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Post Conviction Remedies

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POST CONVICTION REMEDIES

Federal habeas corpus relief first became available to state prisoners in 1867,[1] when the Judiciary Act,[2] which originally applied only to federal prisoners, was amended. Historically, habeas corpus inquiry had been restricted to the question of whether the convicting tribunal had jurisdiction over the person of the defendant and the subject matter of the offense.[3] However, the scope of the federal writ has been gradually expanded until it is now used to test the constitutional validity of a conviction. It has been stated that: ". . . ever since *Brown v. Allen*[4] the Supreme Court has continued to assume, without discussion, that it is the purpose of the federal habeas corpus jurisdiction to redetermine the merits of federal constitutional questions decided in state criminal proceedings."[5]

However, the Supreme Court has placed several limitations upon the availability of federal habeas corpus to state prisoners. The first and most important of these restrictions was enunciated in *Ex parte Hawk*,[6] which established the rule that a state prisoner must first exhaust his state remedies before seeking relief in the federal courts. The exhaustion of state remedies requirement is now codified.[7] It is evident, however, that exhaustion is not required if there is either an absence of an available state corrective process or if the circumstances render the existing state remedies ineffective to protect the rights of the prisoner.[8] This requirement has been narrowed by the Court to the point that only those remedies available to the petitioner at the time he seeks federal habeas corpus review must be exhausted.[9] Thus, a failure to seek a state remedy which is no longer available will not bar federal relief.[10]

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1 Judiciary Act of 1867, ch. 28, § 1, 14 Stat. 385. The federal habeas corpus act is now 28 U.S.C. § 2241 (1958).

2 Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81.

3 McNally v. Hill, 293 U.S. 131 (1934).

4 344 U.S. 443 (1953).

5 Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 500 (1963).

6 321 U.S. 114 (1944). Hawk was convicted of murder in Nebraska in 1936. The extended litigation in this case illustrates the dilemma which may face a state prisoner. For a history of this litigation, see Note, *The Judicial Obstacle Course*, 29 NEB. L. REV. 445 (1951).

7 28 U.S.C. § 2254 (1958).

8 *Ibid.*

9 Townsend v. Sain, 372 U.S. 293 (1963).

10 Fay v. Noia, 372 U.S. 391 (1963). Petitioner Noia did not appeal his state court murder conviction because of fear that a new trial would

A failure to raise a constitutional issue in the state proceedings may result in a waiver of that right and preclude relief by way of federal habeas corpus.[11] However, to be effective, such a waiver must be made only by the petitioner himself, and not by his counsel, and will be effective against him only if made knowingly.[12]

In *Darr v. Burford*,[13] the Supreme Court established the requirement that an application for certiorari to review the denial of the state remedy must be denied by the Supreme Court before federal habeas corpus would lie. But the Court has removed this restriction, stating it to be only "an unnecessary burdensome step in the orderly processing of the federal claims of those convicted of state crimes."[14]

As a result of the liberal rules for the entertaining of the federal habeas corpus petitions of state prisoners, "there has been a tremendous increase in habeas corpus applications in federal courts. Indeed, in the Supreme Court alone they have increased threefold in the last 15 years."[15]

This resort to the federal courts has disturbed the states. "The desirability of minimizing the necessity for resort by state prisoners to federal habeas corpus is not to be denied."[16] Dean Griswold of the Harvard Law School has stated that "the basic responsibility for the enforcement of the criminal law remains with the States. . . . What is needed now is for the States to accept this responsibility, and to adopt means to carry it out."[17] The exodus of state prisoners to the federal courts to seek relief has led to considerable action on the part of the states in order to provide a suitable remedy in the state courts. This expansion of the available state remedies for a prisoner who claims that he has been denied a federal constitutional right is the subject of this comment.

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result in the death penalty rather than the life sentence which he had received at his original trial. The principles established in Townsend v. Sain, 372 U.S. 293 (1963); Fay v. Noia, *supra*, and Saunders v. United States, 373 U.S. 1 (1963), have been codified by recent amendments to 28 U.S.C. §§ 2244, 2254 (1958). The President signed Public Law 89-711, 89th Congress, on November 2, 1966. These amendments "undertake to codify the principles of the trilogy." White v. Swenson, 261 F. Supp. 42, 60 (W.D. Mo. 1966) (addendum to memorandum opinion).

11 Johnson v. Zerbst, 304 U.S. 458 (1938).

12 Fay v. Noia, 372 U.S. 391, 438-39 (1963).

13 339 U.S. 200, 210 (1950).

