based upon art. 4, § 4 of the Washington Constitution. He denied that any court, other than the United States Supreme Court, could divest the state court of such jurisdiction. He concluded, however, with the interesting but unsupported argument that since habeas corpus is not subject to the doctrine of *res judicata*, "exhaus-

opinion written by Judge Finley, argued in dissent that the state court had concurrent jurisdiction, and that petitioner's application raised a new issue which had not been considered at the state level.¹¹

The four judges who found no state jurisdiction based their determination on the premise that jurisdiction once assumed by a district court is exclusive. This view of exclusive federal jurisdiction is, however, diametrically opposed to that expressed by the Ninth Circuit Court of Appeals in the recent case of *Blair v. California*.¹² The court in *Blair* replied upon earlier Ninth Circuit decisions¹³ in holding that a district court may hold an application for writ of habeas corpus in abeyance for a reasonable time in order to allow petitioner to exhaust his state remedies in regard to a particular issue.

The position of a majority of the Washington court, that jurisdiction would not be exercised even if it existed, raises major policy questions about the court's proper role in the federal judicial scheme. The common basis of all three concurring opinions is that the bouncing of a petition from federal court to state court and again back to federal court results in needless expense and delay. But equal consideration should be given to the argument that the habeas corpus remedy, which by its nature is never totally foreclosed, involves expense and delay as an unavoidable concomitant to insuring that a prisoner is not detained in violation of his fundamental liberties.¹⁴

At least two other arguments favor exercise of jurisdiction by the Washington court in this type of case. First, comity suggests that a state court should accept the opportunity to reconsider earlier decisions in light of newly discovered evidence or a subsequent United States Supreme Court decision. Careful consideration of potential error in the state court will reduce chances of reversal in the federal courts.

tion of state remedies" can only refer to remedies available by way of direct challenge. Compare *Blair v. California*, 340 F.2d 741 (9th Cir. 1965), as discussed in note 11 *infra*. Petitioner had admittedly exhausted his direct remedies.

¹¹ The concept that an adverse state court ruling on a particular issue is necessary to establish exhaustion of state remedies on that issue is strictly in keeping with the decision in *Blair v. California*, 340 F.2d 741 (9th Cir. 1965), discussed in the text accompanying notes 12 and 13 *infra*.

¹² 340 F.2d 741 (9th Cir. 1965).

¹³ *Thomas v. Teets*, 205 F.2d 236 (9th Cir. 1953), *cert. denied*, 346 U.S. 910 (1954); *Lee Fong Fook v. Wixon*, 170 F.2d 245 (9th Cir. 1948).

¹⁴ The opinion of the court in the principal case quoted the following passage from *Townsend v. Sain*, 372 U.S. 293, 312 (1963): "State prisoners are entitled to relief on federal habeas corpus only upon showing that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution. Simply because detention so obtained is intolerable, the opportunity to be heard, to argue and present evidence, must never be totally foreclosed." 65 Wash. Dec.2d at 695, 399 P.2d at 526. Compare the statement, also from the opinion of the court, quoted in note 8 *supra*.

Second, state courts can, and should, share the burden of considering the increasing volume of habeas corpus applications which are being presented to the federal district courts.¹⁵

Petitioner's state remedies now *are* exhausted.¹⁶ The federal district court, following the pattern prescribed in *Blair*,¹⁷ may now decide to hold an evidentiary hearing and, perhaps, grant the writ of habeas corpus.

EVIDENCE

Effect of Tortfeasor's Death Upon Admissibility of Blood Test in Civil Action. The question whether analyses of blood samples taken from a deceased person may be admitted into evidence in a civil suit is one of first impression in Washington. Plaintiff, a truck-owner, sued decedent's executor for damages to his truck sustained in a collision with decedent's automobile, alleging that decedent was negligent in driving under the influence of intoxicants. A blood sample was taken by a coroner, in accordance with Washington Revised Code section 68.08.106,¹ approximately one hour after death. Analysis of decedent's blood sample was admitted into evidence over defendant's objection, as proof of decedent's intoxication. On appeal from a jury verdict for plaintiff, *held*: Analysis of a blood sample lawfully taken from a deceased person by a coroner is admissible into evidence in a civil suit. *Zenith Transport, Ltd. v. Bellingham Nat'l Bank*, 64 Wn.2d 967, 395 P.2d 498 (1964).²

The language of Washington Revised Code section 68.08.106, allow-

¹⁵ See Becker, *Collateral Post-Conviction Review—View of a District Judge*, 33 F.R.D. 452, 491 (1963); Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961).

¹⁶ "If no state remedy is available or if, pursuing it, the state prisoner fails to obtain the relief desired, exhaustion of state remedies would be established and 28 U.S.C. § 2254 would not stand in the way of federal habeas corpus." *Blair v. California*, 340 F.2d 741, 745 (9th Cir. 1965).

¹⁷ In *Blair*, the district court was ordered to hold the defendant's petition in abeyance pending his application to the California court. The issue involved denial of counsel to petitioner on appeal from his California conviction, in light of the Supreme Court decision in *Douglas v. California*, 372 U.S. 353 (1963). If the defendant failed to obtain the relief desired from the California court, the district court was then to consider the petition.

¹ "[T]he coroner, upon his own authority or upon the request of the prosecuting attorney . . . may make or cause to be made an analysis of the stomach contents, blood, or organs, or tissues of a deceased person and secure professional opinions thereon and retain any specimens or organs of the deceased which in his discretion are desirable or needful for anatomic, bacteriological, chemical or toxicological examination or upon lawful request are needed or desired for evidence to be presented in court. Costs shall be borne by the county." (1953).

² The court remanded the case for a new trial on another ground.