Nebraska Law Review

Volume 58 | Issue 2 Article 2

1978

Trial Court Responses to Claims for Relief under the Nebraska Post Conviction Act: A Taxonomy

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ARTICLE OUTLINE

I. INTRODUCTION

Thirteen years ago the Nebraska Post Conviction Act was enacted[1] in response to the inadequacies of the available collateral remedies for raising violations of certain constitutional guarantees.[2] During the ensuing years, the Nebraska Supreme Court has

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1. NEB. REV. STAT. §§ 29-3001 to 3004 (Reissue 1975). The Post Conviction Act was passed by the Nebraska Legislature on April 9, 1965, and signed into law by the Governor on April 12, 1965.
2. Prior to the passage of the Post Conviction Act, the only collateral remedies available in Nebraska were the writ of error coram nobis, the writ of habeas corpus, and the motion for a new trial on the ground of newly discovered evidence. While it is apparently possible to raise certain limited constitu-

failed to develop any cohesive system for treating claims under the statute. Instead, cases interpreting the Act are frequently confusing, sometimes inconsistent, occasionally neglectful of precedent and often offer no explanation for the result reached. Nonetheless, a unifying thread can be traced through the opinions—a thread that can be exposed and analyzed.

In essence, the Act provides a procedure for a prisoner sentenced and incarcerated under the laws of Nebraska to assert a claim of denial or infringement of his constitutional rights so as to render the judgment of conviction void or voidable.[3] A post conviction proceeding is commenced by the filing of a motion in the court which imposed the challenged sentence requesting that court to

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tional claims under each of these remedies, *see* text accompanying notes 263-77 *infra*, none is suitable for raising the broad range of claims cognizable under the Post Conviction Act. As a result, for many prisoners there was no adequate state remedy for raising constitutional claims regarding the validity of their conviction and sentence. The federal courts thus entertained many applications for writs of habeas corpus without first requiring petitioners to exhaust state remedies. Noble v. Sigler, 244 F. Supp. 445 (D. Neb. 1964), *aff'd*, 351 F.2d 673 (8th Cir. 1965), *cert. denied*, 385 U.S. 853 (1966); Shupe v. Sigler, 230 F. Supp. 601 (D. Neb. 1964); Geaminea v. State, 206 F. Supp. 308 (D. Neb.), *appeal dismissed*, 308 F.2d 367 (8th Cir. 1962). Stopping "the flood of federal habeas corpus cases" by prisoners with no adequate state remedy was one of the reasons for passage of the Post Conviction Act. *Hearings on L.B. 836 Before the Judiciary Comm.*, 75th Neb. Legis., 1st Sess. (1965) (testimony of Judge Herbert Ronin and Attorney General Clarence Meyer); *Introducer's Statement of Intent* and *Judiciary Comm. Statement on L.B. 836*, 75th Neb. Legis., 1st Sess. (1965) [hereinafter cited as *Judiciary Comm. Statement*].

An additional incentive for passage of the Post Conviction Act was the pendency at the time of Case v. Nebraska, 381 U.S. 336 (1965) (per curiam), in the United States Supreme Court. The Court granted certiorari in *Case* to "decide whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees," *id.* at 337, but the case was ultimately remanded to the Nebraska Supreme Court in light of the intervening passage of the Post Conviction Act. In the prior Nebraska Supreme Court opinion, that court held that a claim of denial of counsel, although a constitutional violation, was not cognizable under a state writ of habeas corpus: "The Legislature has not seen fit by amendment to enlarge the powers of the courts of this state with respect to such writs. Neither should this court do so by judicial legislation. Post conviction procedure is properly one for the Legislature to consider." Case v. State, 177 Neb. 404, 414, 129 N.W.2d 107, 113 (1964). The pendency of *Case v. Nebraska*, as well as the quoted language of the state opinion, served as further impetus for passage of the Act. *Hearings on L.B. 836 Before the Judiciary Comm.*, 75th Neb. Legis., 1st Sess. (1965) (testimony of Judge Herbert Ronin and Attorney General Clarence Meyer).

3. Only the violation or infringement of constitutional rights is cognizable under the Act. State v. DeLoa, 194 Neb. 270, 231 N.W.2d 357 (1975); State v. Williams, 189 Neb. 127, 128, 201 N.W.2d 241, 242 (1972); State v. Whited, 187 Neb. 592, 593, 193 N.W.2d 268, 269 (1971); State v. Bullard, 187 Neb. 334, 335, 190 N.W.2d 628, 629 (1971).

vacate or set aside the conviction and sentence or, where appropriate, the sentence alone. Once the motion to vacate has been filed, the sentencing court reviews the motion in conjunction with the files and records of the case to determine whether it presents a justiciable issue. If the files and records show "to the satisfaction of the court that the prisoner is entitled to no relief," the motion may be summarily denied.[4] Otherwise, the court must grant the prisoner a prompt hearing on his claim.[5]

The Post Conviction Act is modeled substantially after 28 U.S.C. § 2255,[6] the statutory procedure whereby federal prisoners may raise in a post conviction proceeding claims that a sentence was

4. NEB. REV. STAT. § 29-3001 (Reissue 1975).

5. *Id.* Although the proceedings are civil in nature, the practice of the Nebraska courts, to the extent ascertainable, is to treat the motion as a continuation of the original criminal proceeding which resulted in the challenged sentence rather than as a new or independent action (conversations of the author with the Clerks of the Douglas and Lancaster County District Courts). In the motion to vacate, the designation of parties as well as the file number remains the same as in the original criminal proceeding. Treating the motion as a continuation of the original action conforms to the recommendations of the ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST CONVICTION REMEDIES § 1.2 (Approved Draft 1968) [hereinafter cited as STANDARDS]. As a practical matter, however, the decision to treat the motion as a new action or as a continuation of the prior proceeding has little procedural significance except insofar as it affects the internal management practices of the clerks of the various courts.

The practice of the Nebraska district courts, at least in Douglas and Lancaster Counties, is whenever possible to assign the hearing on the motion to vacate to the judge who presided over the original criminal proceeding. The practice is commendable to the extent that it permits the judge to bring to the proceedings his or her own familiarity with the case and an independent recollection of the facts. United States v. Delsanter, 433 F.2d 972, 973-74 (2d Cir. 1970); Briscoe v. United States, 391 F.2d 984, 988-89 (D.C. Cir. 1968); Mirra v. United States, 379 F.2d 782, 788 (2d Cir.), *cert. denied*, 389 U.S. 1022 (1967); Carvell v. United States, 173 F.2d 348, 348-49 (4th Cir. 1949). *See* Rules Governing Section 2255 Proceedings, 28 U.S.C.A. foll. § 2255, Adv. Comm. Note to R. 4 (West Supp. 1978); Kelly, *Objectivity and Habeas Corpus: Should Federal District Court Judges Be Permitted to Rule Upon the Validity of Their Own Criminal Trial Conduct*, 10 J.L. REF. 44 (1976); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1206-08 (1970) [hereinafter cited as *Developments*]. The practice also presents the danger that a judge will find it difficult to be fair and objective in ruling upon the presence of errors that may be of his or her own making. Tyler v. Swenson, 427 F.2d 412 (8th Cir. 1970); Halliday v. United States, 380 F.2d 270, 274 (1st Cir. 1967); STANDARDS, *supra*, at § 1.4(c) & Commentary. This, however, is the same danger that exists when a judge rules on a motion for a new trial, NEB. REV. STAT. §§ 29-2101 to -2103 (Reissue 1975), and there is no reason to find the practice any less acceptable in a post-conviction setting than in the original criminal proceeding.

6. (1976). *Report of Judicial Council Sub-Comm., Hearings on L.B. 836 Before the Judiciary Comm.*, 75th Neb. Legis., 1st Sess. 2 (1965). *See* Dabney v. Sigler, 345 F.2d 710, 714 (8th Cir. 1965); State v. Parker, 180 Neb. 707, 711, 144

imposed in violation of the Constitution or laws of the United States, the court was without jurisdiction to impose the sentence given, or the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack.[7] Although there are differences between the Act and section 2255,[8] cases interpreting the latter are of significant precedential value in construing the provisions of the former.[9]

N.W.2d 525, 527 (1966); State v. Losieau, 180 Neb. 696, 698-99, 144 N.W.2d 435, 436 (1966); State v. Losieau, 180 Neb. 671, 677, 144 N.W.2d 406, 410 (1966).

7. Prior to 1948, federal prisoners applied for the writ of habeas corpus, 28 U.S.C. §§ 2241 to 2254 (1976), in the federal judicial district of their confinement. The result was an overburdening of those federal courts with federal prisons located within their district. The problem was solved by the enactment of 28 U.S.C. § 2255 (1976), which gives federal prisoners a new remedy in lieu of, but in all respects substantially equivalent to, habeas corpus. United States v. Hayman, 342 U.S. 205, 219 (1952). Relief under section 2255 is sought in the court from which the prisoner was sentenced, thus creating a more equitable distribution of cases among the districts. Habeas corpus continues to remain available to state prisoners, but may be used by federal prisoners only if the remedy provided by section 2255 is "inadequate or ineffective."
8. The primary difference between the two remedies is that section 2255 incorporates as bases for relief grounds that are available in a state habeas proceeding but theoretically are not available under the Post Conviction Act. These include the claims that a court was without jurisdiction to impose the sentence given and that a sentence imposed was in excess of the maximum authorized by law. *But see* text accompanying notes 273-77 *infra*. Further, a claim that a sentence was imposed in violation of the laws of the United States is cognizable under section 2255, *see* Davis v. United States, 417 U.S. 333 (1974), while only constitutional claims may be raised under the Post Conviction Act. *See* note 3 *supra*.
9. *See* State v. Parker, 180 Neb. 707, 711, 144 N.W.2d 525, 527 (1966); State v. Losieau, 180 Neb. 671, 677, 144 N W.2d 406, 410 (1966) ("We think some of the decisions of the federal courts with respect to section 2255 are applicable to our own statute."). The general rule in Nebraska concerning the precedential value of another jurisdiction's similar enactment has been stated in Todd v. County of Box Butte, 169 Neb. 311, 99 N.W.2d 245 (1959):

> The general rule to which the appellees resort is one well established in this state. It is stated . . . as follows: "Where the legislature adopts the statute of another state, it likewise adopts the judicial construction which it had already received by the highest court in such state."
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> . . . In State v. Boatman, . . . we said: "We quite agree that in construing a statute borrowed from a foreign state there is a presumption that the legislature adopted it with approval of all interpretations given it by the court of last resort of that state."
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> "* * * when a statute has been adopted from another state, ordinarily the construction given prior to its adoption by the courts of that state will be followed in the adopting state, in the absence of any indication of a contrary intention on the part of the Legislature. The rule is subject to the qualification, however, that a construction of such a statute by the state from which it was adopted is entitled to no greater consideration than previous decisions of this court, and will be rejected for reasons which would require the overruling thereof had it been first adopted in this state." . . .

This article will develop a taxonomy of the different actions the sentencing court may take in response to the filing of a motion to vacate and evaluate those responses against a standard of providing a post conviction procedure that allows for the presentation and consideration of all meritorious constitutional claims a prisoner may have, but which at the same time will result in the swift and expeditious denial of frivolous or meritless claims.[10] More particularly, sections II through IV will discuss the various bases upon which the trial courts are permitted to rely in summarily denying relief to petitioners without according to them the benefits of an evidentiary hearing. Section V will deal with the circumstances under which the granting of a hearing will be required. Finally, throughout the article, suggestions will be made for improvements in the administration of the Act so as to better conform its operation to the purpose of the Act to be "fair to the person in custody and to the State of Nebraska."[11]

II. DISPOSITION ON THE BASIS OF THE MOTION TO VACATE

The function of a pleading system is to aid in the enforcement of substantive legal relations.[12] In doing so, however, the system must accommodate two competing and potentially conflicting interests.[13] On the one hand, the system should assist in framing the issues on which the cause will be tried and in giving notice to the adverse party and the court as to what claims the adverse party will be called upon to meet.[14] Groundless claims, in particular, are

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The above is not intended to be an all-inclusive summary of our decisions.

Id. at 315-16, 99 N.W.2d, at 249 (quoting State v. Boatman, 142 Neb. 589, 591, 7 N.W.2d 159, 160-61 (1942); Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 428, 41 N.W.2d 397, 409 (1950) (asteriks in original)). *But see* State v. Losieau, 180 Neb. 696, 699, 144 N.W.2d 435, 436 (1966) ("It is our conclusion that it was not the intent of the Nebraska Legislature to equate our Post Conviction Act literally with section 2255 of the federal act . . . .").

10. For a similar analysis of section 2255, see Note, *Processing a Motion Attacking Sentence Under Section 2255 of the Judicial Code*, 111 U. PA. L. REV. 788 (1963).
11. *Judiciary Comm. Statement, supra* note 2.
12. C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 11, at 54 (2d ed. 1947). *See generally* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 1.1 (2d ed. 1977).
13. This is a simplification of a complex problem. Pleadings serve several functions, some competing and some complementary, but it is not unfair to use the two-interest analysis in the present context. *See* C. CLARK, *supra* note 12, at § 11; F. JAMES & G. HAZARD, *supra* note 12, at § 2.1 to .2.
14. B.C. Christopher & Co. v. Danker, 196 Neb. 518, 522, 244 N.W.2d 79, 81 (1976); Johnson v. Ruhl, 162 Neb. 330, 335, 75 N.W.2d 717, 720 (1956); C. CLARK, *supra* note 12, at § 11; F. JAMES & G. HAZARD, *supra* note 12, at § 2.1 to .2. *See* State v. Fitzgerald, 182 Neb. 823, 824, 157 N.W.2d 415, 416 (1968).

a burden on the judicial machinery and are inherently unfair to adversaries who must expend valuable resources in meeting and resisting them. An optimal pleading system, through its notice function, ideally should result in the early exposure and dismissal of such claims.[15] On the other hand, the system should not serve as a trap for the unwary or inexperienced by imposing requirements too technical or formal and thereby frustrating the ends of justice.[16]

Within a post conviction pleading system, the tension between the two competing interests becomes heightened. For several reasons, prisoners are the source of numerous frivolous petitions for collateral relief.[17] Balanced against this consideration, however, is the fact that a prisoner with a valid claim concerning the constitutional validity of his conviction will frequently find it a formidable task to bring his claim correctly to the attention of a court.[18] The difficulty is in constructing a pleading system that will result in the exclusion of frivolous claims without at the same time excluding petitions raising valid but inartfully worded claims. The accommo-

15. *See* F. JAMES & G. HAZARD, *supra* note 12, § 2.13, at 95 ("The pleader's possible desire to keep the nuisance value of his claim by concealing its weaknesses is positively antisocial and should be thwarted if there is any procedural way to do that without incurring equal or greater disadvantages."). *See also, e.g.*, Gift Stars, Inc. v. Alexander, 245 F. Supp. 697, 701-02 (S.D.N.Y. 1965) (The expeditious determination of whether a claim is frivolous is desirable).

16. C. CLARK, *supra* note 12, at § 11.

17. The factors contributing to the high incidence among prisoners of frivolous petitions for collateral relief are severalfold. First, the magnitude of the reward for a successful collateral challenge, *i.e.*, release from imprisonment, is a strong incentive for seeking relief when coupled with the ready availability of "jailhouse lawyers," the ease of obtaining a waiver of filing fees and other court costs, and the relatively sparse competing demands on the prisoner's time. Second, many prisoners, after an initial period of remorse for their criminal conduct, begin to feel they have failed to receive their due from the criminal justice system. Third, a trip to the sentencing court to participate in an evidentiary hearing is seen as a vacation from prison life. Lastly, some prisoners view litigation as a vehicle for obstructing the "system." *See generally* Churder v. United States, 294 F. Supp. 207, 209 (E.D. Mo. 1968); STANDARDS, *supra* note 5, § 3.1, at 50. The possibility of frivolous petitions under the Post Conviction Act was recognized quite early by the Nebraska Supreme Court. State v. Clingerman, 180 Neb. 344, 349, 142 N.W.2d 765, 769 (1966) ("It is apparent to everyone that . . . [the Act] affords a prisoner an opportunity to file a frivolous or false claim for relief.").

18. Prisoners are frequently unrepresented by counsel, are many times poorly educated and are usually unable to independently investigate the merits of their claims. *See* Case v. State, 177 Neb. 774, 775, 131 N.W.2d 191, 191-92 (1964) ("It may be stated that the petition and the argument of the plaintiff is itself vague and difficult to follow, probably because he is not a lawyer."); STANDARDS, *supra* note 5, § 3.1, at 50-52; *Developments, supra* note 5, at 1174-75. *But cf.* Bounds v. Smith, 430 U.S. 817, 826-27 (1977) (*pro se* prisoners are capable of using law books to file cases raising serious and legitimate claims).

dation struck between these interests determines what form or system of pleading will be required.[19] The Nebraska system of civil pleading is balanced more toward accommodating the exclusion of frivolous claims,[20] an accommodation that is reflected in the fact pleading standard of the Post Conviction Act.

A prisoner requesting relief under the Post Conviction Act is required in the initial pleading—the motion to vacate—to allege facts which if proved would constitute an infringement of his constitutional rights.[21] The allegations of the motion need not be presented in any technical form nor must the grammar be any more than substantially understandable,[22] but the pleading of mere conclusions of fact or of law is insufficient.[23] Irrespective of the title given the motion or the relief prayed for, if the motion properly invokes the provisions of the Post Conviction Act, it is treated as a motion to vacate.[24] The motion must be verified,[25] but

19. C. CLARK, *supra* note 12, at § 11.
20. Nebraska is a code pleading jurisdiction. Code pleading places its greatest emphasis on the pleading of facts with such specificity as to provide fair notice of the pleader's cause. *See* C. CLARK, *supra* note 12, at § 38.
21. State v. Bartlett, 199 Neb. 471, 475, 259 N.W.2d 917, 920 (1977); State v. Turner, 194 Neb. 252, 257, 231 N.W.2d 345, 349 (1975); State v. Russ, 193 Neb. 308, 310, 226 N.W.2d 775, 777 (1975); State v. Spidell, 192 Neb. 42, 43, 218 N.W.2d 431, 432 (1974); State v. Johnson, 189 Neb. 824, 824, 205 N.W.2d 548, 549 (1973); State v. Riley, 183 Neb. 616, 617, 163 N.W.2d 104, 105 (1968); State v. Dabney, 183 Neb. 316, 317, 160 N.W.2d 163, 164 (1968); State v. Fitzgerald, 182 Neb. 823, 824, 157 N.W.2d 415, 415 (1968); State v. Warner, 181 Neb. 538, 541, 149 N.W.2d 438, 440 (1967); State v. Clingerman, 180 Neb. 344, 350, 142 N.W.2d 765, 769 (1966).
22. Harris v. Sigler, 185 Neb. 483, 484, 176 N.W.2d 733, 734 (1970). *See* State v. Russ, 193 Neb. 308, 310, 226 N.W.2d 775, 777 (1975). The same rule is applicable to civil code pleading in general. Svoboda v. De Wald, 159 Neb. 594, 598, 68 N.W.2d 178, 182 (1955); Benson v. Walker, 157 Neb. 436, 446, 59 N.W.2d 739, 744 (1953):

> Under the code system of pleading, it is not necessary to state a cause of action or defense in any particular form. The facts are to be stated. . . . All that the law requires is that there shall be a cause of action or defense. It looks at the real rights of the parties and aims at the protection and enforcement of such rights.

23. State v. Turner, 194 Neb. 252, 257, 231 N.W.2d 345, 349 (1975); State v. Russ, 193 Neb. 308, 310, 226 N.W.2d 775, 777 (1975); State v. Johnson, 189 Neb. 824, 825, 205 N.W.2d 548, 549 (1973); State v. Virgilito, 187 Neb. 328, 330, 190 N.W.2d 781, 783 (1971); State v. Fitzgerald, 182 Neb. 823, 824, 157 N.W.2d 415, 415 (1968); State v. Erving, 180 Neb. 680, 684-85, 144 N.W.2d 424, 428 (1966); State v. Losieau, 180 Neb. 671, 675, 144 N.W.2d 406, 409 (1966); State v. Clingerman, 180 Neb. 344, 350, 142 N.W.2d 765, 769 (1966). Conclusions of fact and of law also are insufficient in the pleading of civil actions under code pleading. Timmerman v. Hertz, 195 Neb. 237, 244-45, 238 N.W.2d 220, 225 (1976); Ripp v. Riesland, 176 Neb. 233, 237, 125 N.W.2d 699, 702 (1964); C. CLARK, *supra* note 12, § 38, at 225.
24. State v. Turner, 194 Neb. 252, 256, 231 N.W.2d 345, 348-49 (1975); Harris v. Sigler, 185 Neb. 483, 484, 176 N.W.2d 733, 734 (1970); State v. Woods, 180 Neb. 282, 283, 142 N.W.2d 339, 341 (1966). Similarly, under the rules of code pleading the character of a pleading is determined by its content. Walkenhorst v.

a failure to do so is apparently not a jurisdictional defect nor does it require dismissal.[26]

The fact pleading standard for motions to vacate is derived from the Act itself which requires the motion to state "the grounds relied upon" and from the Act's designation of post conviction proceedings as civil in nature.[27] Nebraska as a code pleading state requires fact pleading in civil actions.[28] Although phrased differently, the pleading standard for proceedings under the Act—that the motion to vacate allege facts which if proved would constitute an infringement of the petitioner's constitutional rights—is no different in its requirements or effect than the pleading standard for civil actions in general which requires that the petition contain "a statement of the facts constituting the cause of action."[29]

Apolius, 172 Neb. 830, 836, 112 N.W.2d 31, 35 (1961) ("What a pleading may be denominated in the caption is not necessarily controlling."); Standard Reliance Ins. Co. v. Schoenthal, 171 Neb. 490, 497, 106 N.W.2d 704, 709 (1960) "([W]here the facts state a cause of action . . . the court will grant the proper relief, although it may not conform to the relief prayed for.")

25. NEB. REV. STAT. § 29-3001 (Reissue 1975).

26. Barry v. Sigler, 373 F.2d 835 (8th Cir. 1967). Nearly all jurisdictions require verification of applications for post conviction relief as a deterrence to false allegations, STANDARDS, *supra* note 5, § 3.3, at 54, and retention of the requirement has been urged for this reason. *Id.* at § 3.4; UNIFORM POST-CONVICTION PROCEDURE ACT, Commissioners' Comment to § 3. *See also* MacMillan, *Trial Court and Prison Perspectives on the Collateral Post Conviction Relief Process in Florida*, 21 U. FLA. L. REV. 503, 509-13 (1969); Evans v. State, 242 Ark. 92, 96, 411 S.W.2d 860, 862-63 (1967). The requirement was kept in the Post Conviction Act "in the interest of good pleading and because the Federal Rule [§ 2255] requires such motions to be verified." *Report of Judicial Council Subcomm.*, *supra* note 6, at 3. Whether verification does serve as a deterrence to false allegations is problematical in view of the few reported prosecutions for perjury arising out of post conviction proceedings. STANDARDS, *supra* note 5, § 3.3, at 54.

27. NEB. REV. STAT. § 29-3001 (Reissue 1975).

28. *In re* Estate of Wise, 144 Neb. 273, 281, 13 N.W.2d 146, 151 (1944).

29. NEB. REV. STAT. § 25-804 (Reissue 1975). *See, e.g.*, State v. Warner, 181 Neb. 538, 149 N.W.2d 438 (1967) (allegation that prisoner had only a tenth-grade education and could not and did not intelligently waive his right to counsel fails to allege facts constituting an infringement of prisoner's constitutional rights); State v. Losieau, 180 Neb. 671, 144 N.W.2d 406 (1966) (prisoner's allegations that he was induced by abuse, threats, and false promises to make incriminating statements are conclusions only); State v. Clingerman, 180 Neb. 344, 142 N.W.2d 765 (1966) (allegation that convictions were obtained in violation of defendant's constitutional rights is a mere conclusion).

Several cases suggest that a higher standard of pleading may be imposed in post conviction proceedings than in ordinary civil actions. *Compare* State v. Virgilito, 187 Neb. 328, 330, 190 N.W.2d 781, 783 (1971) ("[B]ald assertions of insanity, unsubstantiated by a recital of credible facts and unsupported by the record, are wholly insufficient . . . .") (post conviction) *with* Wirth v. Weigand, 85 Neb. 115, 122 N.W. 714 (1909) (allegation that plaintiff is insane and confined in hospital for the insane is good against demurrer) (civil).

The first category of cases approving the summary denial of a motion to vacate without an evidentiary hearing contains those cases in which the allegations of the motion are found to be inadequate. The denial of a motion to vacate on the basis of the insufficiency of the allegations therein serves as the procedural equivalent of the general demurrer under code pleading, *i.e.*, a demurrer objecting only that the petition does not state facts sufficient to constitute a cause of action.[30] The courts do not in practice confine themselves solely to considering the pleadings as they would in ruling on a demurrer in an ordinary civil action,[31] but instead usually review the pleadings in conjunction with the files and records of the original criminal proceeding toward which the motion is directed. Nevertheless, for analytical purposes it is useful to differentiate those cases in which the denial of post conviction relief was based on the inherent insufficiency of the pleadings from those in which the pleadings were inadequate when considered in conjunction with the files and records, or because of the existence of a procedural bar to the motion.

A. Claims Not Cognizable Under the Post Conviction Act

Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner sufficient to render the judgment of conviction or sentence void or voidable under the Constitution of Nebraska or of the United States.[32] Despite the narrow confines of the issues cognizable under the Act, numerous prisoners have attempted to raise other than constitutional issues in their motions to vacate, thereby causing the summary denial of the motions.[33]

Compare State v. Fitzgerald, 182 Neb. 823, 157 N.W.2d 415 (1968) (allegation of denial of constitutional right to appeal is a legal conclusion only and is akin to allegation of general negligence in a tort action) (post conviction) *with* Baker v. Daly, 190 Neb. 618, 211 N.W.2d 123 (1973) (general allegation of negligence is sufficient unless attacked by motion) (civil).

30. Johnson v. Ruhl, 162 Neb. 330, 335, 75 N.W.2d 717, 720 (1956) (petition failing to plead actionable facts is vulnerable to general demurrer); NEB. REV. STAT. §§ 25-806 to -807 (Reissue 1975).

31. Koehn v. Union Fire Ins. Co., 152 Neb. 254, 259-60, 40 N.W.2d 874, 877 (1950) (demurrer can only consider facts pleaded and cannot consider facts extrinsic to the pleading); NEB. REV. STAT. § 25-806 (Reissue 1975) ("The defendant may demur to the petition only when it appears on its face . . . .").

32. NEB. REV. STAT. § 29-3001 (Reissue 1975).

33. State v. Miles, 202 Neb. 126, 274 N.W.2d 153 (1979) (prisoner permitted to plead guilty one day after arrest, and waiver in county court); State v. Walker, 197 Neb. 381, 248 N.W.2d 784 (1977) (subsequent statutory change in penalty should result in vacation of sentence); State v. Niemann, 195 Neb. 675, 240 N.W.2d 38 (1976) (sentence imposed was illegal); State v. DeLoa, 194 Neb. 270, 231 N.W.2d 357 (1975) (minimum sentence exceeded one-third of maximum sentence in violation of NEB. REV. STAT. § 83-1,105(1) (Cum. Supp. 1974));

A number of the motions to vacate which raised issues not cognizable in a proceeding under the Post Conviction Act were brought by prisoners appearing *pro se*.[34] By raising issues such as the excessiveness of a sentence, the correctness of evidentiary rulings made during the original trial or error in instructions to the jury, these motions, whether brought *pro se* or by counsel, reflect a basic lack of understanding of the nature and operation of the Act itself.[35] As stated in *State v. Clingerman*:[36]

> A motion to set aside a judgment of conviction on [*sic*] a sentence cannot serve the purpose of an appeal to secure a review of the conviction. Our appellate review procedures are adequate and must be used if an appeal is desired. We interpret. . . [the Post Conviction Act] to be intended to provide relief in those cases where a miscarriage of justice may have occurred, and not to be a procedure to secure a routine review for any defendant dissatisfied with his sentence. To hold otherwise will be to permit defendants to misuse and abuse a remedy intended to provide relief

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State v. Miles, 194 Neb. 128, 230 N.W.2d 227 (1975) (same as *DeLoa*); State v. Taylor, 193 Neb. 388, 227 N.W.2d 26 (1975) (excessiveness of sentence and incomplete presentence report); State v. Jonsson, 192 Neb. 730, 224 N.W.2d 181 (1974) (subsequent statutory change in penalty should result in modification of sentence); State v. Leadinghorse, 192 Neb. 485, 222 N.W.2d 573 (1974) (lack of presentence report); State v. Wade, 192 Neb. 159, 219 N.W.2d 233 (1974) (minimum sentence exceeded one-third of maximum sentence); State v. Spidell, 192 Neb. 42, 218 N.W.2d 431 (1974) (excessiveness of sentence); State v. Moss, 191 Neb. 36, 214 N.W.2d 15 (1973) (sufficiency of the evidence, instructions to the jury, and the failure to limit impeachment by use of prior felony conviction); State v. Fincher, 189 Neb. 746, 204 N.W.2d 927 (1973) (instructions to the jury and failure of proof); State v. Kellogg, 189 Neb. 692, 204 N.W.2d 567 (1973) (excessiveness of sentence); State v. Williams, 189 Neb. 127, 201 N.W.2d 241 (1972) (excessiveness of sentence); State v. Birdwell, 188 Neb. 116, 195 N.W.2d 502 (1972) (failure to allow examination of presentence report); State v. Whited, 187 Neb. 592, 193 N.W.2d 268 (1971) (police failure to immediately check a purported alibi and the court's admission of leading questions and hearsay evidence); State v. Bullard, 187 Neb. 334, 190 N.W.2d 628 (1971) (claim that consecutive sentences should be concurrent); State v. Carreau, 182 Neb. 295, 154 N.W.2d 215 (1967) (excessiveness of sentence); State v. Erving, 180 Neb. 680, 144 N.W.2d 424 (1966) (credibility of witnesses and weight of testimony); State v. Clingerman, 180 Neb. 344, 142 N.W.2d 765 (1966) (court's admission of hearsay and other incompetent evidence).

In several additional cases raising nonconstitutional claims, it is not clear whether a hearing was held before the denial of the motion to vacate or, if a hearing was held, whether it was an evidentiary hearing. *See, e.g.*, State v. Warner, 192 Neb. 438, 222 N.W.2d 292 (1974) (subsequent statutory change in penalty should result in modification of sentence). The pleading of a noncognizable claim is also grounds for the summary denial of relief in a section 2255 proceeding. Paroutian v. United States, 395 F.2d 673, 675 (2nd Cir. 1968), *cert. denied*, 393 U.S. 1058 (1969).

34. *E.g.*, State v. Miles, 194 Neb. 128, 230 N.W.2d 227 (1975); State v. Wade, 192 Neb. 159, 219 N.W.2d 233 (1974).

35. *See* note 33 *supra*.

36. 180 Neb. 344, 142 N.W.2d 765 (1966).

for those exceptional cases where the rights of a defendant have been ignored or abused.[37]

The summary denial of these motions represents a correct and efficient use of judicial resources. It would be totally unproductive to allow the motion to proceed to an evidentiary hearing or to permit amendment in an effort to correct its deficiencies. The problem here is not in the inadequacy of the allegations, but in the raising of issues not cognizable under the Post Conviction Act. No amount of amendment nor greater skill in pleading will be able to correct the basic deficiency of an incorrect conception of the scope of the Act.

