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DOCUMENTARY SUPPLEMENT

State Post-Conviction Remedies and Federal Habeas Corpus

A Study for The Federal Judicial Center

THE MARSHALL-WYTHE SCHOOL OF LAW

Williamsburg, Virginia

DOCUMENTARY SUPPLEMENT

During the 1969-70 academic year, Dr. William F. Swindler with the assistance of the editorial staff of the *William and Mary Law Review* prepared an extended research project with the cooperation and assistance of The Federal Judicial Center. The purpose of this study was to survey the present state of post-conviction procedures in each of the fifty states in view of federal and state developments of the past decade. The progress of the research was submitted to members of the State-Federal Regulations Advisory Committee of the Judicial Center (Tentative Drafts No. 1, November 1969; No. 2, May 1970) for review and revision. The present publication reflects the comments received from authorities in constitutional and criminal law.

The Documentary Supplement of the *William and Mary Law Review* is designed for special projects which do not fit the conventional format of scholarly articles or staff commentary. Previous numbers in this series include *The Virginia Constitution* (10 WM. & MARY L. REV. 511) and *The Business of the 1970 General Assembly* (11 WM. & MARY L. REV. 1031).

William and Mary Law Review

DOCUMENTARY SUPPLEMENT

STATE POST-CONVICTION REMEDIES AND FEDERAL HABEAS CORPUS

INTRODUCTION

This study was undertaken for The Federal Judicial Center and its State-Federal Relations Advisory Committee. The objective was to summarize the present posture of state post-conviction processes with reference to the substantial body of adjudication in the federal courts, the Congressional enactments in Title 28 of the United States Code, and the statutory revisions undertaken by certain state legislatures. Practices in certain states with reference to post-conviction remedies which consistently meet the criteria of this summary are identified in order that the federal courts, to whom state prisoners now direct a large volume of habeas corpus petitions, may readily determine if constitutional rights have been adequately protected in the state forum.

I. CHRONOLOGY OF THE PROBLEM

The adequacy, or perhaps inadequacy, of post-conviction procedures in the state courts, as pointed up by the steady increase in habeas corpus petitions in the United States district courts by prisoners in state custody, has created a dual problem. On the one hand, the continued growth of habeas corpus petitions seeking review of state cases allegedly denying defendants' constitutional rights has placed additional burdens on already over-extended federal dockets. On the other hand, the regularity with which convicted persons challenge the constitutional safeguards in the state procedural systems has substantially complicated the administration of criminal justice at the state level.

Consideration is also given the stresses created within the ancient writ of habeas corpus itself, which historically was issued after the primary inquiry into the jurisdiction of the committing court. This ac-

cent has given way to a more recent position which emphasizes the need for an inquiry into the intrinsic fairness of the proceedings under which the prisoner has been convicted. Since the adoption of the Judicial Code of 1948,¹ the federal courts have become increasingly more receptive to petitions based upon allegations of infringement of constitutional rights. The matter of jurisdiction has been all but obscured as the writ has been broadened to cover more varied causes.² Finally, there is in the post-conviction question the serious practical matter of accommodating the situation of a federal judge acting alone ordering the release of one who has had his conviction affirmed by the state court of last resort, and review of this affirmance denied by the United States Supreme Court.³

The present state of the problem has obviously resulted from the tenor of constitutional decisions in recent years and the emphasis on the safeguarding of individual rights. The legality of incarceration which is thus sought to be tested by petition for habeas corpus in the federal courts has regularly been phrased in terms of deprivation of constitutional rights rather than of guilt or innocence of the prisoner. Because the preservation of these rights continues to be the chief concern of the federal judiciary, a broad definition of habeas corpus jurisdiction is a logical counterpart. For the states to diminish the steady flow of appeals to the federal courts, it is essential that they develop post-conviction procedures which will meet the constitutional tests insisted upon.⁴

1. Act of June 25, 1948, ch. 646, § 1, 62 Stat. 869. Cf. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1948); Becker, *Collateral Post-Conviction Review of State and Federal Criminal Judgments on Habeas Corpus and Section 2255 Motions—View of a District Judge*, 33 F.R.D. 452 (1963).

2. Cases reflecting the broadening of the applicability of the writ before and after the adoption of the 1948 Judicial Code: *Irwin v. Dowd*, 366 U.S. 717 (1961) (jury prejudice); *Brown v. Allen*, 344 U.S. 443 (1953) (coerced confessions—discrimination in jury selection); *Wade v. Mayo*, 334 U.S. 672 (1948) (denial of counsel); *Mooney v. Holohan*, 294 U.S. 103 (1935) (introduction of known perjured testimony by the prosecution); *Moore v. Dempsey*, 261 U.S. 86 (1923) (mob domination of the trial).

3. Cf. C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 183 (1963); Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 KAN. L. REV. No. 3 (1970); Lay, *Post-Conviction Renditions and an Overburdened Judiciary: Solutions Ahead*, 3 CREIGHTON L. REV. 5 (1969).

4. In addition to broadening the definition of the common law writ of habeas corpus, some state courts have, in the alternative, allowed the revitalization of the writ of error coram nobis in criminal cases. Generally, coram nobis is brought for an alleged error of fact dehors the record in the same court rendering judgment of conviction. The errors of fact must be of such fundamental character as to render the proceeding in-

Since 1833 the federal habeas corpus act has applied to all prisoners convicted of violations of federal law,⁵ and since 1867 the federal writ has been available to state prisoners who could validly raise a constitutional question under the Fourteenth Amendment.⁶ The federal courts long refrained, however, from encouraging reliance upon the statute out of a desire to avoid encroachment upon state courts' jurisdiction. Because of this viewpoint they relied upon an 1886 decision holding that state petitioners should first show that they had exhausted all state remedies available to them.⁷

