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POST CONVICTION REMEDIES†

by

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I want to preface my remarks about the subject assigned to me with some observations about the state of the criminal justice. Generally speaking, lawyers find little interest in its practice, probably because most of the available clientele are not flush with funds. A lawyer must make his board and room and something else. This has taken away the field as an area of pursuit, except on the side of prosecution, where the state and federal governments pay the way, for the protection of society.

If the Supreme Court of the United States continues to swing the pendulum toward a dangerous position in favor of the criminal, we may find the rights of law abiding people in jeopardy. Perhaps, and I think the trend is this way, the public in self-defense must provide full time representation for the criminals if for no other purpose than to insure that the person charged with crime receives every possible tender and considerate treatment on his route to conviction. If he is convicted in this way, we may avoid bad cases that make bad law and a conviction can be made to stick. Even so, experienced criminals will be able to abuse rights designed to assure a fair trial.

I look forward to the day when there can be a successful pre-trial conference in a criminal case. At the moment, if one were to be held, the prosecutor would outline his case, list his witnesses and the testimony expected, be compelled to produce his exhibits, set out the issues and his theory of hoped for prosecutive success. The defendant sits there, taking this all in and when his turn comes, says, "Thanks, I have nothing to add," and elects to remain silent.

Under our present procedures, a criminal is entitled to three trials of varying sorts:

- (1) Trial before court and jury for his offense, with appeal.
- (2) A trial in a separate proceeding to ascertain whether his constitutional rights, state or federal, have been violated, in a post conviction proceeding.
- (3) A trial in federal court to determine whether his rights under the Constitution of the United States have been violated.

This is to say nothing of assorted motions, habeas corpus and coram nobis.

It would probably be well in starting off to define what we are talking about, when "Post Conviction Remedies" are discussed. There are several remedies after conviction: the primary one, of course, being an appeal to the

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supreme court from a conviction of crime. That can be followed by a petition for rehearing before the supreme court.

Then there is the "great" writ, habeas corpus, which, under the jurisdiction of the supreme and district courts of the State of Wyoming granted by the state constitution, either court may issue. At the trial level there is, of course, the discretionary motion for arrest of judgment which places the defendant in the same position with respect to the prosecution as before the indictment was found. There is the motion for a new trial and the taking of exceptions by a defendant against whom a verdict has been returned.

An administrative post conviction relief can sometimes, though rarely, be found in executive clemency by way of a pardon.

The post conviction relief to which I shall primarily address myself is the latest and the newest allowed by the Legislature of the State of Wyoming.

WYOMING'S POST CONVICTION ACT

Wyoming's post conviction relief law,¹ hereafter called the Post Conviction Act, is not the uniform act, though in comparing the two, there is a notable likeness in the language of various sections. The Uniform Act was designed to bring together and consolidate into one simple statute all of the remedies, beyond those that are incident to the usual procedures of trial and review which are at present available for challenging the validity of a sentence of imprisonment.²

In the Uniform Act, relief was allowed which would be the same as any permitted collateral attack under a writ of habeas corpus or any other writ. The Uniform Law is drafted so as to protect the right of habeas corpus guaranteed by the Constitution of the United States but at the same time to consolidate it with all other available remedies into one remedy.³

Wyoming, by its post conviction relief law, does not eliminate the present existing procedure for habeas corpus but, in fact, states that "this act is cumulative and shall not repeal any existing laws."⁴

There are probably two reasons why we have this post conviction relief law.

First, application for a writ of habeas corpus must be made to the court or judge most convenient in point of distance to the applicant and the more remote court or judge can refuse unless a sufficient reason is stated as to why the application is not made to the more convenient court.⁵ Of course the bulk of habeas corpus proceedings originated from prisoners incarcerated in the Wyoming State Penitentiary. This meant that the most convenient court was the District Court for Carbon County, Wyoming. It caught them all.