14 Fay v. Noia, 372 U.S. 391, 437 (1963).

15 Case v. Nebraska, 381 U.S. 336, 338 (1965) (concurring opinion).

16 *Id.* at 344 (concurring opinion).

17 Address by Dean Griswold, Cleveland Bar Association, May 13, 1965.

I. TRADITIONAL REMEDIES

The states have always permitted one who has been convicted of a crime two courses to follow in having his conviction reviewed. These are direct review, such as a writ of error or appeal to a higher tribunal, and collateral attack of the conviction, traditionally by the writ of habeas corpus or coram nobis. Historically, habeas corpus was the proper writ for challenging the jurisdiction of the court over the person of the defendant or the subject matter of the offense. It thus developed into the writ by which a person unlawfully imprisoned could obtain his release.[18] Traditionally, it could not be used to challenge as unlawful a future imprisonment[19] (the doctrine of "prematurity"), or an imprisonment already completed (the doctrine of "mootness"), because "without restraint of liberty, the writ will not issue."[20] So restricted, habeas corpus was only available to secure release when the petitioner was presently imprisoned and the imprisonment was being challenged as unlawful. In addition, the remedy was only available to attack an error appearing on the face of the record.

The writ or error, coram nobis developed in order that the court itself might correct certain errors in the process of the convicting court, many times these were errors committed by the clerks, or related to matters of fact.[21] Thus, it came to be the method of correcting errors of law not appearing on the record.

The narrow grounds for granting these two common law remedies left a great many situations in which a petitioner had no means of attacking a conviction as void on constitutional grounds, thus forcing prisoners to resort to the available relief in the federal courts, and causing radical changes in the nature and extent of the remedies available to a state prisoner in the state courts.

II. STATUTORY REMEDIES

In *Young v. Ragen*,[22] the Supreme Court stated that the states must provide prisoners with a "clearly defined method by which they may raise claims of denial of federal rights." The first state to comply with this mandate by enacting a broad statutory remedy was Illinois.[23] Subsequently, eleven other states—Maine,[24] Mary-

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18 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 227 (7th ed. 1955).

19 McNally v. Hill, 293 U.S. 131 (1934).

20 *Id.* at 138.

21 1 HOLDSWORTH, *op. cit. supra* note 18, at 224.

22 337 U.S. 235, 239 (1949).

23 ILL. ANN. STAT. ch. 38, §§ 122-1 to -7 (Smith-Hurd 1964).

24 ME. REV. STAT. ANN. tit. 14, §§ 5501 to 46 (1964).

land,[25] Nebraska,[26] New Mexico,[27] Ohio,[28] Oregon,[29] Pennsylvania,[30] South Dakota,[31] Vermont,[32] Washington,[33] and Wyoming[34] —have passed broad post conviction acts or have expanded existing remedies by statute.[35] In addition, a number of states have provided similar relief by means of rule of court.[36]

The Nebraska Post Conviction Act provides that a prisoner in custody under sentence who claims a right to be released because his conviction is void or voidable due to the denial or infringement of rights under the state or federal constitution may file a motion in the court which imposed the sentence, asking the court to vacate or set the conviction aside. This provides a means whereby the Nebraska prisoner may raise any claims of denial of a federal constitutional right in the Nebraska courts. However, it seems that there are situations in which federal habeas corpus would lie but Nebraska has not yet provided for a remedy. The Nebraska procedure is available to a "prisoner in custody under sentence." If an individual was sentenced to serve two or more sentences consecutively for separate crimes, and he sought to attack the conviction for which the second sentence was imposed on constitutional grounds while serving the first sentence, it is questionable whether he could file a motion under the Nebraska Post Conviction Act. Likewise, an application for habeas corpus would be "premature" because the present imprisonment is perfectly legal. Under these circumstances, he may be able to obtain relief in the federal courts since it has been held that the "prematurity" doctrine will not bar resort to federal habeas corpus.[37]

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25 MD. ANN. CODE art. 27, §§ 645-A to -J (Supp. 1964).

26 NEB. REV. STAT. §§ 29-3001 to 04 (Supp. 1965).

27 N.M. STAT. ANN. § 41-15-8 (1966).

28 OHIO REV. CODE ANN. §§ 2953.21 to .24 (Page Supp. 1966).

29 ORE. REV. STAT. §§ 138.510 to .680 (1963).

30 PA. STAT. tit. 19, §§ 1180-1 to -14 (Supp. 1966).

31 S.D. Laws c. 121 (1966). (effective July 1, 1967).

32 VT. STAT. ANN. tit. 13, §§ 7131 to 37 (Supp. 1966).

33 WASH. REV. CODE § 36.130 (Supp. 1966).

34 WYO. STAT. ANN. §§ 7-408.1 to .8 (Supp. 1963).

35 Correspondence indicates that the states of Iowa, Nevada, Rhode Island, Utah, and Virginia are currently conducting studies relative to legislation in this area.