In 1923, however, the Court accepted an argument first advanced by Justice Holmes dissenting in a 1915 case,⁸ that since an elemental ingredient of due process was the right to a fair trial, habeas corpus

valid, or of such a nature as to prevent rendition of the judgment had they been known. For illustrative materials regarding both the traditional and the more recent expansion of the use of *coram nobis*, including alleged deprivation of constitutional rights see the following: Fairfield, *Post-Conviction Rights and Remedies in Wisconsin*, 1965 WIS. L. REV. 52; Harvey, 28 U.S.C. 2255: *From Habeas Corpus to Coram Nobis*, 1 WASHBURN L. J. 381 (1961); Note, *Coram Nobis*, 4 IDAHO L. REV. 89 (1967); Note, *The Expanding Scope of Coram Nobis*, 13 SYRACUSE L. REV. 116 (1967); Comment, *Post-Conviction Remedies—The Need for Legislative Change*, 55 GEO. L.J. 851 (1967); Note, *State Post-Conviction Remedies and Federal Habeas Corpus*, 40 N.Y.U.L. REV. 154 (1965); 38 N.D. L. REV. 522 (1962). See the following for individual state discussions: Cal., Note, *Review of Criminal Convictions by Habeas Corpus in California*, 15 HASTINGS L.J. 189 (1963); Colo., Comment, *Federal Habeas Corpus Confronts the Colorado Courts: Catalyst or Catalystism?*, 39 U. COLO. L. REV. 83 (1966); Ga., Brown, *Federalism and Federal Habeas Corpus—What Impact on Georgia Criminal Law and Procedure?*, 16 MERCER L. REV. 281 (1964); Idaho, Note, *Habeas Corpus in Idaho*, 4 IDAHO L. REV. 45 (1967); Ind., Note, *Habeas Corpus and Coram Nobis in Indiana*, 26 IND. L.J. 529 (1951); Iowa, Note, *The Need for an Iowa Post-Conviction Hearing Statute*, 18 DRAKE L. REV. 98 (1968); Kan., Note, *Post-Conviction Motions Under the Kansas Revised Code of Civil Procedure*, 12 KAN. L. REV. 493 (1964); Md., Markell, *Review of Criminal Cases in Maryland by Habeas Corpus and by Appeal*, 101 U. PA. L. REV. 1154 (1953); N.Y., Cohen, *Post-Conviction Relief in the New York Court of Appeals: New Wine and Broken Bottles*, 35 BROOKLYN L. REV. 1 (1968); Pa., Note, *Habeas Corpus and the 1966 Post-Conviction Hearing Act: Major Pennsylvania Remedies in Criminal Cases*, 39 TEMPLE L.Q. 188 (1966); Note, *Habeas Corpus in Pennsylvania After Conviction*, 20 U. PITT. L. REV. 652 (1959); W. Va., Note, *Habeas Corpus in West Virginia*, 69 W. VA. L. REV. 293 (1967).

5. Act of March 2, 1833, ch. 57, 4 Stat. 632.

6. Act of February 5, 1867, ch. 28, 14 Stat. 385.

7. *Ex parte Royal*, 117 U.S. 241 (1886). This case implied that the state petitioner for a federal writ of habeas corpus should exhaust state remedies by holding that (a) a United States Circuit Court had the power to remove the petitioner from state jurisdiction before trial, and (b) the Circuit Court retained a discretion to put the accused to his appeal by writ of error from the highest state court or to proceed under habeas corpus to examine alleged violations of constitutional rights.

8. *Frank v. Mangum*, 237 U.S. 309 (1915).

could issue to test an allegation of denial of that right.⁹ Fifteen years later, the Court warned the states that they were chargeable with affording prisoners a reasonable means of raising their claims of denial of federal rights and that, therefore, there should be a post-conviction remedy which would accommodate the general due process principles of the Fourteenth Amendment.¹⁰ Where this involved a habeas corpus proceeding which required some consideration of the jurisdiction of the original court, it soon became manifest that an inordinate amount of legal fiction would be involved. In 1942 the Court candidly stated that habeas corpus "extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights."¹¹ The Court was merely underlining the basic two part problem which was emerging: The need for a reviewing procedure better adapted to the protection of rights than habeas corpus, and the need for such procedure to be developed and administered within the state courts not the federal court system. Seeking to encourage the states to assume this responsibility, the Court in 1944 undertook to limit its 1942 decision in *Waley v. Johnston* by declaring, in *Ex Parte Hawke*,¹² that the petitioner had to exhaust his post-conviction remedies under state law before habeas corpus relief could be obtained in the federal courts. The opinion recognized, however, that this did little to resolve the basic problem; for once it could be shown, as it could more often than not,

9. *Moore v. Dempsey*, 261 U.S. 86 (1923).

10. *Mooney v. Holohan*, 294 U.S. 103 (1938).

11. *Waley v. Johnston*, 316 U.S. 101, 105 (1942).

12. 321 U.S. 114 (1944). This decision resulted in the following rules governing habeas corpus petitions to federal courts: (a) such petitions would be entertained by a federal court (for one convicted and detained by the state) only where *all* state remedies, including *all* state appellate remedies and appeal or certiorari to the United States Supreme Court, had been exhausted; (b) the principle cited previously that the interference by the federal judiciary with state decisions will only take place in "rare cases" where exceptional circumstances of "peculiar urgency" are shown to exist is applicable where the petitioner had not exhausted state remedies but is inapplicable where petitioner had exhausted state remedies and makes a substantial showing of a denial of federal rights; (c) where state courts have considered and adjudicated the merits of the petition and the United States Supreme Court has reviewed or declined to review the state court decision, the federal courts will not ordinarily reexamine on writ of habeas corpus; (d) federal courts should entertain a petition for habeas corpus where resort to state remedies failed to afford a full and fair adjudication of the federal contentions therein raised either because no remedy is available or the remedy provided proves in practice to be unavailable or seriously inadequate.

that state post-conviction remedies were lacking or inadequate, the petitioner would still pursue a course into the federal courts.

