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APPEAL AND ERROR-SIGNIFICANCE OF DENIAL OF CERTIORARI AS PRECEDENT BY UNITED STATES SUPREME COURT

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RECENT DECISIONS

APPEAL AND ERROR—SIGNIFICANCE OF DENIAL OF CERTIORARI AS PRECEDENT BY UNITED STATES SUPREME COURT—Respondents were found guilty of contempt of court for broadcasting dispatches concerning a person about to be tried on a charge of murder. The convictions were reversed on constitutional grounds by the Court of Appeals of Maryland, relying upon certain decisions of the United States Supreme Court. The state sought a writ of certiorari on the ground that the Maryland court had misconceived the rulings of the Supreme Court. Although the application for certiorari was denied, Justice Frankfurter took occasion to write an opinion stating that the denial of the writ meant only that fewer than four members of the court thought it should be granted, and that the denial carried no implication whatsoever regarding the Court's views on the merits of the case. *State v. Baltimore Radio Show,* 338 U.S. 912, 70 S.Ct. 252 (1950).

The primary purpose of the Supreme Court's certiorari jurisdiction (to be distinguished from the common law writ of certiorari) is ". . . to secure uniformity of decision between those courts in the nine circuits, and . . . to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party . . . another hearing."[1] The writ is purely discretionary in nature, designed to enable an overburdened tribunal to sift the mass of litigation and choose the cases in which it will entertain jurisdiction so as to maintain its authoritative standing and decide only the most important questions.[2] Because the bulk of the Supreme Court's diet comes up on certiorari, practical considerations preclude the writing of opinions to explain the grounds for each of the many denials[3] of the writ if the Court is to perform its proper function.[4] However, occasionally the Court has felt called upon to state the reasons for denial in order to prevent misinterpretation.[5] In the ab-

[1] Magnum Import Co. v. Coty, 262 U.S. 159 at 163, 43 S.Ct. 531 (1923). See also Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 at 258, 36 S.Ct. 269 (1916); Fields v. United States, 205 U.S. 292, 27 S.Ct. 543 (1907); 21 VA. L. REV. 815 (1935).

[2] Rules of the Supreme Court, Rule 38, ¶ 5, 28 U.S.C.A.; Peacock, "Purpose of Certiorari in Supreme Court Practice and Effect of Denial or Allowance," 15 A.B.A.J. 681 (1929); 4 GEO. WASH. L. REV. 257 (1936).

[3] The usual procedure is to "deny" the application for the writ without having assumed jurisdiction if the case is not one which the Court wishes to consider. However, the Court may "dismiss" a writ of certiorari improvidently granted. United States v. Rimer, 220 U.S. 547, 31 S.Ct. 596 (1911); ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §289 (1936).

[4] Principal case at 255; Gaines v. Washington, 277 U.S. 81 at 87, 48 S.Ct. 468 (1928); ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 544 (1936); 4 GEO. WASH. L. REV. 257 (1936).

[5] Gaines v. Washington, supra note 5, at 87. Generally, if an opinion is written at all, it is only to explain the jurisdictional basis for denial. See In re Woods, 143 U.S. 202, 12 S.Ct. 417 (1892); Federal Radio Commission v. General Electric Co., 281 U.S. 464, 50 S.Ct. 389 (1930); Pacific Northwest Canning Co. v. Skookum Packers' Assn., 283 U.S. 858, 51 S.Ct. 655 (1931); Dorrance v. Pennsylvania, 287 U.S. 660, 53 S.Ct. 222 (1932). The opinion in the principal case is unusual in that it makes no attempt to indicate the grounds for denial.