36 ALA. SUP. CT. R. 35(b); ARK. SUP. CT. PER CURIAM ORDER, Oct. 18, 1965; COLO. R. CRIM. PROC. 35, 135; DEL. SUPER. CT. (CRIM. PROC.) R. 35; FLA. CRIM. PROC. R. 1; KY. R. CRIM. PROC. 11.42; MO. SUP. CT. R. 27.26; N.J. CRIM. PROC. R. OF SUPER. AND CTY. CTS. 3:10 A-2; N.M.R. CIV. PROC. 93; OKLA. RULES 26.

37 Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965).

The Nebraska Post Conviction Act also provides that an order sustaining or denying a motion under the act shall be a final order and appealable to the Nebraska Supreme Court, and further provides that counsel *may* be appointed by the district court, but not that counsel *must* be appointed.[38]

The remedy provided by the Nebraska Post Conviction Act is expressly stated to be cumulative and not concurrent with any other existing remedies.[39] Therefore, a Nebraska prisoner now has three possible means of collaterally attacking a conviction: habeas corpus,[40] coram nobis,[41] and a motion under the post conviction act. Although the post conviction act does provide a further remedy for a prisoner who claims the denial of a federal constitutional right, it does not simplify the procedure since the petitioner must decide which of the remedies is available to him. It has been argued that the only way for a Nebraska prisoner to exhaust his state remedies is to file three proceedings concurrently, all alleging the same grievance: a petition for habeas corpus filed in the district court of the district where the petitioner is imprisoned; a petition for coram nobis relief filed in the district court where the petitioner was convicted; and a motion for relief under the post conviction act, also filed in the district where the conviction took place.[42] This aspect of the Nebraska Post Conviction Act is common to several of the different states' enactments. Of those states which have enacted post conviction relief statutes, only Maine, Pennsylvania, and South Dakota provide that relief under the statutory procedure shall replace and include any other form of collateral attack. The Maryland enactment would seem to have the same effect since it specifically abrogates the right to appeal from the denial of an application for habeas corpus or coram nobis relief.

III. JUDICIAL EXPANSION OF TRADITIONAL REMEDIES

In several of the states which have not provided broader post conviction remedies by either statute or rule of court, the state courts have expanded the writs of habeas corpus and coram nobis through widening decisions to offer a remedy in a situation where none was available before.

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38 For an analysis of this feature of the Nebraska Post Conviction Act see Lake, *The Echo of Clarence Gideon's Trumpet*, 44 NEB. L. REV. 751, 769-70 (1965).

39 NEB. REV. STAT. § 29-3003 (Supp. 1965).

40 NEB. REV. STAT. § § 29-2801-24 (Reissue 1964).

41 Hawk v. State, 151 Neb. 717, 39 N.W.2d 561 (1949).

42 See Lake, *supra* note 38, at 770.

Some courts, while retaining the restriction that the only basis upon which a conviction may be attacked by habeas corpus is lack of jurisdiction in the convicting tribunal, have narrowed the requirements for proper jurisdiction. These courts have reasoned that a court cannot properly have jurisdiction over the subject matter and the person if the defendant has been denied a constitutional right.[43] Thus, it has been concluded that the denial of a constitutional right deprives a court of jurisdiction ab initio, making habeas corpus available in the state courts to question the constitutional validity of the conviction.

At least one state, Indiana, has applied the above reasoning to an application for writ of coram nobis. The court found that the constitutional error did not appear on the record, thus making coram nobis available in that situation.[44]

The courts of some of the states have partially abandoned the technical restrictions placed upon the availability of habeas corpus which have plagued state petitioners. The doctrine of "prematurity," that the petitioner must be presently incarcerated under the conviction that he is attacking in order to seek habeas corpus, has been abrogated in some states by decisions granting habeas corpus where the effect of the granting of the writ will not be the release of the petitioner from a present imprisonment.[45]

Several courts have gone much farther than merely abrogating some of the technical requirements of the traditional remedies. A notable decision in this respect is *State v. Tahash*,[46] where the Minnesota Supreme Court, "because of the absence of any statute providing a postconviction procedure,"[47] found it to be "necessary to

[43] Wojculewicz v. Cummings, 145 Conn. 11, 138 A.2d 512, *cert. denied* 356 U.S. 969 (1958); *Ex parte* Rose, 122 N.J.L. 507, 6 A.2d 388 (Sup. Ct. 1939); Huffman v. Alexander, 197 Ore. 283, 251 P.2d 87 (1952); *In re* Horner, 19 Wash.2d 51, 141 P.2d 151 (1943). *Huffman, supra*, was decided before Oregon enacted its post conviction relief statute, *supra* note 29.