Under the Post Conviction Act, the proceeding must be filed in the court

1. WYO. STAT. §§7-408.1 to -408.8 (Supp. 1963).

2. UNIFORM POST CONVICTION PROCEDURE ACT (1955, as amended 1964).

3. *Ibid.*

4. WYO. STAT. §7-408.8 (Supp. 1963).

5. WYO. STAT. §1-813 (1957).

where the prisoner was convicted.⁶ It is commenced by filing a petition, verified by affidavit, with the clerk of the court in which the conviction took place.⁷

The Wyoming Act is restricted to persons imprisoned in the penitentiary. I have wondered about this and wondered whether the relief is available to those young people incarcerated in the Industrial School at Worland and the Girls' School at Sheridan. This is a question—not an answer.

The second reason for the enactment appears to be that it is an effort to bring home to the Wyoming courts a means of relief so that Wyoming prisoners will not be incessantly trotting to the United States District Court for the District of Wyoming for relief from a state conviction. You may or may not know that the judiciary of the various states as well as members of the bar have been somewhat tender-skinned about relief which has been granted by federal courts from state convictions.

Perhaps there is another third reason. With the federal courts making revolutionary changes in what are considered constitutional rights of persons tried for crime, the Act provides a means to raise the question of these new rights when they have come into being after conviction and expiration of appeal rights or, when the question is not one that can be raised in habeas corpus.

Briefly the Wyoming remedy is available to those persons convicted and imprisoned in the penitentiary who *assert* that rights guaranteed to them by the Constitution of the United States or the State of Wyoming, or both, have been denied or violated in the proceedings in which they were convicted.⁸

The proceeding must be commenced within five years after the conviction unless facts are shown as to why the delay was not due to the prisoner's own neglect.⁹ A copy of the petition is served on the Attorney General of the state and he is the one charged with defending the proceeding.¹⁰

The petition which is filed identifies the proceedings in which the petitioner was convicted, gives the date of final judgment and must clearly set forth in which respects the petitioner's constitutional rights were allegedly violated.¹¹ It is required that necessary affidavits, records, or other evidence be attached to support the allegations.¹² If not attached, reasons must be stated as to why they are not attached.¹³ Any previous proceedings for securing relief from his conviction must also be stated by the petitioner.¹⁴

A rather interesting restriction is placed upon the petitioner in that he must omit from the petition, argument, citations and discussions of authori-

6. WYO. STAT. §7-408.1 (Supp. 1963).

7. *Ibid.*

8. *Ibid.*

9. *Ibid.*

10. *Ibid.*

11. WYO. STAT. §7-408.2 (Supp. 1963).

12. *Ibid.*

13. *Ibid.*

14. *Ibid.*

ties.¹⁵ I am sure, however, that if citations of cases and a discussion of authorities, if pertinent to the reasons for the relief sought, were included, the petition could hardly be objectionable. Sometimes these are of value to the court and to counsel on the other side. Of course, if you have ever had occasion to read some of the petitions prepared by prisoners, themselves, you find them fluently citing cases which have nothing to do with the proceeding and which are ordinarily wrong. In addition, some of these prisoners will take several pages to discuss at length why they have been unjustly, if not illegally, imprisoned. This is probably what the particular provision was attempting to restrict.

Provision is made in the Post Conviction Act for a petitioner to have appointed counsel, when he is an indigent person. Upon a proper affidavit, the court appoints counsel and counsel is paid from the state treasury. In passing, I would like to mention that this Act was passed in 1961 but the 1961 Legislature and the 1963 Legislature failed to make any appropriation to pay these fees. After hearing these complaints, I got busy and drafted an appropriation bill to take care of the current biennium that will end on July 1. At least one appointed attorney has been paid from that account. There was a further appropriation of \$3,000.00 made for the biennium, July 1, 1965 to June 30, 1967. Courts have been authorizing the payment of \$100.00 on an average in these cases. Courts found funds in various places to pay appointed counsel, even in the absence of a special state appropriation. That will no longer be necessary.

Having in mind that many of the petitions filed with the court would probably not be in proper form, special provision is made for their amendment.¹⁶ This is a problem which has haunted the Attorney General's office. We have received long letters from prisoners telling us that their constitutional rights have been violated. We write back advising the availability of the Post Conviction Act and even send copies of it to the prisoners, pointing out that after they were in court with a petition, the court would appoint counsel. One prisoner had so many friends on the outside who were contacting the Governor and members of the supreme court, that under some persuasion, I finally ended up drawing a petition for him and asked the president of the bar to arrange presenting of the petition for signature of the prisoner. It was done, the man is in court, and has an appointed counsel. This is a bad situation because the Attorney General must be on the other side of the case. We are most hopeful that the Wyoming Defender Aid Program will put this problem on a more orderly basis. I believe Professor John O. Rames of the University of Wyoming College of Law has likewise prepared such a petition for presentation to a prisoner, through the state bar.