It was against this background, that Congress drafted the Judicial Code of 1948, which undertook to codify the judicial preference for a reliance upon state remedies. Congress contemplated no material change in existing practice but sought in its codification to emphasize the discretion of the circuit or district judge to deny "nuisance" applications which, because of their repetitious and unfounded nature, imposed an unnecessary burden on the courts.¹³ In what is now 28 U.S.C. § 2244, the statute directed that federal courts need not entertain a habeas petition if the legality of the state detention had been determined in any prior federal adjudication.¹⁴ However, accepting the realities of contemporary criminal procedure in most states, section 2254 was added in the same act, providing:

An application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall 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.¹⁵

By this enactment, Congress sought to alert the states to the specific criteria by which removals by habeas corpus to the federal courts could

13. See legislative history following 28 U.S.C. § 2244 (1964); *Dorsey v. Gill*, 148 F.2d 857, 862 (1945).

14. No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

28 U.S.C. § 2244.

15. 28 U.S.C. § 2254 (1964) (emphasis added). The legislative history of this section indicates a desire to retain the existing practice affirmed by the United States Supreme Court in *Ex parte Hawk*, 321 U.S. 114 (1944); cf. H.R. REP. NO. 308, 80th Cong., 1st Sess. (1947).

be minimized. As if further to illustrate the method of drafting suitable statutory procedure, 28 U.S.C. § 2255 set out the federal statutory procedure to be followed with respect to persons in federal custody:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

*An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.*¹⁶

16. 28 U.S.C. § 2255 (1964) (emphasis added).

Thus section 2255 accomplished for federal criminal procedure what section 2254 could only urge upon the states in terms of state criminal procedure. It provided a modern statutory means to serve the purposes embodied in the ancient common law writ of error coram nobis, and in the same process made largely unnecessary a resort to habeas corpus by federal prisoners.¹⁷ It is clear that more than two decades ago Congress, in the first two paragraphs of section 2255, gave the states explicit guidelines for keeping their prisoners within the jurisdiction of their own courts. But the fundamental flaw in the Congressional effort was still the lethargy in state statutory revision. The Court recognized as much in the 1949 case of *Young v. Ragen*,¹⁸ where it warned that, although federal courts should deny habeas corpus relief until all state remedies had been exhausted, such a rule presupposed that adequate remedies exist in fact within the state criminal process.

Continuing to give the states every opportunity to put their houses in order, in 1950 the Court in *Darr v. Burford*¹⁹ struggled to postpone the stage of federal entry by declaring that part of the exhaustion process was a petition to the Supreme Court for certiorari in cases of state denials of relief. Three years later this rule was repeated in *Brown v. Allen*²⁰ which declared that a denial of certiorari by the United States

17. See legislative history following 28 U.S.C. § 2255 (1964); cf. H.R. REP. No. 308, *supra* note 15.

18. 337 U.S. 235 (1949).

Of course we do not review state decisions which rest upon adequate non-federal grounds, and of course Illinois may choose the procedure it deems appropriate for the vindication of federal rights But it is not simply a question of state procedure when a state court of last resort closes the door to any consideration of a claim of denial of a federal right.

Id. at 238.

19. 339 U.S. 200, 216 (1950). "Though our denial of certiorari carry no weight in a subsequent federal habeas corpus proceeding, we think a petition for certiorari should nevertheless be made before an application may be filled in another federal court by a state prisoner." The Court in this case was most concerned with the comity doctrine and, as the dissent pointed out, unnecessarily burdened itself because of the absence of a res judicata effect on habeas corpus. For an article agreeing with the dissent see Comment, *Habeas Corpus—Exhaustion of State Remedies—Denial of Certiorari by Supreme Court as Condition to Obtaining Original Writ in Federal District Court*, 49 MICH. L. REV. 611 (1951); see also 3 ALA. L. REV. 212 (1950); 50 COLUM. L. REV. 856 (1950).

20. 344 U.S. 443, 489-497 (1953). The reliance that a district court should place on the review or denial of certiorari by the Supreme Court was ultimately spelled out in the 1966 amendment. 28 U.S.C. § 2244(c) (1966). For discussion of the case see Howe, *The Supreme Court, 1952 Term*, 67 HARV. L. REV. 91, 156-60 (1953) (generally agreeing with the decision); 21 GEO. WASH. L. REV. 810 (1953) (supporting the interest of the

Supreme Court to review a decision of a state supreme court which had affirmed a conviction in a criminal prosecution should be given no weight by a federal court in passing upon the petitioner's application for a writ of habeas corpus. This position was reached by recognizing that in many cases where certiorari had been denied no hearing on the merits of the issues raised in the petition had taken place. The ultimate result of these holdings was simply to render artificial and superfluous the resort to the Supreme Court as part of the exhaustion process.²¹

By 1953, the states were slowly beginning to attempt responses to the proddings of both Congress and the federal judiciary. In that year a special committee on habeas corpus of the Conference of State Chief Justices conceded that many of the complexities created by the growing reliance on federal habeas corpus could be resolved by state law reform.²² Two years later, the National Conference of Commissioners on Uniform State Laws completed work on a Uniform Post-Conviction Procedure Act, which was intended to simplify and standardize state post-conviction remedies in order to conform with the federal standards. The National Conference was reminded that the "multiplicity of remedies at the state level, coupled with the inconsistencies and indefiniteness of these remedies, have made the prerequisite of exhausting the state remedies costly, time-consuming, and uncertain. The ideal situation is to have one remedy which supersedes and includes all other common law and statutory remedies."²³ Perhaps the most important feature of this act provided that the order in the state court making final disposition of the petition should clearly state the grounds on which the case was determined and whether a federal or state right was decided.²⁴ Conceivably, had this recordation provision been adopted by all the states, the job of the federal courts in sorting out unmeritorious claims in habeas petitions would have been materially eased.

In the absence of any concerted reform movement in the states (only four states, in fact, adopted the 1955 Uniform Act), the federal courts

petitioner over the interest of comity); 39 VA. L. REV. 381 (1953) (agreeing with the decision but expressing a fear that the district courts will continue to place reliance on the denial of certiorari nonetheless).