[44] State v. Blackford Cir. Ct., 229 Ind. 3, 95 N.E.2d 556 (1950).

[45] *In re* Tartar, 52 Cal.2d 250, 339 P.2d 553 (1959); *In re* Chapman, 43 Cal.2d 385, 273 P.2d 817 (1954); State v. Tahash, 272 Minn. 466, 139 N.W.2d 161 (1965); Commonwealth v. Myers, 419 Pa. 1, 213 A.2d 613 (1965). Since the *Myers* decision, *supra*, Pennsylvania has enacted a post conviction relief statute, *supra* note 30. In addition to these state court decisions, the United States Court of Appeals for the Fourth Circuit has indicated that the "prematurity" doctrine will no longer bar federal habeas corpus relief. Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965).

[46] 272 Minn. 466, 139 N.W.2d 161 (1965).

[47] *Id.* at 469, 139 N.W.2d at 161.

regard habeas corpus as a postconviction procedure by which a convicted prisoner can obtain an evidentiary hearing and determination of any claimed violation of fundamental rights, including those guaranteed by the Federal Constitution."[48] The court concluded that: "[P]ending enactment of a postconviction-procedure statute which will meet constitutional requirements, habeas corpus is available to a convicted prisoner for the purpose of securing a hearing and determination of any claim of denial of Federal constitutional guarantees."[49] Thus, the Minnesota court has expanded the writ of habeas corpus into a broad post conviction remedy, by doing away with all of the traditional limitations of that ancient writ. Other state courts, in the face of inaction on the part of the legislatures in enacting broad post conviction remedies, have expanded habeas corpus[50] or coram nobis[51] to conform to the federal standards.

Such broad interpretation and expansion of existing remedies serves to provide relief in the state courts where the legislatures have failed to act. It does so without adding an additional remedy to the existing framework, as, for example, the Nebraska Post Conviction Act has done. However, it may prove that such judicial expansion of post conviction remedies will retard any motivation for legislative action in this area. In the field of adjudication of constitutional claims, a statutory procedure is preferable. An expansion of traditional remedies on a case-by-case basis does not clearly forecast whether the remedy will be available in a given situation. In addition, a broad declaration by a court in respect to the scope of a collateral attack remedy is subject to being limited to the facts of the particular case. A statute can clearly delimit the scope of the remedy provided, as no court decision can. Judicial expansion to meet the federal standards has also been criticized as tending to make the state courts "mere subordinate instrumentalities of the federal judicial establishment."[52]

IV. CONCLUSION

Recent decisions in the area of individual rights and the avail-

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48 *Ibid.*

49 *Id.* at 471, 139 N.W.2d at 164.

50 Rice v. Davis, 366 S.W.2d 153 (Ky. Ct. App. 1963); *Ex parte* Bush, 166 Tex. Crim. 259, 313 S.W.2d 287 (1958). Kentucky has since provided post conviction relief by rule of court, *supra* note 36.

51 *In re* Broom's Petition, 251 Miss. 25, 168 So.2d 44 (1964); People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965).

52 People v. Huntley, 15 N.Y.2d 72, 83, 255 N.Y.S.2d 838, 847, 204 N.E.2d 179, 186 (1965) (dissenting opinion).

ability of a federal forum, in which an individual may test his claim of the denial of a federal constitutional right, makes certain the states' awareness of the necessity of providing a suitable remedy that will not abate. The responsibility of the states in this area is clear: to provide prisoners some "clearly defined method by which they may raise claims of denial of federal rights."[53] In enacting new post conviction relief statutes the ends of expediency and justice would be better served if one comprehensive remedy were provided, encompassing and abrogating all other separate means of collateral attack. Under such a statute, the petitioner would not be faced with the choice of concurrent remedies such as exist in Nebraska today.

The availability of the remedies provided should not be unduly restricted by the requirement that the petitioner be in custody at the time of the motion. The conviction itself is surely enough to entitle an individual to relief and a chance to clear his name if his constitutional rights have been infringed, regardless of whether he be free on bail, on parol, or serving another lawful sentence. If this problem is not met, the state will not have provided a complete remedy, and the resort by state prisoners to federal habeas corpus will continue.

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[53] Young v. Ragen, 337 U.S. 235, 239 (1949).