B. Allegations Which Are Conclusions of Fact or of Law

The second basis upon which the courts summarily deny motions to vacate because of pleading inadequacies is that the allegations necessary to make out a constitutional violation are in the form of conclusions of law or of fact. A motion to vacate is required to set forth allegations of fact which if proved would constitute a violation of the prisoner's constitutional rights; conclusory allegations do not accomplish this task.[38]

The strict enforcement of a fact pleading standard when applied to motions to vacate drafted by prisoners without the assistance of counsel results in the frequent denial of their claims on procedural grounds without any consideration of the merits of their contentions. Most prisoners simply do not have the knowledge, education, or grasp of legal technicalities necessary to the understanding and application of a pleading standard that has confounded numerous lawyers through the years. Without this understanding, prisoners will be severely hampered in expressing their claims, irrespective of the merits, in a way that will survive review under a fact pleading standard.

The potential injustice of a fact pleading standard is multiplied when it is applied in conjunction with the Nebraska rule prohibiting successive motions for post conviction relief. A prisoner who brings a motion to vacate seeking vindication of a constitutional right runs the risk of not only being denied relief on the claim because of inartful pleading, but also from *ever* receiving consideration of the merits of the claim or of any other claim because of the prohibition of successive motions to vacate.[39] Despite its oft-repeated insistence that motions to vacate contain allegations of fact, the Nebraska Supreme Court has apparently implicitly recognized

37. *Id.* at 350-51, 142 N.W.2d at 769-70.
38. *See* text accompanying notes 21-23 *supra.*
39. *See* Jenner, *The Illinois Post-Conviction Hearing Act*, 9 F.R.D. 347, 360 (1950); § IV-A of text *infra.*

that strict enforcement of such a standard when applied to prisoners proceeding *pro se* will result in the denial of many motions on procedural grounds. Consequently, the court has on occasion acted in a flexible manner in considering such motions on appellate review.

When reviewing a lower court's denial of post conviction relief to a *pro se* prisoner, the supreme court has in several instances looked beyond the conclusory or otherwise inadequate allegations of the motion to vacate and proceeded to examine the files and records of the case to determine if they affirmatively showed any constitutional violations related to the facts that were pleaded. In other words, where the motion to vacate contains defective allegations, the court will attempt to ascertain the nature of the prisoner's constitutional claim and then review the files and records of the case in an attempt to find support for the claim.[40]

40. In State v. Turner, 194 Neb. 252, 231 N.W.2d 345 (1975), the prisoner alleged he was denied the right to be present at a suppression hearing and claimed that if he had been present, he could have provided sufficient evidence to justify the evidence in question being suppressed. The latter allegation was held to be a conclusion only. The Nebraska Supreme Court then proceeded to examine the files and records in regard to the one fact pleaded and found that the prisoner had waived the right to be present at the suppression hearing through the action of his counsel. A similar approach was followed by the court in State v. Russ, 193 Neb. 308, 226 N.W.2d 775 (1975). In State v. Fincher, 189 Neb. 746, 204 N.W.2d 927 (1973), it is impossible to ascertain whether the allegations of the motion to vacate were considered conclusory, but the court nonetheless stated, "We have reviewed the whole record and find that the record affirmatively shows there was no denial or infringement of the appellant's rights . . . ." *Id.* at 747, 204 N.W.2d at 927.

In several other cases the court reviewed the files and records with regard to conclusory allegations, but apparently more with the intent to refute the claims presented than to see if there was any support for them in the record. In State v. Warner, 181 Neb. 538, 149 N.W.2d 438 (1967), the petitioner alleged that he had only a tenth-grade education and, therefore, could not and did not intelligently waive his right to counsel. The court held that this was a conclusory allegation and thus justified the denial of relief; but after so holding, the court proceeded to state that an examination of the record also showed the waiver was freely, knowingly, and voluntarily made. The same approach was followed in State v. Losieau, 180 Neb. 671, 144 N.W.2d 406 (1966), to refute conclusory allegations that a guilty plea was the result of abuse, threats and false promises.

In a third group of cases, the court considered the contentions of the prisoners even though the claims were presented in conclusory form. Whether the court reviewed the files and records in deciding to deny the claims is unclear. State v. Spidell, 192 Neb. 42, 218 N.W.2d 431 (1974); State v. Dabney, 183 Neb. 316, 160 N.W.2d 163 (1968); State v. Erving, 180 Neb. 680, 144 N.W.2d 424 (1966). Nor is it clear from the opinions whether the claims were of such a nature that a resort to the record would have provided any additional information with which to judge their validity.

If the court did not review the files and records yet proceeded to consider

State v. Russ,[41] the only case in which this approach was explicitly recognized and articulated, provides an illustration of the court's practice. The prisoner filed a *pro se* motion to vacate alleging that Omaha police officers had entered into an illegal conspiracy to arrest him in violation of his civil rights, that the police had forcibly entered the home of a third party, and that they had arrested him without a warrant. On appeal, the supreme court found the motion contained only two allegations of fact: the arrest was made in the residence of a third party following forcible entry into that residence, and the arrest was made without a warrant. The court correctly concluded that the factual allegations of the motion, without more, did not state a constitutional violation, but went on to say that "because the defendant appears pro se we examine the files and bill of exceptions to determine if they affirmatively show constitutional violations related to the two facts pled."[42] After reviewing the files and records, no support for any constitutional violation was found.

The *Russ* approach has been followed in several other cases in which the allegations of the motions to vacate were defective[43] and even in instances in which the prisoners were represented by

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the petitioners' claims despite their having been presented in conclusory form, then these cases serve to illustrate a second approach the court has used to mitigate the potential harshness of a fact pleading standard. The approach, that of considering a post conviction claim on its merits to the extent the allegations permit even though the allegations are in conclusory form, serves basically to convert the pleading standard into one of notice pleading.

A last group of cases reveals the court refusing to give any consideration to prisoners' claims because of their conclusory nature. In these cases the court strictly followed the fact pleading standard and refused to consider the claims on their merits or to conduct anything more than a minimal review of the record. State v. Williams, 189 Neb. 127, 201 N.W.2d 241 (1972); State v. Fitzgerald, 182 Neb. 823, 157 N.W.2d 415 (1968); State v. Fugate, 180 Neb. 701, 144 N.W.2d 412 (1966); State v. Clingerman, 180 Neb. 344, 142 N.W.2d 765 (1966).

It should be evident that the court has been less than consistent in its response to post conviction motions containing conclusory allegations other than to give lip service recognition to the fact pleading standard. The brevity of the court's opinions and their frequent lack of any clear line of legal reasoning prevent the development of any precise guides to the court's approach. The best that can be done is to give recognition to the different approaches taken and to recognize that any conclusions drawn are open to a certain amount of speculation.

The pleading of conclusions is also unacceptable in section 2255 proceedings and justifies the summary denial of relief, Ward v. United States, 486 F.2d 305 (5th Cir. 1973), *cert. denied*, 416 U.S. 990 (1974), but a *pro se* prisoner is not held to the same pleading standards as a prisoner with counsel. Sanders v. United States, 373 U.S. 1, 22 (1963).

41. 193 Neb. 308, 226 N.W.2d 775 (1975).
42. *Id.* at 311, 226 N.W.2d at 777.
43. *See* note 40 *supra*.

counsel at the trial court level.[44] This approach where applied has served to mitigate the potential harshness of the fact pleading standard applicable to post conviction proceedings, but even with such a doctrine the potential for the denial of a meritorious claim because of inartful pleading is still great for three reasons. First, the Nebraska Supreme Court has never made the *Russ* approach applicable to the trial courts in their review of pleadings.[45] Thus, a prisoner will only receive the benefit of the doctrine if the denial of the motion to vacate is appealed to the higher court.[46] Second, occasionally the allegations are presented in such a conclusory form or confused manner that the court will be at a loss to determine of what constitutional defect the petitioner is complaining.[47] Third, the constitutional defect complained of may depend for proof on facts outside the record and, therefore, the court's review of the files and records naturally will not reveal any facts in support of the claim.[48]

It is difficult to ascertain from the reported opinions the bases of the trial courts' responses to motions to vacate which contain conclusory or otherwise inadequate allegations. It is apparently quite different, however, than that followed in the ordinary civil action. Under code practice, when a plaintiff's complaint is dismissed for failure to state a cause of action because a necessary allegation has been pleaded in the form of a conclusion or because of a failure to include a necessary allegation, the court will grant the plaintiff leave to amend if there is a reasonable possibility that the defect can be cured by amendment.[49] Thus, the pleading of conclusions, when successfully challenged by a general demurrer, does not bring the action to an end; instead, the plaintiff is generally permitted to replead in an attempt to set out a viable cause of

44. *E.g.*, State v. Losieau, 180 Neb. 671, 144 N.W.2d 406 (1966).
45. It is impossible to ascertain from the reported cases whether the trial courts are following the *Russ* approach of their own volition. If the approach were applied with some consistency by the Nebraska Supreme Court, then it would be expected that the lower courts would do the same in an effort to prevent any possibility of reversal on appeal.
46. Not infrequently the denial of a motion to vacate is not appealed. *See* note 186 *infra*.
47. *E.g.*, State v. Crooks, 189 Neb. 344, 202 N.W.2d 627 (1972) (difficult to understand arguments contained in the prisoner's *pro se* brief); State v. Duncan, 182 Neb. 598, 599, 156 N.W.2d 165, 166 (1968) ("The defendant's motion, pleadings, and briefs, do not even indicate any facts whatever which could conceivably constitute any denial or infringement of his constitutional rights in any respect.").
48. *E.g.* State v. Fitzgerald, 182 Neb. 823, 157 N.W.2d 415 (1968) (prisoner claimed an unconstitutional denial of his right to appeal).
49. Cagle, Inc. v. Sammons, 198 Neb. 595, 603-04, 254 N.W.2d 398, 404 (1977); NEB. REV. STAT. § 25-854 (Reissue 1975).

action.[50] Even though proceedings under the Post Conviction Act are civil in nature, none of the reported opinions involving appeals under the Act mentions an instance of a trial court granting leave to a prisoner to amend a defective motion to vacate prior to denying relief.[51]

The *Russ* approach is presumably the result of a commendable desire on the part of the Nebraska Supreme Court to mitigate the potential for injustice that occurs in applying a fact pleading standard to *pro se* motions to vacate. But as a solution to the problem it is incomplete. A better answer to the problem would involve instituting several additional curatives.

The first and most obvious step is to make the *Russ* approach applicable to the lower courts as well as to the Supreme Court. Then, when the motion to vacate raises constitutional claims dependent on facts contained in the files and records, application of the *Russ* approach will quickly reveal whether there is any merit to the claim. Where, however, the allegations are too conclusory to permit ascertainment of the claim presented or where the claim depends on proof outside the record, a solution other than application of the *Russ* approach will be necessary. In those situations, permitting the prisoner an opportunity to amend his motion to vacate in order to present the necessary facts, as would occur in any other civil action, would assist in the preservation of meritorious claims[52] without abandoning the beneficial aspects of fact pleading. For any opportunity to amend to be meaningful for a *pro se* prisoner, the order granting the right to amend would have to be accompanied by an opinion of the trial court specifically detailing those allegations deemed to be conclusory and explaining the need for the pleading of facts. A last curative measure and, in fact, the best and most comprehensive solution would be for all indigent prisoners to receive appointed counsel who would then be able to correct any pleading deficiencies.[53]

50. Kohler v. Ford Motor Co., 187 Neb. 428, 431, 191 N.W.2d 601, 604 (1971).

51. This is not to say that amendment of the motion to vacate is not permitted. *See* note 280 *infra*. At the federal level, several courts have held that the "better practice" in a section 2255 proceeding is to direct the prisoner to amend conclusory pleadings rather than to summarily deny relief. Raiford v. United States, 483 F.2d 445 (9th Cir. 1973); Smith v. United States, 454 F.2d 1330 (9th Cir. 1972).

52. In contrast to a dismissal based on a technical defect, a final dismissal of a complaint for failure to state a cause of action is *res judicata* with respect to any subsequent proceeding raising the same facts or question. Knapp v. City of Omaha, 175 Neb. 576, 122 N.W.2d 513 (1963). The Nebraska rule prohibiting successive motions for post conviction relief, *see* § IV-A of text *infra*, achieves the same result in proceedings under the Post Conviction Act.

53. Recognition must be given to the fact that most criminal convictions were obtained in a constitutionally permissible manner and that as a result, the

C. Facts Alleged Fail to Show a Constitutional Violation

The last basis upon which the courts summarily deny motions to vacate due to inadequacy of the pleadings is that the allegations, although raising issues cognizable under the Post Conviction Act, fail to show a violation of the prisoner's constitutional rights.[54] This generally results from failure to include in the motion a fact necessary to show the violation[55] or, more infrequently, failure to plead the necessary facts in sufficient detail.[56]

An example of the Nebraska Supreme Court's response to a

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vast majority of post conviction claims for relief are frivolous. Although there are no comparable statistics for proceedings under the Nebraska Post Conviction Act, only 3% of federal habeas corpus petitions ever result in a trial being held. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, tbl. C-58, at A-31 (1977). Adoption of the proposal to provide appointed counsel for all indigent post conviction petitioners is not likely to change these facts. Except to the extent that appointed counsel is able to dissuade a prisoner from pursuing a frivolous claim, the number of meritless filings might well increase since a prisoner would now have an additional incentive to file in the form of free legal representation. *See* Lay, *Modern Administrative Proposals for Federal Habeas Corpus: The Rights of Prisoners Preserved*, 21 DE PAUL L. REV. 701, 736 (1972). Additionally, the appointment of counsel for all indigent petitioners will impose a substantial financial burden on the State. *See generally* Lake, *The Echo of Clarence Gideon's Trumpet*, 44 NEB. L. REV. 751 (1965). Nevertheless, appointment of counsel will insure that all of a prisoner's meritorious constitutional claims will receive consideration.

54. This basis is closely related to the code pleading requirement that all facts essential to the plaintiff's cause of action be alleged in the complaint. Pinkerton v. Leonhardt, 184 Neb. 430, 168 N.W.2d 272 (1969); Ainsworth v. County of Fillmore, 166 Neb. 779, 90 N.W.2d 360 (1958).

55. State v. Bartlett, 199 Neb. 471, 474, 259 N.W.2d 917, 920 (1977) (ineffective assistance of counsel because of a failure to challenge a search, but no allegation of grounds on which the search could be challenged); State v. Leadinghorse, 192 Neb. 485, 489, 222 N.W.2d 573, 577 (1974) (ineffective assistance of counsel because of a failure to challenge a psychiatric report or to ask for further testing, but no allegations of how the report was to be challenged or of what would be achieved by further testing); State v. Johnson, 189 Neb. 824, 205 N.W.2d 548 (1973) (incompetence of counsel for failure to call certain witnesses and suppression of evidence by prosecutor, but no allegations of what witnesses were called, what they could have testified to, or what evidence was suppressed); State v. Nelson, 189 Neb. 144, 146, 201 N.W.2d 248, 249 (1972) (exclusion of women from the jury panel, but nothing to suggest prejudice from exclusion); State v. Myles, 187 Neb. 105, 107-08, 187 N.W.2d 584, 586 (1971) (denial of right to appeal, but no showing of meritorious grounds for appeal); State v. Silvacarvalho, 180 Neb. 755, 757, 145 N.W.2d 447, 448-49 (1966) (illegal interrogation, but no allegation of any statements being used against the defendant).

56. State v. Ronzzo, 181 Neb. 16, 17, 146 N.W.2d 576, 576 (1966) (illegal interrogation, but the time and substance of the interrogation are speculative). Lack of a necessary allegation and insufficient detail in the allegations are both grounds for the summary denial of section 2255 relief. Grimes v. United States, 396 F.2d 331 (9th Cir. 1968).

failure to plead a necessary fact occurs in *State v. Johnson*[57] in which the motion to vacate alleged the suppression of evidence by the prosecution and incompetence of counsel due to a failure of the defendant's attorney to call certain purported witnesses. In a short and terse opinion, the Nebraska Supreme Court held that the failure of the motion to specify what witnesses were not called, what the witnesses could have testified to, or what evidence was suppressed, justified the summary denial of relief.[58]

The potential for the denial of meritorious claims because of inartful pleading when the denial is for a failure to plead a necessary allegation is the same as when the denial is for pleading conclusions of fact or of law, but with one added consideration. There can be some expectation that a prisoner having once been made aware of the need to plead facts, will be able to grasp the distinction between facts and conclusions.[59] But in many instances there can be no similar expectation that a prisoner, having been told to plead facts showing a constitutional violation, will be able to ascertain what facts, among all the available facts concerning his conviction and sentence, a court will consider necessary for that showing.

State v. Johnson[60] again serves as an illustration. The Supreme Court of Nebraska affirmed the lower court's denial of relief on the grounds the prisoner had failed to plead what witnesses were not called, what they could have testified to, or what evidence was suppressed. For its authority, the court relied on a Sixth Circuit case interpreting section 2255.[61] Prior to the decision in *Johnson*, there was nothing in Nebraska case law to indicate the need for prisoners claiming incompetence of counsel or suppression of evidence to use these allegations, nor does the Post Conviction Act suggest by its terms the necessity of so pleading.[62] Even given the understanding on his part that he must plead facts making out a constitutional violation, it would appear unreasonable to expect the

57. 189 Neb. 824, 205 N.W.2d 548 (1973).
58. *Id.* at 825, 205 N.W.2d at 548.
59. For example, the Model Form for Use in Applications for Habeas Corpus Under 28 U.S.C. § 2254, 28 U.S.C.A. foll. § 2254, Appendix of Forms (West 1977), designed for use by prisoners proceeding *pro se* instructs the petitioner to plead facts.
60. 189 Neb. 824, 205 N.W.2d 548 (1973).
61. Harris v. Thomas, 341 F.2d 560 (6th Cir. 1965).
62. The holding in Harris v. Thomas, 341 F.2d 560 (6th Cir. 1965), that the names and potential testimony of the witnesses who were not called must be alleged, was derived from the rule that facts, not conclusions, must be pleaded. 341 F.2d at 561. Case law prior to *Johnson* did clearly state the need to plead facts rather than conclusions, *see* note 21 *supra*, but for a *pro se* prisoner it is a long leap from this general proposition to the specific requirement that the names and proposed testimony be alleged.

petitioner in *Johnson*[63] to know that he should refer to cases interpreting section 2255 for guidance as to what should be pleaded under the Post Conviction Act. Yet his failure to look to such cases resulted in the dismissal of what might well have been a meritorious claim.[64]

The *Russ* approach[65] is also applicable when the pleadings are defective through lack of a necessary allegation,[66] but the doctrine is a safeguard against the dismissal of meritorious claims only when the missing allegation relates to matters on the record. Where the missing allegation concerns matters outside the record,[67] then, as with conclusory allegations, there is a need for granting the prisoner leave to amend the motion to vacate to supply the necessary allegation if he is able to do so. Once again, any opportunity to amend, to be meaningful, would have to be accompanied by an opinion of the trial court explaining in what respect the motion to vacate is deficient. In this situation, where the deficiency is the failure to allege a fact concerning events outside the record, the sole function of the opinion may well be to instruct the prisoner as to what allegations are necessary to obtain an evidentiary hearing. In short, for those prisoners less than fully respectful of the truth, the opinion would only be an invitation to perjury. The best and most comprehensive solution would again be the appointment of counsel who could conduct an investigation of the facts, ascertain what facts need to be pleaded to make out a constitutional violation, and draft the motion to vacate accordingly.

63. Although represented by counsel on appeal, the petitioner in *Johnson* appeared *pro se* in the trial court. Transcript, State v. Johnson, 189 Neb. 824, 205 N.W.2d 548 (1973).

64. The defendant's counsel in the original criminal trial was disbarred on July 5, 1972, for numerous instances of neglect of duty. State *ex rel.* Nebraska State Bar Ass'n v. Sturek, Supreme Court of Nebraska Docket No. 38583 (1972).

65. *See* text accompanying note 41 *supra*.

66. In State v. Myles, 187 Neb. 105, 187 N.W.2d 584 (1971), the prisoner alleged he was wrongfully denied his right of appeal, but did not allege any meritorious grounds for appeal. The court denied relief after noting that the record did not reveal any grounds. The petitioner in State v. Silvacarvalho, 180 Neb. 755, 145 N.W.2d 447 (1966), pleaded the denial of counsel and a failure to warn him of his right to remain silent during a police interrogation, but did not allege that any statements made were used against him. The court held that the files and records in the case established that the petitioner was entitled to no relief, presumably because a review of the record revealed that no statements were introduced against him at trial. Both of the cited cases reveal the same sort of review conducted in *Russ*, but without acknowledgment that this was being done.

67. *E.g.*, State v. Bartlett, 199 Neb. 471, 259 N.W.2d 917 (1977) (ineffective assistance of counsel because of failure to challenge a search, but no allegation of grounds on which the search could be challenged); State v. Johnson, 189 Neb. 824, 205 N.W.2d 548 (1973).

III. DISPOSITION ON THE BASIS OF THE FILES AND RECORDS

Where the files and records of the case, when read in conjunction with the motion to vacate, show to the satisfaction of the trial court that the prisoner is entitled to no relief, the motion may be summarily denied without conducting an evidentiary hearing.[68] In determining what the files and records show, the court, within its discretion, may adopt whatever reasonable procedures are necessary.[69]

What constitutes the "files and records of the case" has never been explicitly defined, but the opinions of the Nebraska Supreme Court do provide some guidance to the trial courts in determining what they may consider in denying a motion to vacate. Certainly the transcript and the bill of exceptions in the original criminal

68. State v. Miles, 202 Neb. 126, 129, 274 N.W.2d 153, 154-55 (1979); State v. Spidell, 192 Neb. 42, 44, 218 N.W.2d 431, 433 (1974); NEB. REV. STAT. § 29-3001 (1975). The Post Conviction Act differs from section 2255 in that the former requires that the files and records "show to the *satisfaction* of the court that the prisoner is entitled to no relief" while the federal statute requires that the files and records "*conclusively* show that the prisoner is entitled to no relief." (Emphasis added.) The drafters of the Act explained the difference in wording by noting, "Our committee has eliminated the word 'conclusively' to permit some judicial discretion in the court in eliminating frivolous petitions and those which on the face appear to have no substantial merit." *Report of Judicial Council Sub-Comm., supra* note 6, at 3. Although the difference in wording would suggest a lesser standard than that of section 2255 is to be used in reviewing motions to vacate under the Act, there is no indication in the cases that any such difference exists in application. *See, e.g.*, State v. Ford, 198 Neb. 376, 378, 252 N.W.2d 643, 644-45 (1977) ("In a post conviction proceeding, the files and records of the case must affirmatively establish that the prisoner is entitled to no relief or an evidentiary hearing must be granted.").

When the trial court denies relief to a petitioner without conducting an evidentiary hearing, the journal entry should affirmatively indicate that the files and records of the case show that he was entitled to no relief. State v. Flye, 201 Neb. 115, 119, 266 N.W.2d 237, 240 (1978). It has also been suggested that in a section 2255 proceeding the court should also make findings of fact when denying a motion without a hearing. Brown v. United States, 468 F.2d 897, 898 (5th Cir. 1972).

On all appeals under the Post Conviction Act from an order denying an evidentiary hearing, the files and records of the case which the trial court judge considered in ruling on the motion shall accompany the transcript of appeal and the transcript shall contain a certificate from the judge identifying the files and records which were considered. State v. Fugate, 180 Neb. 701, 703-04, 144 N.W.2d 412, 414 (1966).

69. State v. Flye, 201 Neb. 115, 118-19, 266 N.W.2d 237, 240 (1978); State v. Leadinghorse, 192 Neb. 485, 486, 222 N.W.2d 573, 576 (1974); State v. Reyes, 192 Neb. 153, 154-55, 219 N.W.2d 238, 239-40 (1974); State v. Fowler, 182 Neb. 333, 334-35, 154 N.W.2d 766, 768 (1967); State v. Snyder, 180 Neb. 787, 790, 146 N.W.2d 67, 69 (1966); State v. Silvacarvalho, 180 Neb. 755, 759, 145 N.W.2d 447, 449 (1966); State v. Woods, 180 Neb. 282, 284, 142 N.W.2d 339, 341 (1966).

proceeding may be relied upon.[70] It is equally certain that evidence extrinsic to the original proceeding may not be reviewed.[71] Between these opposite ends of the spectrum, the courts may take into account two other types of information even though they are difficult to reconcile with the terms of the statute.

The primary category of information which can be considered, in addition to the files and records of the case, is that information of which the court may properly take judicial notice.[72] The two situations in which courts most frequently take judicial notice as a basis for denying relief without an evidentiary hearing are consideration of the competence of counsel and of inconsistent statements and materials in related proceedings. In the first instance, the Nebraska Supreme Court has stated a trial court may take judicial notice of the competency and qualifications of the lawyers that practice before it, and this knowledge may be used to deny a motion to vacate based on a claim of ineffective assistance of counsel.[73] Similarly, a court may as a basis for denying relief take judi-

70. State v. Virgilito, 187 Neb. 328, 328-29, 190 N.W.2d 781, 782 (1971) ("A transcript and bill of exceptions have been filed, certified to contain all evidence, both oral and documentary. These constitute the 'files and records of the case' "). The transcript contains the judgment, decree or final order sought to be reversed, vacated or modified, as well as all other filings made with the clerk of the court, NEB. REV. STAT. § 25-1912 (Reissue 1975), including pleadings, papers and orders. Anania v. City of Omaha, 170 Neb. 160, 167, 102 N.W.2d 49, 53 (1960). The bill of exceptions contains all of the evidence in the proceeding, both oral and documentary. Everts v. School Dist. No. 16, 175 Neb. 310, 315-16, 121 N.W.2d 487, 490 (1963). Federal cases interpreting the similar language of section 2255 indicate that any filings with the clerk of the court made up to the time of filing of the motion to vacate may be considered part of the files and records. Houston v. United States, 419 F.2d 30 (5th Cir. 1969) (affidavits filed on direct appeal in opposition to petitioner's affidavits are technically a part of the files and records); Streator v. United States, 395 F.2d 661 (5th Cir. 1968) (presentence reports and files of the probation officer are part of the files and records).

71. *See* State v. Flye, 201 Neb. 115, 266 N.W.2d 327 (1978); State v. Dabney, 181 Neb. 263, 267-68, 147 N.W.2d 768, 771-72 (1967) (stipulated receipt into evidence of evidence taken at trial of federal habeas corpus case may be treated as according the prisoner an evidentiary hearing). Unless the evidence extrinsic to the record is part of an expanded record, *see* text accompanying notes 152-56 *infra*, federal cases interpreting the similar language of section 2255 are in accord with the Nebraska position. Owens v. United States, 551 F.2d 1053 (5th Cir.), *cert. denied*, 434 U.S. 845 (1977) (ordinarily, contested facts may not be decided on affidavits alone, but where affidavits are supported by other evidence in the record, the court may rely on them); Taylor v. United States, 487 F.2d 307 (2d Cir. 1973) (affidavit of United States Attorney offered in opposition to motion to vacate is not part of files and records).

72. A court can, of course, take judicial notice of its own records in the case before it. State v. Coffen, 184 Neb. 254, 256, 166 N.W.2d 593, 594 (1969); Quinton v. State, 112 Neb. 684, 688, 200 N.W. 881, 883 (1924).

73. State v. Losieau, 180 Neb. 671, 677, 144 N.W.2d 406, 410 (1966). In *Losieau*, the supreme court took judicial notice of the competency of petitioner's counsel,

cial notice of inconsistent claims and statements by a petitioner in prior proceedings.[74]

The other category of information the court may rely on is the judge's own recollection of what transpired during the original criminal proceeding. Where the judge's memory of what occurred during the trial and sentencing of the petitioner contradicts the allegations in the motion to vacate, the court may rely on its own recollection of events as a basis for denying post conviction relief.[75]

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but made it clear the trial court had the power to do the same. The court's decision to take judicial notice appeared to be merely gratuitous in this instance, since petitioner claimed a lack of counsel rather than ineffective assistance of counsel. *Cf.* State v. Robinson, 194 Neb. 111, 112-13, 230 N.W.2d 222, 224 (1975) (supreme court took judicial notice of the competence of petitioners' counsel in affirming the denial of post conviction relief after an evidentiary hearing); State v. Oziah, 186 Neb. 541, 546-47, 184 N.W.2d 725, 728 (1971) (same). It is certainly questionable whether judicial notice of this sort comports with the requirement of NEB. REV. STAT. § 27-201 (Reissue 1975).

74. State v. Miles, 202 Neb. 126, 132, 274 N.W.2d 153, 156 (1979); State v. Losieau, 180 Neb. 671, 678, 144 N.W.2d 406, 411 (1966):

> In the present case the prisoner alleges he only had 5 years of schooling. We think this court can take notice of our previous opinion setting forth the interrogation by the trial court in the other conviction where he stated he had finished the eighth grade in school and the tenth by studying evenings at home. This court may take judicial notice of inconsistent claims and statements of a defendant in successive post conviction proceedings appealed to it in order to prevent an imposition on the court.

The power to take judicial notice of related proceedings is not confined to the supreme court alone but is also given to the trial courts. Knapp v. City of Omaha, 175 Neb. 576, 582, 122 N.W.2d 513, 517 (1963) (where cases are interwoven and interdependent, trial court may take judicial notice of its prior adjudication). Another example of the use of judicial notice occurs in State v. Crooks, 189 Neb. 344, 202 N.W.2d 627 (1972), in which notice was taken that life sentences are frequently commuted and that the sentences end before the death of the prisoner.

75. In State v. Leadinghorse, 192 Neb. 485, 491, 222 N.W.2d 573, 578 (1974), the prisoner alleged he was sentenced for charges which were dropped as a result of a plea bargain. The trial court denied relief without an evidentiary hearing and the Nebraska Supreme Court affirmed. Although the supreme court did not specifically say it was proper for the trial judge to rely on his or her own recollection of his or her reasons for granting the sentence, the court denied an evidentiary hearing on the basis that the necessary information was locked within the judge's mind. *But see* State v. Virgilito, 187 Neb. 328, 330, 190 N.W.2d 781, 783 (1971) ("It is entirely possible that the district judge was aware of ample evidence to establish the defendant's competency to stand trial, but that evidence, if any, does not appear in the record."). *Virgilito* may well stand only for the proposition that the trial court should make findings of fact reflecting its recollection of events. *See* State v. Flye, 201 Neb. 115, 119, 266 N.W.2d 237, 240 (1978).

The right of a federal trial judge to rely on his or her memory of events is well established in section 2255 proceedings. Machibroda v. United States, 368 U.S. 487, 495 (1962); Burris v. United States, 430 F.2d 399, 401 (7th Cir.

The trial courts have used files and records in several different ways to deny post conviction relief.[76] Where properly utilized, resort to the files and records may result in the swift and expeditious disposition of frivolous claims, but when used as a convenient excuse for ignoring the petitioner's allegations, the result may be the denial of meritorious claims.

A. No Factual Issue Presented

Frequently a prisoner's motion to vacate presents a constitutional challenge based on events fully reflected in the records of the original criminal proceeding. The error complained of occurred during the course of the original proceeding and all of the necessary relevant facts concerning the alleged error are undisputed and fully revealed in the files and records. In such a situation, there is no need to go outside the record to develop any additional facts. In this respect, the trial court acts in no different manner than does an appellate court in confining itself to consideration of matters appearing on the record;[77] each is concerned with deciding questions of law rather than disputes of fact.[78] And, like an appellate court, the trial court may grant as well as deny relief on the basis of the record before it.

