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CONSTITUTIONAL LAW-PROCEDURAL DUE PROCESS IN CRIMINAL CASES-ADEQUACY OF REMEDIES IN STATE COURTS TO RAISE THE QUESTIONS

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COMMENTS

CONSTITUTIONAL LAW—PROCEDURAL DUE PROCESS IN CRIMINAL CASES—ADEQUACY OF REMEDIES IN STATE COURTS TO RAISE THE QUESTIONS—In recent years the United States Supreme Court has gone far in defining the procedural requirements of due process of law. Be-

ginning with the first Scottsboro decision[1] many opinions have helped to define more fully the basic protection afforded an accused person by the Fourteenth Amendment. Although the complete scope of an accused's rights is still uncertain, many of them are now clear. The use of a coerced confession,[2] the denial of the right of counsel in certain cases,[3] the systematic exclusion of members of defendant's race from jury duty,[4] have been considered so contrary to our fundamental concepts of liberty and justice that they violate the due process clause of the Fourteenth Amendment.[5] The struggle to broaden and clarify these concepts has met with much success. However, with the recognition of these procedural rights comes an equally important problem of supplying a procedure and tribunal by which they may be vindicated. If constitutional guarantees of a fair trial are to be more than moral strictures it is essential that a person illegally convicted be given an opportunity for a post-conviction hearing. A right can hardly be considered worthy of that name unless there is some tribunal that will take cognizance of it. This comment will not attempt to consider the guarantees of a fair trial, but will deal with the remedies available to a person confined in a state prison in his attempt to secure relief on the ground of an asserted violation of such guarantees in the conduct of his trial.

A. *General Scope of Remedial Procedure*

1. *Normal remedy.* If the question of deprivation of procedural due process is properly raised in the state trial court, the accused is then entitled to the ordinary process of appellate review in the state courts. If the record clearly indicates the federal question involved, review may then be had in the United States Supreme Court by writ of certiorari.[6] This procedure will ordinarily be adequate to raise the constitutional questions.

However, this method of review becomes one merely of academic interest when the crux of the alleged deprivation of due process is that the accused was rushed to trial without counsel and in ignorance of

[1] Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932).

[2] Ashcraft v. Tennessee, 322 U.S. 143, 64 S.Ct. 921 (1944); Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302 (1948).

[3] De Meerleer v. Michigan, 329 U.S. 663, 67 S.Ct. 596 (1947); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932). Compare Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252 (1942); Bute v. Illinois, (U.S. 1948) 68 S.Ct. 763.

[4] Pierre v. Louisiana, 306 U.S. 354, 59 S.Ct. 536 (1939); Smith v. Texas, 311 U.S. 128, 61 S.Ct. 164 (1940). Compare Moore v. New York, (U.S. 1948) 68 S.Ct. 705.

[5] See Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149 (1937); Boskey and Pickering, "Federal Restrictions on State Criminal Procedure," 13 UNIV. CHI. L. REV. 266 (1946).

[6] Bute v. Illinois, (U.S. 1948) 68 S.Ct. 763; Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932); Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927).

his rights. In such a case the accused is securely within the prison walls, and the time for appeal has usually run before he realizes that his conviction has failed to conform to our traditional sense of justice.[7] In such a case the prisoner must rely on some extraordinary procedure.

2. *Extraordinary remedies.* In the great majority of states there is ample opportunity for the accused to gain a post-conviction hearing. The form of the remedy may be the traditional writ of habeas corpus, writ of error coram nobis, or some modern statutory remedy.[8] When such a hearing is obtained the petitioner may raise the question of due process, and if the state courts misconceive the guarantees of the due process clause, the federal question may be reviewed by the United States Supreme Court upon writ of certiorari.[9] If it is clear that there is no state remedy afforded, or if the case is one of peculiar urgency, the accused has a remedy by the writ of habeas corpus in federal courts.[10]