Whatever action the district court takes on one of these petitions is reviewable by the supreme court.¹⁷ It must be kept in mind that this is a civil

15. *Ibid.*

16. WYO. STAT. §7-408.5 (Supp. 1963).

17. WYO. STAT. §7-408.7 (Supp. 1963).

proceeding and the state, as well as the prisoner, can appeal.¹⁸ This is like habeas corpus which is also a civil action.

FEDERAL POST CONVICTION RELIEF LAW

The federal post conviction relief remedy¹⁹ also provides that a prisoner in custody can, and must, go back to the court which sentenced him and claim the right to be released upon the grounds that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction, or that the sentence was in excess of the maximum authorized by law or otherwise subject to collateral attack, and can move that his sentence be set aside or corrected. Such a motion can be made at any time after conviction. (In Wyoming's similar proceeding, it must be taken within five years unless there is a showing of no neglect.) Unless the motion and the files in the records of the case show conclusively that the prisoner is entitled to no relief, the United States Attorney must be notified and a hearing held.²⁰ Within the discretion of the court, production of the prisoner for the hearing can be ordered.²¹ The sentencing court is not required to entertain a second or successive motion for similar relief on behalf of the same prisoner.²² Any order of the court is appealable to the United States Court of Appeals.²³

The statute requires a prisoner to proceed under this statute, rather than under habeas corpus.²⁴ Relief by habeas corpus cannot be sought from a *federal* conviction unless the prisoner shows that he has proceeded under section 2255 or to the court which sentenced him, or unless it appears that the motion is inadequate or ineffective to test the legality of his detention.

One of the basic reasons for the passage of this particular law was the fact that the United States District Courts located in the same districts as the federal penitentiaries were overburdened with applications for habeas corpus. This procedure spread the burden around more equitably.

An examination of the annotations in the United States Code Annotated will disclose that relief is sought under this provision by hundreds. Occasionally relief is granted, but the percentage is mighty small. Of course, prisoners may proceed *in forma pauperis*, so since it is free, most prisoners want to take a crack at it; they cannot lose anything and all are looking for a sympathetic word from the Supreme Court of the United States.

One of the most troublesome areas of post conviction relief is that found in title 28, section 2254, of the United States Code. This is the provision that permits an application for a writ of habeas corpus to be filed with the United States District Court for relief from the judgment of conviction of a

18. *Ibid.*

19. 28 U.S.C. §2255 (1948).

20. *Ibid.*

21. *Ibid.*

22. *Ibid.*

23. *Ibid.*

24. *Ibid.*

state court. An application for such a writ will not be granted "unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

This section has come into the limelight quite considerably within the last couple of years.

The United States Supreme Court, in *Fay v. Noia*,²⁵ held that a state prisoner who does not appeal his judgment of conviction can nevertheless avail himself of federal habeas corpus to test whether his federal rights under the Constitution, laws or treaties of the United States were violated.²⁶ In reaching this conclusion, the court examined three doctrines, any one of which proposed a potential bar to federal habeas corpus. No one of the three doctrines: Waiver, exhaustion of state remedies, or independent, adequate state ground, withstood Noia's prayer for freedom.²⁷

In 1942, Noia and two companions, Caminito and Bonino, were tried in New York in a state court for the murder of a gentleman by the name of Hammeroff. The only evidence presented by the state was the confession of each defendant. The defense charged that the confessions had been coerced. All three men got life sentences. His co-defendants took state appeals, which were unsuccessful. Noia did not appeal. Both of Noia's companions sought release in the federal courts and were released on the ground that their confessions had been coerced.

As you can see, since Noia had not sought relief by appeal and had not exhausted his state remedies, he was foreclosed from proceeding in federal habeas corpus. As you can imagine, he was a bit dissatisfied; therefore he sought relief in state court by a motion in the nature of *coram nobis* to vacate his judgment on the ground that his confession was involuntary. The state relied upon his failure to appeal as a bar to relief. The state court was sympathetic and set aside the judgment and ordered a new trial. This decision, however, was reversed on appeal. Noia, now having a state proceeding which he had exhausted, turned to the federal habeas corpus.