The Post Conviction Act does not demand that the prisoner be accorded an evidentiary hearing before a determination of the motion to vacate is made on the merits where the facts are undisputed and contained on the record:

> It is clear that the sentencing court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing. Where no controverted material issues of fact are presented, the facts as shown by the record are undisputed, the taking of oral testimony on the motion could not add to or detract from the information shown by the court's files and records, and the court is satisfied that the prisoner is entitled to no relief, no hearing is required under the provisions of the Post Conviction Act.[79]

1970), *cert. denied*, 401 U.S. 921 (1971); United States v. McDowell, 305 F.2d 12, 14 (6th Cir. 1962). In fact, reliance on that right is usually considered desirable. Mirra v. United States, 379 F.2d 782, 788 (2nd Cir. 1967). *See generally* Kelly, *supra* note 5.

76. *See* §§ III-A to -D of text *infra*.

77. *See* Schetzer v. Sullivan, 193 Neb. 841, 843, 229 N.W.2d 550, 552 (1975).

78. *See* State v. Pilgrim, 184 Neb. 457, 168 N.W.2d 368 (1969) (only issues present in appeal from denial of motion to vacate are ones of law); Hancock v. Parks, 172 Neb. 442, 110 N.W.2d 69 (1961) (it is not the province of the supreme court in actions at law to resolve conflicts in or weigh the evidence). *But cf.* NEB. REV. STAT. § 25-1925 (Reissue 1975) (appeals in equity are triable *de novo*).

79. State v. Woods, 180 Neb. 282, 284, 142 N.W.2d 339, 341 (1966). *Accord*, State v. Flye, 201 Neb. 115, 118-19, 266 N.W.2d 237, 240 (1978); State v. Dabney, 181 Neb. 263, 265-66, 147 N.W.2d 768, 771 (1967).

State v. Brown[80] is an example of a situation in which all of the

Woods, the first case decided on appeal under the newly enacted Post Conviction Act, illustrates the often poorly researched and argued legal authority presented to the Nebraska Supreme Court as a basis for its decisions. In this case the prisoner was represented by counsel on appeal, yet his appellate brief contained exactly three paragraphs of argument without one case citation. The state's brief was nearly as cursory with one and a half pages of argument and one case citation. No reply brief was filed. Briefs for Appellant and Appellee, State v. Woods, 180 Neb. 282, 142 N.W.2d 339 (1966).

80. 185 Neb. 389, 176 N.W.2d 16 (1970). Other examples of motions to vacate directed to matters fully reflected in the record are numerous: State v. Flye, 201 Neb. 115, 266 N.W.2d 237 (1978) (ineffective assistance of counsel and abuse of discretion by trial judge in failing to raise or hold hearing on mental competency were alleged; reports were received at sentencing hearing showing defendant's sanity); State v. Bartlett, 199 Neb. 471, 259 N.W.2d 917 (1977) (claim of ineffective assistance of counsel for failure to move to suppress evidence resulting from a possibily illegal search and seizure and failure to make certain objections at trial); State v. Hardin, 199 Neb. 314, 258 N.W.2d 245 (1977) (claim that since all charges grew out of one transaction, defendant was being twice punished for the same offense); State v. Coleman, 197 Neb. 186, 247 N.W.2d 627 (1976) (claims of illegal arrest, lineup, *nunc pro tunc* order and ineffective assistance of counsel; exact nature of complaints is unclear, but court held that all questions raised could be resolved by reference to the record); State v. Miles, 194 Neb. 128, 230 N.W.2d 227 (1975) (claim that judge had failed to honor a plea bargain, but record showed no obligation on part of judge to honor the agreement); State v. Jonsson, 192 Neb. 730, 224 N.W.2d 181 (1974) (claim that defendant is subject to amendatory legislation, but record showed conviction final before date of enactment); State v. Brown, 192 Neb. 505, 222 N.W.2d 808 (1974) (denial of right to speedy trial); State v. Leadinghorse, 192 Neb. 485, 222 N.W.2d 573 (1974) (claim that presentence report should have been prepared, but no legal requirement to do so); State v. Warner, 192 Neb. 438, 222 N.W.2d 292 (1974) (same issue and disposition as in *Jonsson*); State v. Goham, 191 Neb. 639, 216 N.W.2d 869 (1974) (claim that state had lost jurisdiction through retrocession to federal government); State v. Grayer, 191 Neb. 523, 215 N.W.2d 859 (1974) (statutory procedures for waiving juvenile court jurisdiction are unconstitutional); State v. Fincher, 189 Neb. 746, 204 N.W.2d 927 (1973) (ineffective assistance of counsel); State v. Kellogg, 189 Neb. 692, 204 N.W.2d 567 (1973) (claim that appellate counsel should not have been permitted to withdraw by the district court; this decision is the opposite from that reached in State v. Blunt, 197 Neb. 82, 246 N.W.2d 727 (1976), in which the Nebraska Supreme Court granted relief on the exact same claim); State v. Crooks, 189 Neb. 344, 202 N.W.2d 627 (1972) (sentence of years imposed consecutively to life sentence is cruel and unusual punishment); State v. Williams, 189 Neb. 127, 201 N.W.2d 241 (1972) (constitutionality of implied consent statute); State v. Howell, 188 Neb. 687, 199 N.W.2d 21 (1972) (denial of right to appeal and meritorious grounds for appeal because of illegal search and seizure; court held on basis of record that there was no denial of the right to appeal and that search and seizure issue had been waived and was harmless error); State v. Whited, 187 Neb. 592, 193 N.W.2d 268 (1971) (claim of denial of counsel at preliminary hearing and improper confrontation, but court found on basis of record that no right to counsel existed at that time and the in-court identification was untainted); State v. Rhodes, 187 Neb. 332, 190 N.W.2d 623 (1971) (claim that defendant should have been advised of his ineligibility for parole at time of his guilty plea); State v. Ondrak, 186 Neb.

necessary relevant facts were contained on the record and there was no need for further factual development. The record of the original trial showed that during the state's direct examination of a police officer, he responded to a question about his interrogation of the defendant by stating that the defendant had refused to answer any questions in regard to the incident without the benefit of counsel. The defense counsel moved to have the answer stricken and a mistrial declared, but the motion was overruled. The question presented in the motion to vacate was whether the admission of the witness' statement over objection was prejudicial error and the Nebraska Supreme Court held that it was.[81]

Nothing could have been added to the relevant facts of this case had the trial court conducted an evidentiary hearing. All of the facts necessary for the court's consideration and decision were contained in the records of the original criminal proceeding. The supreme court's disposition of the prisoner's motion to vacate on the basis of the files and records of the case represented an efficient use of valuable judicial manpower.[82]

838, 186 N.W.2d 727 (1971) (counsel was ineffective for failing to argue for probation at time of sentencing); State v. Gero, 186 Neb. 379, 183 N.W.2d 274 (1971) (ineffective assistance of counsel); State v. Pilgrim, 184 Neb. 457, 168 N.W.2d 368 (1969) (claim of prejudice from jury seeing exhibits not admitted into evidence; record showed no prejudice); State v. Losieau, 184 Neb. 178, 166 N.W.2d 406 (1969) (constitutionality of Habitual Criminal Act); State v. Nicholson, 183 Neb. 834, 164 N.W.2d 652, *cert. denied*, 396 U.S. 879 (1969) (claim of defective extradition proceedings; evidentiary hearing was held, but court said issues were determinable from the record); State v. Kauffman, 183 Neb. 817, 164 N.W.2d 469 (1969) (claims that no intent to commit murder shown at trial under felony-murder rule, and that felony-murder rule is unconstitutional); State v. Losieau, 182 Neb. 367, 154 N.W.2d 762 (1967) (constitutionality of Habitual Criminal Act); State v. Dabney, 181 Neb. 263, 147 N.W.2d 768 (1967) (claim of failure to appoint counsel on appeal, but record showed no request for counsel); State v. Brevet, 180 Neb. 616, 144 N.W.2d 210 (1966) (claim that defendant should have been informed that counsel would have been appointed at state's expense and that district court did not have jurisdiction because transcript from justice of the peace court was not lodged in that court until after plea and sentence; court found waiver of right to counsel, and guilty plea waived need to file transcript); State v. Clingerman, 180 Neb. 344, 142 N.W.2d 765 (1966) (claim of illegal arrest outside of county; statute permitted the arrest).

In several of the above cited cases it is difficult to ascertain from the opinions whether an evidentiary hearing was held. Even if one was held, however, the issues cited could have been resolved by reference to the record only.

81. 185 Neb. at 391, 176 N.W.2d at 18.

82. Section 2255 is similarly interpreted not to require an evidentiary hearing when there is no substantial factual dispute. *See, e.g.*, Mixen v. United States, 469 F.2d 203, 205 (8th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973).

B. Motion and Files and Records Fail to Show a Constitutional Violation

Another situation in which the courts summarily determine motions to vacate by referring to the files and records of the case is one in which the allegations of the motion, accepted as true, fail to show a constitutional violation when considered in conjunction with the files and records. This situation is very similar to that discussed in the preceding section, but in this instance the allegations of the motion concern facts outside the record instead of events reflected in the record.[83] The courts then assume the truthfulness of the allegations[84] in determining the existence of any constitutional violation rather than conduct an evidentiary hearing to test their verity.[85]

As an example, in *State v. Snyder*[86] the petitioner alleged among other things that at some time subsequent to his arrest he was interrogated by the police without being advised of his right to remain silent and to have the assistance of counsel, and, further, that he was denied the assistance of counsel during a psychiatric examination. The court found from examining the record that there was nothing to indicate the results of any interrogation were used against the petitioner at any stage of the original proceedings and that the psychiatric examination was ordered by the trial court upon the request of petitioner's trial counsel. Coupling the allega-

83. It is possible for a motion to vacate to plead the relevant facts in such completeness that no recourse to the files and records by the court would be necessary to determine the lack of any constitutional violation. *See, e.g.*, State v. Craig, 181 Neb. 8, 146 N.W.2d 744 (1966), in which the petitioner claimed a denial of equal protection because he received a longer sentence than one codefendant and because another codefendant was not prosecuted. In this instance, the lack of any constitutional violation was evident on the face of the motion. Other examples are rare, presumably because of the pleaders' desire to present their cases in the most favorable light, ignoring those aspects of the record harmful to their cause.

84. *See* State v. Leadinghorse, 192 Neb. 485, 489, 222 N.W.2d 573, 577 (1974) ("Assuming, as we must do, that [an allegation in the motion was true]"); State v. Woods, 180 Neb. 282, 284, 142 N.W.2d 339, 341 (1966) ("It is important to note also that for purposes of the court's consideration of the defendant's motion, the allegations of fact made by the defendant were accepted as true and correct.").

85. If the allegations considered in conjunction with the files and records do make out a constitutional violation, then an evidentiary hearing must be held. *See* text accompanying note 283 *infra*. Disposition on this basis is somewhat analogous to the procedure on a motion for a directed verdict at the close of the plaintiff's case; the court treats as true all of the plaintiff's evidence and every reasonable inference that can be drawn from the evidence. McKamy v. Bonanza Sirloin Pit, Inc., 195 Neb. 325, 237 N.W.2d 865 (1976); Hansen v. Hasenkamp, 192 Neb. 530, 223 N.W.2d 44 (1974).

86. 180 Neb. 787, 146 N.W.2d 67 (1966).

tions of the motion to vacate with the additional information revealed by the record, the court held that (1) absent the use of any confession or statement against the defendant, an "otherwise valid conviction . . . is not rendered void or voidable solely because at a pretrial police interrogation, the defendant was denied counsel, and was not warned of his absolute right to remain silent";[87] and (2) "once a defendant . . . requests or submits to an examination by court-appointed psychiatrists, he is not constitutionally entitled to the presence of his counsel at the examination."[88] On the basis of the motion to vacate in conjunction with the files and records of the case, the court affirmed the lower court's denial of relief.

The Nebraska Supreme Court has only once expressly articulated the analytical process described above,[89] but has frequently engaged in this process in disposing of motions to vacate without the benefit of evidentiary hearings.[90] The process represents a fast, efficient method of disposing of meritless motions to vacate

87. *Id.* at 789, 146 N.W.2d at 68.
88. *Id.* at 790, 146 N.W.2d at 68.
89. State v. Woods, 180 Neb. 282, 284, 142 N.W.2d 339, 341 (1966).
90. State v. Kirby, 198 Neb. 646, 254 N.W.2d 424 (1977) (alleged a denial of right to represent self, but the record showed he was not prejudiced by the denial); State v. McDonnell, 192 Neb. 500, 222 N.W.2d 583 (1974) (claim of ineffective assistance of counsel for failure to object to a joinder of causes, but court held no prejudice was shown because defendant was acquitted on one of the charges); State v. Menard, 189 Neb. 825, 205 N.W.2d 547 (1973) (claim of ineffective assistance of counsel for failure to call a witness, but record showed the evidence was overwhelming); State v. Williams, 189 Neb. 127, 201 N.W.2d 241 (1972) (allegation that defendant was not advised of his rights when he gave a specimen to determine blood alcohol content and that he gave a coerced confession, but the court found from examining the record that there was no need to give constitutional warnings under the Implied Consent Law, that the right to remain silent had been waived, and that no confession was ever used against the defendant); State v. Dabney, 183 Neb. 316, 160 N.W.2d 163 (1968) (motion to vacate alleged the state suppressed evidence by not calling certain witnesses, but the record revealed that the names of the witnesses had been elicited by the state on direct examination; the court found no duty on the part of the state to call the witnesses); State v. Fowler, 182 Neb. 333, 154 N.W.2d 766 (1967) (petitioner claimed he was not warned of his right to remain silent and to have the assistance of counsel at the time of a pretrial interrogation, but the record revealed that any statements made were never used against him); State v. Newman, 181 Neb. 588, 150 N.W.2d 113 (1967) (although petitioner insisted that an investigation should be made of whether the county attorney, who withdrew from the case because he was to appear as a witness, assisted the special prosecutor in preparing the case, the court found that the record revealed no prejudice to the defendant from any such assistance); State v. Warner, 181 Neb. 538, 149 N.W.2d 438 (1967) (claim of denial of counsel, but record showed counsel had been waived); State v. Dabney, 181 Neb. 263, 147 N.W.2d 768 (1967) (claim of a failure to appoint counsel on appeal, but the record showed no request for appointed counsel was ever made); State v. Clingerman, 180 Neb. 344, 142 N.W.2d 765 (1966) (allegations of an illegal arrest outside of county and a refusal to issue process for a witness,

while conferring on prisoners all of the benefits they could have obtained had an evidentiary hearing been held.[91] This method of disposing of motions to vacate can, however, be subject to abuse if the prisoner has failed to allege all of the relevant facts necessary to the determination of his claim. For example, where the prisoner has failed to allege a fact not reflected in the record, but which could be proved at an evidentiary hearing, and the motion, had that fact been pleaded, would have made out a constitutional violation, then disposition on the basis of the files and records will result in the denial of a meritorious claim.

In all of the reported cases in which the court followed the process described above,[92] the motion to vacate concerned issues which, while not always well pleaded, would not have constituted a constitutional violation regardless of the detail or completeness of the pleadings. For instance, in the example of *Snyder*, it is difficult to imagine any additional facts which the prisoner could have pleaded that would have changed the outcome of the case. Nevertheless, before disposing of claims without first conducting an evidentiary hearing, the courts should remain sensitive to the possibility that the prisoner has failed through ignorance to plead a necessary fact which, if pleaded, would present a constitutional violation.[93]

The difficulty is in translating a general admonition to the courts to be sensitive into workable guidelines for them to follow. In most situations, a court would need to be possessed of clairvoy-

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but the record showed the arrest was authorized by statute and that the witness was cumulative).

As is frequently the case in other contexts, it is occasionally difficult to ascertain from the opinions whether the court reached its decision by examining the motion alone or in conjunction with the files and records. In any event, the court could have reached its decision by examining the files and records, and the cases are cited for that proposition.

91. Federal courts interpreting section 2255 have followed the same analytical process as the Nebraska courts. *See* Boyden v. United States, 407 F.2d 140 (9th Cir.), *cert. denied*, 396 U.S. 881 (1969) (fact that petitioner was forced to attend a line-up in the absence of appointed counsel was assumed to be true in determining the existence of a constitutional violation).

92. *See* note 90 *supra*.

93. In State v. Craig, 181 Neb. 8, 146 N.W.2d 744 (1966), the petitioner had received a sentence different than that of a codefendant. This, standing alone, is not enough to make out a constitutional violation and the motion was properly denied. However, a situation could be imagined in which the sentence is greater because of the defendant's insistence on exercising his right to trial. In that instance, there presumably would be a constitutional violation. *See* United States v. Peskin, 527 F.2d 71, 86-87 (7th Cir. 1975); United States v. Rauhoff, 525 F.2d 1170, 1177-79 (7th Cir. 1975). If this fact was not alleged in the motion to vacate and did not appear on the record for whatever reason, then the motion would be denied without consideration of the issue.

ant powers in order to ascertain from the face of the motion the existence of other critical facts not pleaded. The only adequate method of insuring that all relevant necessary facts are placed before the trial court in the initial pleading is to appoint counsel for all indigent prisoners.

C. Allegations are Contradicted by Files and Records

On occasion, a prisoner alleges facts in a motion to vacate that are clearly contradicted by the files and records of the case.[94] Where the contradicted facts go to the heart of the prisoner's claim and the facts, as shown by the files and records, are of an irrefutable nature, the allowance of an evidentiary hearing to permit the prisoner to attempt to prove the allegations of his motion would be an exercise in futility. In such a situation the trial court is justified in summarily denying the motion to vacate.[95]

As an illustration, the prisoner in *State v. Ransom*[96] claimed in his motion to vacate that he had been sentenced on a count charging that he was an habitual criminal while the record clearly showed that he was sentenced on separate counts of burglary.[97] The prisoner made no allegations of falsification or error in the record[98] and there was no reasonably conceivable evidence the pris-

94. The term "files and records" is here meant in the broader sense of including those facts of which the court may take judicial notice and events which are recalled by the judge.

95. *See* State v. Losieau, 180 Neb. 671, 679, 144 N.W.2d 406, 411 (1966): "Even though one of the grounds of a motion to vacate a sentence raises a factual issue, where the issue is one that was readily determinable by reference to files and records of the district court, the prisoner was not entitled to hearing on the motion." The same principle has been followed by the federal courts in interpreting section 2255. *See* Machibroda v. United States, 368 U.S. 487, 494 (1962) ("This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the 'files and records' in the trial court."); Steele v. United States, 362 F.2d 536, 537 (10th Cir. 1966).

96. 188 Neb. 499, 197 N.W.2d 637 (1972).

97. The Habitual Criminal Act, NEB. REV. STAT. §§ 29-2221 to -2222 (Reissue 1975), does not create a new and separate offense for which a person may be separately sentenced, but merely enhances the punishment for a criminal conviction. Gamron v. Jones, 148 Neb. 645, 28 N.W.2d 403 (1947).

98. Transcript at 39-42, State v. Ransom, 188 Neb. 499, 197 N.W.2d 637 (1972). The Nebraska Supreme Court has suggested, but not specifically stated, that the trial court may rely on the accuracy of its own records and the bill of exceptions when contradicted by the allegations of a motion to vacate. *See* State v. Losieau, 180 Neb. 671, 679, 144 N.W.2d 406, 411 (1966); State v. Clingerman, 180 Neb. 344, 351, 142 N.W.2d 765, 770 (1966). Although the issue has not been squarely considered in any reported Nebraska case, the federal cases interpreting section 2255 have permitted the trial judge to rely on the accuracy of the transcript of testimony and his or her own memory of events in rejecting without an evidentiary hearing a claim of falsification of the transcript. *E.g.*,

oner could have introduced at an evidentiary hearing that would have refuted the virtually unassailable evidence of the record. In this situation, the trial court could and did properly rely on the accuracy of the record in denying the motion to vacate. Other examples in which the record was considered to be irrefutable include the issues of whether a defendant had been represented by counsel;[99] whether an information had charged the defendant with being an habitual criminal;[100] whether counsel was ineffective when at the time his guilty plea was taken, the defendant testified he was satisfied with his counsel;[101] whether defendant received ineffective assistance of counsel or made an involuntary guilty plea, when the defendant claimed he had acted in self defense but a confession in the record showed this not to be so;[102] whether there had been a voluntary waiver of counsel;[103] whether there had been a resentencing of the defendant by a *nunc pro tunc* order;[104] whether the court had advised the defendant of his constitutional rights;[105] whether the defendant had requested to represent himself;[106] whether there had been any police interrogation when at trial the defendant had testified there had not been any;[107] and whether the defendant was sentenced for charges which were dropped as a result of plea bargaining when this was presumably contradicted by the court's memory of events.[108]

An apparent conflict has developed between the Nebraska and federal cases in resolving the question of whether a prisoner should be permitted, in effect, to impeach his own testimony, but the conflict may now be settled. The issue, more precisely defined, is whether a defendant's answers given at the time of the taking of his guilty plea in response to the court's interrogation as to whether the plea is voluntarily, understandingly and intelligently made are controlling, or whether, despite the prisoner's assertions at that time, he can assert in a subsequent collateral proceeding

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United States v. McDowell, 305 F.2d 12 (6th Cir. 1962). *But cf.* United States v. LaVallee, 319 F.2d 308 (2d Cir. 1963) (specific allegations of fraud or irregularity which call into dispute the accuracy of the record entitle the prisoner to a hearing).

99. State v. Losieau, 180 Neb. 671, 676, 144 N.W.2d 406, 410 (1966); State v. Clingerman, 180 Neb. 344, 347, 142 N.W.2d 765, 768 (1966).
100. State v. Coleman, 197 Neb. 186, 187, 247 N.W.2d 627, 628 (1976).
101. State v. Sargent, 186 Neb. 155, 156, 181 N.W.2d 449, 450 (1970).
102. State v. Reyes, 192 Neb. 153, 219 N.W.2d 238 (1974).
103. State v. Miles, 202 Neb. 126, 274 N.W.2d 153 (1979).
104. State v. Coleman, 197 Neb. 186, 187, 247 N.W.2d 627, 628 (1976).
105. State v. Clingerman, 180 Neb. 344, 347-48, 142 N.W.2d 765, 768 (1966).
106. State v. Kirby, 198 Neb. 646, 648, 254 N.W.2d 424, 425 (1977).
107. State v. Hizel, 181 Neb. 680, 682-83, 150 N.W.2d 217, 219, *cert. denied*, 389 U.S. 868 (1967).
108. State v. Leadinghorse, 192 Neb. 485, 491, 222 N.W.2d 573, 578 (1974).

that his answers were false.[109]

The United States Supreme Court has recently addressed this issue in *Blackledge v. Allison*,[110] in which the Court considered a North Carolina prisoner's habeas challenge to his plea of guilty to a single count of attempted safe robbery. At the plea taking, the trial judge asked the defendant thirteen questions concerning his understanding of the charge, its consequences and the voluntariness of his plea. In particular, the defendant was asked whether he understood he could receive a sentence of ten years to life—to which he responded "yes"—and whether anyone had made any promises or threats to induce him to plead guilty—to which he responded "no". Three days later the defendant was sentenced to seventeen to twenty-one years in prison.

Subsequently, the defendant filed in federal district court a *pro se* petition for habeas corpus relief alleging that he had pleaded guilty because his attorney led him to believe that the attorney, the prosecutor and the judge had agreed the defendant would receive a ten-year sentence in exchange for his guilty plea. The defendant further explained that he had answered no to the judge's interrogation as to whether any promises had been made because he had been instructed by his attorney to so answer. The federal district court dismissed the petition without a hearing and the Fourth Circuit reversed, ruling that in the circumstances of this case summary dismissal was improper.[111]

The Supreme Court, in affirming the judgment of the Court of Appeals, put great emphasis on the need for finality in criminal litigation[112] and stated that a prisoner's answers given at the taking of a guilty plea have a strong presumption of truthfulness,[113]

109. FED. R. CRIM. P. 11 requires that before a plea of *nolo contendre* or guilty is accepted, the federal district judge must advise the defendant personally of the effects of his plea, insure that the plea is voluntary, and ascertain the existence of any plea bargain agreements. State v. Turner, 186 Neb. 424, 183 N.W.2d 763 (1971), laid down the requirement that in Nebraska the taking of a guilty plea must, at a minimum, conform to the procedures contained in the ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY (Approved Draft 1968) [hereinafter cited as STANDARDS RELATING TO PLEAS OF GUILTY], which are very similar to the procedures contained in FED. R. CRIM. P. 11. The Nebraska court imposed the new standards for taking guilty pleas in order to conform plea taking procedures to those required by Boykin v. Alabama, 395 U.S. 238 (1969), which held that the record must affirmatively disclose that a guilty plea was made understandingly and voluntarily.

110. 431 U.S. 63 (1977). For an excellent discussion of the issues involved in the collateral attack of guilty pleas, see Note, *Rule 11 and Collateral Attack on Guilty Pleas*, 86 YALE L.J. 1395 (1977).

111. Allison v. Blackledge, 533 F.2d 894 (4th Cir. 1976), *aff'd*, 431 U.S. 63 (1977).

112. 431 U.S. at 71.

113. *Id.* at 73-74.

but it balanced against these considerations the need to safeguard constitutional guarantees.[114] The Court refused to adopt a *per se* rule according complete finality to a defendant's representations at the time of his plea taking,[115] but looked to whether the petitioner's claim was alleged with sufficient specificity and, if so, whether the allegations were so incredible as to justify dismissal.[116]

The Court agreed that in this instance, because the trial court had not explained the legitimacy of plea bargaining, had made no inquiry of defense counsel and the prosecutor about the existence of any plea bargain, and had made no verbatim record of the proceedings, it could not be said the allegations were beyond belief and, therefore, an evidentiary hearing was necessary.[117] If the omitted procedures had been followed, they "would almost surely have shown whether any bargain did exist and, if so, insured that it was not ignored."[118]

In contrast to *Blackledge* is the Nebraska Supreme Court's decision in *State v. Rapp*.[119] There the defendant alleged that as a result of plea bargaining, he was assured a lesser sentence than that which he received. The trial court denied relief without conducting an evidentiary hearing and the Nebraska Supreme Court affirmed on the grounds that at the time of the defendant's arraignment, he assured the trial court that there had not been any plea bargaining and that the court had told him that in the event there had been any plea bargaining, the court was not a party to it and it would not be binding on the court. The supreme court, in effect, made the defendant's assertions at arraignment dispositive of the issue. This was true even though the defendant had alleged that his attorney had assured him a five-year sentence[120] and had alleged in a previous motion to vacate that the court had made it clear off the record that it would abide by any plea bargain and

114. *Id.* at 72.
115. *Id.* at 74-75:

> What *Machibroda* and *Fontaine* indisputably teach, however, is that the barrier of the plea or sentencing proceeding record, although imposing, is not invariably insurmountable. In administering the writ of habeas corpus and its § 2255 counterpart, the federal courts cannot fairly adopt a *per se* rule excluding all possibility that a defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment.

(Footnotes omitted).
116. *Id.* at 76.
117. *Id.* at 75-80.
118. *Id.* at 79-80.
119. 186 Neb. 785, 186 N.W.2d 482 (1971).
120. Transcript at 28, State v. Rapp, 186 Neb. 785, 186 N.W.2d 482 (1971).

that the on the record statements by the court to the contrary were necessary to make the plea bargain legal.[121] Further, the record of the sentencing proceedings made it very clear that some sort of plea bargaining had occurred and that the trial court was aware of it.[122]

Even though the plea taking in *Rapp* did not suffer from several of the omissions the United States Supreme Court found to be of significance in *Blackledge*,[123] the allegations of the motion to vacate, when considered in conjunction with the files and records of the case, were not so "vague or conclusory"[124] nor so "palpably incredible" as to warrant summary dismissal.[125] The motion to vacate presented a prima facie case for relief which, if presented in a petition for federal habeas corpus relief, would have justified further factual development.[126]

The United States Supreme Court also dealt with the issue of guilty pleas in *Fontaine v. United States*,[127] in which it reversed the lower court's denial of relief without an evidentiary hearing to a federal prisoner proceeding under section 2255. In his motion, the prisoner claimed that his plea of guilty had been induced, contrary to his responses to the trial court's Rule 11 interrogation, by a combination of fear, coercive police tactics and physical and

121. *Id.* at 15.

122. Bill of Exceptions at 21-22, 25, State v. Rapp, 186 Neb. 785, 186 N.W.2d 482 (1971). At the sentencing hearing the trial judge also explained to the defendant that the court would not follow any sentence recommendation in light of an escape attempt by the defendant subsequent to the taking of his guilty plea and offered the defendant an opportunity to withdraw his plea. *Id.* at 24-25. The Supreme Court could have based the denial of post conviction relief on this ground, but, instead, based it on the defendant's answers at the taking of the guilty plea.

123. For instance, the trial court in *Rapp* explained to the defendant the legitimacy of plea bargaining. Bill of Exceptions at 17.

The plea taking in *Rapp* occurred prior to the decision in State v. Turner, 186 Neb. 424, 183 N.W.2d 763 (1971). Now that the trial courts are required to adhere to the procedures of the STANDARDS RELATING TO PLEAS OF GUILTY, *supra* note 109, the court must make inquiry of defense counsel and the prosecution as to the existence of any plea bargain, *id.*, § 1.5, and a verbatim recording of the plea taking must be made. NEB. REV. STAT. § 24-342.02 (Reissue 1975). However, the trial court is still not required to explain the legitimacy of plea bargaining. *See generally* BENCH BOOK COMMITTEE OF THE NEBRASKA DISTRICT COURT JUDGES ASSOCIATION, NEBRASKA BENCH BOOK 1976, XVIII-8 to -9 (1976).

124. 431 U.S. at 75.

125. *Id.* at 76.

126. In fact Rapp did file a petition in federal district court for habeas corpus relief alleging essentially the same facts as were presented in the state court proceedings and an evidentiary hearing was held by the federal court. Rapp v. Wolff, 489 F.2d 712 (8th Cir. 1974).

127. 411 U.S. 213 (1973).

mental illness. The Supreme Court noted that the objective of Rule 11 was to "flush out and resolve all such issues, but like any procedural mechanism, its exercise is neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations."[128] In this instance the detailed allegations of the motion and supporting records did not conclusively show that the petitioner was entitled to no relief and the case was remanded for an evidentiary hearing.

The prisoner in *State v. Leadinghorse*,[129] raising issues similar to those presented in *Fontaine*, claimed his guilty plea was the result of teasing and verbal abuse by his jailors, his reactions to drug withdrawal,[130] and false statements by his attorney that the defendant's mother was urging him to plead guilty.[131] First reciting the prisoner's responses at the time of his guilty plea that his plea was knowing, voluntary and intelligent, the Nebraska Supreme Court affirmed the denial of relief without an evidentiary hearing on the bases that no suggestion was made that the prisoner's jailers were coercing him to plead guilty, that his incarceration for five months made his claim of drug withdrawal frivolous, and that it was a "strain on credulity" to believe that a message from his mother induced him to plead guilty.[132]

Although the need for further factual development in *Leadinghorse* is not nearly so compelling as in *Fontaine*, it is still reasonably safe to say that a federal court considering the same facts in a habeas corpus proceeding would not have summarily denied the petitioner's claim as did the Nebraska courts.[133] The Nebraska Supreme Court did label several of the defendant's factual assertions incredible, an acceptable basis under *Blackledge* for summarily denying relief,[134] but the factual contentions presented in *Leadinghorse* are not so inherently unbelievable as the court would have the reader conclude.[135]

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128. *Id.* at 215.
129. 192 Neb. 485, 222 N.W.2d 573 (1974).
130. *Id.* at 490, 222 N.W.2d at 578.
131. Transcript at 28, State v. Leadinghorse, 192 Neb. 485, 222 N.W.2d 573 (1974):
> The guilty plea was induced, in part, by misrepresentations made by counsel to defendant that he had spoken to defendant's mother and that defendant's mother had told counsel that she wanted defendant to plead guilty when in fact counsel had not discussed the issue of whether defendant should plea guilty with defendant's mother.