B. *Remedies where State Procedure is Not Clear*

In contrast to the effective remedies mentioned above, some state procedures are so burdened by procedural anachronisms, narrow limitations, and judicial ambiguity that it is often difficult to discover the proper procedure for post-conviction hearing, or whether that procedure is adequate. When such uncertainty exists the fundamental problem of protecting constitutional rights becomes interwoven with delicate questions of the relation between state and federal courts. The federal courts, as a matter of policy, have long refrained from interfering with state administration of criminal law until all state remedies have been exhausted.[11] This policy gives rise to a serious problem where it is difficult to tell when the state remedies have been exhausted. Henry Hawk, confined in a Nebraska prison, has sought no less than sixteen times a hearing on the merits of his allegation of an unconsti-

[7] This may also preclude the accused from insuring that a record is sufficiently preserved for appeal by writ of error to the state court. See People v. McElhaney, 394 Ill. 380, 68 N.E. (2d) 715 (1946).

[8] The scope of these remedies varies with the state practice. Habeas corpus is often available to attack collaterally the jurisdiction of the trial court on the basis of unconstitutional proceedings. Coram nobis is a writ of error from the trial court that is often used to raise issues of unconstitutional procedure not known to the trial court at time of the trial. For an unusual coram nobis procedure see Hysler v. Florida, 315 U.S. 411 at 415, 62 S.Ct. 688 (1942). Michigan's deferred motion for a new trial was used to raise the question in De Meerleer v. Michigan, 329 U.S. 663, 67 S.Ct. 596 (1947).

[9] Smith v. O'Grady, 312 U.S. 329, 61 S.Ct. 572 (1941); De Meerleer v. Michigan, 329 U.S. 663, 67 S.Ct. 596 (1947).

[10] Woods v. Nierstheimer, 328 U.S. 211 at 217, 66 S.Ct. 996 (1946).

[11] Ex parte Hawk, 321 U.S. 114, 64 S.Ct. 448 (1944); Urquhart v. Brown, 205 U.S. 179, 27 S.Ct. 459 (1907); Davis v. Burke, 179 U.S. 399, 21 S.Ct. 210 (1900).

tutional trial, and, although the United States Supreme Court has once remanded his cause and ordered a hearing,[12] he is still conducting a vain search for the proper procedure and tribunal. What the proper procedure is, the Nebraska Supreme Court has been unwilling to say, and a federal district judge has been unable to ascertain.[13] In Illinois the procedural difficulties appear to be even more confusing. The status of habeas corpus in Illinois is very uncertain. The Illinois Supreme Court has stated that its denials of petitions for the writ were based on the fact that habeas corpus is available only for an attack on the jurisdiction of the court over the person and the subject matter.[14] That such a limitation exists on habeas corpus originally brought in Illinois circuit courts has been the basis of denials of certiorari in the United States Supreme Court.[15] The motion in the nature of a writ of error coram nobis in Illinois is supposedly the complement of habeas corpus, and is often said to be the remedy the petitioner should have tried.[16] But it appears to be limited in application, and is made unavailable in many cases by a five year statute of limitations.[17] In the recent case of *Marino v. Ragen*,[18] Marino's application for a writ of habeas corpus was denied by the state circuit court. Upon certiorari to the United States Supreme Court the attorney general of Illinois, representing Ragen, the nominal respondent, conceded error in that Marino had sought and been denied the appropriate remedy in the state court. The attorney general's view of the Illinois law appeared to be that habeas corpus was proper to raise a question of deprivation of due process within the knowledge of the trial judge at the time of the trial. Coram nobis, on the other hand, was said to be proper where the deprivations were not

[12] Hawk v. Olson, 326 U.S. 271, 66 S.Ct. 116 (1945).

[13] Hawk v. Olson, (D.C. Neb. 1946) 66 F. Supp. 195 at 202. See also Hawk v. O'Grady, 137 Neb. 639, 290 N.W. 911 (1940); 56 YALE L.J. 574 (1947).