sence of such opinion, denial of certiorari is under no circumstances to be considered a decision on the merits by the Supreme Court, nor is it to have any effect as a precedent.[6] As is pointed out by Justice Frankfurter, the writ may be denied for any one of a multitude of reasons. "Review may be sought too late; the judgment of the lower court may not be final; it may not be the judgment of a State court of last resort; the decision may be supportable as a matter of State law, not subject to review by this Court, even though the State court also passed on issues of federal law. A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening."[7] To this list might be added the following grounds: form of the writ imperfect; poor showing of the vital questions really present; vital questions not properly before the state court and therefore not passed on by that court. The possible grounds for denial are legion. Therefore, while the practical effect of denial between the parties is the same as if the Supreme Court had considered the case and affirmed the decision below, the legal effect is to add nothing to that decision.[8] Notwithstanding persistent warnings, bench and bar have frequently attached significance to a denial of certiorari on the theory that the only grounds for refusal could have been approval of the lower court's decision.[9] That this is a dangerous practice is obvious.

[6] United States v. Carver, 260 U.S. 482 at 490, 43 S.Ct. 181 (1923); Anderson v. Moyer, (D.C. Ga. 1912) 193 F. 499 at 507; Stamey v. United States, (D.C. Wash. 1929) 37 F. (2d) 188 at 190; Cooper v. Robertson, (D.C. Md. 1930) 38 F. (2d) 852 at 858; ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §287 (1936).

[7] Principal case at 918.

[8] Peacock, "Purpose of Certiorari in Supreme Court Practice and Effect of Denial or Allowance," 15 A.B.A.J. 681 at 683 (1929). It should be noted that denial by a state supreme court having certiorari jurisdiction which parallels that of the United States Supreme Court is said to amount to approval of the lower court's conclusion (though not necessarily of the reasoning on which it was based). Soden v. Claney, 269 Ill. 98 at 102, 109 N.E. 661 (1915); People v. Grant, 283 Ill. 391 at 397, 119 N.E. 344 (1918). The decision of the lower court must then be considered the equivalent of a judgment of the highest court of the state in which a judgment in the suit could be had, for the purposes of determining federal jurisdiction on a "federal question" basis. Minneapolis, St. Paul & Sault Ste. Marie R. Co. v. Rock, 279 U.S. 410 at 412, 49 S.Ct. 363 (1929). And the lower court's decision must be considered as enunciating "state law" which is binding on the federal courts. West v. A.T. & T. Co., 311 U.S. 223, 61 S.Ct. 179 (1940). Cf. Graham v. White-Phillips Co., 296 U.S. 27, 56 S.Ct. 21 (1935).

[9] United States v. Morse, (C.C.N.Y. 1908) 161 F. 429 at 436: "The question . . . was presented to the Supreme Court so fully and forcibly, yet so simply and directly, that the refusal of the writ is certainly an authority demonstrating the willingness of the highest tribunal to let the law alone." Boise Commercial Club v. Oregon Short Line R. Co., (C.C.A. 9th, 1919) 260 F. 769 at 772; Lupipparu v. United States, (C.C.A. 9th, 1925) 5 F. (2d) 504; Burget v. Robinson, (C.C.A. 1st, 1903) 123 F. 262 at 266 and 268; Cleveland Provision Co. v. Weiss, (D.C. Ohio 1925) 4 F. (2d) 408 at 411; Campbell River Mills Co. v. Chicago, Mil., St. Paul & Pacific R. Co., (D.C. Wash. 1930) 42 F. (2d) 775 at 778.

The Supreme Court is under no compulsion to recognize what was decided in the lower court as stare decisis.[10] At most, the conclusions drawn as to the reasons for denial, after a careful study of the record, should be used only as personal information, indicating to the practitioner the chances for success of his own particular application for certiorari.

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[10] Seney v. Swift & Co., 260 U.S. 146 at 151, 43 S.Ct. 22 (1922); Atlantic Coast Line R. Co. v. Powe, 283 U.S. 401 at 403, 51 S.Ct. 498 (1931). Lower federal courts often take positions contra to that of other federal courts in cases where the Supreme Court denied the losing party's petition for certiorari. Bankers' Trust Co. v. Bowers, (D.C.N.Y. 1928) 23 F. (2d) 941; All America Cables, Inc. v. Comr., 10 B.T.A. 213 at 226 (1928).