132. *Id.* at 491, 222 N.W.2d at 578.
133. There is no record of the petitioner in *Leadinghorse* ever having instituted a federal habeas corpus action so this conclusion must remain speculative.
134. 431 U.S. at 74.
135. *But see* Malone v. United States, 299 F.2d 254, 256 (6th Cir. 1962) ("It must have seemed fantastic to the District Judge, as it was to us, that a federal prisoner who was confined in jail for six months awaiting trial could conceal

A recent indication that the Nebraska standard is coming into line with the federal standard is found in *State v. Svoboda*.[136] There the prisoner alleged that his guilty pleas were involuntary as a result of the trial judge's participation in plea negotiations and his attorney's misrepresentations and coercion. The motion to vacate had been summarily denied in the sentencing court but on appeal the case was reversed and remanded with instructions to conduct an evidentiary hearing.[137] Even though the claims of misrepresentation and coercion were presumably in contradiction of the defendant's assertions at the time of the plea taking, no mention of this was made in the Nebraska Supreme Court's opinion. Whether this shows a greater willingness on the part of the court to consider claims impeaching a defendant's answers at the time of a guilty plea or is an aberrational decision remains to be seen.

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one and one-half ounces of gum opium on his person, avoid detection and keep enough on hand to drug himself to the extent that he was incompetent at his trial.").

136. 199 Neb. 452, 259 N.W.2d 609 (1977). *See also* State v. Hoppes, 202 Neb. 383, — N.W.2d — (1979). In *Hoppes* the prisoner's testimony at his post conviction evidentiary hearing was characterized as "severely impeached" by the statements made at his plea taking, *id.* at 388-89, — N.W.2d at —, which indicates that statements made at the plea taking may be subject to later contradiction. The trial courts have been much more willing than the Nebraska Supreme Court to grant an evidentiary hearing to a prisoner challenging the voluntariness of his guilty plea. *See* State v. Hoppes, 202 Neb. 383, —N.W.2d — (1979); State v. Partridge, 201 Neb. 799, 272 N.W.2d 366 (1978); State v. Ford, 200 Neb. 779, 265 N.W.2d 456 (1978); State v. Morrow, 197 Neb. 627, 250 N.W.2d 247 (1977); State v. McClelland, 194 Neb. 535, 233 N.W.2d 786 (1975); State v. Krider, 191 Neb. 285, 214 N.W.2d 611 (1974); State v. Mayes, 190 Neb. 833, 212 N.W.2d 621 (1973); State v. Smith, 188 Neb. 388, 196 N.W.2d 918 (1972); State v. Fusby, 188 Neb. 139, 195 N.W.2d 495 (1972); State v. Hall, 188 Neb. 130, 195 N.W.2d 201 (1972); State v. Mason, 187 Neb. 675, 193 N.W.2d 576 (1972); State v. Cruse, 187 Neb. 331, 190 N.W.2d 629 (1971); State v. Alvarez, 185 Neb. 557, 177 N.W.2d 591 (1970), *modified*, 408 U.S. 937 (1972); State v. Coffen, 184 Neb. 254, 166 N.W.2d 593 (1969); State v. Crenshaw, 183 Neb. 449, 161 N.W.2d 502 (1968); State v. Raue, 182 Neb. 735, 157 N.W.2d 380 (1968); State v. Tunender, 182 Neb. 701, 157 N.W.2d 165, *supp. op.*, 183 Neb. 242, 159 N.W.2d (1968); State v. Jackson, 182 Neb. 472, 155 N.W.2d 361 (1968); State v. Williams, 182 Neb. 444, 155 N.W.2d 377 (1967); State v. Putnam, 182 Neb. 185, 153 N.W.2d 456 (1967); State v. Decker, 181 Neb. 859, 152 N.W.2d 5 (1967). The reasons for the trial courts' liberality are unclear, but may reflect an appreciation on their part that reversal on appeal is less likely after an evidentiary hearing, since the supreme court will only set aside findings of the trial court that are clearly erroneous. State v. Halsey, 195 Neb. 432, 434, 238 N.W.2d 249, 250 (1976); State v. McClelland, 194 Neb. 535, 538, 233 N.W.2d 786, 787 (1975); State v. Crenshaw, 183 Neb. 449, 450-51, 161 N.W.2d 502, 503 (1968). *See* State v. Fowler, 201 Neb. 647, 271 N.W.2d 341 (1978). However, when the trial court denies the motion without an evidentiary hearing, the supreme court will examine the files and records anew. *See* State v. Turner, 194 Neb. 252, 258, 231 N.W.2d 345, 349 (1975); State v. Virgilito, 187 Neb. 328, 190 N.W.2d 781 (1971).

137. 199 Neb. at 456, 259 N.W.2d at 611.

The significance of the federal and state courts following different standards in determining whether to allow an evidentiary hearing or further factual development becomes apparent when a state prisoner, having been denied post conviction relief without an evidentiary hearing in the state courts, files a petition for a writ of habeas corpus in federal court. *Townsend v. Sain*[138] requires that when the merits of a factual dispute raised by a habeas petition and return were not resolved in a state court hearing, then the federal court must grant an evidentiary hearing to the habeas applicant.[139] A state court's summary denial of relief to prisoners in situations in which the federal habeas court would grant an evidentiary hearing results in a shifting of the fact finding process from the state to the federal courts and an abdication by the state courts of their proper role in the application and enforcement of federal law.[140] The Nebraska courts, by giving conclusive effect to

138. 372 U.S. 293 (1963). The Court in *Townsend* decided the issues of when the district court must grant a habeas petitioner an evidentiary hearing and when it is permissible to rely on the state court's findings of fact:

> We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual disputes were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313. *See generally, Developments, supra* note 5, at 1118-40.

139. The district court may also remand the case to the state courts for a full and fair evidentiary hearing within a reasonable period of time, *e.g.*, Beal v. Henderson, 317 F. Supp. 1323 (W.D. La. 1970); Neal v. Taylor, 264 F. Supp. 418 (E.D.N.C. 1967), and is required to do so when the issue is the voluntariness of a confession. Sigler v. Parker, 396 U.S. 482 (1970). *See generally, Developments, supra* note 5, 1145-48.

140. The rationale for encouraging the state courts to assume the initial responsibility for enforcing federal constitutional standards has been extensively discussed elsewhere and will not be repeated here, *see, e.g.*, Case v. Nebraska, 381 U.S. 336, 344-47 (1965) (Brennan, J., concurring); Darr v. Burford, 339 U.S. 200 (1950); Wright & Sofaer, *Federal Habeas Corpus: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 896 (1966); *Developments, supra* note 5, at 1093-95, other than to note that the federal courts' deference to the state courts is based on comity and is thought justified as necessary to preserve the role of the state courts in the application and enforcement of federal law, to maintain the orderly administration of state court procedures and to reduce the tensions inherent in a system of federal review of state decisions. *Developments, supra* note 5, 1093-95.

A broader issue inherent in the conclusions of this article is whether the states should adapt their post conviction procedures to conform to the procedures for federal habeas corpus promulgated by the United States Supreme Court or whether they should pursue policies that, while conflicting with the federal procedures, nonetheless are important to the vindication of state in-

a prisoner's answers to the trial court's interrogation at the time of the prisoner's guilty plea, although the prisoner has presented detailed factual allegations contradicting the answers and the allegations are not wholly incredible, have shifted to the federal district courts the responsibility of determining the truthfulness of the prisoner's claims.[141]

D. Probative Value of Files and Records Outweighs Allegations

Even where the allegations of the motion to vacate are not directly contradicted by the files and records of the case, the courts have nevertheless found in certain instances that the probative value of the record outweighs the allegations of the motion. The first example of the courts following this approach occurs when the alleged facts are incredible and therefore beyond belief,[142] a basis

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terests. For instance, a state may well conclude that it is more desirable to have the federal courts make the initial determination on the voluntariness of a guilty plea than it is to detract from a policy of finality of criminal convictions by permitting the state courts to consider collateral challenges to such pleas. Resolution of this issue is beyond the scope of this article and is only noted in passing. *See generally* Hawk v. Olson, 146 Neb. 875, 22 N.W.2d 136 (1946); Clinton, *Are The Courts Too Available?*, Daily Record, May 1, 1978, at 15, col. 1; Holman, *Multiple Post-Trial Litigation in Criminal Cases*, 19 DE PAUL L. REV. 490 (1970). Recognition, however, must be given to the fact that many conclusions of this article are based on the premise that the states should retain control, in the first instance, over the determination of constitutional error in their own criminal proceedings by conforming when necessary to federal habeas procedure.

141. The best example occurs in State v. Rapp, 186 Neb. 785, 186 N.W.2d 482 (1971), in which the state courts summarily denied relief, but the federal courts granted an evidentiary hearing. *See* note 126 *supra*.

142. *See* State v. Flye, 201 Neb. 115, 119, 266 N.W.2d 237, 240 (1978) ("[B]ald assertions of insanity, unsubstantiated by a recital of credible facts and unsupported by the record, are wholly insufficient, and justify the summary dismissal of a post conviction proceeding."); State v. Johnson, 189 Neb. 824, 825, 205 N.W.2d 548, 549 (1973) ("Conclusions, not substantiated by allegations of fact with some probability of verity, are not sufficient to warrant a hearing.") (quoting from Harris v. Thomas, 341 F.2d 560 (6th Cir. 1965)); State v. Virgilito, 187 Neb. 328, 330, 190 N.W.2d 781, 783 (1971) (same as *Flye*); State v. Losieau, 180 Neb. 671, 679, 144 N.W.2d 406, 411 (1966) ("His allegation that he pleaded guilty in the city jail is incredible and in any event did not enter into his plea of guilty.").

This is in accord with the practice in section 2255 proceedings in which summary dismissal is proper when there are "contentions that in the face of the record are wholly incredible." Blackledge v. Allison, 431 U.S. 63, 74 (1977); Raines v. United States, 423 F.2d 526, 529 (4th Cir. 1970) ("If the petition be frivolous or patently absurd on its face, entry of dismissal may be made on the court's own motion without even the necessity of requiring a responsive pleading from the government."). *See* Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254, Adv. Comm. Note to R. 4 (West 1977).

relied upon by the court in *State v. Leadinghorse*.[143] Another example occurs when the prisoner has presented inconsistent allegations within the motion to vacate or in related motions. Where this occurs, the court is free to disbelieve the allegations.[144] Similarly, it has been stated that delay in raising a claim leads to a strong inference of invalidity.[145]

The underlying rationale of these rules is that some claims are so unworthy of belief that the granting of an evidentiary hearing would be a wasteful expenditure of judicial resources. While the rationale is sound, the danger is that the courts will use it to indiscriminately deny hearings where the allegations are "improbable,"[146] but not "palpably incredible."[147] Mere improbability of success should not prevent a petitioner from attempting to prove what ultimately might be a valid claim.

An approach that would better insure that possibly valid but improbable claims are not denied without opportunity for further factual development, yet that will still cull out meritless claims without the expense and burden of a full evidentiary hearing is to

143. 192 Neb. 485, 222 N.W.2d 573 (1974). *See* text accompanying note 131 *supra*.

144. State v. Losieau, 180 Neb. 671, 678, 144 N.W.2d 406, 411 (1966). The rule is the same in section 2255 proceedings. Lucas v. United States, 114 F. Supp. 584, 590 (N.D.W. Va. 1953).

145. State v. Losieau, 180 Neb. 671, 677, 144 N.W.2d 406, 410 (1966). *See* State v. Kirby, 198 Neb. 646, 648, 254 N.W.2d 424, 425 (1977); State v. Brevet, 180 Neb. 616, 620, 144 N.W.2d 210, 214 (1966), *cert. denied*, 386 U.S. 967 (1967). *Cf.* State v. Mason, 187 Neb. 675, 677, 193 N.W.2d 576, 578 (1972) (addition of claim after appointment of attorney is noteworthy).

A distinction must be made between the effect on the probity of the allegations of delay in bringing a motion to vacate and the right to bring the motion at all. NEB. REV. STAT. § 29-3001 (Reissue 1975) makes it clear that a motion to vacate may be brought at any time; there is no statute of limitations applicable to proceedings under the Post Conviction Act. The cases interpreting section 2255 allow the length of delay to be a factor in judging the believability of the allegations of the motion, Raines v. United States, 423 F.2d 526, 531 (4th Cir. 1970); Parker v. United States, 358 F.2d 50, 54 n.4 (7th Cir. 1965), and the doctrine of laches has now been made applicable to the bringing of delayed motions to vacate. Rules Governing Section 2255 Proceedings, 28 U.S.C.A. foll. § 2255, Adv. Comm. Note to R. 9 (West Supp. 1978).

146. Machibroda v. United States, 368 U.S. 487 (1962):

> Not by the pleadings and the affidavits, but by the whole of the testimony must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard.

Id. at 495. (quoting from Walker v. Johnson, 312 U.S. 275, 287 (1941)).

147. Blackledge v. Allison, 431 U.S. 63, 76 (1977): "The critical question is whether these allegations, when viewed against the record of the plea hearing, were so 'palpably incredible,' . . . so 'patently frivolous or false,' . . . as to warrant summary dismissal."

require the regular filing of a responsive pleading by the state and to permit the trial court to expand the record on which it bases its conclusions.

Requiring the regular filing of a responsive pleading[148] will rarely result in the disposition of a motion on the basis of the answer alone except insofar as it brings to the court's attention information that it was not aware of or to which it had not given proper consideration.[149] But the filing of an answer will assist in the development of the issues and hopefully their narrowing,[150] and will serve "sometimes, as not infrequently occurs, to admit the merit or veracity of some or all of the petitioner's assertions."[151]

Expansion of the record expedites the determination of the meritoriousness of a motion to vacate through the inclusion of additional relevant materials in the files and records of the case. Letters predating the filing of the motion,[152] documents, exhibits,[153] answers under oath to written interrogatories propounded by the court, depositions of the prisoner and others,[154] and even affidavits

148. The content of answers in civil actions is governed by NEB. REV. STAT. §§ 25-811 to -812. *See generally* Rules Governing Section 2255 Proceedings, 28 U.S.C.A. foll. § 2255, Adv. Comm. Note to R. 5 (West Supp. 1978).

149. The answer could point out to the court a basis for denying the motion such as the instant motion being a second or successive motion or it could provide the court with information not usually contained in the files and records, such as appellate briefs. *See generally* Rules Governing Section 2255 Proceedings, 28 U.S.C.A. foll. § 2255, Adv. Comm. Note to R. 5 (West Supp. 1978).

150. *See* Raines v. United States, 423 F.2d 526, 529 (4th Cir. 1970); STANDARDS, *supra* note 5, § 4.3 & Commentary, *Developments*, *supra* note 5, at 1178. *But see* Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254, Adv. Comm. Note to R. 4 (West 1977) (it is the duty of the trial judge to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer).

151. Raines v. United States, 423 F.2d 526, 529 (4th Cir. 1970).

152. *Id.* at 529, 533 (Sobeloff, J., concurring in part & dissenting in part); Rules Governing Section 2255 Proceedings, 28 U.S.C.A. foll. § 2255, R. 7 (West Supp. 1978); Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254, R. 7 (West 1977).

153. Harris v. United States, 436 F.2d 591, 594 (10th Cir. 1971); Rules Governing Section 2255 Proceedings, 28 U.S.C.A. foll. § 2255, R. 7 (West Supp. 1978); Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254, R. 7 (West 1977).

154. Blackledge v. Allison, 431 U.S. 63, 81 (1977); Moorhead v. United States, 456 F.2d 992 (3d Cir. 1972); Reed v. United States, 438 F.2d 1154, 1156 (10th Cir. 1971); Russell v. United States, 321 F.2d 533, 533 (9th Cir. 1963) ("Obviously appellant can be required to particularize his claim. Perhaps a deposition taken of appellant would show more clearly whether a hearing need be held, or if held, whether there is any need for Russell's presence.") Rules Governing Section 2255 Proceedings, 28 U.S.C.A. foll. § 2255, R. 6 (West Supp. 1978); Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254, Adv. Comm. Note to R. 6 (West 1977); STANDARDS, *supra* note 5, at § 4.5(b). *But cf.* Burleson v. United States, 430 F.2d 387 (8th Cir. 1965) (refusal of prisoner to answer deposition questions does not make evidentiary hearing unnecessary).

in the appropriate case[155] may be considered by the court in exploring the veracity of a prisoner's allegations. Through expansion of the record, the trial court is afforded an intermediate state of consideration between summary dismissal and a full evidentiary hearing.[156]

Expansion of the record is based on the premise that "the evidence against a petitioner's extra-record contentions may be so overwhelming as to justify a conclusion that an unsupported and inherently improbable allegation does not raise a substantial issue of fact."[157] Thus, it is well suited for the ascertainment of independently verifiable facts. Where, however, the issue is one of credibility, resolution should be by live testimony before the court rather than by affidavits or similar out of court forms of evidence.[158]

155. Rules Governing Section 2255 Proceedings, 28 U.S.C.A. foll. § 2255, R. 7 (West Supp. 1978); Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254, R. 7 (West 1977). *See* United States v. Carlino, 400 F.2d 56, 58 (2d Cir. 1968), *cert. denied*, 394 U.S. 1013 (1969) (affidavit of prisoner showed no basis for claim); Mirra v. United States, 379 F.2d 782, 787 (2d Cir. 1967) (affidavit of doctor taken as true would only raise possibility of mental incompetency at time of trial); Accardi v. United States, 379 F.2d 312, 313 (2d Cir. 1967) (affidavit of prisoner was totally devoid of any factual elaboration). An opposite proposition may be found in Raines v. United States, 423 F.2d 526 (4th Cir. 1970):

> By the inclusion of affidavits within the scope of "files and records" the majority neatly obviates the necessity of a hearing in every case. It could never have been envisioned that the summary disposition provided in the statute would encompass such trial by affidavit. Testimony by witnesses to past events should be live and subject to testing by cross-examination. Affidavits cannot be probed; nor can they fill in missing details which may significantly alter or refute the account. "It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised."

Id. at 533. (Sobeloff, J., concurring in part & dissenting in part) (citations omitted).

156. Blackledge v. Allison, 431 U.S. 63, 82 (1977); Raines v. United States, 423 F.2d 526, 529-30 (4th Cir. 1970); Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254, Adv. Comm. Note to R. 7 (West 1977).

157. Moorhead v. United States, 456 F.2d 992, 996 (3d Cir. 1972). *See* Blackledge v. Allison, 431 U.S. 63, 82 n.25 (1977) ("But before dismissing facially adequate allegations short of an evidentiary hearing, ordinarily a district judge should seek as a minimum to obtain affidavits from all persons likely to have firsthand knowledge of the existence of any plea bargain.").

158. Blackledge v. Allison, 431 U.S. 63, 82 n.25 (1977); Raines v. United States, 423 F.2d 526, 530 (4th Cir. 1970) ("When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive, but this is not to say they may not be helpful."); Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254, Adv. Comm. Notes to R. 4, 7 (West 1977). The express language of Rule 7, for both sections 2254 and 2255, would permit the disposition of a habeas petition or section 2255 motion to vacate on the basis of affidavits even when the issue is one of credibility. The scope of the language is, however, called into doubt by the Advisory Committee Notes to the Rules and note 25 of *Blackledge*.

Machibroda v. United States[159] illustrates a situation in which expansion of the record would have revealed whether a claim was substantial before a full evidentiary hearing was held. The prisoner claimed his pleas of guilty to two counts of bank robbery were involuntary because on three separate occasions an Assistant United States Attorney had promised him that he would receive a total sentence of not more than twenty years if he pleaded guilty when, in fact, he received consecutive terms of twenty-five and fifteen years. He further alleged that he had been told not to tell his attorney about the conversations and that if he told the court or his attorney, two other robberies would be brought up. Finally, he alleged he wrote several letters to the Attorney General and the court in regard to the promises he had received and he had received replies. The district court denied the prisoner's section 2255 motion without an evidentiary hearing and the court of appeals affirmed.[160] The Supreme Court reversed, holding that a hearing was necessary, but noted:

> The language of the statute [section 2255] does not strip the district courts of all discretion to exercise their common sense. Indeed, the statute itself recognizes that there are times when allegations of facts outside the record can be fully investigated without requiring the personal presence of the prisoner. Whether the petition in the present case can appropriately be disposed of without the presence of the petitioner at the hearing is a question to be resolved in the further proceedings in the District Court.[161]

The Court previously had noted: "It is not unreasonable to suppose that many of the material allegations can either be corroborated or disproved by the visitors' records of the county jail where the petitioner was confined, the mail records of the penitentiary to which he was sent, and other such sources."[162] In other words, the Court was suggesting a procedure for expanding the record by resort to independently verifiable facts.

Procedure under section 2255 and federal habeas corpus now explicitly provides for expansion of the record,[163] but this is not the only method for testing the allegations of a motion to vacate short of a full evidentiary hearing. The motion for summary judgment[164] is ideally suited for testing allegations capable of in-

159. 368 U.S. 487 (1962).
160. Machibroda v. United States, 280 F.2d 379 (6th Cir. 1960).
161. 368 U.S. at 495-96 (footnotes omitted).
162. *Id.* at 495.
163. Rules Governing Section 2255 Proceedings, 28 U.S.C.A. foll. § 2255, R. 7 (West Supp. 1978); Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254, R. 7 (West 1977).
164. NEB. REV. STAT. §§ 25-1330 to -1336 (1975). *See generally* Mecham v. Colby, 156 Neb. 386, 56 N.W.2d 299 (1953):

> The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented in the case, but to

dependent verification and the Court in *Blackledge* has urged utilization of this procedural device.[165]

The reported cases give no indication that the Nebraska trial courts have made use of any procedure for expanding the record nor has the state used the motion for summary judgment as a means of avoiding the need for a full evidentiary hearing. Given the Nebraska Supreme Court's authorization of the trial courts to adopt whatever reasonable procedures are necessary for determining what the files and records show[166] as well as the civil nature of the Post Conviction Act,[167] there would appear to be no reason why these procedures could not be adopted as methods of expediting the resolution of post conviction litigation. More importantly, the use of these procedures would insure that motions to vacate raising claims that are merely improbable, but not necessarily incredible, would not be summarily denied without further factual development.

IV. DISPOSITION ON THE BASIS OF A PROCEDURAL BAR

When the motion to vacate in conjunction with the files and records of the case reveals the existence of what can best be classified as a procedural bar to relief, the motion may be summarily denied without further factual development or an evidentiary hearing. The various procedural bars, derived from the express language of the Post Conviction Act and from case law, cover a

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> discover if any real issue of fact exists. . . . In other words, the court can merely determine that an issue of fact does or does not exist. If such an issue does exist, the summary judgment act has no application; if such issue does not exist, a motion for summary judgment affords a proper remedy. The evidence offered in support of the motion is for the purpose of showing that no issue of fact exists, not to try issues on pleadings, depositions, admissions, and affidavits which constitute only a part of the evidence available on a trial on the merits. The burden is upon the moving party to show that no issue of fact exists, and unless he can conclusively do so, the motion for summary judgment must be overruled.

Id. at 389, 56 N.W.2d at 301 (citations omitted).

165. 431 U.S. at 80.

166. *See* text accompanying note 69 *supra*. The problem confronting those federal courts which allowed an expansion of the record in section 2255 proceedings prior to the effective date of Rule 7 was how to justify the expansion in light of the language of section 2255 requiring the holding of a hearing if the files and records did not negative the petitioner's claim. Their solution was to designate the additional information as an "expansion" of the record rather than going outside the record. Harris v. United States, 436 F.2d 591, 594 (10th Cir. 1971); Raines v. United States, 423 F.2d 526, 529-30 (4th Cir. 1970). While this solution is less than fully satisfying, the lack of any definition of files and records in the statute does permit the taking of a flexible approach, an option also open to the Nebraska courts.

167. NEB. REV. STAT. § 29-3001 (Reissue 1975).

myriad variety of situations, but for analytical purposes may be classified into four types: (1) where the motion to vacate is a second or successive motion; (2) where the issue presented has been previously adjudicated; (3) where the issue presented has been previously waived; and (4) where a statutory prerequisite to relief has not been satisfied.

A. Successive Motions

The Post Conviction Act provides for limiting successive motions for post conviction relief: "The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner."[168] On its face the quoted language would appear to vest the trial court with the unlimited discretion to deny consideration of a second motion to vacate if it had once previously considered a motion from the same prisoner challenging the same conviction or sentence.[169] Neither the United States nor Nebraska Supreme Courts have chosen to so interpret this language, but, instead, have developed markedly different rules concerning successive applications.

After entertaining several appeals from prisoners denied relief in prior motions and who were now contesting the denial of a second motion to vacate,[170] the Nebraska Supreme Court in *State v.*

168. *Id.*

169. In Sanders v. United States, 373 U.S. 1 (1963), the United States Supreme Court interpreted the nearly identical language of section 2255:

> Under § 2255, it is enough, in order to invoke the court's discretion to decline to reach the merits, that the prisoner is seeking "similar relief" for the second time. This language might seem to empower the sentencing court to apply *res judicata* virtually at will, since even if a second motion is predicated on a completely different ground from the first, the prisoner ordinarily will be seeking the same "relief." . . . But the language cannot be taken literally.

Id. at 12-13 (citations omitted). The Court went on to explain that principles of *res judicata* do not apply to habeas corpus proceedings under section 2254 and, whereas the scope of section 2255 is the same as that of section 2254, *res judicata* also does not apply to section 2255. *Res judicata* does apply to habeas corpus proceedings in Nebraska where the second petition is based on the same reasons and facts as a first petition. Jackson v. Olson, 146 Neb. 885, 905, 22 N.W.2d 124, 135 (1946); Williams v. Olson, 145 Neb. 282, 287-88, 16 N.W.2d 178, 180, *cert. denied*, 325 U.S. 877 (1944).

170. State v. Rapp, 186 Neb. 785, 186 N.W.2d 482 (1971); State v. Dabney, 183 Neb. 316, 160 N.W.2d 163 (1968); State v. Wycoff, 183 Neb. 373, 160 N.W.2d 221 (1968); State v. Sheldon, 184 Neb. 852, 172 N.W.2d 631 (1969); State v. Cole, 184 Neb. 864, 173 N.W.2d 39 (1969). It is unclear from the cited opinions whether the trial courts chose to base their respective denials of post conviction relief on the provisions of NEB. REV. STAT. § 29-3001 (Reissue 1975), limiting successive motions. However, it is hinted, although not clearly stated in *Dabney* and *Cole* that the affirmance of the trial court's dismissal of the motions was

Reichel[171] laid down a new rule severely curtailing the bringing of successive motions for post conviction relief:

> We hold that a motion for relief under the Post Conviction Act must state all grounds which are available to the prisoner as a basis for relief at the time the motion is filed. After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the district court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief.[172]

Since its adoption the rule has been applied repeatedly to bar consideration of a second motion for post conviction relief.[173]

The facts of *Reichel* reveal the narrow scope of the rule. In 1966 Reichel had been convicted of burglary and sentenced as an habitual criminal and the conviction was affirmed on appeal.[174] Shortly thereafter Reichel filed his first motion for post conviction relief claiming that the denial of a pretrial discovery motion had resulted in the suppression of evidence favorable to him. The motion to vacate was denied by the district court without an evidentiary hearing and the denial was affirmed on appeal.[175] Less than two years later Reichel filed a second motion for post conviction relief claiming he had made an unintelligent waiver of his right to counsel in one of the prior convictions upon which his habitual criminal sentence was based. The district court denied an evidentiary hearing and dismissed the motion.

On appeal the supreme court agreed with Reichel that the record of the prior conviction was insufficient to show a valid waiver of his right to counsel and that ordinarily he would be entitled to an evidentiary hearing to determine whether the waiver was intelligently and understandingly made. However, in this instance, an interest in the finality of judgments and an end to litigation[176] com-

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based in part on the fact that the second motions presented issues raised and determined in the first motions.

171. 187 Neb. 464, 191 N.W.2d 826 (1971).

172. *Id.* at 467, 191 N.W.2d at 828.

173. The *Reichel* rule has been applied in State v. Newton, 202 Neb. 361, —N.W.2d — (1979); State v. Niemann, 195 Neb. 675, 240 N.W.2d 38 (1976); State v. Haskett, 194 Neb. 523, 233 N.W.2d 782 (1975); State v. Hall, 194 Neb. 173, 231 N.W.2d 123 (1975); State v. Fincher, 191 Neb. 446, 216 N.W.2d 172 (1974); State v. Huffman, 190 Neb. 319, 207 N.W.2d 696 (1973); State v. Weiland, 190 Neb. 111, 206 N.W.2d 336 (1973); State v. Redemer, 188 Neb. 653, 198 N.W.2d 325 (1972); State v. Smith, 188 Neb. 388, 196 N.W.2d 918 (1972); and State v. Birdwell, 188 Neb. 116, 195 N.W.2d 502 (1972). *See also* State v. Pilgrim, 188 Neb. 213, 196 N.W.2d 162 (1972).

174. State v. Riley, 182 Neb. 300, 154 N.W.2d 741 (1967).

175. State v. Reichel, 184 Neb. 194, 165 N.W.2d 743 (1969).

176. State v. Reichel, 187 Neb. 464, 466-67, 191 N.W.2d 826, 827-28 (1971):

> There ought to be some final end to litigation in a criminal case. Post conviction procedures come into play only after traditional

pelled applying a rule forbidding the bringing of a second post conviction motion where the basis relied upon was available at the time of filing of the prior motion. This was so although the petitioner had presented a prima facie case for relief.

What would appear to be a grant of discretion, by the Act[177] and by *Reichel*,[178] to the trial courts in determining whether to entertain a second motion for post conviction relief has in application become an inflexible bar to such motions. As an example, in *State v. Smith*,[179] a case decided after *Reichel*, the trial court exercised its discretion in favor of entertaining a prisoner's second motion for post conviction relief by appointing counsel, granting a hearing and deciding the motion on the merits. On appeal, however, the Nebraska Supreme Court affirmed the trial court's dismissal, not on the merits, but by citing the rule given in *Reichel* and stating, "We see no reason to depart from that holding in this case."[180]

The opinions of the Nebraska Supreme Court do not reveal in what situations the basis relied upon for relief in the second motion to vacate would not have been available at the time of the filing of the previous motion. Several obvious examples are when a constitutional standard with retroactive application has been announced subsequent to the filing of the prior motion;[181] when the facts forming the basis for the motion were not known to or reasonably ascertainable by the prisoner at the time of the filing of the prior motion; and when there is a showing of new evidence, previously undiscoverable, concerning a claim presented in a prior motion.[182]

The *Reichel* rule is the source of several problems, but it causes

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> criminal procedures have been completed. Post conviction remedies are cumulative and are not concurrent with any other remedy. There is no justification for allowing a prisoner to continue litigation endlessly by piecemeal post conviction attacks on his conviction and sentence.

See State v. Fincher, 191 Neb. 446, 447, 216 N.W.2d 172, 173 (1974); State v. Weiland, 190 Neb. 111, 113, 206 N.W.2d 336, 338 (1973); State v. Pilgrim, 188 Neb. 213, 214-15, 196 N.W.2d 162, 164 (1972).

177. NEB. REV. STAT. § 29-3001 (Reissue 1975): "The court *need not* entertain a second motion or successive motions . . . ." (Emphasis added.).

178. 187 Neb. at 467, 191 N.W.2d at 828: "[A]ny subsequent motion . . . *may be* dismissed . . . ." (Emphasis added.)

179. 188 Neb. 388, 196 N.W.2d 918 (1972).