21. *Fay v. Noia*, 372 U.S. 391, 435 (1963).

22. Cf. PROCEEDINGS, CONFERENCE OF CHIEF JUSTICES 1-11 (1953).

23. Prefatory Note, 9B UNIFORM LAWS ANNOT. 548 (1966).

24. Cf. UNIFORM POST-CONVICTION PROCEDURE ACT § 7 (1955).

necessarily remained in the picture. The next significant development was the "trilogy" of cases decided by the Supreme Court in 1963: *Fay v. Noia*,²⁵ *Townsend v. Sain*,²⁶ and *Sanders v. United States*.²⁷

In *Fay v. Noia* the Court held that the jurisdiction of the federal courts in regard to habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings. Thus, the Court clarified its previous doctrine of exhausting every state remedy by declaring that section 2254 refers only to a failure to exhaust state remedies still open to the petitioner at the time he files his petition for habeas corpus in the federal court. The opinion also stressed that the district court may deny relief in its discretion to a petitioner who had deliberately avoided the procedure of the state law and had thereby waived his claims under post-conviction review. But where, as was generally the case, the question was not one of avoiding procedure but of seeking to have constitutional rights properly considered on review, the net effect of the holding was to assure that the district court would in fact hear the petitions.²⁸

Of significance in *Townsend v. Sain* was the Court's firm statement of the necessity of a proper record of evidentiary hearings at the state level.²⁹ The district court is obliged to hear the petitions where

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

26. 372 U.S. 293 (1963).

27. 373 U.S. 1 (1963).

28. 372 U.S. at 434 *et seq.* *Fay v. Noia* set out the guiding principle that conventional notions of finality in criminal litigation could not be permitted to defeat the federal policy that federal constitutional rights of personal liberty should not be denied without the fullest opportunity for plenary federal judiciary review. *Id.* at 424. See Gold & Emerling, *Federal Habeas Corpus for the State Prisoner—A New Look*, 25 OHIO S.L.J. 60 (1964) (a discussion in support of the Supreme Court decision but raising doubts as to the degree to which the holding would liberalize the rules of habeas corpus eligibility); Meador, *The Impact of Federal Habeas Corpus on State Trial Procedure*, 52 VA. L. REV. 286 (1966) (which sees *Noia* as carving out a new role as activist for the state trial judge to protect the resulting conviction finality by showing in the record that the petitioner deliberately bypassed state procedure and that no constitutional questions are left unraised at the trial level). The Meador article suggests that the influence the *Noia* and *Townsend* cases have had in bringing on reform in state post-conviction review could significantly improve the quality of criminal justice, although it predicts a federal court retrenchment on the *Noia* tests of forfeiture and deliberate by-pass. Note, *The 1963 Trilogy*, 42 N.C. L. REV. 352 (1964) is an excellent summary of the law presented in *Noia*, *Townsend v. Sain*, 372 U.S. 293 (1963) and *Sanders v. United States*, 373 U.S. 1 (1963). See also comments in 76 HARV. L. REV. 416 (1962); 62 COLUM. L. REV. 1077 (1962); 48 VA. L. REV. (1962).

29. 372 U.S. at 312 *et seq.* This requirement of *Townsend* has been expanded and incorporated into 28 U.S.C. § 2254(d) (1964) by the 1966 amendment to this section. Act

(1) the merits of the factual dispute 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.³⁰

Thus, the Court expanded the scope of relief in federal habeas corpus situations where the demands of due process and the inadequacy of state post-conviction remedies make it necessary.

Although the *Sanders* case was not a proceeding in habeas corpus but a section 2255 motion, it was evident from the opinion and subsequent judicial behavior that it was to be analogized to section 2254 petitions. The case concerned the vexing problem of repetitious motions by federal prisoners for post-conviction relief. The Court took the opportunity afforded by *Sanders* to fix a reasonable limit to habeas corpus petitions and section 2255 motions by declaring that to merit a hearing in the district court, the grounds asserted must be different from those on which prior applications had been denied.³¹

The effect of the "trilogy," nevertheless, was to increase federal habeas corpus business in the face of an already overburdened federal docket. Under the circumstances of the state post-conviction procedures then existing, it was reasonable to anticipate that almost any well-drafted petition alleging one or more of the grounds set out in *Townsend* would succeed in obtaining a hearing.

Seeking to accelerate state reform, and at the same time adapt to the new guidelines of the "trilogy," the National Conference of Commissioners on Uniform State Laws prepared the Revised Uniform Post-

of November 2, 1966, § 2, 80 Stat. 1105. For law review comment on the *Townsend* decision see, Gold & Emerling, *supra* note 28; Meador, *supra* note 28; Note, *The 1963 Trilogy*, 42 N.C. L. REV. 352 (1964); Comment, *Federal Habeas Corpus: Its Increasing Influence on State Criminal Procedure*, 29 ALBANY L. REV. 335 (1965) (suggesting the impact of *Townsend* to be that a state prisoner will get a hearing somewhere unless he has deliberately bypassed state procedure or deliberately waived state remedies, but raising doubts that the Supreme Court has succeeded in clarifying and simplifying the question of federal habeas corpus).

30. 372 U.S. at 312-18.

31. 373 U.S. at 17-20.

Conviction Procedure Act of 1965.³² The basic objectives of this act were similar to those of the 1955 act. The significance of the changes as well as the accommodation of the criteria in the "trilogy," are discernible in Part V, *infra*. The number of state adoptions is small—two, in addition to the four which had adopted and have subsequently amended the 1955 model—but hopefully will increase in the legislative sessions of the early seventies. In any event, this is not to say that only a model law will establish a post-conviction reviewing process which will be acceptable in the district courts. Most post-1963 amendments to existing state laws on the subject presumably were enacted in an effort to come to terms with the "trilogy." In this connection, *see* Table 2 in Part II and the specific developments in Part IV, *infra*.