[14] Thompson v. Nierstheimer, 395 Ill. 572, 71 N.E. (2d) 343 (1947); Barrett v. Bradley, 391 Ill. 169, 62 N.E. (2d) 788 (1945).

[15] Marino v. Ragen, 332 U.S. 561 at 565, 68 S.Ct. 240 (1947).

[16] Id. at 566; see also Woods v. Nierstheimer, 328 U.S. 211, 66 S.Ct. 996 (1946).

[17] See People v. Touhy, 397 Ill. 19 at 26, 72 N.E. (2d) 827 (1947); Sims v. People, 399 Ill. 159, 77 N.E. (2d) 173 (1948). A similar situation exists in Indiana where a narrow habeas corpus procedure is not available as a means of asserting deprivation of due process, and the coram nobis remedy is crippled by a five year statute of limitations. See 22 IND. L.J. 189, 390 (1947).

[18] 332 U.S. 561, 68 S.Ct. 240 (1947). After the reversal of the state circuit court, Attorney General Barrett of Illinois contended that Marino should be ordered released immediately. This contention was denied by the state circuit court, and the United States Supreme Court denied a request for instructions to this effect. Marino v. Ragen, (U.S. 1948) 68 S.Ct. 729. Then, upon hearing, the state circuit court judge found that Marino had not been deprived of his constitutional rights, and quashed the writ of habeas corpus. CHICAGO TRIBUNE, April 4, 1948, 41:3.

within the knowledge of the trial judge at the time of the trial.[19] The effect of a five year statute of limitations on coram nobis in Illinois has been confused by *Woods v. Nierstheimer*[20] in which the United States Supreme Court held that the petitioner must exhaust his state remedy of coram nobis even though the statute of limitations had already run. The Court evidently felt that the Illinois Supreme Court must first say that the plain words of the statute applied to this case before the federal courts would exercise their jurisdiction. The Circuit Court of Appeals for the Seventh Circuit later pointed out in *Rooney v. Ragen*[21] that the Supreme Court must have overlooked *People v. Rave*,[22] in which the Illinois Supreme Court held that the five year limitation is applicable to all coram nobis proceedings, including those alleging deprivation of due process.

This confusion of remedies for all practical purposes eliminates the petitioner's chances for a writ of certiorari to the United States Supreme Court. The Court has refused to grant the writ in cases where the state court's denial of a hearing can be based on limitations under state law on remedial procedure.[23] Since the state court's denials of hearing are almost invariably without opinion, and the status of the remedies is uncertain, the United States Supreme Court has taken the position, in most cases, that it cannot say that the decision was not based on such procedural grounds, and it has therefore denied certiorari.[24] This weakness in the remedial system of certain states has been attacked by the federal courts, legal writers, and also by the Attorney General of Illinois.[25] It would be well to consider the possible sources of a solution, and the forms it may take.

C. *Possible Solutions to Inadequacies of State Remedial Procedure*

1. *State reform.* The soundest solution to the problem of securing these basic constitutional rights would, of course, be wise and vigorous state reform to eliminate the procedural impasse and provide

[19] See the quotation taken from the Illinois Attorney General's remarks in Marino v. Ragen, 332 U.S. 561 at 566, 68 S.Ct. 240 (1947); see also Justice Rutledge's commentary on the Illinois procedure in concurring opinion at 563.

[20] 328 U.S. 211, 66 S.Ct. 996 (1946).

[21] (C.C.A. 7th, 1946) 158 F. (2d) 346.

[22] 392 Ill. 435, 65 N.E. (2d) 23 (1946).

[23] Of 322 petitions for certiorari to the United States Supreme Court alleging a denial of post-conviction hearing, only two were granted during the 1946 term. Marino v. Ragen, 332 U.S. 561 at 563, 68 S.Ct. 240 (1947).

[24] See footnote 4 to Justice Rutledge's concurring opinion in Marino v. Ragen, 332 U.S. 561 at 565, 68 S.Ct. 240 (1947).