180. *Id.* at 389, 196 N.W.2d at 918. The opinion does not reveal whether the second motion for post conviction relief presented the same or different grounds for relief than the first motion.

181. *See* State v. Warner, 192 Neb. 438, 222 N.W.2d 292 (1974).

182. A situation not covered by the *Reichel* rule occurs when the motion to vacate states facts which if true would constitute grounds for relief under another existing remedy. In that case, the motion will be dismissed without prejudice. *See* text accompanying note 251 *infra*.

least concern when applied to a second motion based on grounds previously heard in a prior motion if the prior motion was decided on the merits. Once the merits of a dispute have been determined, there is little justification for incurring the social and economic costs of relitigating the matter.[183] The matter should be, and in Nebraska is, properly considered *res judicata*.[184]

Where the trial court's determination has not been appealed and, therefore, not affirmed on the merits, there is more reason for permitting reconsideration of the controversy. Certainly where the prisoner was represented by competent counsel who chose not to appeal the trial court's decision for tactical reasons and the prisoner agreed, there is no excuse for permitting the relitigation of the same issue.[185] But where the prisoner appeared in the trial court unrepresented by reason of indigency and failed to obtain an appellate determination of his contentions because of a lack of knowledge of the legal mechanics of bringing an appeal,[186] there is a greater potential for injustice. However, rather than tolerating the relitigation of previously determined issues,[187] it would be far more desirable to liberalize the procedures for appointment of counsel so as to avoid the problem.

The major difficulty in applying the *Reichel* rule to successive

183. F. JAMES & G. HAZARD, *supra* note 12, at 529-30:

> Whether the scope of the rules of res judicata is relatively narrow (as it formerly was) or relatively broad (as it has now become), the social objectives of the rules have remained much the same. They give recognition to the fact that the purpose of a lawsuit is not only to do substantial justice but to bring an end to controversy. It is important that judgments of the court have stability and certainty. This is true not only so that the parties and others may rely on them in ordering their practical affairs (such as borrowing or lending money, or buying property), but also so that the moral force of court judgments will not be undermined. There is still need for some flexibility, and of course the law does afford procedures for correcting, reversing, reopening, and vacating judgments. But the limitations on these procedures are on the whole stricter and more strictly enforced, and the area for discretion is narrower, than is the case with prejudgment procedures.

(Citations omitted.).

184. State v. Redemer, 188 Neb. 653, 198 N.W.2d 325 (1972). *But cf.* Sanders v. United States, 373 U.S. 1, 8 (1963) (*res judicata* is inapplicable to federal habeas corpus).

185. *See* Fay v. Noia, 372 U.S. 391, 439 (1963).

186. State v. Niemann, 195 Neb. 675, 240 N.W.2d 38 (1976), and State v. Redemer, 188 Neb. 653, 198 N.W.2d 325 (1972), are two examples of where the prisoners failed to appeal from the denial of his first motion to vacate. The reasons for the decisions not to appeal are not indicated, but it is certainly questionable whether it was because they were satisfied with the trial court's decision. *See* Harris v. Brewer, 434 F.2d 166, 169 (8th Cir. 1970).

187. *But see* Powell v. Sacks, 303 F.2d 808, 810 (6th Cir. 1962); STANDARDS, *supra* note 5, at 94.

motions occurs when the issues raised in the second motion are different from those raised in the prior motion or, when the issues are the same, the disposition of the prior motion was not on the merits. In either event the prisoner is prevented from receiving a complete review of the constitutional validity of his conviction and sentence. The problems are severalfold in applying the *Reichel* rule to this last situation. First, concepts of finality of judgment and *res judicata* are elevated to a position paramount to the vindication of constitutional rights in such a way as to foreclose a prisoner from receiving consideration of his claims of constitutional error. Such an ordering of priorities does not comport with current notions concerning the need for a full and fair determination of constitutional claims.[188]

Second, where the prior motion for post conviction relief has been brought by a *pro se* prisoner, as is frequently the case, the injustice of applying the *Reichel* rule to any subsequent motion is compounded. Most prisoners have little or no grasp of legal technicalities or of their constitutional rights as is evidenced by the numerous filings of frivolous motions to vacate. But unless a prisoner with a valid constitutional claim is possessed of unusual legal acumen or just plain luck, he is more likely than not to file a groundless motion to vacate or one containing less than all of his claims for relief. Nevertheless, by filing the motion, no matter how unwise or misguided this might be, he will have foreclosed himself from the future consideration of the valid claim when subsequently discovered by himself or counsel.[189]

Third, unless the prisoner has deliberately bypassed available state procedure by intentionally failing to assert a claim in the prior motion to vacate, the federal courts are free to consider in a habeas corpus proceeding claims the Nebraska courts would be precluded from reaching because of the *Reichel* rule.[190]

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188. In Sanders v. United States, 373 U.S. 1 (1963), the Court stated:

> Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If "government . . . [is] always [to] be accountable to the judiciary for a man's imprisonment," . . . access to the courts on habeas must not be thus impeded. The inapplicability of *res judicata* to habeas, then, is inherent in the very role and function of the writ.

Id. at 8 (quoting Fay v. Noia, 372 U.S. 391, 402 (1963)). Similar priorities were voiced in Fay v. Noia, 372 U.S. 391, 424 (1963): "But conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." *But see* Wainwright v. Sykes, 433 U.S. 72, 89-90 (1977).

189. *See* Collins & Neil, *The Oregon Postconviction-Hearing Act*, 39 ORE. L. REV. 337, 341 (1960); Jenner, *supra* note 39, at 360.

190. In the landmark case of Fay v. Noia, 372 U.S. 391 (1963), the Supreme Court held that a state prisoner who may have procedurally forfeited his right to

raise a federal constitutional claim in the state courts through an untimely or incorrect assertion of that claim is not similarly foreclosed from raising the claim in a federal habeas corpus proceeding unless there has been a deliberate bypassing of the state court procedures for raising the claim. Applying the principles of *Fay v. Noia* to a situation in which the state prisoner was barred from consideration of his federal constitutional claims in the state courts because they were first asserted in a second or successive application for post conviction relief, the courts that have considered the question have held that the claims may be reviewed in federal habeas corpus absent a determination that the prisoner engaged in the deliberate piecemeal presentation of his claims to the state courts. Murch v. Mottram, 409 U.S. 41 (1972); Smith v. Wolff, 506 F.2d 556 (8th Cir. 1974); Harris v. Brewer, 434 F.2d 166 (8th Cir. 1970).

Recently the Supreme Court has chosen at least partially to retreat from the broad rule announced in *Fay v. Noia*. In Francis v. Henderson, 425 U.S. 536 (1976), the Court considered a state prisoner's challenge in a federal habeas corpus proceeding to the composition of the grand jury that had indicted him. State law required that any challenge to the composition of the grand jury be made in advance of trial or it would be considered waived; the same rule applied in the federal courts. Since in Davis v. United States, 411 U.S. 233 (1973), it was decided that a failure to raise a timely challenge to the composition of the grand jury in a federal criminal prosecution was a waiver of the right in a subsequent section 2255 proceeding, the Court held the same conclusion should apply to a state prisoner in a federal habeas proceeding unless the prisoner can show cause for his failure to timely challenge the composition and demonstrate actual prejudice.

Subsequently, in Wainwright v. Sykes, 433 U.S. 72 (1977), the Court considered a contention by a state prisoner in a federal habeas proceeding that he had not understood his Miranda rights before making incriminating statements, although this issue had not been raised at or before trial in compliance with the state's contemporaneous objection rule. The Court held that the prisoner's failure to comply with the state rule was an independent and adequate state procedural ground barring federal habeas review absent a showing of cause and prejudice. As stated by the Court:

> [W]e deal only with contentions of federal law which were *not* resolved on the merits in the state proceeding due to the respondent's failure to raise them there as required by state procedure. We leave open for resolution in future decisions the precise definition of the "cause" and "prejudice" standard, and note here only that it is narrower than the standard set forth in dicta in *Fay v. Noia*, . . . which would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention. It is the sweeping language of *Fay v. Noia*, going far beyond the facts of the case eliciting it, which we today reject.

Id. at 87-88 (footnotes omitted; citations omitted; emphasis in original). *See also* Estelle v. Williams, 425 U.S. 501 (1976). *See generally* Soloff, *Litigation and Relitigation: The Uncertain Status of Federal Habeas Corpus for State Prisoners*, 6 HOFSTRA L. REV. 297 (1978); Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473 (1978). Whether a state rule barring successive applications for post conviction relief would also be considered an adequate and independent state ground for barring federal habeas review is not clear. Certainly many of the reasons given in *Sykes* for holding the contemporaneous objection rule to be an adequate ground would also be applicable to the *Reichel* rule. *See* Murch v. Mottram, 409 U.S. 41 (1972).

For example, the prisoner in *Smith v. Wolff*[191] had pleaded guilty to first degree murder during the commission of a robbery and was sentenced to life imprisonment. No direct appeal was taken from the conviction and sentence. He then filed a motion to vacate which was denied, after which he filed a motion for a new trial in the post conviction proceeding. The motion for a new trial was dismissed for being filed out of time and the dismissal was affirmed on appeal by the Nebraska Supreme Court.[192]

Smith then filed a second motion to vacate, the trial court appointed counsel, a hearing was held and the trial court denied relief on the merits. On appeal to the Nebraska Supreme Court, the court refused to consider the merits of the appeal, but instead applied the *Reichel* rule and affirmed the lower court decision.[193]

Having twice been before the Nebraska Supreme Court without receiving a ruling on the merits of his constitutional claims, Smith next filed a petition for a writ of habeas corpus in the United States District Court raising the same claims presented to the state courts as well as additional claims. The district court proceeded to dismiss those claims not yet presented to the state courts on the grounds Smith had not exhausted his state remedies. On appeal, the Eighth Circuit held that further relief in the state courts was no longer available because of the rule against successive motions and since Smith had not deliberately bypassed the state courts, the case was remanded to the district court with directions to consider his claims.[194]

From *Smith* it can be seen that the *Reichel* rule does not completely foreclose a prisoner from receiving consideration of a federal constitutional claim first presented in a successive motion to vacate, but merely shifts that consideration to another forum, the federal court. As a consequence, the federal courts end up ruling for the first time on matters which quite properly should initially be considered by the state courts of Nebraska.

In contrast to the position taken by the Nebraska Supreme Court in *Reichel*, the United States Supreme Court has interpreted

191. 506 F.2d 556 (8th Cir. 1974).
192. State v. Smith, 182 Neb. 458, 155 N.W.2d 368 (1968).
193. State v. Smith, 188 Neb. 388, 196 N.W.2d 918 (1972).
194. There is some indication in Robinson v. Wolff, 468 F.2d 438 at 439-40 (8th Cir. 1972), that the *Reichel* rule is constitutionally impermissible. If this is the correct reading of the opinion, the court's conclusion is clearly erroneous. Murch v. Mottram, 409 U.S. 41, 45 (1972) ("There can be no doubt that states may likewise provide . . . that a prisoner seeking post-conviction relief must assert all known constitutional claims in a single proceeding."); Harris v. Brewer, 434 F.2d 166, 168 (8th Cir. 1970) ("Federal courts cannot insist upon liberalization of state procedures.).

the similar language of section 2255[195] to formulate a radically different rule than that followed by the Nebraska courts. In *Sanders v. United States*,[196] the Court laid down a three-part test for determining when a second or successive application for post conviction relief may be denied:

> Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.[197]

There is some indication that the Nebraska Supreme Court is moving toward adopting the second of the three parts of the *Sanders* test. In *State v. Svoboda*,[198] the prisoner had brought motions to vacate in three separate but contemporaneous criminal proceedings claiming that his guilty plea in each of the proceedings was involuntary because of the trial court's participation in plea bargaining discussions and because of misrepresentation and coercion by counsel as to the plea bargains. The same issues had been raised in the prisoner's direct appeal from the convictions, but because he had failed to file motions for a new trial, the Supreme Court had refused to consider the issues on appeal and affirmed the judgments.[199] Now, on a consolidated appeal from the denial of post conviction relief, the state contended that the supreme court was barred from considering the prisoner's contentions because of the rule that a motion to vacate cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.[200]

The court, in an opinion by Justice McCown, the author of the *Reichel* opinion, rejected the state's argument, stating: "The assertion of a constitutional right by a defendant in a direct appeal of a criminal conviction in this court does not constitute a waiver of his right to post conviction review where this court does not consider

195. 28 U.S.C. § 2255 (1976): "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

196. 373 U.S. 1 (1963).

197. *Id.* at 15. The *Sanders* test is now incorporated in Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254, R. 9(b) (West 1977) and Rules Governing Section 2255 Proceedings, 28 U.S.C.A. foll. § 2255, R. 9(b) (West Supp. 1978). *See generally* Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Act*, 63 IA. L. REV. 15 (1977); Williamson, *Federal Habeas Corpus: Limitations on Successive Applications From the Same Prisoner*, 15 WM. & MARY L. REV. 265 (1973); Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254, Adv. Comm. Note to R. 9 (West 1977).

198. 199 Neb. 452, 259 N.W.2d 609 (1977).

199. State v. Svoboda, 194 Neb. 663, 234 N.W.2d 901 (1975).

200. *See* text accompanying notes 204-05 *infra*.

or pass upon the issue."[201] The same rule, which is basically the second part of the *Sanders* test, could and should be applied to situations in which the constitutional issue was first asserted in a prior post conviction proceeding. Whether the Nebraska Supreme Court will take this next step remains to be seen.[202]

One problem presented by the *Sanders* rule which is avoided by application of the *Reichel* rule is that of repeated filing by prisoners who, having been previously unsuccessful in obtaining post conviction relief, seek again to find that combination of words that will result in gaining their freedom. A rectifier for this problem currently exists in the form of the courts' power to deem any subsequent proceedings an abuse of process and all matters connected with the prisoner's conviction to be *res judicata*.[203]

Adoption of the first two parts of the *Sanders* rule would cure many of the problems that result from the application of the *Reichel* rule. The new rule would better promote the full and fair consideration of a prisoner's constitutional claims and would act to preserve the proper relationship between the state and federal courts. An alternative to the adoption of the *Sanders* rule as an ameliorative for the harshness of the *Reichel* rule would be the appointment of counsel for all indigent petitioners filing *pro se* under the Post Conviction Act. Such a step would greatly aid in insuring

201. 199 Neb. at 455, 259 N.W.2d at 611. *Accord*, State v. Curnyn, 202 Neb. 135, 138, 274 N.W.2d 157, 159-60 (1979).

202. The Nebraska Supreme Court has chosen not to apply the *Reichel* rule when the prior collateral proceeding was other than under the Post Conviction Act. In Robinson v. Wolff, 349 F. Supp. 514 (D. Neb. 1972), *aff'd*, 468 F.2d 438 (8th Cir. 1972), the petitioner argued that he had exhausted his available state remedies concerning a constitutional issue never presented to the state courts because he had previously brought a petition for habeas corpus in the state courts and now, under the *Reichel* rule, was foreclosed from presenting the new constitutional issue in a motion to vacate under the Post Conviction Act. The district and circuit courts both rejected this argument on the grounds that the *Reichel* rule only applies to successive motions under the Post Conviction Act and not to other collateral remedies. The petitioner then brought a motion to vacate in the state courts, was denied relief, and the denial was affirmed on appeal. State v. Robinson, 194 Neb. 111, 230 N.W.2d 222 (1975). In its opinion the Nebraska Supreme Court made no mention of the *Reichel* rule. *See also* State v. Nicholson, 183 Neb. 834, 164 N.W.2d 652, *cert. denied*, 396 U.S. 879 (1969).

The refusal to apply the *Reichel* rule when the prior collateral proceeding was other than a motion to vacate is a correct result. The Post Conviction Act provides only a cumulative remedy; if an issue is cognizable under any other remedy, then it should not be heard in a motion to vacate under the Post Conviction Act. Therefore, any other available collateral remedy is mutually exclusive of the remedy under the Post Conviction Act. *See* text accompanying note 251 *infra*.

203. State v. Pilgrim, 188 Neb. 213, 196 N.W.2d 162 (1972). *See* Sanders v. United States, 373 U.S. 1, 17-19 (1963).

that all constitutional claims would be raised in the prisoner's first motion to vacate, thus avoiding the need for any successive motions.

B. Previous Adjudication

The summary denial of a claim because the issue presented has been previously adjudicated usually occurs in situations in which the same issue raised in the post conviction proceeding was presented and adversely decided on direct appeal from the original conviction.[204] When this has occurred, the Nebraska Supreme Court has in almost every instance responded by citing the rule, or some variation of the rule, that "[a] motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated."[205] Nor will rephrasing, embroidering, expanding or adding new arguments save an issue from application of this

204. *See generally* STANDARDS, *supra* note 5, at §§ 2.1(a)(v), (vi), 6.1 and Commentary.

205. State v. Lacy, 198 Neb. 567, 568, 254 N.W.2d 83, 84 (1977); State v. McDonnell, 192 Neb. 500, 501-02, 222 N.W.2d 583, 584 (1974); State v. Spidell, 192 Neb. 42, 44, 218 N.W.2d 431, 433 (1974); State v. Lincoln, 186 Neb. 783, 784, 186 N.W.2d 490, 490-91 (1971). *See* State v. Svoboda, 199 Neb. 452, 454, 259 N.W.2d 609, 611 (1977).

A common variation of the cited rule is that "[a] defendant who has appealed his conviction cannot secure a second review of the identical proposition advanced in such appeal by resort to a post conviction procedure." State v. Suggett, 200 Neb. 693, 695-96, 264 N.W.2d 876, 878 (1978); State v. Bartlett, 199 Neb. 471, 475, 259 N.W.2d 917, 921 (1977); State v. Franklin, 187 Neb. 363, 363-64, 190 N.W.2d 780, 780 (1971); State v. Newman, 181 Neb. 588, 589, 150 N.W.2d 113, 114 (1967). *See* State v. Leadinghorse, 192 Neb. 485, 486-87, 222 N.W.2d 573, 576 (1974). Other variations are contained in State v. Brown, 192 Neb. 505, 506, 222 N.W.2d 808, 808 (1974); State v. Moore, 192 Neb. 74, 75-76, 218 N.W.2d 540, 541 (1974); State v. Blackwell, 191 Neb. 155, 159, 214 N.W.2d 264, 266 (1974) (Clinton, J., concurring); State v. Moss, 191 Neb. 36, 37, 214 N.W.2d 15, 16 (1973); State v. Weiland, 188 Neb. 626, 627, 198 N.W.2d 327, 329 (1972); State v. Pilgrim, 188 Neb. 213, 214, 196 N.W.2d 162, 164 (1972); State v. Birdwell, 188 Neb. 116, 117, 195 N.W.2d 502, 502-03 (1972); State v. Huffman, 186 Neb. 809, 811, 186 N.W.2d 715, 717 (1971); State v. Erving, 180 Neb. 680, 684, 144 N.W.2d 424, 428 (1966). Also see State v. DeLoa, 194 Neb. 270, 231 N.W.2d 357 (1975).

The federal courts considering the issue have agreed that a federal habeas petitioner having once raised an issue on direct appeal to the Nebraska Supreme Court is foreclosed from raising the same issue under the Post Conviction Act and, therefore, has exhausted his available state remedies. Rice v. Wolff, 513 F.2d 1280, 1290 (8th Cir.), *cert. denied*, 422 U.S. 1003 (1975); Davis v. Sigler, 415 F.2d 1159, 1161 (8th Cir. 1969); Kennedy v. Sigler, 397 F.2d 556, 559 (8th Cir. 1968); Homan v. Sigler, 278 F. Supp. 201, 203 (D. Neb. 1967). *See* Homan v. Sigler, 283 F. Supp. 404, 404-05 (D. Neb. 1968). *But cf.* Blunt v. Wolff, 501 F.2d 1138, 1141 (1974) (where prisoner was denied right to appellate counsel, Nebraska Supreme Court may well grant new appeal on same issues); State v. Blunt, 197 Neb. 82, 246 N.W.2d 727 (1976) (court considered same

rule.[206] But to be "litigated" on appeal the issue must have been actually considered or passed upon on the merits. If disposed of on procedural grounds, the issue may properly be raised again in a subsequent motion for post conviction relief.[207]

An exception to the rule exists where a miscarriage of justice is shown,[208] but what constitutes a miscarriage of justice has never been expressly defined.[209] It appears, sometimes more by implication than by positive assertion, that a second consideration is permissible in four situations: (1) where the issue on direct appeal has been considered on nonconstitutional grounds;[210] (2) where

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claim on merits when prisoner was denied right to appellate counsel in prior appeal).

In a small number of cases, the Nebraska Supreme Court for no apparent reason ignored the prior appeal and decided the prisoners' contentions on the merits. State v. Moss, 185 Neb. 536, 177 N.W.2d 284 (1970); State v. Sheldon, 184 Neb. 852, 172 N.W.2d 631 (1969); State v. Nicholson, 183 Neb. 834, 164 N.W.2d 652, *cert. denied*, 396 U.S. 879 (1969).

206. *See* State v. Bartlett, 199 Neb. 471, 259 N.W.2d 917 (1977); State v. McDonnell, 192 Neb. 500, 501, 222 N.W.2d 583, 584 (1974); State v. Moore, 192 Neb. 74, 218 N.W.2d 540 (1974). *Accord*, DeMaro v. Willingham, 401 F.2d 105, 106 (7th Cir. 1968) (§ 2255); De Welles v. United States, 372 F.2d 67, 70 (7th Cir. 1967) (§ 2255).

207. State v. Curnyn, 202 Neb. 135, 138, 274 N.W.2d 157, 159-60 (1979); State v. Svoboda, 199 Neb. 452, 455, 259 N.W.2d 609, 611 (1977).

208. State v. Agnew, 185 Neb. 716, 717, 178 N.W.2d 592, 593 (1970); State v. O'Kelly, 181 Neb. 618, 620, 150 N.W.2d 117, 119 (1967); State v. Sheldon, 181 Neb. 360, 361, 148 N.W.2d 301, 301 (1967); State v. Parker, 180 Neb. 707, 714, 144 N.W.2d 525, 529 (1966).

209. The Nebraska Supreme Court on several occasions has stated, "The Post Conviction Act was intended to provide a remedy where a miscarriage of justice has occurred," but has not defined what this means nor whether it means something different than when the phrase is used in cases such as those cited in the preceding footnote. State v. Nelson, 189 Neb. 144, 145, 201 N.W.2d 248, 248 (1972); State v. Snyder, 180 Neb. 787, 790, 146 N.W.2d 67, 69 (1966); State v. Silvacarvalho, 180 Neb. 755, 759, 145 N.W.2d 447, 449 (1966); State v. Clingerman, 180 Neb. 344, 350-51, 142 N.W.2d 765, 770 (1966). *See generally* 27 WORDS AND PHRASES, *Miscarriage of Justice* 454 (1961).

210. In State v. Leadinghorse, 192 Neb. 485, 222 N.W.2d 573 (1974), the motion to vacate claimed that a sentence of 15 years imprisonment for sodomy was cruel and unusual punishment while on direct appeal the defendant had claimed the sentence was excessive. State v. Leadinghorse, 187 Neb. 386, 191 N.W.2d 440 (1971). The court noted in the post conviction action that, "[d]efendant seeks to avoid our rule that a defendant who has appealed a conviction cannot secure a second review of the identical proposition examined in that appeal by resorting to a post conviction procedure by framing the question in a constitutional context," *id.* at 485-87, 191 N.W.2d at 576, and then proceeded to consider the defendant's constitutional claim on its merits and denied relief.

Similarly, on direct appeal in State v. Erving, 174 Neb. 90, 116 N.W.2d 7 (1962), *cert. denied*, 375 U.S. 876 (1963), the prisoner claimed that the trial court committed nonconstitutional error in allowing the state to show that he refused to answer questions put to him by the county attorney soon after his

there has been a retroactive change in the applicable constitutional standard since the time of the direct appeal;[211] (3) where there is a showing of new evidence;[212] and (4) where on the direct appeal the defendant was unconstitutionally denied his right to the effective assistance of appellate counsel.[213]

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arrest and asserted that he wanted to see an attorney. On appeal from the denial of post conviction relief, the prisoner again challenged the same testimony, but on the constitutional grounds that he had not been advised of his right to remain silent or to consult with an attorney. State v. Erving, 180 Neb. 680, 144 N.W.2d 424 (1966). The court referred to its earlier opinion in denying the prisoner's claim, but did consider the claim on its merits.

211. In State v. Goham, 187 Neb. 34, 187 N.W.2d 305, *cert. denied*, 404 U.S. 1004 (1971), the court on direct appeal held the state had not lost jurisdiction over the offense because of retrocession of jurisdiction over the Indian reservation where the crime occurred. Subsequently, the Eighth Circuit Court of Appeals held in an unrelated case that retrocession had occurred. In State v. Goham, 191 Neb. 639, 216 N.W.2d 869 (1974), an appeal from a denial of post conviction relief, the court again considered whether the state had jurisdiction and again held that retrocession had not occurred, but then for purposes of argument proceeded to consider the petitioner's claim, assuming that retrocession had occurred.

In State v. Pilgrim, 184 Neb. 457, 168 N.W.2d 368 (1969), the court considered the application of Bruton v. United States, 391 U.S. 123 (1968), to a claim presented on direct appeal that the state had displayed to the jury exhibits not admitted into evidence. State v. Pilgrim, 182 Neb. 594, 156 N.W.2d 171 (1968). Although the claim had been previously considered, the court determined on the merits the prisoner's contention that *Bruton*, a case decided subsequent to the direct appeal, had application.

Lastly, in State v. Alvarez, 185 Neb. 557, 564, 177 N.W.2d 591, 596 (1970), *modified*, 408 U.S. 937 (1972), the court stated: "Questions going to the constitutionality of the death penalty itself were considered by this Court in the original appeal. There have been no controlling changes since that time which would alter the conclusions reached."

212. Only by implication can it be concluded that the showing of new evidence would induce the courts to entertain again a claim once previously considered. In State v. Blackwell, 191 Neb. 155, 214 N.W.2d 264 (1974), the trial court granted an evidentiary hearing on the prisoner's claim of incompetence to stand trial, a claim considered on direct appeal in State v. Blackwell, 184 Neb. 121, 165 N.W.2d 730 (1969). Additional evidence was presented at the hearing, relief was denied, and the supreme court affirmed the denial. The majority and dissenting opinions considered the claim on its merits with only the concurring opinion of Justice Clinton resting on the rule against a second consideration of issues once decided. In State v. Moore, 192 Neb. 74, 218 N.W.2d 540 (1974), the court only noted that all of the circumstances surrounding a claim of illegal search and seizure were known at the time of the direct appeal raising the same issue.

213. *See* Blunt v. Wolff, 501 F.2d 1138 (1974); State v. Blunt, 197 Neb. 82, 246 N.W.2d 727 (1976). Under section 2255 the federal courts, within their discretion, may deny a motion to vacate on the basis of the files and records when the trial or appellate court has had a "say" on the prisoner's claim. Kaufman v. United States, 394 U.S. 217, 227 n.8 (1968). In fact, this discretion is almost always exercised to deny a second consideration. *E.g.*, Odom v. United States, 455 F.2d 159, 160 (9th Cir. 1972). But an exception does exist when there is a

Two other situations in which the courts will consider an issue to be barred from consideration because of a previous adjudication occur when the issue raised in the present motion to vacate was presented in a prior motion for post conviction relief and when the issue presented is a factual question or is based on a factual question raised and adversely determined by the jury or court during the course of the original trial. Once it has been disposed of in a prior motion, the courts will not consider an issue again,[214] while issues of fact once determined by the jury or court will not be retried in a post conviction proceeding.[215]

The refusal of the Nebraska courts to consider a claim previously adjudicated is essentially an application of the doctrine of *res judicata*. The arguments for and against the enforcement of the rule parallel those concerning the rule prohibiting a second motion for post conviction relief where the motion raises the same claim as the prior motion.[216] The exceptions to both rules are essentially the same[217] and the rules in both instances embody a commenda-

showing of new evidence, Kaufman v. United States, 394 U.S. at 230; Argo v. United States, 473 F.2d 1315, 1317 (9th Cir), *cert. denied*, 412 U.S. 906 (1973); a change in the applicable constitutional standard, Kaufman v. United States, 394 U.S. at 320; Sanders v. United States, 373 U.S. 1, 17 (1963); Barnett v. United States, 439 F.2d 801, 803 (6th Cir. 1971); or other "unusual circumstances," Sanders v. United States, 373 U.S. at 17; Hanson v. United States, 406 F.2d 199 (9th Cir. 1969). A subsequent change in the applicable nonconstitutional law is a basis for a second consideration when the claimed error of law was a fundamental defect resulting in a complete miscarriage of justice and exceptional circumstances are presented justifying the need for the remedy afforded by habeas corpus. Davis v. United States, 417 U.S. 333, 346 (1974). This exception is based on the language of section 2255 allowing relief for violations of the "laws of the United States," a basis not available under the Post Conviction Act.

214. State v. Weiland, 190 Neb. 111, 112-13, 206 N.W.2d 336, 338 (1973); State v. Pilgrim, 188 Neb. 213, 214, 196 N.W.2d 162, 164 (1972); State v. Cole, 184 Neb. 864, 865-66, 173 N.W.2d 39, 40 (1969); State v. Dabney, 183 Neb. 316, 317, 160 N.W.2d 163, 164 (1968). This basis for denial of relief will now occur very infrequently, if at all, because of the adoption of the rule prohibiting a second or successive motion to vacate. *See* text accompanying note 171 *supra*. The United States Supreme Court has also held that a second section 2255 motion raising the same issues as a first motion need not be entertained when the prior determination was on the merits and the ends of justice would not be served by reaching the merits again. Sanders v. United States, 373 U.S. 1, 15 (1963).

215. State v. Weiland, 188 Neb. 626, 627, 198 N.W.2d 327, 329 (1972); State v. Ford, 187 Neb. 353, 354, 190 N.W.2d 787, 788 (1971); State v. Hizel, 181 Neb. 680, 682, 150 N.W.2d 217, 219, *cert. denied*, 389 U.S. 868 (1967). The same rule is followed in section 2255 proceedings. *See* Davidson v. United States, 258 F. Supp. 167, 168-69 (E.D.N.C. 1966); United States v. Rosenberg, 108 F. Supp. 798, 808 (S.D.N.Y. 1952).

216. *See* note 183 & accompanying text *supra*.

217. *See* text accompanying notes 181-82 *supra*. The rule against consideration of a claim previously adjudicated has exceptions for a retroactive change in the applicable constitutional standard and for a showing of new evidence. The

ble policy of refusing to reconsider an issue once finally decided.

C. Previous Waiver of the Issue

The third basis upon which the courts have held an issue to be barred is that the issue has previously been waived. The primary example of this occurs when the claimed constitutional error was apparent to the prisoner and his counsel at the time of the trial resulting in his conviction, but was not raised on direct appeal. Where this has occurred, the Nebraska Supreme Court has stated the error will not ordinarily be considered in a post conviction proceeding.[218] Nor is it of significance that no objection was made to the error at the time of the trial[219] or that no appeal was taken from

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rule against successive motions does not apply when the second motion affirmatively shows on its face that the basis relied upon was not available at the time of the filing of the prior motion. The exceptions to the first rule are subsumed into the exception to the second rule. The exceptions to the first rule for an issue being previously considered on nonconstitutional grounds and for the unconstitutional denial of counsel on direct appeal would not arise in situations of second or successive motions.

