

451, to issue writs of habeas corpus in aid of its appellate jurisdiction. Cf. *Ex parte Peru*, 318 U. S. 578, 582-3. That jurisdiction is discretionary, *id.* 584; *Bowen v. Johnston*, 306 U. S. 19, 27, and this Court does not, save in exceptional circumstances, exercise it in cases where an adequate remedy may be had in a lower federal court, *Ex parte Current*, 314 U. S. 578; *Ex parte Spaulding*, 317 U. S. 593; *Ex parte Hawk*, 318 U. S. 746, or, if the relief sought is from the judgment of a state court, where the petitioner has not exhausted his remedies in the state courts, *Mooney v. Holohan*, 294 U. S. 103, 115; *Ex parte Botwinski*, 314 U. S. 586; *Ex parte Davis*, 317 U. S. 592, 318 U. S. 412; *Ex parte Williams*, 317 U. S. 604. Refusal of the writ, without more, is not an adjudication on the merits and is to be taken as without prejudice to an application to any other court for the relief sought.

UNITED STATES EX REL. McCANN *v.* ADAMS,
WARDEN, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

No. 371. Decided November 8, 1943.

The petition to the District Court for a writ of habeas corpus adequately raised the issue, not previously adjudicated, whether, in a prosecution in the District Court which resulted in a judgment of conviction, the petitioner had intelligently—with full knowledge of his rights and capacity to understand them—waived his right to the assistance of counsel and to trial by jury; and, in the circumstances, the petitioner was entitled to an opportunity to establish his claim. P. 221.

136 F. 2d 680, reversed.

PETITION for a writ of certiorari to review the affirmance of an order denying an application for a writ of habeas corpus.

Gene McCann, pro se.

Solicitor General Fahy, Assistant Attorney General Tom C. Clark, and Mr. Oscar A. Provost were on the brief for respondents.

PER CURIAM.

This proceeding is a sequel to *Adams v. U. S. ex rel. McCann*, 317 U. S. 269. We there reversed an order of the Circuit Court of Appeals of the Second Circuit discharging the present relator from custody. We did so because we held that, if his waiver was the exercise of an intelligent choice made with the considered approval of the trial court, he could as a matter of law waive his right to a jury trial without being represented by counsel. After the case went back to the Circuit Court of Appeals on mandate and further steps not necessary here to recount were taken, the relator filed a petition for a writ of *habeas corpus* in the District Court which, with supporting affidavits, adequately raised the issue whether in fact he intelligently—with full knowledge of his rights and capacity to understand them—waived his right to the assistance of counsel and to trial by jury. That issue, as appears from our former opinion, was explicitly withdrawn from consideration on the *habeas corpus* proceedings previously before the Circuit Court of Appeals. 126 F. 2d 774. That issue, now fairly tendered by the petition for *habeas corpus* below, has never been adjudicated on its merits by the lower courts. But it is no longer within the bosom of the trial court. Nor can it be disposed of on the appeal of his conviction, for the claim rests on materials *dehors* the trial proceedings. It is a claim which the relator should be allowed to establish, if he can. We cannot say that, in the light of the supporting affidavits, the petition for a writ of *habeas corpus* was palpably unmeritorious, and should have been dismissed without more. We are compelled therefore to accede to the Government's consent to a reversal of the order of the

Circuit Court of Appeals affirming the order denying the application for the writ of *habeas corpus*.

The motion for leave to proceed *in forma pauperis* and the petition for certiorari are therefore granted and the judgment is reversed for further proceedings not inconsistent with this opinion. Petitioner's applications for other relief are denied.

So ordered.

HUNTER COMPANY, INC. *v.* McHUGH, COMMISSIONER OF CONSERVATION, ET AL.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 25. Argued October 18, 19, 1943.—Decided November 8, 1943.

1. The only order of the State Commissioner of Conservation which was before the state courts in this case having been superseded by later orders, the cause has become moot so far as it is concerned with the original order; and this Court, in reviewing on appeal the judgment of the highest court of the State, is not free to, and will not, adjudicate the constitutionality of the later orders, where the state court has had no opportunity to pass upon their validity under state law or the Federal Constitution. P. 226.
2. A State has constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landholders of the migratory gas and oil underlying their land, fairly distributing among them the costs of production and of the apportionment. P. 227.
3. Upon the record in this case, Act No. 157 of the Louisiana Acts of 1940 can not be held invalid on its face. P. 228.

Dismissed.

APPEAL from a judgment, 202 La. 97, 11 So. 2d 495, which, reversing a decision of a lower state court, sustained the constitutional validity, as applied to the appellant, of an order promulgated by the State Commissioner of Conservation under authority of a state statute providing for regulation of the production of oil and gas.