[25] "George F. Barrett, Illinois Attorney General, issued a statement declaring Marino had suffered 'a flagrant violation of his constitutional rights,' and admitted that the Illinois law needed clarification." NEW YORK TIMES, December 23, 1947 20:4; see note 18, supra.

a practical, simple, and efficient post-conviction remedy. This could best be done by the creation of a statutory remedy under which the prisoner could assert deprivation of due process as to matters in the record or outside of it. Such a remedy should be without time limitation and should be allowed *in forma pauperis*. In some states a remedy might be developed by clear and consistent definition of the scope of present common law and statutory procedures by the state supreme courts.

State reform would have the advantage of fitting the remedy to the particular court system of the state, and of permitting the special use of less burdened courts.[26] State reform would also be an assumption by the states of their proper function, and would allow them to maintain control of the administration of criminal justice without criticism or interference.[27] One needed reform lies easily within the power of the state courts. By indicating clearly when dismissal of a prisoner's petition is on the merits, the state courts could eliminate the problem faced by the petitioner in the United States Supreme Court where it is usually presumed that the state dismissal was on procedural grounds.[28] The scope of this comment does not include the additional problems that may spring from an inadequately constituted court system.[29]

2. *A more readily available remedy in the federal courts.* The right to procedural due process is clearly a federal right, and as such must ultimately be protected by the federal government. Although the federal courts have ample jurisdiction to grant writs of habeas corpus to persons imprisoned in violation of constitutional rights,[30] they have long conformed to a self imposed limitation on this jurisdiction.[31] In *Ex parte Hawk*, the United States Supreme Court said:

[26] For example, Illinois might provide for original hearings or more complete review in the intermediate appellate courts without deluging the overburdened Illinois Supreme Court. Compare the unique coram nobis procedure used in Hysler v. Florida, 315 U.S. 411 at 415, 62 S.Ct. 688 (1942).

[27] "Upon the state courts, equally with the Courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution." Mooney v. Holohan, 294 U.S. 103 at 113, 55 S.Ct. 340 (1935). In that case the Court rejected the idea that the state courts had no duty to provide for post-conviction hearings.

[28] Woods v. Nierstheimer, 328 U.S. 211 at 214, 66 S.Ct. 996 (1946). See also Williams v. Kaiser, 323 U.S. 471 at 477, 65 S.Ct. 363 (1945).

[29] See, "A Study of The Illinois Supreme Court," 15 UNIV. CHI. L. REV. 107 at 163 (1947).

[30] U.S. Rev. Stat. (1878) § 753, 28 U.S.C. (1946) § 453.

[31] "While the power to issue writs of *habeas corpus* under Rev. Stat. sec. 753, nominally extends to every case where a party 'is in custody in violation of the Constitution . . .,' it is not every such case where the interference of the federal court is demanded, particularly where the state court is executing its own criminal laws. . . . Ordinarily an error in this particular can be better corrected by this court upon a writ of error to the highest court of the State than by an interference, which is never

"Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted. [Citing cases.] And where those remedies have been exhausted this Court will not ordinarily entertain an application for the writ before it has been sought and denied in a district court or denied by a circuit or district judge."[32]

The Supreme Court has left an opening for the federal courts in cases where the state remedy "proves in practice unavailable or seriously inadequate,"[33] but in practical application the rule has been of little value to the petitioner. In the last petition of Henry Hawk to the federal district court, the judge held that the United States Supreme Court decisions compelled him to send Hawk back to try another state remedy of questionable adequacy.[34] The federal courts generally have believed that the doctrine of exhaustion of state remedies should be used to close the doors of the district courts to such applicants; within limits it seems that the doctrine ought to be so used. From neither a theoretical nor a practical standpoint should the federal courts establish themselves as the sole safeguard of constitutional liberty.[35] Yet stringent insistence upon the exhaustion of state remedies which are often equivocal seems an unnecessary and improper refusal by the federal courts to consider questions directly concerning basic federal rights. Justice Rutledge, in his separate concurring opinion in *Marino v. Ragen*,[36] clearly pointed out the futility of requiring a petitioner to pursue uncertain remedies, and said that petitioners in Illinois should no longer be required to exhaust state remedies before applying to federal district courts.[37]