218. State v. Fowler, 201 Neb. 647, 271 N.W.2d 341 (1978) (rule applied after an evidentiary hearing; it was unclear whether counsel was aware of claimed defect at time of trial); State v. Suggett, 200 Neb. 693, 696, 264 N.W.2d 876, 878 (1978); State v. Nelson, 189 Neb. 144, 145-46, 201 N.W.2d 248, 248-49 (1972); State v. Weiland, 188 Neb. 626, 627, 198 N.W.2d 327, 329 (1972); State v. Lincoln, 186 Neb. 783, 784, 186 N.W.2d 490, 491 (1971); State v. LaPlante, 185 Neb. 816, 818, 179 N.W 2d 110, 111 (1970); State v. Howard, 182 Neb. 411, 418, 155 N.W.2d 339, 343-44 (1967) (rule applied after evidentiary hearing); State v. Losieau, 182 Neb. 367, 368-69, 154 N.W.2d 762, 763 (1967). *See* Poindexter v. Wolff, 403 F. Supp. 723, 733 (D. Neb. 1975). The rule is frequently stated in the form of the oft-quoted ruberic that "[a] motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated." *E.g.*, State v. Lincoln, 186 Neb. at 784, 186 N.W.2d at 490-91. *See also* text accompanying note 205 *supra*.

The Nebraska rule is obviously analogous to the deliberate bypass rule applicable in federal habeas proceedings. *See* note 190 *supra*. Under what circumstances counsel's decision to forego raising an issue will be considered binding on the defendant has not been answered under the Nebraska rule. *Compare* State v. Losieau, 182 Neb. 367, 154 N.W.2d 762 (1967) *with* Losieau v. Sigler, 421 F.2d 825 (8th Cir. 1970). In the federal habeas corpus case, the district court found that there was not a deliberate bypass of an available state remedy because of a failure to raise an illegal search and seizure issue on appeal to the Nebraska Supreme Court and that the defendant had specifically asked his attorney to present the claims on appeal. The briefs in the state post conviction proceeding did not raise this issue, but, instead, argued that there were unstated reasons which appeared to defendant's attorney making it advisable not to raise the error or, in the alternative, that his attorney was ineffective. Brief for Appellant at 38-41, State v. Losieau, 182 Neb. 367, 154 N.W.2d 762 (1967).

219. *See* State v. Lacy, 198 Neb. 567, 254 N.W.2d 83 (1977); State v. Russ, 193 Neb. 308, 226 N.W.2d 775 (1975); State v. Nelson, 189 Neb. 144, 201 N.W.2d 248 (1972);

the conviction.[220]

Exceptions to the rule have arisen. In several post conviction proceedings, the court has considered the merits of a constitutional claim that was raised at trial but not raised in the subsequent direct appeal[221] or that was raised at trial and no direct appeal was taken.[222] Unfortunately the court has given no guidance as to when the exceptions will be applied and in only one instance has it even given recognition to the deviation from its own rule of not considering such claims.[223]

Reference to cases arising under section 2255 provides scant additional help in determining when an exception will be made. The federal courts have long held that a district court may refuse to consider a section 2255 motion to vacate which raises a constitutional issue when the petitioner has deliberately bypassed the remedies available at the original trial or on direct appeal.[224] The

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State v. Pilgrim, 188 Neb. 213, 196 N.W.2d 162 (1972); State v. Howard, 182 Neb. 411, 155 N.W.2d 339 (1967).

220. *See* State v. Oziah, 198 Neb. 423, 253 N.W.2d 48 (1977).

221. State v. Reizenstein, 183 Neb. 376, 160 N.W.2d 208 (1968) (in the post conviction proceeding, prisoner contended certain statements he gave were involuntary; on direct appeal he contended method of disclosing the statements to the jury was improper even though all facts on which the claim of involuntariness was based were known to the prisoner at that time); State v. Fugate, 180 Neb. 701, 144 N.W.2d 412 (1966) (defendant claimed certain statements were involuntary and made without benefit of counsel; the same issue was raised at the original trial and in the motion for a new trial, but was abandoned on appeal).

222. State v. Brown, 185 Neb. 389, 176 N.W.2d 16 (1970) (prisoner challenged a witness' comments on his assertion of his fifth amendment rights during a police interrogation, but the same objection was made at the original trial, and no appeal was taken from his conviction); State v. Silvacarvalho, 180 Neb. 755, 145 N.W.2d 447 (1966) (prisoner through pretrial motions and a motion for a new trial raised the issue of police interrogation without benefit of counsel and without warning of his right to remain silent, but no appeal was taken from his conviction). In State v. Williams, 189 Neb. 127, 201 N.W.2d 241 (1972), the prisoner executed a written waiver of his right to direct appeal, but it is impossible to tell from the opinion whether any issues raised in the post conviction proceeding were raised in the original criminal trial or were apparent at the time.

223. State v. Fugate, 180 Neb. 701, 707, 144 N.W.2d 412, 416 (1966): "Under these circumstances, we do not believe that the defendant should be deprived of a post conviction review at this time upon the ground that the matter has been fully litigated."

224. *E.g.*, Kaufman v. United States, 394 U.S. 217, 227 n.8 (1969); Mitchell v. United States, 482 F.2d 289, 292 (5th Cir. 1973); Battaglia v. United States, 428 F.2d 957, 960 (9th Cir.), *cert. denied*, 400 U.S. 919 (1970).

A separate but related rule holding that section 2255 may not be used to challenge error that was not raised on direct appeal is often cited, but has no application to proceedings under the Post Conviction Act. Paige v. United States, 456 F.2d 1278, 1279 (9th Cir. 1972); United States v. Gordon, 433 F.2d 313, 314 (2d Cir. 1970). To this rule there are several exceptions: (1) the

courts will depart from this rule, however, when the ends of justice would be served by reaching the merits of the constitutional claim[225] or where there are exceptional circumstances excusing the failure to raise the issue.[226] All of the Nebraska cases in which consideration on the merits was given to issues presented at trial but not raised on direct appeal concern claims of fifth amendment violations.[227] Arguably, the ends of justice were served by the court reaching the merits in each one of these cases, but whether an exception to the rule will be made in other circumstances, similar to the practice under section 2255, remains to be seen.[228]

The other situation in which an issue is considered barred from consideration because of a prior waiver is one in which the petitioner has procedurally waived the issue by failing to raise it at the appropriate time. This form of waiver should be distinguished from the preceding situation of deliberate bypass. With a procedural waiver, the foreclosure is automatic upon failure to raise the objection or claim at the designated time, absent a showing of unconstitutionality in the waiver itself. With a deliberate bypass, the waiver is a factual determination dependent upon the intent of the

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claimed error was of significant constitutional dimensions, Kaufman v. United States, 394 U.S. at 223; Sunal v. Large, 332 U.S. 174, 178-79 (1947) (federal prisoner proceeding under habeas corpus); (2) the claimed error seriously affected the trial even though not of constitutional magnitude, if it was not correctable on appeal, United States v. Sobell, 314 F.2d 314, 323 (2d Cir. 1963); (3) the claimed error rests on facts outside of the record, United States v. Hedberg, 411 F.2d 607 (9th Cir. 1969); (4) the claimed error goes to the illegality of the sentence itself and not to trial errors relating to the underlying conviction, Natarelli v. United States, 516 F.2d 149, 152 n.4 (2d Cir. 1975); and (5) other exceptional circumstances exist, United States v. Sobell, 314 F.2d at 323. *See generally* Kaufman v. United States, 394 U.S. at 222-24. This rule should be distinguished from the deliberate bypass rule previously discussed.

225. United States v. Haywood, 464 F.2d 756, 762 (D.C. Cir. 1972).

226. McKnight v. United States, 507 F.2d 1034 (5th Cir. 1975) (medical reasons caused the prisoner to abandon his direct appeal, thus rendering the bypass involuntary).

227. *See* notes 221-22 *supra*.

228. Poindexter v. Wolff, 403 F. Supp. 723, 733-34 (D. Neb. 1975), *aff'd*, 540 F.2d 390 (8th Cir. 1976), suggests another instance in which the Nebraska courts would make an exception to the rule:

> The subject [admissibility of a photograph] was mentioned in only one sentence of the petitioner's pro se brief to the Supreme Court of Nebraska [on direct appeal], and I cannot conclude that the issue was properly presented to the court. I am well aware that the Supreme Court of Nebraska has rules that errors known to petitioners at the time of their direct appeal and which were not presented therein will not *ordinarily* be considered in a post-conviction petition. The issue is not completely foreclosed from such post-conviction relief, however, and the state courts should be first given the opportunity to consider it.

(Emphasis in original; citations omitted.).

defendant and his counsel.[229]

The Nebraska Supreme Court has found a procedural waiver in situations when the post conviction challenge is to the composition of the jury in the original criminal proceeding;[230] to prejudicial publicity regarding the prisoner's prosecution;[231] to the legality of a search and seizure;[232] and to the absence of the prisoner from a session in which a stipulation regarding a hearing on a search and seizure claim was entered into.[233] The effect of designating an issue as procedurally waived if not raised at the appropriate time, of course, is to remove the issue from the scope of those cognizable under the Post Conviction Act.

It is difficult to ascertain whether the breadth of the Nebraska procedural waiver rule differs from that applied in federal habeas corpus because of the uncertain state of the federal rule.[234] The Nebraska court has made only passing reference to the reasons why the rule is applied in some situations and not in others and so it is difficult to articulate any predictive standards for its future application.[235] Whether the court is adhering to the same reasons

229. *See generally* Dumont v. Estelle, 513 F.2d 793, 798 (5th Cir. 1975). A procedural waiver is also frequently referred to as a procedural default.

230. State v. Robinson, 194 Neb. 111, 230 N.W.2d 222 (1975). In Davis v. United States, 411 U.S. 233 (1973), the Supreme Court held that where a federal prisoner sought for the first time in a section 2255 proceeding to challenge the composition of the grand jury that indicted him when FED. R. CRIM. P. 12(b)(2) required that such challenges be made by motion before trial, the claim was waived absent a showing of cause for noncompliance with the Rules and some showing of actual prejudice. This is substantially the same rule as that enunciated in *Robinson* except that the state rule does not require a showing of cause. Subsequently, in Francis v. Henderson, 425 U.S. 536 (1976), the *Davis* rule was applied to a state procedural requirement that challenges to grand jury composition be raised before trial. *Cf.* Robinson v. Wolff, 349 F. Supp. 514 (D. Neb. 1972) (a pre-*Davis* decision suggesting a constitutional challenge to jury array would not be procedurally waived under the Post Conviction Act).

231. State v. Erving, 180 Neb. 680, 144 N.W.2d 424 (1966).

232. State v. Howell, 188 Neb. 687, 199 N.W.2d 21 (1972).

233. State v. Turner, 194 Neb. 252, 231 N.W.2d 345 (1975).

234. *See* note 190 *supra*.

235. In State v. Howell, 188 Neb. 687, 199 N.W.2d 21 (1972), the court relied on the statutory requirement that a motion to suppress illegally seized evidence be brought prior to trial. In State v. Robinson, 194 Neb. 111, 230 N.W.2d 222 (1975), the court cited the case law rule that challenges to the composition of the jury must be made before trial. The court has failed to mention similar requirements in other instances with no explanation as to why. *Compare* State v. Mackey, 200 Neb. 549, 264 N.W.2d 430 (1978) (claim that a statute is unconstitutional must be raised at or before trial or it is waived) *with* State v. Grayer, 191 Neb. 523, 215 N.W.2d 859 (1974) *and* State v. Williams, 189 Neb. 127, 201 N.W.2d 241 (1972) (post conviction cases considering the constitutionality of statutes without any mention of a waiver rule). Similarly, the court has pointed out that an issue which is waived for purposes of direct appeal

and standards as announced by the United States Supreme Court for the federal rule can only be conjecture, but to the extent the Nebraska rule is more restrictive than the federal rule, the Nebraska courts have delegated their post conviction adjudicative powers to the federal courts.[236]

D. Failure to Fulfill A Statutory Prerequisite

The nonfulfillment of a statutory prerequisite to relief is the last procedural bar that serves as a basis for the summary denial of post conviction relief. The two prerequisites that have to date surfaced in the opinions are the requirements that a petitioner be in custody and that no other remedy be currently available for raising the petitioner's claim.

Section 29-3001 of the Post Conviction Act requires a petitioner under the Act to be "in custody under sentence."[237] The exact scope of the custody requirement, which also applies to federal habeas and section 2255 proceedings,[238] has proved difficult of definition. There is no question that a prisoner challenging the judgment and sentence under which he is currently incarcerated is in custody under the Act.[239] The difficulty arises in considering all of the numerous sentencing variations that can occur because of the release of prisoners on parole, sentences imposed by more than one jurisdiction, concurrent and consecutive sentences, sentences of probation, sentences that have been completed, but are serving as the basis for an enhanced sentence under a multiple offender statute, and so on.

A consecutive sentence scheduled to begin sometime in the future may be challenged before its commencement date. Prior to the United States Supreme Court's decision in *Peyton v. Rowe*,[240] a prisoner in custody under one sentence could not in a federal habeas or section 2255 proceeding challenge a second conviction

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because of a failure to file a motion for a new trial may, nonetheless, be raised in a post conviction proceeding if of constitutional dimensions. State v. Beans, 199 Neb. 807, 261 N.W.2d 749 (1978); State v. Price, 198 Neb. 229, 252 N.W.2d 165 (1977).

236. *See* Frazior v. Roberts, 441 F.2d 1224, 1230 (8th Cir. 1971); Midgett v. Warden, 329 F.2d 185, 186 (4th Cir. 1964); Comment, *Post-Conviction Relief in Arkansas*, 24 ARK. L. REV. 57, 83 (1970).

237. NEB. REV. STAT. § 29-3001 (Reissue 1975). *See* State v. Moore, 190 Neb. 271, 272, 207 N.W.2d 518, 519 (1973) ("The Post Conviction Act extends relief only to persons 'in custody.' ").

238. 28 U.S.C. §§ 2241(c), 2255 (1976).

239. This proposition is so basic that no case specifically holds to this effect, but examples of prisoners challenging a sentence being served are numerous. *E.g.*, State v. Miles, 194 Neb. 128, 230 N.W.2d 227 (1975); State v. Cortez, 191 Neb. 800, 218 N.W.2d 217 (1974).

240. 391 U.S. 54 (1968).

and sentence he had not yet begun to serve. Under what is known as the "prematurity doctrine," the prisoner was not considered to be in custody until service of the sentence had commenced.[241] In *State v. Losieau*,[242] an opinion presaging the decision in *Peyton*, the Nebraska Supreme Court held the doctrine did not apply to proceedings under the Post Conviction Act:

> Logic, necessity, and the practical considerations of modern jurisprudence make it imperative that historical doctrine not outweigh effective criminal procedure. A refusal to recognize the jurisdiction of the court here would necessitate placing preeminent emphasis on the history of the writ of habeas corpus rather than on the practical and effective employment of the Post Conviction Act. We, therefore, hold that under the circumstances here, the defendant was "in custody under sentence" and the remedies of the Post Conviction Act may be sought against the validity of a final judgment of conviction, even though the petitioner has not yet begun to serve the sentence imposed.[243]

A logical but as yet unruled upon extension of the holding in *Losieau* is that the procedure of the Post Conviction Act is available to a prisoner in custody in another jurisdiction to attack a Nebraska conviction and sentence scheduled to be served upon completion of the term imposed by the other jurisdiction. Such a conclusion is not only supported by the quoted language of the *Losieau* opinion, but by the majority of the federal courts that have considered whether a state prisoner may challenge a federal sentence scheduled to commence in the future.[244]

Another issue that has arisen under the custody requirement is whether the Act provides a vehicle for attacking a conviction and sentence already completed, but which is serving as the basis for an enhanced sentence under an habitual criminal statute. Although this question has been squarely presented on two separate occasions, the Nebraska Supreme Court avoided answering it both

241. Peyton v. Rowe, 391 U.S. 54 (1968), overruled the Court's earlier decision in McNally v. Hill, 293 U.S. 131 (1934), which held that under federal habeas corpus, "[a] sentence which the prisoner has not begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry." 293 U.S. at 138. The prematurity doctrine still applies to Nebraska habeas proceedings. *See, e.g.*, Kuwitzky v. O'Grady, 135 Neb. 466, 282 N.W. 396 (1938).

242. 180 Neb. 696, 144 N.W.2d 435 (1966).

243. *Id.* at 701, 144 N.W.2d at 438.

244. Simmons v. United States, 437 F.2d 156 (5th Cir. 1971); Jackson v. United States, 423 F.2d 1146 (8th Cir. 1970); Desmond v. United States Bd. of Parole, 397 F.2d 386 (1st Cir.), *cert. denied*, 393 U.S. 919 (1968); Collins v. United States, 418 F. Supp. 577 (E.D.N.Y. 1976); Porter v. United States, 343 F. Supp. 849 (E.D. Mo. 1972). *Cf.* United States *ex rel.* Meadows v. New York, 426 F.2d 1176 (2d Cir. 1970), *cert. denied*, 401 U.S. 941 (1971) (federal prisoner may challenge future state sentence). *Contra*, Tremarco v. United States, 412 F. Supp. 550 (D.N.J. 1976); Newton v. United States, 329 F. Supp. 90 (S.D. Tex. 1971).

times.[245] However, in several other cases the court proceeded to consider the merits of a prisoner's attack on his prior convictions without any discussion of the issue.[246] Further, in *State v. Bevins*,[247] the court considered the prisoner's contentions even though the prior conviction was serving as the basis for another state's enhanced sentence under which the prisoner was currently incarcerated.[248]

There are other forms of restraint which have not yet been considered by the Nebraska Supreme Court as to whether they rise to the level of "custody" as that term is used in the Post Conviction Act.[249] It is clear, however, that once a sentence has been completed and the petitioner released from custody, he may no longer resort to the provisions of the Act.[250]

The other statutory prerequisite, that no other remedy be currently available for raising the prisoner's claim, is based on the provisions of section 29-3003 of the Act:

> The remedy provided by sections 29-3001 to 29-3004 is cumulative and is not intended to be concurrent with any other remedy existing in the

245. State v. Clingerman, 180 Neb. 344, 142 N.W.2d 765 (1966); State v. Losieau, 180 Neb. 671, 144 N.W.2d 406 (1966).

246. State v. Reichel, 187 Neb. 464, 191 N.W.2d 826 (1971) (although motion to vacate denied because it was a successive motion, the court held that but for this fact, an evidentiary hearing would be necessary concerning attack on prior conviction); State v. LaPlante, 185 Neb. 816, 179 N.W.2d 110 (1970); State v. Brevet, 180 Neb. 616, 144 N.W.2d 210 (1966), *cert. denied*, 386 U.S. 967 (1967). *See* Noll v. Nebraska, 537 F.2d 967, 969 n.3 (8th Cir. 1976).

247. 187 Neb. 785, 194 N.W.2d 181 (1972). The opinion states only that the prisoner was "convicted several years ago," *id.* at 785, 194 N.W.2d at 182, but the prisoner's supreme court brief reveals that he was serving a sentence of life imprisonment in California as an habitual criminal based partly on the challenged Nebraska conviction. Brief for Appellant at 4, State v. Bevins, 187 Neb. 785, 194 N.W.2d 181 (1972).

248. A petitioner in a federal habeas corpus proceeding is permitted to challenge a prior conviction used to enhance a sentence being currently served. Nelson v. Tahash, 347 F.2d 500 (8th Cir. 1965); United States v. Wilkins, 315 F.2d 865 (2d Cir. 1963).

249. These include, for example, a petitioner released on parole, *see generally* Jones v. Cunningham, 371 U.S. 236 (1963); a petitioner on probation, *see generally* United States *ex rel.* B. v. Shelly, 430 F.2d 215, 217 n.3 (2d Cir. 1970); or a petitioner released after the institution of his post conviction proceedings but prior to a decision being rendered, *see generally* Williams v. United States Bd. of Parole, 383 F. Supp. 402 (D. Conn. 1974).

250. State v. Moore, 190 Neb. 271, 207 N.W.2d 518 (1973) (relief denied prisoner bringing motion to vacate after completion of sentence). *See* State v. Ewert, 194 Neb. 203, 230 N.W.2d 609 (1975). *But see* State v. Myles, 187 Neb. 105, 187 N.W.2d 584 (1971) (prisoner alleged a denial of right to appeal, but had already served his sentence). In *Myles*, the court considered the motion on the merits on the basis of Sibron v. New York, 392 U.S. 40 (1968). In *Moore*, the decision in *Myles* was distinguished on the grounds that *Myles* was not a post conviction proceeding, but a direct appeal. This is clearly an incorrect reading of the opinion in *Myles*.

courts of this state. Any proceeding filed under the provisions of sections 29-3001 to 29-3004 which states facts which if true would constitute grounds for relief under another remedy shall be dismissed without prejudice.[251]

A cumulative remedy is a statutorily created remedy available in addition to other previously existing remedies.[252] Although generally a party may elect between cumulative and pre-existing remedies,[253] the post conviction remedy, by the terms of the Act, may not be pursued simultaneously with any previously existing remedy.[254] In other words, the remedy is cumulative, but not concurrent.

In Nebraska, the only previously existing remedies available to set aside a judgment and sentence once final[255] are direct ap-

251. NEB. REV. STAT. § 29-3003 (Reissue 1975).

252. State v. Turner, 194 Neb. 252, 254-55, 231 N.W.2d 345, 348 (1975); People v. Santa Fe Federal Savings & Loan Ass'n, 28 Cal. 2d 675, 683, 171 P.2d 713, 717 (1946); Wood v. Honeyman, 178 Or. 484, 535, 169 P.2d 131, 153 (1946).

253. Kosicki v. S.A. Healy Co., 380 Ill. 298, 302, 44 N.E.2d 27, 29 (1942); Barrett v. Daly, 319 Ill. App. 169, 171, 48 N.E.2d 717, 718 (1943).

254. State v. Turner, 194 Neb. 252, 255, 231 N.W.2d 345, 348 (1975). *See* State v. Svoboda, 199 Neb. 452, 454, 259 N.W.2d 609, 611 (1977); State v. Reichel, 187 Neb. 464, 466, 191 N.W.2d 826, 827-28 (1971); State v. Losieau, 180 Neb. 696, 698, 144 N.W.2d 435, 436 (1966).

255. The following rule exists in Nebraska:

> [I]n the absence of statute, when a valid sentence has been put into execution by commitment of a prisoner, the District Court has no authority to set aside, modify, amend, or revise the sentence, either during or after the term or session of court at which the sentence was imposed. Any attempt to do so is of no effect and the original sentence remains in force.

State v. Adamson, 194 Neb. 592, 594, 233 N.W.2d 925, 926 (1975). *See also* State v. McDermott, 200 Neb. 337, 263 N.W.2d 482 (1978); State v. Betts, 199 Neb. 277, 258 N.W.2d 136 (1977); State v. Price, 198 Neb. 229, 252 N.W.2d 165 (1977); State v. Snider, 197 Neb. 317, 248 N.W.2d 342 (1977); State v. Brewer, 190 Neb. 667, 212 N.W.2d 90 (1973); State v. Keyser, 190 Neb. 445, 209 N.W.2d 187 (1973); State v. Carpenter, 186 Neb. 605, 185 N.W.2d 663 (1971); Housand v. Sigler, 186 Neb. 414, 183 N.W.2d 493 (1971); Moore v. State, 125 Neb. 565, 251 N.W. 117 (1933); Myers v. Fenton, 121 Neb. 56, 236 N.W. 143 (1931); Hickman v. Fenton, 120 Neb. 66, 231 N.W. 510 (1930); *In re* Jones, 35 Neb. 499, 53 N.W. 468 (1892).

Commitment of a prisoner occurs at the time he is sentenced. Once he leaves the courtroom, his sentence is beyond the power of the court to change. State v. Price 198 Neb. 229, 252 N.W.2d 165 (1977); State v. Snider 197 Neb. 317, 248 N.W.2d 342 (1977); State v. Brewer 190 Neb. 667, 212 N.W.2d 90 (1973); Hickman v. Fenton 20 Neb. 66, 231 N.W. 510 (1930); *In re* Jones 35 Neb. 499, 53 N.W. 468 (1892); *In re* Fuller, 34 Neb. 581, 52 N.W. 577 (1892); NEB. REV. STAT. § 29-2401 (Reissue 1975). The only exceptions to this rule occur where the original judgment or sentence is erroneous or void, State v. McDermott 200 Neb. 337, 263 N.W.2d 482 (1976); State v. Blankenship, 195 Neb. 329, 237 N.W.2d 868 (1976); State v. Adamson 194 Neb. 592, 333 N.W.2d 925 (1975); State v. Shelby, 194 Neb. 445, 232 N.W.2d 23 (1975); Dimmel v. State, 128 Neb. 191, 258 N.W. 271 (1935); Hickman v. Fenton, 120 Neb. 66, 231 N.W. 510 (1930); where it is necessary to correct the judgment to make it conform to the judgment actu-

peal,[256] a motion for a new trial on the ground of newly discovered evidence,[257] the writ of error coram nobis,[258] and the writ of habeas

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ally pronounced, State v. Adamson, 194 Neb. 592, 333 N.W.2d 925 (1975); *In re* Jones, 35 Neb. 499, 53 N.W. 468 (1892); or where there is direct or implied statutory authorization for the change, State v. Adamson, 194 Neb. 592, 333 N.W.2d 925 (1975); State v. Keyser, 190 Neb. 445, 209 N.W.2d 187 (1973); Housand v. Sigler, 186 Neb. 414, 183 N.W.2d 493 (1971).

An example of a court being directed to use its inherent powers to vacate a void judgment occurs in State v. Ewert, 194 Neb. 203, 230 N.W.2d 609 (1975). There the petitioner had been convicted under a statute, the effective date of which did not occur until after the date of the violation. The prisoner had been sentenced to a fine, no appeal had been taken, and the fine had been paid by the time of the motion. Neither habeas corpus nor post conviction relief was available because the petitioner was not currently incarcerated. However, the Nebraska Supreme Court directed the lower court in these circumstances, where no appeal had been taken and upon proper motion, to set aside the judgment of conviction. It can be argued that the inherent power of the court to vacate void or erroneous judgments constitutes an additional remedy for setting aside a judgment once final.

256. A direct appeal to the supreme court is instituted by filing with the clerk of the district court a notice of appeal within one month of the rendition of the verdict or the overruling of a motion for a new trial. NEB. REV. STAT. § 25-1912 (Reissue 1975).

257. *Id.* § 29-2101. The motion must be filed within a reasonable time after the discovery of the new evidence, but in any event, within three years after the date of the verdict. *Id.* § 29-2103. When a motion for a new trial on grounds other than newly discovered evidence is pending, there is no judgment or final order which might be vacated or set aside and the bringing of a motion to vacate is improper. State v. Werts, 189 Neb. 468, 203 N.W.2d 157 (1973).

258. The writ of error coram nobis "reaches only matters of fact, unknown to the applicant at the time of judgment, not discoverable by him with reasonable diligence, and which fact or facts are of such a nature that if known to the court they would have prevented entry of the judgment." State v. Turner, 194 Neb. 252, 255, 231 N.W.2d 345, 348 (1975). The applicability of coram nobis has been described as a two-part test: (1) Do facts exist which could not have been reasonably discovered by a petitioner prior to the original entry of judgment; and (2) would these facts have necessarily caused the court to enter a different judgment? State v. Wilson, 194 Neb. 587, 589, 234 N.W.2d 208, 210 (1975). *See* Comment, *Post Conviction Remedies*, 46 NEB. L. REV. 135 (1967); Note, *The Judicial Obstacle Course*, 29 NEB. L. REV. 445 (1950); Note, *Coram Nobis*, 26 NEB. L. REV. 102 (1946); 20 NEB. L. REV. 173 (1941); Note, *Scope of Writ of Error Coram Nobis in Criminal Cases*, 19 NEB. L. BULL. 150 (1940); Orfield, *Writ of Error Coram Nobis in Nebraska—An Addendum*, 11 NEB. L. BULL. 421 (1933); Orfield, *Applicability of Writ of Error Coram Nobis in Nebraska*, 10 NEB. L. BULL. 314 (1932).

The time in which an application for a writ of error coram nobis may be brought is unclear. In State v. Rhodes, 192 Neb. 557, 222 N.W.2d 837 (1974), *cert. denied*, 420 U.S. 980 (1975) (citing Newcomb v. State, 120 Neb. 69, 261 N.W. 348 (1935)), the time limitations of NEB. REV. STAT. § 25-2008 (Reissue 1975) were held applicable to coram nobis proceedings. Section 25-2008 contains time limitations for bringing a proceeding to vacate or modify a judgment in civil actions under section 25-2001. In *Newcomb*, the claim was that of insanity at the time of the guilty plea, erroneous proceedings against a person of unsound mind being one of the grounds for vacating a judgment

corpus.[259] The first of these, direct appeal, is actually a continua-

under section 25-2001. Section 25-2008 limits vacating a judgment on this ground to within two years after removal of the disability.

The confusion arises in applying the time limitations of section 25-2008 to the presentation of claims other than the insanity of the defendant. The only other ground contained in section 25-2001 for vacating a judgment that could be applicable to coram nobis proceedings is that of newly discovered material evidence which could not, with reasonable diligence, have been discovered and produced at trial. A petition for vacation or modification on this basis must be filed within one year of the rendition of the judgment being challenged, however, this time limitation is contained in section 25-2001 rather than section 25-2008. How to reconcile the time limitations of section 25-2008 to claims other than insanity of the defendant remains unclear.

Rhodes suggests that the one year time limitation of section 25-2001, applicable to claims of newly discovered evidence, would also be applicable to a similar claim in a coram nobis proceeding. In *Rhodes*, the defendant claimed his sentence was void because he was not present when it was pronounced; it included a provision for hard labor; he was required to be a witness against himself; and he was denied the right of confrontation. The Nebraska Supreme Court dealt with these claims on their merits, but before doing so, stated the claim was not suitable for coram nobis because all the relevant facts were known at the time of trial and, more importantly, the motion was not brought within the time limitations of section 25-2008. There are no time limitations in section 25-2008 applicable to a claim of this nature, the only possible ground being that of newly discovered evidence contained in section 25-2001. Although certainly unclear from the language of the opinion, it would thus appear that the court intended to apply the time limitations of section 25-2001 as well as those of section 25-2008 to the bringing of an application for a writ of error coram nobis.

Coram nobis is only available when there is no other remedy for a wrong. Carlsen v. State, 129 Neb. 85, 102, 261 N.W. 330, 348 (1935). Since a motion for a new trial may also raise newly discovered evidence, *see* note 257 *supra*, presumably an application for a writ of error coram nobis would not be proper within three years of the date of the verdict. Because *Rhodes* apparently limits the time for the bringing of a petition for a writ of coram nobis for most purposes to one year from the time of the judgment, the arguable effect of *Rhodes* is to render coram nobis a nugatory remedy for the most part. *See* Note, *State Post Conviction Remedies and Federal Habeas Corpus*, 40 N.Y.U. L. REV. 154, 181 (1965); Note, *Coram Nobis*, 26 NEB. L. REV. 102 (1946).

259. Habeas corpus is a statutory remedy, NEB. REV. STAT. §§ 29-2801 to -2824 (Reissue 1975), for challenging the sentencing court's jurisdiction of the offense and of the defendant and for determining whether the sentence was within the power of the court to impose. To secure release by habeas corpus, it must appear that the sentence was absolutely void. When the judgment is regular upon its face and was given in an action in which the court had jurisdiction of the offense and of the person of the defendant, extrinsic evidence is not admissible to show its invalidity. Percy v. Parratt, 202 Neb. 102, 273 N.W.2d 689 (1979); Lingo v. Hann, 161 Neb. 67, 70, 71 N.W.2d 716, 719 (1955); Jackson v. Olson, 146 Neb. 885, 894, 22 N.W.2d 124, 129 (1946). *See* Comment, *Post Conviction Remedies*, 46 NEB. L. REV. 135 (1967); Note, *The Judicial Obstacle Course*, 29 NEB. L. REV. 445 (1950); 9 NEB. L. BULL. 343 (1941). There are no applicable time limitations to the bringing of a habeas corpus proceeding.