The United States District Court denied relief on the ground that he had failed to raise his federal question in state appellate court, and there were no exceptional circumstances. The Court of Appeals reversed, stating that he had exhausted his state remedies. The Supreme Court of the United States agreed with the decision of the United States Court of Appeals.

25. 372 U.S. 391 (1963).

26. *Id.* at 435.

27. *Fay*, *supra* note 25.

The *Noia* case made it clear that the exhaustion of remedies need not be those remedies in existence at the time of the conviction but if any new remedy is made available, it is available to the prisoner.

There have been filed in the United States District Court, District of Wyoming, a half dozen or so petitions for writs of habeas corpus by prisoners in the Wyoming State Penitentiary in the last few months. All of these have been disposed of by the United States District Court Judge on the ground that these prisoners of Wyoming have failed to exhaust there state remedies, in not seeking relief under Wyoming's post conviction law. The court has felt itself free to do this because of the decision in *Henry v. State of Mississippi*,²⁸ wherein the court said the following: "The Court is not blind to the fact that the federal habeas corpus jurisdiction has been a source of irritation between the federal and state judiciaries. It has been suggested that this friction might be ameliorated if the States would look upon our decisions in *Fay v. Noia, supra*, and *Townsend v. Sain, supra*, as affording them an opportunity to provide state procedures direct or collateral, for a full airing of federal claims."²⁹ This case was decided January 18, 1965.

In the United States Court of Appeals for the Tenth Circuit in *Henry v. Tinsley*,³⁰ decided on April 12, 1965, involving a prisoner who sought a federal writ of habeas corpus, the court said that he had failed to seek an appeal in the state supreme court from an adverse ruling under a post conviction relief rule of the Colorado Rules of Criminal Procedure, which relief is substantially similar to that provided by 28 U.S.C. Section 2255.³¹ So we can see that within this circuit, the exhaustion of the state remedy is required and we have one.

There has been some turmoil among the Committees on Habeas Corpus of the Conference of Chief Justices, National Association of Attorneys General and the National Association of District Attorneys over a bill called H.R. 1835 introduced in the last session of Congress by the Judicial Conference of the United States. The bill passed one house, but not the other.

Very briefly, it would amend title 28, section 2254, United States Code, covering habeas corpus from state court convictions, providing for a preliminary screening by individual federal, district and circuit court judges and for those, having a basic justifying consideration, being referred for review by a three judge United States District Court. Seven tests are provided outlining the circumstances under which such a federal court would grant an evidentiary hearing. The tests would do no more than codify case law. Present section 2254 is nothing more than a codification of *ex parte Royall*.³²

28. 85 Sup.Ct. 564 (1965).

29. *Id.* at 570.

30. 344 F.2d 109 (1965).

31. *Id.* at 110.

32. 117 U.S. 241 (1886).

These tests are taken substantially from *Townsend v. Sain*,³³ and other federal cases. I do not want to take time to cover them all, but some are as follows:

1. The merits of a factual dispute were not resolved in the state hearing.
2. The state factual determination was 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. The material facts were not adequately developed at the state court hearing.
5. Applicant not represented by counsel.

I think that all these tests and the others are the law, anyway. There is a certain desirability in cataloging conditions for relief. There is a convenience to counsel.

The three-judge court throws the magnitude of the problem way out of proportion. This is not necessary. Three-judge courts are clumsy and inconvenient to gather together.

The bill has a long row to hoe. The state chief justices are against it, because they think only the Supreme Court of the United States ought to review state supreme court decisions. Furthermore, they want it made clear that state court decisions carry a "presumption of legality, regularity and correctness."

The National Association of Attorneys General is against it because it tends to remove finality from state decisions even more so than now. Nor does the Association favor a three-judge court.

I think the Wyoming Post Conviction Act will keep us out of federal courts, if it is used properly, *i.e.*, a full hearing and a record kept.

You have just received a whirlwind course in post conviction procedures.

33. 372 U.S. 293 (1963).