This condensed chronological description of the emergence of problems of state post-conviction remedies vis-à-vis federal habeas corpus provides a background for analysis of the problems which follow. Part II incorporates statistics illustrating the growth of the problem in federal-state judicial relationships, and tabulates the tentative correlation between federal decisions and state legislative responses. Part III is a recapitulation of the guidelines evolved to date as a result of the "trilogy" and its effect on the 1965 revision of the Post-Conviction Procedure Act. Part IV considers the efforts to modernize the post-conviction process in a dozen selected states.³³ A summary of the situation in the remaining states is provided in the same section.

On the basis of this data, Part V deals with the "scale of adequacy" and its implementation in state-by-state situations.

II. STATISTICS OF THE PROBLEM: FEDERAL HABEAS CORPUS, 1962-1968

These statistics seek to document the answers to two questions arising from the foregoing chronology: (1) Has the checklist of minimal requirements set out in the "trilogy" stimulated greater reliance on federal habeas corpus? (2) Has any revision in post-conviction procedure in any of the states since the 1963 "trilogy" resulted either in a significant drop in federal habeas or a significant increase in terminations before pretrial in the federal courts? The statistics collected for the

32. The full text of the Revised Uniform Post-Conviction Procedure Act of 1965 is reprinted in Part III *infra*.

33. California, Colorado, Illinois, Maine, Massachusetts, Mississippi, Missouri, New York, Oregon, Pennsylvania, Texas and Virginia.

years 1962, 1964, 1966, and 1968 from the Administrative Office of the United States Courts have been grouped by circuits in Table 1.

TABLE 1

STATE HABEAS CORPUS TERMINATIONS BY ACTION TAKEN BY U. S. DISTRICT COURTS

TABLE 1-A

Totals for All Federal District Courts

| Year | Total Petitions | No Court Action | Total Action | Before Pretrial | Pretrials | Total Trials |
|------|--------------------|--------------------|-----------------|--------------------|-----------|-----------------|
| 1962 | 1,126 | 31 | 1,095 | 1,033 | 2 | 60 |
| 1964 | 3,535 | 41 | 3,494 | 3,247 | 17 | 230* |
| 1966 | 4,760 | 74 | 4,686 | 4,207 | 45 | 434* |
| 1968 | 6,046 | 68 | 5,978 | 5,416 | 78 | 484 |

*One tried with jury.

TABLE 1-B

Totals for District of Columbia Circuit

| Date | Total Petitions | No Court Action | Total Action | Before Pretrial | Pretrials | Trials |
|------|--------------------|--------------------|-----------------|--------------------|-----------|--------|
| 1962 | 2 | | 2 | 2 | | |
| 1964 | 1 | 1 | | | | |
| 1966 | 1 | | 1 | 1 | | |
| 1968 | 5 | | 5 | 4 | | 1 |

TABLE 1-C

Totals for First Circuit

| District | Date | Total Petitions | No Court Action | Total Action | Before Pretrial | Pretrials | Trials |
|---------------|------|--------------------|-----------------------|-----------------|--------------------|-----------|--------|
| Maine | 1962 | 5 | | 5 | 4 | | 1 |
| | 1964 | 1 | 1 | | | | |
| | 1966 | 7 | | 7 | 6 | 1 | |
| | 1968 | 10 | | 10 | 6 | | 4 |
| Massachusetts | 1962 | 2 | | 2 | 2 | | |
| | 1964 | 10 | | 10 | 10 | | |
| | 1966 | 21 | 1 | 20 | 18 | | 2 |
| | 1968 | 44 | 2 | 42 | 39 | | 3 |
| New Hampshire | 1962 | 1 | 1 | | | | |
| | 1964 | 1 | | 1 | 1 | | |
| | 1966 | | | | | | |
| | 1968 | 4 | | 4 | 3 | | 1 |

TABLE 1-C—Continued

| District | Date | Total Petitions | No Court Action | Total Action | Before Pretrial | Pretrials | Trials |
|--------------|------|--------------------|-----------------------|-----------------|--------------------|-----------|--------|
| Rhode Island | 1962 | | | | | | |
| | 1964 | 2 | 1 | 1 | 1 | | |
| | 1966 | | | | | | |
| | 1968 | 2 | 1 | 1 | 1 | | |
| Puerto Rico | 1962 | 3 | 1 | 2 | 2 | | |
| | 1964 | 11 | 1 | 10 | 9 | 1 | |
| | 1966 | 39 | 2 | 37 | 32 | | 5 |
| | 1968 | 15 | | 15 | 13 | 1 | 1 |

TABLE 1-D

Totals for Second Circuit

| | | | | | | | |
|------------------------|------|-----|---|-----|-----|---|----|
| Connecticut | 1962 | 33 | 4 | 29 | 29 | | |
| | 1964 | 43 | | 43 | 37 | | 6 |
| | 1966 | 51 | 1 | 50 | 37 | 2 | 11 |
| | 1968 | 38 | 3 | 35 | 30 | | 5 |
| New York (northern) | 1962 | 73 | | 73 | 70 | | 3 |
| | 1964 | 276 | 3 | 274 | 264 | | 10 |
| | 1966 | 128 | | 128 | 119 | | 9 |
| | 1968 | 95 | | 95 | 92 | | 3 |
| (eastern) | 1962 | 2 | 1 | 1 | 1 | | |
| | 1964 | 11 | 1 | 10 | 10 | | |
| | 1966 | 16 | 2 | 14 | 13 | 1 | |
| | 1968 | 123 | 1 | 122 | 115 | | 7 |
| (southern) | 1962 | 34 | 5 | 29 | 28 | | 1 |
| | 1964 | 209 | 2 | 207 | 207 | | |
| | 1966 | 201 | 7 | 194 | 194 | | |
| | 1968 | 230 | 3 | 227 | 225 | 1 | 1 |
| (western) | 1962 | 101 | 1 | 100 | 100 | | |
| | 1964 | 220 | 1 | 219 | 215 | | 4 |
| | 1966 | 127 | 2 | 125 | 125 | | |
| | 1968 | 92 | 1 | 91 | 89 | | 2 |
| Vermont | 1962 | 2 | | 2 | 1 | | 1 |
| | 1964 | 1 | | 1 | 1 | | |
| | 1966 | | | | | | |
| | 1968 | 1 | | 1 | 1 | | |