In State v. Kluge, 198 Neb. 115, 120, 251 N.W.2d 737, 740 (1977) (Clinton, J., dissenting), a motion for a new trial, a proceeding under the Post Conviction

tion of the original criminal proceeding, and properly not a "post conviction" remedy.[260] Where a direct appeal is pending at the time of the commencement of a post conviction proceeding, the latter will be dismissed without prejudice.[261] This is so even, presumably, where the motion to vacate raises issues different from those raised on the direct appeal or issues not reflected in the record on appeal.[262] Arguably the same would be true if the time for bringing a direct appeal had not yet expired even though no appeal had, in fact, been brought.

A motion for a new trial on the ground of newly discovered evidence and coram nobis are both procedures for bringing newly discovered evidence to the attention of the trial court for the purpose of setting aside the judgment. Although there are significant differences between the two remedies,[263] both are for the purpose of raising errors of fact and not of law, constitutional or otherwise.[264] It is obvious that for most constitutional errors cognizable under the Post Conviction Act, coram nobis and a motion for a new trial

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Act and coram nobis were given as the exclusive means for setting aside a conviction once final. There is no indication of why habeas corpus was omitted from the available remedies.

260. *See* State v. Reichel, 187 Neb. 464, 466, 191 N.W.2d 826, 827 (1971).

261. State v. Moore, 187 Neb. 507, 192 N.W.2d 157 (1971); State v. Williams, 181 Neb. 692, 150 N.W.2d 260 (1967); State v. Dabney, 181 Neb. 263, 147 N.W.2d 768 (1967); State v. Carr, 181 Neb. 251, 147 N.W.2d 619 (1967).

262. The wording of section 29-3003 would indicate the key test to be whether an issue would constitute grounds for relief under another remedy, not whether the issue has been actually raised under the other remedy. *But cf.* Smith v. State, 167 Neb. 492, 93 N.W.2d 499 (1958) (motion for new trial on the ground of newly discovered evidence and direct appeal may be brought concurrently); Marer, *Effective Criminal Appellate Advocacy: Seeking Reversal by Concurrent Collateral and Direct Attacks in the Appellate Court*, 27 HASTINGS L.J. 333 (1975); Lay, *Post Conviction Remedies and the Overburdened Judiciary: Solutions Ahead*, 3 CREIGHTON L. REV. 5, 17-20 (1969). Except in unusual circumstances, a federal defendant is not permitted to simultaneously bring a direct appeal and a section 2255 motion to vacate for the reason that the disposition of the direct appeal may render the motion moot. Jack v. United States, 435 F.2d 317 (9th Cir. 1970), *cert. denied*, 402 U.S. 933 (1971); Welsh v. United States, 404 F.2d 333 (5th Cir. 1968).

263. For example, on a motion for a new trial, the newly discovered evidence "must be competent, material, credible, and [that] which might have changed result [*sic*] of trial and which by the exercise of due diligence could not have been discovered and produced at trial." State v. Seger, 191 Neb. 760, 763, 217 N.W.2d 828, 830 (1974). On the other hand, for coram nobis the newly discovered evidence "must be such as would have prevented a conviction. It is not enough to show that it might have caused a different result." Parker v. State, 178 Neb. 1, 3, 131 N.W.2d 678, 680 (1964).

264. State v. Wilson, 194 Neb. 587, 589, 234 N.W.2d 208, 210 (1975) ("As for appellant's first claim, that he was denied due process of law at the arraignment, it is obvious that a writ of error coram nobis was intended to remedy errors of fact, not errors of law."); State v. Turner, 194 Neb. 252, 255, 231 N.W.2d 345, 348 (1975) (coram nobis not available to correct errors of law).

on the ground of newly discovered evidence do not provide a concurrent remedy. It is possible, nevertheless, to posit a situation where an overlap does exist.[265] This occurs where the newly discovered evidence goes not to the guilt or innocence of the prisoner, but to the existence of a constitutional violation which, if shown, would have caused a different result at trial. Several Nebraska cases have suggested the availability of coram nobis for this purpose[266] even though traditionally the remedy was confined to evidence bearing only on the guilt or innocence of the prisoner.[267] These cases were decided prior to the adoption of the Post Conviction Act and may have represented a tentative effort by the Nebraska Supreme Court to fashion a limited remedy for raising constitutional violations.[268] Now that the Act provides the necessary means for presenting such claims, the court may well choose to adhere to the traditional view of coram nobis.[269]

Another area of confusion and potential overlap between coram

265. State v. Turner, 194 Neb. 252, 254, 231 N.W.2d 345, 347 (1975) ("The remedy provided by the Post Conviction Act and that afforded under the ancient common law writ of error coram nobis overlap to some degree."). In State v. Dabney, 183 Neb. 316, 318, 160 N.W.2d 163, 164 (1968), the court suggests that a motion for a new trial on the ground of newly discovered evidence is never available for raising constitutional issues: "[T]here is an adequate procedure provided by our law to secure a new trial on the grounds of newly discovered evidence if one is entitled to it, and the Post Conviction Act cannot be used for that purpose."

266. Hawk v. State, 151 Neb. 717, 729, 39 N.W.2d 561, 569 (1949), *cert. denied*, 339 U.S. 923 (1950); Swanson v. State, 148 Neb. 155, 159, 26 N.W.2d 595, 597 (1947); Hawk v. Olson, 145 Neb. 306, 309-10, 16 N.W.2d 181, 183, *rev'd*, 326 U.S. 271 (1945). *See* Shupe v. Sigler, 230 F. Supp. 601, 603 (D. Neb. 1964); Geaminea v. Nebraska, 206 F. Supp. 308, 312 (D. Neb.), *appeal dismissed*, 308 F.2d 367 (8th Cir. 1962); Grandsinger v. Bovey, 153 F. Supp. 201, 213-15 (D. Neb. 1957), *aff'd*, 253 F.2d 917 (8th Cir. 1958).

In *Swanson*, the court stated:

> An application for a writ of coram nobis will be denied in the absence of a showing that the alleged acts of inefficiency on the part of petitioner's counsel upon which the motion for the writ was predicated were not known, or by the exercise of reasonable diligence could not have been known, by the petitioner before the close of trial.

148 Neb. at 159, 26 N.W.2d at 597.

267. Burzell v. People, 402 Ill. 259, 261, 83 N.E.2d 585, 586 (1949); Quinn v. State, 209 Ind. 316, 318, 198 N.E. 70, 72 (1935); Stephenson v. State, 205 Ind. 141, 196, 179 N.E. 633, 647 (1932); Wheeler v. State, 158 Ind. 687, 696, 63 N.E. 975, 981 (1902); Commonwealth v. Sirles, 267 S.W.2d 66 (Ky. 1954); Note, *State Post Conviction Remedies and Federal Habeas Corpus*, *supra* note 258, at 161. In some jurisdictions, coram nobis has been expanded well beyond its original scope to encompass all violations of the prisoner's constitutional rights. *E.g.*, Lyons v. Goldstein, 290 N.Y. 19, 47 N.E.2d 425 (1943). Nebraska has not followed this lead.

268. *See* Grandsinger v. Bovey, 153 F. Supp. 201, 211-15 (D. Neb. 1957), *aff'd*, 253 F.2d 917 (8th Cir. 1958).

269. *See* State v. Turner, 194 Neb. 252, 255, 231 N.W.2d 345, 348 (1975) ("The writ

nobis and the Post Conviction Act concerns the issue of the prisoner's sanity at the time of trial or guilty plea. Coram nobis has long been used for raising claims of this sort,[270] a practice Nebraska has also followed.[271] This is so even though it is difficult to reconcile such a claim with the requirement of coram nobis that the new evidence not have been reasonably discoverable prior to the original entry of judgment. But insanity at the time of trial may also be raised by a motion to vacate under the Post Conviction Act and to this extent the two remedies overlap.[272]

The extent of overlap between habeas corpus and the Post Conviction Act is similarly difficult to ascertain. Habeas corpus is, among other things, a remedy for challenging the sentencing court's jurisdiction of the offense and of the person of the defendant, and the power of the court to impose the sentence given. The claimed defect in jurisdiction must render the judgment or sentence absolutely void rather than merely voidable in order for the prisoner to secure release.[273] The Post Conviction Act also pro-

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does not reach such matters as the legality of a search or seizure."); Parker v. State, 178 Neb. 1, 8-9, 131 N.W.2d 678, 683 (1964).

270. *See, e.g.*, Linton v. State, 72 Ark. 532, 81 S.W. 608 (1904); Friedman, *The Writ of Error Coram Nobis*, 3 TEMP. L.Q. 365, 398 (1929).

271. Carlsen v. State, 129 Neb. 84, 100-01, 261 N.W. 339, 348 (1935); Newcomb v. State, 129 Neb. 69, 261 N.W. 348 (1935).

272. State v. Cortez, 191 Neb. 800, 218 N.W.2d 217 (1974); State v. Blackwell, 191 Neb. 155, 214 N.W.2d 264 (1974); State v. Virgilito, 187 Neb. 328, 190 N.W.2d 781 (1971). *See* State v. Flye, 201 Neb. 115, 266 N.W.2d 237 (1978). Presumably, the motion to vacate was not dismissed in *Virgilito* and *Blackwell* pursuant to section 29-3003 because the issue of sanity was raised at the time of trial and, therefore, was not unknown to the defendant at the time of judgment, an essential requirement of coram nobis. State v. Turner, 194 Neb. 252, 255, 231 N.W.2d 345, 348 (1975). But in *Cortez*, the sanity of the defendant was not considered at trial.

A last area of potential overlap between coram nobis and the Act concerns claims of a guilty plea being given under duress or because of fraud or mistake. Coram nobis has traditionally been available to set aside pleas given under these conditions, State v. Calhoun, 50 Kan. 523, 32 P. 38 (1893); Sanders v. State, 85 Ind. 318 (1883); Friedman, *supra* note 270, at 398-402, as have the provisions of the Act, State v. Elliott, 192 Neb. 217, 219 N.W.2d 775 (1974). To date, the Nebraska courts have not ruled on whether coram nobis is available in Nebraska for this purpose.

273. Lingo v. Hann, 161 Neb. 67, 69-70, 71 N.W.2d 716, 719 (1955); Jackson v. Olson, 146 Neb. 885, 894, 22 N.W.2d 124, 129 (1946); Hawk v. Olson, 146 Neb. 875, 880-81, 22 N.W.2d 136, 139 (1946).

The only exception to the requirement that the judgment or sentence be absolutely void is a case in which the prisoner contends not that the sentence is invalid, but that he has served his sentence and is entitled to discharge. Gamron v. Parratt, 199 Neb. 163, 256 N.W.2d 867 (1977).

The writ of habeas corpus is also available for challenging any unlawful restraint of liberty, Rose v. Vosburg, 107 Neb. 847, 187 N.W. 46 (1922); NEB. REV. STAT. §§ 29-2801 to -2901; including the right to the custody of a child, *In re* Schwartzkopf, 149 Neb. 460, 31 N.W.2d 294 (1948); the correctness of extra-

vides a remedy for attacking a "judgment void . . . under the Constitution of this state or the Constitution of the United States."[274] Whether a judgment void for purposes of habeas corpus is also void under the Act and whether a judgment can be void but on a basis other than under the Constitution are questions never answered by the Nebraska court and are beyond the scope of this discussion. However, the opinions of the court do reveal several areas of overlap between the two remedies.

An example that illustrates well the concurrent nature of habeas corpus and the Post Conviction Act is a challenge to the constitutionality of a statute.[275] In general, constitutional violations occurring in the proceedings leading to the prisoner's conviction are not cognizable in habeas corpus,[276] but where the prisoner raises the constitutional validity of the statute under which he was convicted and sentenced, the claim may be presented either under

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dition proceedings, Gorgen v. Tomjack, 160 Neb. 457, 70 N.W.2d 514 (1955); imprisonment for contempt, *In re* Havlik, 45 Neb. 747, 64 N.W. 234 (1895); and the excessiveness of bail, State v. Watkins, 190 Neb. 450, 209 N.W.2d 184 (1973).

274. NEB. REV. STAT. § 29-3001 (Reissue 1975).

275. Other examples of overlap between habeas corpus and the Post Conviction Act occur with claims challenging the geographic jurisdiction of the court, *compare* Robinson v. Sigler, 187 Neb. 144, 187 N.W.2d 756, *appeal dismissed*, 404 U.S. 987 (1971) (habeas challenge to jurisdiction over crimes committed on Indian reservation) *with* State v. Goham, 191 Neb. 639, 216 N.W.2d 869 (1974) (post conviction challenge to jurisdiction over crimes committed on Indian reservation); claims challenging the jurisdiction of the court over the defendant, *compare* Lingo v. Hann, 161 Neb. 67, 71 N.W.2d 716 (1955) (habeas available for challenges to jurisdiction) *and* Howell v. Hann, 155 Neb. 698, 53 N.W.2d 81 (1952) (habeas challenge to defendant being forcibly brought into state) *and* Jackson v. Olson, 146 Neb. 885, 22 N.W.2d 124 (1946) (same as *Howell*) *with* State v. Grayer, 191 Neb. 523, 215 N.W.2d 859 (1974) (post conviction challenge to district court jurisdiction over juveniles) *and* State v. Nicholson, 183 Neb. 834, 164 N.W.2d 652, *cert. denied*, 396 U.S. 879 (1969) (post conviction challenge to defendant being forcibly brought into state); claims challenging the imposition of two sentences for one violation, *compare* Gamron v. Jones, 148 Neb. 645, 28 N.W.2d 403 (1947) (habeas challenge to imposition of sentence for underlying offense and separate sentence for being an habitual criminal) *and* Kuwitsky v. O'Grady, 135 Neb. 466, 282 N.W. 396 (1938) (same as *Gamron*) *with* State v. Huffman, 186 Neb. 809, 186 N.W.2d 715 (1971) (post conviction challenge to two sentences being imposed for separate counts arising out of one transaction; evidentiary hearing held, but not on this issue); and claims of double jeopardy, *compare In re* Resler, 115 Neb. 335, 212 N.W. 765 (1927) (habeas corpus) *with* State v. Huffman, 186 Neb. 809, 186 N.W.2d 715 (1971) (post conviction; evidentiary hearing held, but not on this issue).

276. Nicholson v. Sigler, 183 Neb. 24, 157 N.W.2d 872, *cert. denied*, 393 U.S. 876 (1968); Case v. State, 177 Neb. 404, 129 N.W.2d 107 (1964), *vacated*, 381 U.S. 336 (1965); Swanson v. Jones, 151 Neb. 767, 39 N.W.2d 557 (1949); Jackson v. Olson, 146 Neb. 885, 22 N.W.2d 124 (1946); Hawk v. Olson, 146 Neb. 875, 22 N.W.2d 136 (1946).

habeas corpus or the Act.[277] Given this overlap, a court should dismiss without prejudice the numerous motions to vacate that have raised claims of an unconstitutional statute, leaving the claim to be brought by way of habeas corpus. Although the precise degree of overlap between coram nobis, habeas corpus, and the Act is difficult if not impossible to ascertain, overlap does exist. Despite this, there is no opinion reporting the dismissal of a post conviction proceeding on the grounds that the constitutional violation alleged should have been raised by way of another remedy.

An early prophecy of one commentator that "[t]he only safe and economical way for Nebraska prisoners to exhaust their state remedies is to file three proceedings concurrently [post conviction, habeas corpus, and coram nobis] . . .,"[278] just has not come to be. Except where a motion for a new trial or a direct appeal are currently pending, the Nebraska courts appear to be ignoring the requirements of section 29-3003.

While several criticisms and recommendations for change could be made regarding the statutory requirements that when unfulfilled serve as the basis for summary denial of motions to vacate,[279] the courts cannot be censured for ferreting out claims defective for that reason and disposing of them without conducting an evidentiary hearing. Certainly there is no fault in following a practice of at the earliest point possible disposing of claims that ultimately must fail because of noncompliance with a statutory prerequisite for relief. If anything, criticism should be made of the courts' failure to more closely adhere to the commands of section 29-3003.

V. DISPOSITION ON THE BASIS OF AN EVIDENTIARY HEARING

A. Requirement of An Evidentiary Hearing

Unless the files and records of the case affirmatively establish

277. Although several early cases held that the constitutionality of a statute could not be raised in a habeas proceeding, *e.g.*, *In re* Caldwell, 82 Neb. 544, 118 N.W. 133 (1908); *Ex parte* Fisher, 6 Neb. 309 (1877); these decisions have not been followed by later opinions, State *ex rel.* Brito v. Warrick, 176 Neb. 211, 125 N.W.2d 545 (1964); Lingo v. Hann, 161 Neb. 67, 71 N.W.2d 716 (1955); *In re* Rozgall, 147 Neb. 260, 23 N.W.2d 85 (1946). The constitutionality of a statute may also be raised in a post conviction proceeding. State v. Grayer, 191 Neb. 523, 215 N.W.2d 859 (1974); State v. Williams, 189 Neb. 127, 201 N.W.2d 241 (1972); State v. Alvarez, 185 Neb. 557, 177 N.W.2d 591 (1970), *modified*, 408 U.S. 937 (1972); State v. Losieau, 184 Neb. 178, 166 N.W.2d 406 (1969); State v. Kauffman, 183 Neb. 817, 164 N.W.2d 469 (1969).

278. Lake, *supra* note 53, at 770 n.49.

279. For a discussion of the need for a unitary post conviction remedy, *see* STANDARDS, *supra* note 5, at § 2.1 and Commentary.

that the petitioner is entitled to no relief, the Post Conviction Act directs the sentencing court to cause notice of the motion to vacate to be served on the county attorney, grant a prompt evidentiary hearing, determine the issues, and make findings of fact and conclusions of law.[280] But to arrive at the point of an evidentiary hear-

280. NEB. REV. STAT. § 29-3001 (Reissue 1975). *See* State v. Russ, 193 Neb. 308, 310, 266 N.W.2d 775, 777 (1975); State v. Reichel, 187 Neb. 464, 466, 191 N.W.2d 826, 827 (1971); State v. Virgilito, 187 Neb. 328, 330, 190 N.W.2d 781, 783 (1971); State v. Woods, 180 Neb. 282, 284, 142 N.W.2d 339, 341 (1966). *See also* State v. Svoboda, 199 Neb. 452, 455, 259 N.W.2d 609, 611 (1977); State v. Ford, 198 Neb. 376, 378, 252 N.W.2d 643, 644-45 (1977).

The procedures for carrying out the functions of giving notice, conducting an evidentiary hearing and making findings of fact and law have been left to the trial courts to develop along the lines of local practice. A number of trial courts upon receiving a motion to vacate, issue an order directed to the county attorney to show cause why the motion should not be granted, *e.g.*, State v. Reichel, 184 Neb. 194, 195, 165 N.W.2d 743, 744 (1969), or an evidentiary hearing held, *e.g.*, State v. Pilgrim, 184 Neb. 457, 458, 168 N.W.2d 368, 369 (1969); State v. Erving, 180 Neb. 680, 681, 144 N.W.2d 424, 426 (1966). A response to the order to show cause is then filed, *e.g.*, State v. Reichel, 184 Neb. at 195, 165 N.W.2d at 744, or a hearing is held on the order and a determination made as to the necessity of an evidentiary hearing, *e.g.*, State v. Pilgrim, 184 Neb. at 458, 168 N.W.2d at 369; State v. Losieau, 180 Neb. 671, 674-75, 144 N.W.2d 406, 409 (1966). In some courts the county attorney will file a response to the motion to vacate without receiving any order from the court, *see, e.g.*, Transcript, State v. Jonsson, 192 Neb. 730, 224 N.W.2d 181 (1974), while it appears other courts rule on the necessity for an evidentiary hearing without any response from the county attorney, *e.g.*, State v. Turner, 194 Neb. 252, 256, 231 N.W.2d 345, 348 (1975). What is common to all courts is some procedure for ruling on the prima facie validity of a prisoner's claim prior to the granting of an evidentiary hearing.

The proceedings are governed, to the extent applicable, by the Code of Civil Procedure, NEB. REV. STAT. ch. 25 (Reissue 1975). The applicability of the Code is controlled by section 25-2225, which provides that where a civil action, legal or equitable, is created by statute, and the mode of proceeding prescribed, the proceedings shall be conducted in conformity with the Code so far as may be consistent with the statute and as shall be practicable. *See* Chilen v. Commercial Cas. Ins. Co., 135 Neb. 619, 627-28, 283 N.W. 366, 370 (1939). While arguably a post conviction proceeding is neither an action at law nor a suit in equity, this does not detract from the application of section 25-2225. Swan v. Bowker, 135 Neb. 405, 409-12, 281 N.W. 891, 893-95 (1938). Further, although neither the Post Conviction Act nor any case interpreting the Act has explicitly stated that the Code governs, several post conviction cases strongly intimate that it does. State v. Turner, 194 Neb. 252, 257, 231 N.W.2d 345, 349 (1975) (court cited NEB. REV. STAT. § 25-101 in relation to coram nobis and post conviction proceedings); State v. Williams, 188 Neb. 802, 803, 199 N.W.2d 611, 612 (1972) (appeal from denial of post conviction relief in municipal court shall be the same as the appeal of any other civil action); State v. Erving, 180 Neb. 680, 685, 144 N.W.2d 424, 428 (1966) ("The pleading of conclusions is no more acceptable in a post-conviction proceeding than in any other civil proceeding."). A number of cases also report the use of procedural devices in the trial court which would be consistent only with the applicability of the Code of Civil Procedure. *E.g.*, State v. O'Kelly, 181 Neb. 618, 620, 150

ing, a petitioner first must have overcome or avoided all of the different bases discussed above that the court is permitted to use summarily to deny relief. This is a difficult task in view of the numerous motions denied without benefit of a hearing.[281]

Up to now, the focus of discussion has been on identifying the circumstances in which a petitioner under the Act can be summarily denied relief. The correlative issue to be discussed is under what circumstances an evidentiary hearing will be granted.[282]

N.W.2d 117, 119 (1967) (discovery); State v. Williams, 189 Neb. 127, 128, 201 N.W.2d 241, 242 (1972) (amendment); State v. Oziah, 186 Neb. 541, 542, 184 N.W.2d 725, 726 (1971) (amendment). *Cf.* Documentary Supplement, *State Post Conviction Remedies and Federal Habeas Corpus*, 12 WM. & MARY L. REV. 147, 206 (1970) ("There is presently no machinery for perfecting amended petitions for post-conviction review [under the Nebraska Act].").

No specific time period has been used to define the requirement of a prompt hearing under the Act, but

> delay in a state court in and of itself does not present sufficient grounds to merit federal intervention. Only when evidence is produced that shows the state delay is a result of discrimination, amounting to a denial of process, should federal intervention proceed to a hearing on the merits.

Barry v. Sigler, 373 F.2d 835, 838 n.4 (8th Cir. 1967).

The evidentiary hearing is limited to the issues raised by the pleadings, State v. O'Kelly, 181 Neb. 618, 150 N.W.2d 117 (1967), and at the conclusion of the hearing the court is directed to make findings of fact and law. The making of findings is important in light of the requirement of Townsend v. Sain, 372 U.S. 293, 314 (1963), that an evidentiary hearing be granted a state habeas petitioner when the district court cannot determine whether the state court made its determination of the prisoner's claim on the merits or on a procedural ground. *See* Breitenstein, *Remarks on Recent Post Conviction Decisions*, 33 F.R.D. 363, 434 (1963); Note, *A Comparative Analysis of the Ohio Post Conviction Determination of Constitutional Rights Act*, 17 WEST. RES. L. REV. 1367, 1381 (1966).

281. *See* §§ II, III & IV of text (numerous examples of motions to vacate that were denied without an evidentiary hearing).

282. In Kaufman v. United States, 394 U.S. 217 (1968), the Supreme Court set down the circumstances under which a federal court must grant an evidentiary hearing on a constitutional claim raised in a section 2255 proceeding. With one exception, they are the same as those that were established in Townsend v. Sain, 372 U.S. 293 (1963), for granting hearings to state habeas petitioners, 394 U.S. at 227. *See* note 138 *supra*. The exception is the third circumstance of *Townsend*, the adequacy of the fact-finding procedure, which the Court held did not apply in a section 2255 proceeding because "federal fact-finding procedures are by hypothesis adequate to assure the integrity of the underlying constitutional rights." 394 U.S. at 227.

A different catalog of circumstances under which a section 2255 hearing must be granted is given in Kapatos v. United States, 432 F.2d 110, 113 (2d Cir.), *cert. denied*, 401 U.S. 909 (1970); Thornton v. United States, 368 F.2d 822, 831 (D.C. Cir. 1966) (Wright, J., dissenting); and Ormento v. United States, 328 F. Supp. 246, 252 (S.D.N.Y. 1971):

> An evidentiary hearing is required as to constitutional claims (1) where a federal trial or appellate court said nothing in the earlier proceedings because the issue was not raised, (2) where it was un-

There are two factors universal to every situation in which an evidentiary hearing is ordered: (1) the motion to vacate must raise an issue of fact material to the determination of the prisoner's constitutional claim, and (2) the factual issue raised cannot be resolved to the satisfaction of the trial court by reference to the motion and the files and records of the case.[283] These two factors serve as but the starting point for several variations that provide a basis for further analysis.

The usual circumstance in which resort to an evidentiary hearing must be had occurs when the claimed constitutional error was not previously raised in the original criminal proceeding.[284] Examples of such errors are claims of an involuntary guilty plea where the plea taking was not in conformance with the necessary requirements;[285] a coerced confession;[286] an unintelligent waiver of the right to counsel;[287] and ineffective assistance of counsel where the acts contended to be ineffective occurred off the record.[288] If

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clear whether the court's "say" was on the merits, (3) where new law has been made or facts uncovered relating to the constitutional claim since the trial and appeal, and (4) where the trial or appellate court bases its rulings on findings of fact made after a hearing that was not full and fair.

283. *See* State v. Blunt, 182 Neb. 477, 479, 155 N.W.2d 443, 444 (1968); State v. Erving, 180 Neb. 680, 685, 144 N.W.2d 424, 428 (1966).

284. A claim not previously raised falls within the fifth circumstance of Townsend v. Sain, 372 U.S. 293, 313 (1963), and the first circumstance of Kapatos v. United States, 432 F.2d 110, 113 (2d Cir. 1970), for which an evidentiary hearing is required in a section 2255 proceeding. *See* note 282 *supra*.

285. State v. Curnyn, 202 Neb. 135, 274 N.W.2d 157 (1979); State v. Svoboda, 199 Neb. 452, 259 N.W.2d 609 (1977); State v. Ford, 198 Neb. 376, 252 N.W.2d 643 (1977); State v. Elliott, 192 Neb. 217, 219 N.W.2d 775 (1974). For a discussion of the necessary requirements for the taking of a guilty plea, see note 109 *supra*. Examples of an evidentiary hearing being held regarding a claim of an involuntary guilty plea are found in note 136 *supra*.

286. State v. Fugate, 180 Neb. 701, 144 N.W.2d 412 (1966). An evidentiary hearing regarding a coerced confession was held in State v. DeBerry, 191 Neb. 445, 215 N.W.2d 73 (1974); State v. Bundy, 184 Neb. 406, 167 N.W.2d 770 (1969); State v. Howard, 182 Neb. 411, 155 N.W.2d 339 (1967); State v. Fugate, 182 Neb. 325, 154 N.W.2d 514 (1967); and State v. Parker, 180 Neb. 707, 144 N.W.2d 525 (1966).

287. State v. Reichel, 187 Neb. 464, 191 N.W.2d 826 (1971).

288. State v. Blunt, 182 Neb. 477, 155 N.W.2d 443 (1968). Examples of an evidentiary hearing held to investigate a claim of ineffective assistance of counsel are numerous although it is not always possible to tell from the opinions whether the complained of acts were reflected in the record: State v. Hoppes, 202 Neb. 383, — N.W.2d — (1979). State v. Partridge, 201 Neb. 799, 272 N.W.2d 366 (1978); State v. Fowler, 201 Neb. 647, 271 N.W.2d 341 (1978); State v. Morrow, 197 Neb. 627, 250 N.W.2d 247 (1977); State v. Halsey, 195 Neb. 432, 238 N.W.2d 249 (1976); State v. Robinson, 194 Neb. 111, 230 N.W.2d 222 (1975); State v. Cortez, 191 Neb. 800, 218 N.W.2d 217 (1974); State v. DeBerry, 191 Neb. 445, 215 N.W.2d 73 (1974); State v. Krider, 191 Neb. 285, 214 N.W.2d 611 (1974); State v. Henry, 191 Neb. 27, 213 N.W.2d 733 (1973); State v. Hall, 188 Neb. 130, 195 N.W.2d 201 (1972); State v. Hatten, 187 Neb. 237, 188 N.W.2d 846 (1971); State v.

the necessary facts underlying the claim are not reflected in the files and records, they must be developed through an evidentiary hearing.[289]

Only once has the Nebraska Supreme Court ruled that an evidentiary hearing is required in circumstances other than when the claim was not raised in the original proceeding.[290] However, several cases suggest the possibility that, if presented with the proper factual situation, the court would order a hearing for claims previously raised when they are supported by newly discovered evidence, when there has been a change in the applicable constitutional standard, and when the claims were previously not decided on the merits. That a hearing would be granted on allegations of newly discovered evidence has been suggested only by implication,[291] even though this is a well established basis for a hearing under section 2255.[292] Whether the Nebraska courts will adopt the section 2255 standard that there must be a substantial, nonfrivolous allegation of evidence which could not have reasonably been presented in the original proceeding and which is relevant to a constitutional claim remains to be seen.[293]

Anderson, 186 Neb. 769, 186 N.W.2d 479 (1971); State v. Phillips, 186 Neb. 547, 184 N.W.2d 639 (1971); State v. Oziah, 186 Neb. 541, 184 N.W.2d 725 (1971); State v. Norgard, 186 Neb. 535, 184 N.W.2d 632 (1971); State v. Moss, 185 Neb. 536, 177 N.W.2d 284 (1970); State v. Tunender, 182 Neb. 701, 157 N.W.2d 165, *supp. op.*, 183 Neb. 242, 159 N.W.2d 320 (1968); State v. Jackson, 182 Neb. 472, 155 N.W.2d 361 (1968); State v. Putnam, 182 Neb. 185, 153 N.W.2d 436 (1967); State v. Decker, 181 Neb. 859, 152 N.W.2d 5 (1967); State v. Konvalin, 181 Neb. 554, 149 N.W.2d 755, *cert. denied*, 389 U.S. 872 (1967).

289. There are numerous other issues not raised in the original proceeding on which evidentiary hearings have been held, but the examples given adequately illustrate the point. *See* Fairchild, *Post Conviction Rights and Remedies in Wisconsin*, 1965 WIS. L. REV. 52, 61.

290. State v. Svoboda, 199 Neb. 452, 259 N.W.2d 609 (1977). *See* text accompanying note 198 *supra*.

291. *See* note 212 & accompanying text *supra*.

292. Newly discovered evidence is the fourth circumstance of Townsend v. Sain, 372 U.S. 293, 313 (1963), and the third circumstance of Kapatos v. United States, 432 F.2d 110, 113 (2d Cir. 1970). *See* note 282 *supra*.

293. Townsend v. Sain, 372 U.S. 293, 317 (1963). The similar Nebraska standard for granting a new trial on the ground of newly discovered evidence, NEB. REV. STAT. § 29-2101 (Reissue 1975), is that the evidence must be competent, credible, materially affect the defendant's substantial rights and with reasonable diligence could not have been discovered and produced at trial. State v. Atkinson, 191 Neb. 9, 213 N.W.2d 351 (1973); Duffey v. State, 124 Neb. 23, 245 N.W. 1 (1932).