less than unpleasant, with the procedure of the state courts before the petitioner has exhausted his remedy there," Brown, J., in Davis v. Burke, 179 U.S. 399 at 402, 21 S.Ct. 210 (1900). See also Urquhart v. Brown, 205 U.S. 179, 27 S.Ct. 459 (1907); Ex parte Royall, 117 U.S. 241, 6 S.Ct. 734 (1886).

[32] 321 U.S. 114 at 116, 64 S.Ct. 448 (1944).

[33] Id. at 118.

[34] Hawk v. Olson, (D.C. Neb. 1946) 66 F. Supp. 195 at 199.

[35] "State courts are no less under duty to observe the United States Constitution than is this Court. To be sure, authority is vested in this Court to see to it that that duty is observed. But to assume disobedience instead of obedience to the Law of the Land by the highest courts of the states is to engender friction between the federal and state judicial systems, to weaken the authority of the state courts and the administration of state laws by encouraging unmeritorious resorts to this Court, and wastefully to swell the dockets of this Court," Frankfurter, J., dissenting in Williams v. Kaiser, 323 U.S. 471 at 482, 65 S.Ct. 363 (1945).

[36] 332 U.S. 561 at 563, 68 S. Ct. 240 (1947).

[37] Rutledge, J., concurring in Marino v. Ragen, 332 U.S. 561 at 570, 68 S.Ct. 240 (1947). It is unlikely, however, that the federal district judges in Illinois will

The Circuit Court of Appeals for the Seventh Circuit, however, has recently considered the question of exhaustion of remedies in a more realistic manner. In *Potter v. Dowd*,[38] the court held that the writ should be granted although the petitioner had done no more than apply once for coram nobis in Indiana. In a split decision the court reversed its previous stand requiring exhaustion of the state habeas corpus procedure which the state court had repeatedly held available only to question jurisdiction of the court over the person and the subject matter. The court also held that appeal from a denial of hearing on coram nobis need not be taken since state practice did not allow the indigent prisoner to proceed *in forma pauperis*.[39] In *Rooney v. Ragen*,[40] the same court disregarded the case of *Woods v. Nierstheimer*[41] which required a petitioner to exhaust a state remedy already barred by the statute of limitations. Rooney was therefore given a hearing after his exhaustion of the state habeas corpus procedure. It must be recognized, however, that the abuse of habeas corpus by petitioners with unfounded claims will induce federal judges to use the available precedents as a bar to the worthy as well as the unworthy petitioner. At the present time, the value of the writ of habeas corpus to the state prisoner seems to depend largely on whether the federal judge will consider "availability" and "adequacy" in the sense of practical efficacy of the remedy in obtaining a hearing, or as a convenient means to avoid unwelcome duties.

3. *Reform by federal legislation.* The doctrine of exhaustion of state remedies becomes especially significant with the recent enactment by Congress of the revision of the Judicial Code,[42] embodying a codification of the rule of *Ex Parte Hawk*.[43] A proposed modification of this revision would allow the application for a writ of habeas corpus in federal courts if there is no plain, speedy, and efficient remedy available in the state courts as comprehensive and effective as the writ of

be more inclined to assume the burden of hearing all the habeas corpus proceedings brought in Illinois. Under the present limitations on federal jurisdiction, 293 petitions for writs of habeas corpus were filed in the federal courts of the seventh circuit (Illinois, Indiana, and Wisconsin) for the fiscal year ending June 30, 1947. Annual Report of the Director of the Administrative Office of the United States Courts, table C 3, 113 (1948). In the 1946 term of the United States Supreme Court, 322 petitions for certiorari or appeal were filed *in forma pauperis* by Illinois prisoners. Marino v. Ragen, id. at 563.