TABLE 1-E

Totals for Third Circuit

| | | | | | | | |
|----------|------|----|---|----|----|--|--|
| Delaware | 1962 | 5 | 5 | | 5 | | |
| | 1964 | 4 | | 4 | 4 | | |
| | 1966 | 14 | 2 | 12 | 12 | | |
| | 1968 | 16 | 1 | 15 | 15 | | |

TABLE 1-E—Continued

| District | Date | Total Petitions | No Court Action | Total Action | Before Pretrial | Pretrials | Trials |
|---------------------------|------|--------------------|-----------------------|-----------------|--------------------|-----------|--------|
| New Jersey | 1962 | 25 | 1 | 24 | 22 | | 2 |
| | 1964 | 55 | | 55 | 53 | | 2 |
| | 1966 | 75 | | 75 | 71 | | 4 |
| | 1968 | 99 | | 99 | 96 | | 3 |
| Pennsylvania (eastern) | 1962 | 44 | 2 | 44 | 40 | | 4 |
| | 1964 | 120 | | 118 | 106 | | 12 |
| | 1966 | 130 | | 128 | 105 | | 23 |
| | 1968 | 209 | | 209 | 138 | | 31 |
| (middle) | 1962 | 22 | 2 | 20 | 20 | | |
| | 1964 | 47 | | 47 | 42 | | 5 |
| | 1966 | 99 | | 98 | 85 | | 13 |
| | 1968 | 56 | | 56 | 55 | | 1 |
| (western) | 1962 | 14 | 2 | 12 | 7 | | 5 |
| | 1964 | 17 | | 17 | 13 | | 4 |
| | 1966 | 159 | | 158 | 154 | | 4 |
| | 1968 | 121 | | 120 | 115 | | 5 |

TABLE 1-F

Totals for Fourth Circuit

| | | | | | | | |
|-----------------------------|------|-----|---|-----|-----|----|----|
| Maryland | 1962 | 54 | 3 | 54 | 43 | | 11 |
| | 1964 | 279 | | 276 | 254 | | 22 |
| | 1966 | 186 | | 185 | 167 | | 18 |
| | 1968 | 187 | | 184 | 174 | 1 | 9 |
| North Carolina (eastern) | 1962 | 14 | 1 | 14 | 13 | | 1 |
| | 1964 | 52 | | 51 | 48 | | 3 |
| | 1966 | 91 | | 91 | 86 | | 5 |
| | 1968 | 60 | | 60 | 54 | | 6 |
| (middle) | 1962 | 1 | 1 | 1 | 1 | | |
| | 1964 | 4 | | 4 | 4 | | |
| | 1966 | 22 | | 22 | 22 | | |
| | 1968 | 44 | | 43 | 39 | | 4 |
| (western) | 1962 | | 2 | | | | |
| | 1964 | 10 | | 10 | 10 | | |
| | 1966 | 78 | | 76 | 64 | | 12 |
| | 1968 | 73 | | 71 | 66 | | 5 |
| South Carolina (eastern) | 1962 | 4 | | 4 | 4 | | |
| | 1964 | 27 | | 27 | 22 | | 5 |
| | 1966 | 16 | | 16 | 16 | | |
| | 1968 | 41 | | 41 | 39 | | 2 |
| (western) | 1962 | 2 | | 2 | 2 | | |
| | 1964 | 2 | | 2 | 2 | | |
| | 1966 | | | | | | |
| | 1968 | | | | | | |
| Virginia (eastern) | 1962 | 43 | 1 | 42 | 36 | | 6 |
| | 1964 | 158 | 2 | 156 | 145 | 2 | 9 |
| | 1966 | 209 | 4 | 205 | 170 | 8 | 27 |
| | 1968 | 392 | 3 | 388 | 361 | 10 | 18 |

TABLE 1-F—Continued

| District | Date | Total Petitions | No Court Action | Total Action | Before Pretrial | Pretrials | Trials |
|-----------------------------|------|--------------------|-----------------------|-----------------|--------------------|-----------|--------|
| Virginia (western) | 1962 | 1 | | 1 | | 1 | |
| | 1964 | 1 | | 1 | 1 | | |
| | 1966 | 4 | | 4 | | 4 | |
| | 1968 | 150 | | 150 | 140 | 2 | 8 |
| West Virginia (northern) | 1962 | 37 | | 37 | 33 | | 4 |
| | 1964 | 81 | | 81 | 69 | | 12 |
| | 1966 | 215 | 5 | 210 | 189 | | 21 |
| | 1968 | 72 | 1 | 71 | 42 | | 29 |
| (southern) | 1962 | | | | | | |
| | 1964 | 1 | | 1 | | 1 | |
| | 1966 | 3 | 1 | 2 | | 2 | |
| | 1968 | 22 | 2 | 20 | 18 | | 2 |