At least one court has held that where the petitioner has already had a full evidentiary hearing on the same claim, greater specificity in the allegations is required before another hearing will be granted on the ground of newly discovered evidence. This is to avoid relitigation of issues on the basis of proof already deemed insufficient. Dalli v. United States, 491 F.2d 758, 761 (2d Cir. 1974).

Similarly, the cases indicate the need for an evidentiary hearing when there has been a retroactive change in the applicable constitutional standard.[294] A change in the constitutional standard alone does not necessarily require a hearing if the claim was decided in a prior proceeding under the old standard and all of the necessary facts are undisputed and contained in the record.[295] But where the claim was raised and the evidence disputed, reconstruction of the facts will not be possible and an evidentiary hearing will have to be held before the new constitutional standard can be applied.[296]

Where a constitutional claim was raised in the original criminal proceeding on disputed evidence, but the trial court's decision was not on the merits or on appeal the decision in the supreme court was not on the merits, an evidentiary hearing will be necessary when the same claim is raised in a post conviction proceeding.[297] As previously discussed, if the claim was raised in a prior post conviction proceeding, it will not be considered in a subsequent proceeding, even if the prior decision was not on the merits.[298]

A wider range of circumstances necessitates an evidentiary

294. *See* note 211 & accompanying text *supra*. New law impliedly falls within the first circumstance of Townsend v. Sain, 372 U.S. 293, 313 (1963), and is the third circumstance of Kapatos v. United States, 432 F.2d 110, 113 (2d Cir. 1970). *See* note 282 *supra*.

A circumstance similar to a retroactive change in the applicable constitutional standard and one apparently unique to Nebraska occurs when the claim is being considered for a second time, but in the prior proceeding the adjudication was on nonconstitutional grounds. *See* note 210 & accompanying text *supra*. Although none of the cases in which this situation arose resulted in an evidentiary hearing, any previous findings of fact might well have been influenced by the nonconstitutional standard unless the prior evidence was undisputed.

295. The need for the facts to be undisputed is suggested by State v. Flye, 201 Neb. 115, 118-19, 266 N.W.2d 237, 240 (1978), and State v. Woods, 180 Neb. 282, 284, 142 N.W.2d 339, 341 (1966):

> Where no controverted material issues of fact are presented, *the facts as shown by the record are undisputed*, the taking of oral testimony on the motion could not add to or detract from the information shown by the court's files and records, and the court is satisfied that the prisoner is entitled to no relief, no hearing is required under the provisions of the Post Conviction Act.

(Emphasis added.)

296. Townsend v. Sain, 372 U.S. 293, 314-15 (1963). Findings of fact made in the prior proceeding will not avoid the necessity for a new trial if the fact finder has been guided by an erroneous standard of law, since "findings of fact may often be . . . influenced by what the finder is looking for." Rogers v. Richmond, 365 U.S. 534, 547 (1961). *See* Townsend v. Sain, 372 U.S. at 315 n.10.

297. State v. Svoboda, 199 Neb. 452, 259 N.W.2d 609 (1977). A decision not on the merits falls within the first circumstance of Townsend v. Sain, 372 U.S. 293, 313 (1963), and the second circumstance of Kapatos v. United States, 432 F.2d 110, 113 (2d Cir. 1970). *See* note 282 *supra*.

298. *See* notes 185-86 & accompanying text *supra*.

hearing in federal habeas proceedings than is currently recognized by the Nebraska courts as requiring a hearing under the Post Conviction Act.[299] The Nebraska courts have not chosen to deny a hearing in situations that would require a hearing under federal habeas, but simply have not yet been confronted with the necessary factual setting requiring a decision. That the state courts will follow the lead of the federal courts by granting a hearing whenever a federal district court would do so is suggested by the Nebraska Supreme Court's statement in *State v. Leadinghorse*[300] that "[a]n evidentiary hearing is not always necessary in order to dismiss a post conviction motion, however, such a hearing is usually advisable to avoid protracted litigation."[301]

B. Burden and Standard of Proof

The burden of proof in a post conviction proceeding rests on the petitioner[302] while the standard of proof is a preponderance of the evidence,[303] the usual standard in civil actions.[304] The same bur-

299. The Nebraska courts have not yet found the necessity for an evidentiary hearing when (1) in a prior proceeding the factual determination regarding the petitioner's constitutional claim is not fairly supported by the record as a whole; (2) the fact finding procedure employed in the prior proceeding was not adequate to afford a full and fair hearing on the petitioner's constitutional claim; (3) for any reason it appears that the judge in a prior proceeding did not afford the petitioner a full and fair fact hearing on his constitutional claim; and (4) there was an application of an incorrect constitutional standard to the petitioner's claim in a prior hearing. These are the second, third, sixth and first circumstances listed in Townsend v. Sain, 372 U.S. 293, 313 (1963), as necessitating a hearing.

300. 192 Neb. 485, 222 N.W.2d 573 (1974).

301. *Id.* at 486, 222 N.W.2d at 575.

302. State v. Bartlett, 199 Neb. 471, 475, 259 N.W.2d 917, 920 (1977); State v. Halsey, 195 Neb. 432, 433, 238 N.W.2d 249, 250 (1976); State v. McClelland, 194 Neb. 535, 537, 233 N.W.2d 786, 787 (1975); State v. Robinson, 194 Neb. 111, 112, 230 N.W.2d 222, 223 (1975); State v. Howell, 188 Neb. 687, 689, 199 N.W.2d 21, 23 (1972); State v. Fusby, 188 Neb. 139, 142, 195 N.W.2d 495, 497 (1972); State v. Rhodes, 187 Neb. 332, 334, 190 N.W.2d 623, 624 (1971); State v. Hatten, 187 Neb. 237, 243, 188 N.W.2d 846, 850-51 (1971); State v. Myles, 187 Neb. 105, 108, 187 N.W.2d 584, 586 (1971); State v. Huffman, 186 Neb. 809, 814, 186 N.W.2d 715, 718 (1971); State v. Rapp, 186 Neb. 785, 786, 186 N.W.2d 482, 483 (1971); State v. Phillips, 186 Neb. 547, 553, 184 N.W.2d 639, 643 (1971); State v. Moss, 185 Neb. 536, 538, 177 N.W.2d 284, 286 (1970); Harris v. Sigler, 185 Neb. 483, 484, 176 N.W.2d 733, 734 (1970); State v. Coffen, 184 Neb. 254, 258, 166 N.W.2d 593, 595 (1969), State v. Riley, 183 Neb. 616, 617, 163 N.W.2d 104, 105 (1968); State v. Reizenstein, 183 Neb. 376, 377, 160 N.W.2d 208, 209 (1968); State v. Raue, 182 Neb. 735, 736, 157 N.W.2d 380, 381 (1968); State v. Tunender, 182 Neb. 701, 711, 157 N.W.2d 165, 167 (1968) (Carter, J., dissenting); State v. Williams, 182 Neb. 444, 445, 155 N.W.2d 377, 378 (1967); State v. Sagaser, 181 Neb. 329, 333, 148 N.W.2d 206, 208 (1967). *See* State v. Orosco, 199 Neb. 532, 542, 260 N.W.2d 303, 309 (1977).

303. State v. Halsey, 195 Neb. 432, 433-34, 238 N.W.2d 249, 250 (1976); State v. Decker, 181 Neb. 859, 860-61, 152 N.W.2d 5, 7 (1967).

304. Keiserman v. Lydon, 153 Neb. 279, 285, 44 N.W.2d 513, 517 (1950).

den and standard of proof apply in federal habeas corpus and section 2255 proceedings,[305] but with certain claims the burden of persuasion shifts to the government to rebut the petitioner's claim or to show the existence of an affirmative "defense" once the petitioner has established a prima facie claim for relief.[306]

In a Nebraska post conviction proceeding the burden of proof apparently never shifts, but always remains with the prisoner.[307] The effect of Nebraska not shifting the burden to the state in a situation in which it would have shifted in a federal habeas proceeding is to render the state fact-finding procedure inadequate for purposes of determining the necessity of an evidentiary hearing in any subsequent federal habeas proceeding.[308] The result is to shift from the Nebraska courts to the federal courts the responsibility for determining the relevant facts when considering the application of federal constitutional standards.

C. Presence of Prisoner

The Post Conviction Act specifically provides that "[a] court may entertain and determine such motion without requiring the

305. Johnson v. Zerbst, 304 U.S. 458, 468-69 (1938); Fugate v. Gaffney, 453 F.2d 362, 364-65 (8th Cir. 1971), *cert. denied*, 409 U.S. 888 (1972); Coon v. United States, 441 F.2d 279, 280 (5th Cir.), *cert. denied*, 404 U.S. 860 (1971); Skinner v. United States, 326 F.2d 594, 597 (8th Cir. 1964). *See* State v. Orosco, 199 Neb. 532, 542, 260 N.W.2d 303, 309 (1977).

306. An example of a shifting burden of proof occurs when the record is silent as to whether counsel was furnished to an accused at a critical stage. If the accused introduces evidence tending to show that he was not represented, the burden then shifts to the state to prove by a fair preponderance of the evidence that the accused was represented. Losieau v. Sigler, 406 F.2d 795, 803 (8th Cir. 1969). Other examples of when the state assumes the burden of proof are where the issue is the voluntariness of a confession, Reizenstein v. Sigler, 428 F.2d 702, 707 (8th Cir. 1970); the giving of consent to a search and seizure, Montana v. Tomich, 332 F.2d 987, 989 (9th Cir. 1964); an absence of prejudice, when there has been a belated appointment of counsel, United States *ex rel.* Chambers v. Maroney, 408 F.2d 1186, 1188-90 (3d Cir. 1969); and that a guilty plea was in fact voluntarily and understandingly entered when the defendant pleaded guilty in federal court between July 1, 1966, and April 2, 1969, and the record does not demonstrate literal compliance with FED. R. CRIM. P. 11, Hall v. United States, 489 F.2d 427, 430 (5th Cir. 1974). *See, Developments, supra* note 5, at 1140-41.

307. Reizenstein v. Sigler, 428 F.2d 702, 707 (8th Cir. 1970). *But see* State v. Reichel, 187 Neb. 464, 191 N.W.2d 826 (1971) (suggestion that state may bear the burden of proof when claim is made of an unintelligent waiver of counsel and files and records do not show otherwise); State v. Brown, 185 Neb. 389, 176 N.W.2d 16 (1970) (state has burden of proof to show harmless error once a constitutional violation has been established).

308. Townsend v. Sain, 372 U.S. 293, 316 (1963).

production of the prisoner, whether or not a hearing is held."[309] While on its face the language of the statute seemingly permits the sentencing court to dispense with the presence of the prisoner under all circumstances, the argument can be made that the presence of a prisoner at an evidentiary hearing concerning his claim is necessary for him to be able to offer testimony as to events in which he participated,[310] to confront witnesses against him,[311] and to assist and prompt his counsel[312] or, if unrepresented, to examine and cross-examine witnesses.[313] Of these reasons, only the first, the offering of testimony, has been adopted as a basis for cutting back the Act's grant of discretion:

> This [the language of the statute] does not mean that a defendant may be prevented from testifying in support of a claim under circumstances where his testimony would be material. However, the mere filing of a motion under the Post Conviction Act, alleging a denial or infringement of constitutional rights, does not automatically entitle a prisoner to a trip to the sentencing court, even where an evidentiary hearing is required. The Act itself points up the fact that there are occasions when allegations of fact outside the record can be fully investigated and developed without requiring the personal presence of the prisoner.[314]

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309. NEB. REV. STAT. § 29-3001 (Reissue 1975).

310. *See* Sanders v. United States, 373 U.S. 1, 21 (1963); Ladner v. United States, 358 U.S. 169, 178-79 (1958); United States v. Hayman, 342 U.S. 205, 223 (1952); Moorhead v. United States, 456 F.2d 992, 996 (3d Cir. 1972). The argument has been made that a prisoner has a due process right to be present when he has personal knowledge of material issues of fact, *see* Note, *supra* note 10, at 817-18, even though a habeas petitioner has no due process right to present oral argument on appeal. Price v. Johnston, 334 U.S. 266, 286 (1948). Nor is there a due process right to an evidentiary hearing itself in a state post conviction proceeding. Weiland v. Parratt, 530 F.2d 1284, 1288 (8th Cir. 1976), *cert. denied*, 429 U.S. 847 (1977). *But cf.* Garton v. Swenson, 266 F. Supp. 726, 727 (W.D. Mo. 1967) (constitutional right to an evidentiary hearing on federal claims alleged in a state post conviction proceeding).

311. *See* Green v. United States, 158 F. Supp. 804, 807-08 (D. Mass. 1958), *aff'd per curiam*, 256 F.2d 483 (1st Cir.), *cert. denied*, 358 U.S. 854 (1958). The sixth amendment right of confrontation does not apply to collateral proceedings. United States v. Hayman, 342 U.S. 205, 222 (1952); Douglas v. Maxwell, 357 F.2d 320, 321 (6th Cir.), *cert. denied*, 385 U.S. 858 (1966); United States *ex rel.* Marshall v. Wilkins, 338 F.2d 404, 406 (2d Cir. 1964).

312. *See* Walters v. Harris, 460 F.2d 988, 995 (4th Cir.) (Winter, J., concurring in part & dissenting in part), *cert. denied*, 409 U.S. 1129 (1972); Raines v. United States, 423 F.2d 526, 534 (4th Cir. 1970) (Sobeloff, J., dissenting in part); Green v. United States, 158 F. Supp. 804, 808 (D. Mass.), *aff'd per curiam*, 256 F.2d 483 (1st Cir.), *cert. denied*, 358 U.S. 854 (1958); STANDARDS, *supra* note 5, at 74.

313. Green v. United States, 158 F. Supp. 804, 808 (D. Mass), *aff'd per curiam*, 256 F.2d 483 (1st Cir.), *cert. denied*, 358 U.S. 854 (1958).

314. State v. Woods, 180 Neb. 282, 285, 142 N.W.2d 339, 341 (1966). The quoted language from *Woods* is substantially similar to language found in Machibroda v. United States, 368 U.S. 487, 495-96 (1962). The federal courts have interpreted section 2255 regarding the presence of the prisoner to the same effect as the Nebraska court has interpreted the Post Conviction Act.

Although a prisoner has a right to be present at an evidentiary hearing

The Post Conviction Act also provides that "[t]estimony of the prisoner or other witnesses may be offered by deposition."[315] While no Nebraska opinion has of yet interpreted this provision, the practice under section 2255 and federal habeas corpus has been to permit the presentation of testimony by means of depositions, interrogatories, and affidavits where the parties have had the right to propound written interrogatories to the affiant or to file answering affidavits.[316]

The problem inherent in the use of depositions is their unsuitability for resolving questions of credibility. Direct observation by the judge of the witnesses' testimonial demeanor would seem essential to a correct resolution of such a dispute and it might well be argued that the language quoted above in regard to the necessity for the presence of the prisoner at an evidentiary hearing is broad enough to preclude the use of depositions when the issue is one of credibility.[317] Where depositions are used for proof of uncontro-

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only when he can testify to material facts, he will at the same time be able to assist his counsel in cross-examination. Where the prisoner would not have a right to be present, it is very likely that he also would have no knowledge to offer in assistance of cross-examination.

315. NEB. REV. STAT. § 29-3001 (Reissue 1975). *Id.* §§ 25-1233 to -1234 suggest that the only time the production of the prisoner would be permitted is when the sentencing court is located in the county of incarceration. Otherwise, the use of a deposition would be necessary for the presentation of his testimony. The relationship between these sections and the Post Conviction Act has never been considered by the Nebraska Supreme Court.

316. Authorization for the use of depositions, interrogatories, and affidavits in section 2255 proceedings has been found in the statement in Machibroda v. United States, 368 U.S. 487, 495 (1962), that "[T]he statute itself recognizes that there are times when allegations of facts outside the record can be fully investigated without requiring the personal presence of the prisoner." Walters v. Harris, 460 F.2d 988, 992-93 (4th Cir.), *cert. denied*, 409 U.S. 1129 (1973); Kent v. United States, 423 F.2d 1050, 1051 (5th Cir. 1970). However, the procedure had been recognized prior to *Machibroda*. Kimbrough v. United States, 226 F.2d 485, 488 (5th Cir. 1955). *But see* Phillips v. United States, 533 F.2d 369, 371 (8th Cir. 1976), *cert. denied*, 429 U.S. 924 (1977). The use of depositions and affidavits in habeas proceedings is specifically authorized by 28 U.S.C. § 2246 (1976). If affidavits are used, the other party must have been given the right to propound written interrogatories to the affiants or to file answering affidavits. *See* Clark v. Lockhart, 512 F.2d 235, 237-38 (8th Cir.), *cert. denied*, 423 U.S. 872 (1975); Anderson v. Johnson, 371 F.2d 84, 94 (6th Cir. 1966). Although not authorized by section 2246, the use of interrogatories in habeas proceedings has been noted. McGarrah v. Dutton, 381 F.2d 161 (5th Cir. 1967).

317. *See* Phillips v. United States, 533 F.2d 369, 371 (8th Cir. 1976) ("Normally, when a case turns on an issue of credibility, the trier of fact should have the benefit of oral testimony."); Walters v. Harris, 460 F.2d 988, 994-95 (4th Cir.), (Winter, J., concurring in part & dissenting in part), *cert. denied*, 409 U.S. 1129 (1972) ("Where the single issue was the credibility of Wren and Mr. Kirkman, Wren should have been seen and observed by the district judge so that he would be able to resolve this issue with the help of his own observation of Wren's testimonial demeanor.").

verted facts, they are an efficient method of avoiding the inconvenience of requiring the presence of far distant witnesses or the expense and security problems of transporting the prisoner to the sentencing court.

Even where the use of depositions would be appropriate, fairness would seem to require that the prisoner, if unrepresented by counsel, be permitted to attend and cross-examine.[318] Further, where the deposition concerns matters of which the prisoner has personal knowledge, his presence would be desirable in order for him to assist his counsel in the conduct of cross-examination.[319]

D. Right to Counsel

The district court is empowered to appoint up to two attorneys to represent a prisoner in all proceedings under the Post Conviction Act.[320] The appointment of counsel is discretionary with the court,[321] but where the prisoner has presented a justiciable issue of law or fact, an indigent prisoner is entitled to the assistance of counsel.[322] On the other hand, where the motion and the files and

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The importance of the trial judge having observed the demeanor of the witnesses has been recognized in Nebraska in the context of the weight to be given to the trial court's findings in an appeal de novo on the record in an equity action. Modern Plumbing & Heating, Inc. v. Journey West Campground, Inc., 193 Neb. 781, 784-85, 229 N.W.2d 192, 194 (1975); Seybold v. Seybold, 191 Neb. 480, 482, 216 N.W.2d 179, 181 (1974).

318. Phillips v. Smith, 300 F. Supp. 130, 133-34 (S.D. Ga. 1969). *Cf.* Campbell v. Minnesota, 487 F.2d 1, 4 (8th Cir. 1973) (use of affidavits in state hearing without opportunity for cross-examination of affiants renders hearing less than full and fair); Kent v. United States, 272 F.2d 795, 797-98 (1st Cir. 1959) (hearing without presence of prisoner with knowledge of facts so he can cross-examine witness is an abuse of discretion); Miller v. Smith, 302 F. Supp. 385, 386-87 (N.D. Ga. 1968) (failure to allow prisoner to cross-examine deposition witness renders state hearing less than full and fair). It is unlikely that a Nebraska petitioner would ever be unrepresented in a situation in which a deposition would be required. *See* § V-D of text *infra*.

319. Walters v. Harris, 460 F.2d 988, 995 (4th Cir.) (Winter, J., concurring in part & dissenting in part), *cert. denied*, 409 U.S. 1129 (1972).

320. NEB. REV. STAT. § 29-3004 (Reissue 1975). A petitioner moving in the county or municipal court to vacate a misdemeanor sentence must apply to the district court for appointment of counsel. Although the problem should rarely arise because of the few misdemeanants who apply for relief under the Act, the bifurcating of the proceedings between two separate courts will tend to result in unnecessary confusion that could be avoided by placing the power to appoint counsel in the court being moved for relief.

321. State v. Nicholson, 183 Neb. 834, 837, 164 N.W.2d 652, 655, *cert. denied*, 396 U.S. 879 (1969).

322. State v. Pilgrim, 184 Neb. 457, 460, 168 N.W.2d 368, 370 (1969). *But cf.* State v. Craig, 181 Neb. 8, 10, 146 N.W.2d 744, 746 (1966) (when appeal presents a single narrow and uncomplicated question of law, no abuse of discretion to refuse to appoint appellate counsel when counsel had been appointed to represent prisoner in the trial court). The seemingly contradictory holding in *Craig*

records show the prisoner is entitled to no relief, a failure to appoint counsel is not an abuse of discretion.[323] Appointment of counsel on appeal is similarly discretionary with the district court[324] and where there are no valid grounds for the appeal[325] or, at most, a single narrow and uncomplicated question of law,[326] there is no abuse of discretion in refusing to appoint appellate counsel.

Appointment of counsel for indigent petitioners is desirable for several reasons.[327] As has been previously discussed, the assistance of counsel is more likely to guarantee that claims are alleged

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can be rationalized with *Pilgrim* on the basis that the issues would have already been developed in the trial court where the defendant had the benefit of counsel and the supreme court would merely be reviewing those issues. *See* Ross v. Moffitt, 417 U.S. 600 (1974).

323. State v. Birdwell, 188 Neb. 116, 117, 195 N.W.2d 502, 503 (1972); State v. Nicholson, 183 Neb. 834, 837, 164 N.W.2d 652, 655, *cert. denied*, 396 U.S. 879 (1969).

324. Harris v. Sigler, 185 Neb. 483, 484, 176 N.W.2d 733, 734 (1970); State v. Jackson, 182 Neb. 472, 477, 155 N.W.2d 361, 364 (1968); State v. Williams, 182 Neb. 444, 446, 155 N.W.2d 377, 379 (1967); State v. Hizel, 181 Neb. 680, 684, 150 N.W.2d 217, 219, *cert. denied*, 389 U.S. 868 (1967); State v. Burnside, 181 Neb. 20, 22, 146 N.W.2d 754, 755, *cert. denied*, 387 U.S. 936 (1966).

325. State v. Taylor, 193 Neb. 388, 389-90, 227 N.W.2d 26, 27 (1975); State v. Gero, 186 Neb. 379, 380, 183 N.W.2d 274, 275 (1971); State v. Jackson, 182 Neb. 472, 477, 155 N.W.2d 361, 364 (1968); State v. Williams, 182 Neb. 444, 446, 155 N.W.2d 377, 378 (1967); State v. Hizel, 181 Neb. 680, 684, 150 N.W.2d 217, 219, *cert. denied*, 389 U.S. 868 (1967); State v. Burnside, 181 Neb. 20, 22, 146 N.W.2d 754, 755, *cert. denied*, 387 U.S. 936 (1966).

326. State v. Craig, 181 Neb. 8, 10, 146 N.W.2d 744, 746 (1966). *See* note 322 *supra*.

327. *See generally* Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254, Adv. Comm. Note to R. 8 (West 1977); STANDARDS, *supra* note 5, at § 4.4 and Commentary; *Developments, supra* note 5, at 1197-1202.

While there is no sixth amendment right to counsel in a collateral proceeding, *see* note 311 *supra*, several courts have recognized a limited due process right to counsel in federal habeas corpus and section 2255 proceedings when the prisoner shows a particularized need, such as mental incompetence, or the matter is of such a difficult nature that the prisoner is unable to adequately present his case to the court. Vandenades v. United States, 523 F.2d 1220, 1226 (5th Cir. 1975); Dillon v. United States, 307 F.2d 445, 447 (9th Cir. 1962). *See generally* Miller, *The Right to Counsel in Collateral Proceedings—Habeas Corpus*, 15 How. L.J. 200 (1969); Note, *Discretionary Appointment of Counsel at Post-Conviction Proceedings: An Unconstitutional Barrier to Effective Post-Conviction Relief*, 8 GEO. L. REV. 434 (1974); Note, *Criminal Procedure—Post Conviction Right to Counsel*, 77 W. VA. L. REV. 571, 589-93 (1975); *Developments, supra* note 5, at 1202-05. A number of other federal courts have found an abuse of discretion in a failure to appoint counsel in circumstances similar to those in which a due process right to counsel has been held to exist. Cates v. Ciccone, 422 F.2d 926, 928 (8th Cir. 1970); Fleming v. United States, 367 F.2d 555, 557 (5th Cir. 1966). With the adoption of the rules governing section 2254 cases and section 2255 proceedings, the appointment of counsel is mandatory when an evidentiary hearing is required and permissible at any stage of the proceeding whenever the interests of justice so requires. Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254, R. 8(c)

in conformity with the fact pleading standard applicable to post conviction proceedings[328] as well as that a prisoner's motion to vacate will contain all of his potentially viable claims.[329] This, in turn, will relieve the courts of the responsibility in cases with defective motions of reviewing the files and records for the existence of inadequately or unpleaded constitutional claims.[330] Besides these obvious benefits, counsel is able to investigate the facts underlying a claim, thus resulting in the drafting of pleadings better suited to assist the court in its task of reviewing the motion and files and records of the case;[331] the pleadings themselves are likely to be clearer and shorter than those drafted by a *pro se* prisoner;[332] and, it is hoped, frivolous claims will be culled by the attorney

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(West 1977); Rules Governing Section 2255 Proceedings, 28 U.S.C.A. foll. § 2255, R. 8(c) (West Supp. 1978).

Although some state courts have found a constitutional requirement of counsel in certain circumstances under their own post conviction remedy, *e.g.*, People v. Shipman, 397 P.2d 993, 42 Cal. Rptr. 1 (1965), the federal courts have not yet imposed this requirement upon the states, Abraham v. Wainwright, 407 F.2d 826, 827-28 (5th Cir. 1969); Noble v. Sigler, 244 F. Supp. 445, 449 (D. Neb. 1964), *aff'd*, 351 F.2d 673, 678 (8th Cir. 1965), *cert. denied*, 385 U.S. 853 (1966), nor have the state courts of Nebraska recognized this right, State v. Burnside, 181 Neb. 20, 22, 146 N.W.2d 754, 755, *cert. denied*, 387 U.S. 936 (1966). It should be noted, however, that the constitutional right of access to the courts requires prison authorities to provide "prisoners with adequate law libraries or adequate assistance from persons trained in the law," Bounds v. Smith, 430 U.S. 817, 828 (1977), and that this requirement exists despite any provisions for appointing counsel for prisoners in state post conviction proceedings whose claims survive initial review by the courts. *Id.* at 828 n.17. *See generally* Potuto, *The Right of Prisoner Access: Does* Bounds *Have Bounds?*, 53 IND. L.J. 207 (1977-1978).

Despite the absence of any constitutional requirement for the appointment of counsel in state post conviction proceedings, powerful pressures to do so exist through the requirement of Townsend v. Sain, 372 U.S. 293 (1963), that an evidentiary hearing be provided a federal habeas petitioner when the state courts have failed to afford him a full and fair fact hearing. *Id.* at 313. *See* note 138 *supra*. One of the factors that almost all of the courts look to in determining whether there was a full and fair hearing at the state level is whether the prisoner had the assistance of counsel in that hearing. Lane v. Henderson, 480 F.2d 544, 545 (5th Cir. 1973); Hawkins v. Bennett, 423 F.2d 948, 951 (8th Cir. 1970). Although Nebraska requires the appointment of counsel for indigent prisoners whenever a justiciable issue of law or fact is presented which would cover any situation in which an evidentiary hearing would be required, those states not having a similar requirement run the risk of involuntarily delegating their fact finding function to the federal courts.

328. *See* text accompanying note 21 *supra*.
329. *See* text accompanying note 39 *supra*. *But see* STANDARDS, *supra* note 5, at 66 ("[I]t is wasteful to appoint counsel to determine solely if the applicant has some grounds for relief not stated in his original application.").
330. *See* text accompanying note 40 *supra*.
331. *See* STANDARDS, *supra* note 5, at 66; *Developments, supra* note 5, at 1198-99.
332. *See, Developments, supra* note 5.

rather than by the courts.[333] Perhaps most importantly, the skilled assistance of counsel will be helpful in overcoming the apparently inimical attitudes of the courts to claims for post conviction relief.[334]

Unfortunately, the appointment of counsel is only required once a prisoner has successfully passed the pleading stage by presenting a justiciable issue of law or fact. Prior to that stage, when a prisoner is most in need of counsel in order to be able to present such a claim, the sentencing court is permitted to dismiss a defectively pleaded claim without providing counsel.[335]

A justiciable issue having been pleaded, the appointment of counsel for an indigent petitioner becomes mandatory. After the pleading stage of the proceedings, the assistance of an attorney is important for identifying issues,[336] briefing and arguing the law, gathering evidence, interviewing witnesses,[337] utilizing discovery,[338] participating in pretrial conferences[339] and conducting the

333. *Id.* at 1199.

334. The heuristic conclusion that the Nebraska courts are hostile to post conviction claims admittedly finds little express support in the case law, but is mainly based on an overall impression derived from the tone and tenor of the numerous opinions arising under the Post Conviction Act. *See, e.g.*, State v. Clingerman, 180 Neb. 344, 142 N.W.2d 765 (1966). The compelling need for counsel in such a situation is suggested by Powell v. Alabama, 287 U.S. 45, 68-69 (1932):

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

335. *See* Lake, *supra* note 53, at 769-70.

336. *See* Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254, Adv. Comm. Note to R. 8 (West 1977).

337. *See, Developments, supra* note 5, at 1198.

338. *Id.* at 1199; Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254, Adv. Comm. Note to R. 8 (West 1977).

339. *See, Developments, supra* note 5, at 1199; Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254, Adv. Comm. Note to R. 8 (West 1977).

Pretrial conferences in Nebraska are authorized by NEB. SUP. CT. R. V, Pre-Trial Procedure: Formulating Issues. For a discussion of the utility of pretrial conferences in a post conviction context, see Carter, *Pre-Trial Suggestions for Section 2255 Cases*, 32 F.R.D. 391 (1963).

evidentiary hearing.[340] However, an indigent prisoner will never reach this stage unless he has first successfully completed the difficult task of having pleaded a justiciable claim.

VI. CONCLUSION

The prior sections consist of a catalog of the actions the trial courts may take in response to the filing of a motion to vacate under the Nebraska Post Conviction Act. Throughout, suggestions have been made for improvements in the administration of the Act. This has been done with the objective in mind of better adapting the present procedure to the standard of providing a post conviction procedure that allows for the presentation and consideration of all meritorious constitutional claims a prisoner may have, but which at the same time will result in the swift and expeditious denial of frivolous or meritless claims.[341] The changes suggested may be summarized into two major recommendations:

1. Counsel should be appointed for all indigent post conviction petitioners. This is the most efficacious step that can be taken to insure that all meritorious claims are presented to and considered by the courts.
2. The standards applied by the Nebraska courts in considering claims for post conviction relief should conform to those applied by the federal courts to habeas corpus proceedings. Uniformity in the standards applied will preserve the role of the Nebraska courts as the initial enforcer of federal constitutional standards as well as avoid the ill will that would be generated by the federal courts' assumption of this role.

These two reforms, although not encompassing several of the suggestions for change that have been made in the preceding pages, will result in a post conviction procedure that is, in fact, "fair to the person in custody and to the State of Nebraska."[342]

340. *See, Developments, supra* note 5, at 1198.
341. *See* § II of text *supra.*
342. *Judiciary Comm. Statement, supra* note 2.