[38] (C.C.A. 7th, 1944) 146 F. (2d) 244.

[39] Id. at 246.

[40] (C.C.A. 7th, 1946) 158 F. (2d) 346.

[41] 328 U.S. 211, 66 S.Ct. 996 (1946).

[42] Public Law 773, 80th Cong., 2d sess. (1948). See § 2254. Judge Parker of the United States Circuit Court for the Fourth Circuit comments favorably on the revison in "Limiting the Abuse of Habeas Corpus," 8 FED. RULES DEC. 171 (1948).

[43] 321 U.S. 114, 64 S.Ct. 448 (1944).

habeas corpus in the federal court.[44] This would solve the problem of the petitioner in a state with unsatisfactory remedies, but the suggested legislation would also impose a tremendous burden on the federal district courts in such a state.

The recommendations of the Judicial Conference of Senior Circuit Judges are clearly opposed to any extension of jurisdiction in habeas corpus proceedings.[45] They would require exhaustion of all available remedies, unless exceptional circumstances render the procedures ineffective. Such an amendment would amount to little more than a clarification of the language of *Ex parte Hawk*. It clearly would not extend the federal remedy to any petitioner who has not exhausted all his remedies as required by the present practice. A clear departure from a doctrine of exhaustion of state remedies would not only appear shocking to those accustomed to traditional thinking concerning the relation between federal and state courts, but would create serious burdens on the federal courts.[46] However, some change would clearly be desirable to eliminate the necessity of exhausting purely fictional remedies.

D. *Conclusion*

Any review of post-conviction remedies compels a realization of the serious difficulties facing a prisoner who has been convicted in unconstitutional proceedings. Although solution on the state level is the most satisfactory answer, the federal courts should not be prevented by

[44] The suggested amendment is similar to the Johnson Act dealing with the jurisdiction of the federal courts to enjoin state rate schedules. 28 U.S.C. (1946) § 41 (1). See Driscoll v. Edison Light and Power Co., 307 U.S. 104, 59 S.Ct. 831 (1939).

The suggested modification is supported by Frank, "The United States Supreme Court, 1946-47," 15 UNIV. CHI. L. REV. 1 at 28 (1947); and Fraenkel, "The Function of the Lower Federal Courts as Protectors of Civil Liberties," 13 LAW AND CONTEM. PROB. 132 at 136 (1948).

[45] See Report of the Judicial Conference, 92 L. Ed. 125 at 134 (1947).

[46] What is probably the attitude of many federal judges is expressed by Judge Goodman in "The Use and Abuse of the Writ of Habeas Corpus," 7 F.R.D. 313 (1948) ". . . the great writ [of habeas corpus] has been one of the staunch safeguards of liberty. The last few years have seen the right to its use become a penitentiary racket!" Id. at 316.

But compare the language of Circuit Judge Evans: "Enforcement or protection of the rights of an individual is surely not adequate if it turns on the amount or increase of the judicial labors in the federal courts. . . . Legislation may be required to relieve the burden of the courts, and yet insure protection to the various prisoners who present grievances . . . through the establishment of a separate quasi-judicial body or a separate court." Potter v. Dowd, (C.C.A. 7th, 1944) 146 F. (2d) 244 at 249. The traditional arguments against assumption of jurisdiction by the federal courts are raised by Major, J., in his dissenting opinion in the same case. Id. at 250.

For a very recent Supreme Court decision dealing with the matter of repeated applications for the writ, see Price v. Johnston, 334 U.S. 266, (1948).

equivocal state procedures from vindicating the rights guaranteed by the Constitution of the United States. A realistic solution would seem to be a careful assessment by federal district judges of the adequacy in fact of state remedies, with a view to the actual possibility of securing a hearing on the merits and with less concern for the judicial labors of the federal courts. A revision of the Judicial Code that would make this duty clear would be welcome.

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