TABLE 1-G

Totals for Fifth Circuit

| | | | | | | | |
|-----------------------|------|-----|---|-----|-----|---|----|
| Alabama (northern) | 1962 | 5 | | 5 | 3 | 2 | |
| | 1964 | 10 | | 10 | 8 | | 2 |
| | 1966 | 12 | | 12 | 12 | | |
| | 1968 | 16 | | 16 | 16 | | |
| (middle) | 1962 | 7 | | 7 | 6 | | 1 |
| | 1964 | 87 | | 87 | 82 | 1 | 4 |
| | 1966 | 123 | 2 | 121 | 111 | 3 | 7 |
| | 1968 | 86 | | 86 | 78 | 2 | 6 |
| (southern) | 1962 | 1 | | 1 | 1 | | |
| | 1964 | 7 | 2 | 5 | 5 | | |
| | 1966 | 28 | | 28 | 28 | | |
| | 1968 | 51 | 4 | 47 | 43 | 1 | 3 |
| Florida (northern) | 1962 | | | | | | |
| | 1964 | 5 | | 5 | 5 | | |
| | 1966 | 22 | | 22 | 22 | | |
| | 1968 | 60 | 1 | 59 | 59 | | |
| (middle) | 1962 | | | | | | |
| | 1964 | 35 | 1 | 34 | 34 | | |
| | 1966 | 137 | | 137 | 125 | | 12 |
| | 1968 | 181 | 1 | 180 | 167 | | 13 |
| (southern) | 1962 | 12 | | 12 | 12 | | |
| | 1964 | 5 | | 5 | 5 | | |
| | 1966 | 10 | | 10 | 10 | | |
| | 1968 | 110 | | 110 | 104 | 3 | 3 |
| Georgia (northern) | 1962 | 1 | | 1 | 1 | | |
| | 1964 | 7 | | 7 | 6 | | 1 |
| | 1966 | 22 | | 22 | 21 | | 1 |
| | 1968 | 51 | | 51 | 45 | | 6 |

TABLE 1-G—Continued

| District | Date | Total Petitions | No Court Action | Total Action | Before Pretrial | Pretrials | Trials |
|---------------------------|------|--------------------|-----------------------|-----------------|--------------------|-----------|--------|
| Georgia (middle) | 1962 | | | | | | |
| | 1964 | 3 | | 3 | 3 | | |
| | 1966 | 15 | 3 | 12 | 11 | | 1 |
| | 1968 | 30 | | 30 | 29 | | 1 |
| (southern) | 1962 | 9 | | 9 | 9 | | |
| | 1964 | 68 | | 68 | 67 | | 1 |
| | 1966 | 77 | | 77 | 34 | | 43 |
| | 1968 | 130 | 1 | 129 | 92 | | 37 |
| Louisiana (eastern) | 1962 | 7 | | 7 | 7 | | |
| | 1964 | 49 | 1 | 48 | 48 | | |
| | 1966 | 47 | | 47 | 43 | | 4 |
| | 1968 | 68 | 3 | 65 | 44 | | 21 |
| (western) | 1962 | | | | | | |
| | 1964 | 3 | | 3 | 3 | | |
| | 1966 | 14 | | 14 | 10 | | 4 |
| | 1968 | 12 | | 12 | 6 | 1 | 5 |
| Mississippi (northern) | 1962 | | | | | | |
| | 1964 | 1 | | 1 | 1 | | |
| | 1966 | 5 | | 5 | 4 | | 1 |
| | 1968 | 11 | | 11 | 11 | | |
| (southern) | 1962 | | | | | | |
| | 1964 | 8 | 1 | 7 | 6 | | 1 |
| | 1966 | 4 | | 4 | 2 | | 2 |
| | 1968 | 6 | | 6 | 4 | | 2 |
| Texas (northern) | 1962 | 2 | | 2 | 2 | | |
| | 1964 | 9 | | 9 | 7 | 2 | |
| | 1966 | 14 | | 14 | 12 | | 2 |
| | 1968 | 128 | 4 | 124 | 96 | 17 | 11 |
| (eastern) | 1962 | 5 | | 5 | 4 | | 1 |
| | 1964 | 18 | | 18 | 17 | | 1 |
| | 1966 | 55 | | 55 | 38 | | 17 |
| | 1968 | 39 | | 39 | 34 | | 5 |
| (southern) | 1962 | 20 | 2 | 18 | 16 | | 2 |
| | 1964 | 71 | 3 | 68 | 62 | | 6 |
| | 1966 | 179 | 4 | 175 | 133 | | 42 |
| | 1968 | 194 | 7 | 187 | 159 | 5 | 23 |
| (western) | 1962 | 3 | | 3 | 2 | | 1 |
| | 1964 | 3 | | 3 | 3 | | |
| | 1966 | 11 | | 11 | 11 | | |
| | 1968 | 49 | 2 | 47 | 43 | | 4 |

TABLE 1-H
Totals for Sixth Circuit

| District | Date | Total Petitions | No Court Action | Total Action | Before Pretrial | Pretrials | Trials |
|------------------------|------|--------------------|-----------------------|-----------------|--------------------|-----------|--------|
| Kentucky (eastern) | 1962 | | | | | | |
| | 1964 | | | | | | |
| | 1966 | 1 | | 1 | 1 | | |
| | 1968 | 18 | | 18 | 18 | | |
| (western) | 1962 | 9 | | 9 | 8 | | 1 |
| | 1964 | 19 | | 19 | 18 | | 1 |
| | 1966 | 44 | | 44 | 44 | | |
| | 1968 | 38 | | 38 | 37 | | 1 |
| Michigan (eastern) | 1962 | 45 | 2 | 43 | 43 | | |
| | 1964 | 71 | 1 | 70 | 66 | 1 | 3 |
| | 1966 | 54 | 4 | 50 | 48 | | 2 |
| | 1968 | 86 | | 86 | 85 | | 1 |
| (western) | 1962 | 2 | | 2 | 1 | | 1 |
| | 1964 | 7 | 1 | 6 | 6 | | |
| | 1966 | 6 | | 6 | 6 | | |
| | 1968 | 39 | 2 | 37 | 32 | 1 | 4 |
| Ohio (northern) | 1962 | 2 | | 2 | 2 | | |
| | 1964 | 6 | | 6 | 6 | | |
| | 1966 | 43 | | 43 | 42 | | 1 |
| | 1968 | 59 | | 59 | 56 | | 3 |
| (southern) | 1962 | 10 | | 10 | 10 | | |
| | 1964 | 73 | 2 | 71 | 52 | 1 | 18 |
| | 1966 | 42 | 3 | 39 | 33 | | 6 |
| | 1968 | 84 | 2 | 82 | 72 | 2 | 8 |
| Tennessee (eastern) | 1962 | 1 | | 1 | 1 | | |
| | 1964 | 14 | | 14 | 14 | | |
| | 1966 | 22 | 1 | 21 | 19 | | 2 |
| | 1968 | 40 | | 40 | 37 | | 3 |
| (middle) | 1962 | 22 | | 22 | 20 | | 2 |
| | 1964 | 70 | 5 | 65 | 54 | | 11 |
| | 1966 | 136 | 2 | 134 | 107 | | 27 |
| | 1968 | 92 | 2 | 80 | 78 | | 12 |
| (western) | 1962 | | | | | | |
| | 1964 | 2 | | 2 | 2 | | |
| | 1966 | 12 | | 12 | 12 | | |
| | 1968 | 32 | 1 | 31 | 26 | | 5 |

TABLE 1-I
Totals for Seventh Circuit

| | | | | | | | |
|------------------------|------|-----|---|-----|-----|--|---|
| Illinois (northern) | 1962 | 76 | 3 | 73 | 72 | | 1 |
| | 1964 | 197 | 3 | 194 | 189 | | 5 |
| | 1966 | 132 | 3 | 129 | 127 | | 2 |
| | 1968 | 192 | 2 | 190 | 189 | | 1 |

TABLE 1-I—Continued

| District | Date | Total Petitions | No Court Action | Total Action | Before Pretrial | Pretrials | Trials |
|------------------------|------|--------------------|-----------------------|-----------------|--------------------|-----------|--------|
| Illinois (eastern) | 1962 | 35 | 1 | 34 | 34 | | |
| | 1964 | 53 | | 53 | 53 | | |
| | 1966 | 52 | 1 | 52 | 52 | | |
| | 1968 | 46 | | 45 | 45 | | |
| (southern) | 1962 | 3 | | 3 | 3 | | |
| | 1964 | 2 | | 2 | 1 | | 1 |
| | 1966 | 4 | | 4 | 4 | | |
| | 1968 | 1 | | 1 | 1 | | |
| Indiana (northern) | 1962 | 24 | | 24 | 24 | | |
| | 1964 | 32 | | 32 | 30 | | 2 |
| | 1966 | 23 | | 23 | 23 | | |
| | 1968 | 46 | | 46 | 45 | | 1 |
| (southern) | 1962 | 5 | | 5 | 5 | | |
| | 1964 | 5 | 3 | 5 | 4 | | 1 |
| | 1966 | 15 | | 12 | 12 | | |
| | 1968 | 18 | | 18 | 18 | | |
| Wisconsin (eastern) | 1962 | 6 | | 6 | 6 | | |
| | 1964 | 29 | | 29 | 27 | 1 | 1 |
| | 1966 | 29 | | 29 | 27 | | 2 |
| | 1968 | 69 | | 69 | 66 | 2 | 1 |
| (western) | 1962 | | | | | | |
| | 1964 | | | | | | |
| | 1966 | | | | | | |
| | 1968 | 23 | | 23 | 23 | | |

TABLE 1-J

Totals for Eighth Circuit

| | | | | | | | |
|-----------------------|------|----|---|----|----|--|---|
| Arkansas (eastern) | 1962 | 2 | | 2 | 2 | | |
| | 1964 | 5 | | 5 | 3 | | 2 |
| | 1966 | 18 | | 18 | 17 | | 1 |
| | 1968 | 29 | 1 | 28 | 20 | | 8 |
| (western) | 1962 | | | | | | |
| | 1964 | 1 | | 1 | 1 | | |
| | 1966 | 1 | | 1 | 1 | | |
| | 1968 | 4 | | 4 | 2 | | 2 |
| Iowa (northern) | 1962 | | | | | | |
| | 1964 | 1 | | 1 | 1 | | |
| | 1966 | 4 | | 4 | 4 | | |
| | 1968 | 8 | | 8 | 7 | | 1 |
| (southern) | 1962 | 10 | 1 | 9 | 9 | | |
| | 1964 | 31 | | 31 | 30 | | 1 |
| | 1966 | 9 | | 9 | 5 | | 4 |
| | 1968 | 8 | | 8 | 7 | | 1 |

TABLE 1-J—Continued

| District | Date | Total Petitions | No Court Action | Total Action | Before Pretrial | Pretrials | Trials |
|-----------------------|------|--------------------|-----------------------|-----------------|--------------------|-----------|--------|
| Minnesota | 1962 | 5 | | 5 | 5 | | |
| | 1964 | 40 | 2 | 38 | 38 | | |
| | 1966 | 23 | | 23 | 22 | | 1 |
| | 1968 | 20 | | 20 | 20 | | |
| Missouri (eastern) | 1962 | | | | | | |
| | 1964 | 6 | | 6 | 6 | | |
| | 1966 | 2 | | 2 | 2 | | |
| | 1968 | 15 | 2 | 13 | 13 | | |
| (western) | 1962 | 23 | | 23 | 22 | | 1 |
| | 1964 | 58 | | 58 | 56 | | 2 |
| | 1966 | 32 | 1 | 31 | 29 | 1 | 1 |
| | 1968 | 59 | | 59 | 56 | | 3 |
| Nebraska | 1962 | 19 | | 19 | 18 | | 1 |
| | 1964 | 37 | | 37 | 28 | | 9 |
| | 1966 | 15 | | 15 | 15 | | |
| | 1968 | 27 | | 27 | 16 | | 11 |
| North Dakota | 1962 | 1 | | 1 | 1 | | |
| | 1964 | 2 | | 2 | 2 | | |
| | 1966 | | | | | | |
| | 1968 | 3 | | 3 | 2 | | 1 |
| South Dakota | 1962 | 1 | | 1 | 1 | | |
| | 1964 | 2 | | 2 | 2 | | |
| | 1966 | | | | | | |
| | 1968 | 4 | 1 | 3 | 2 | | 1 |

TABLE 1-K
Totals for Ninth Circuit

| | | | | | | | |
|--------------------------|------|-----|---|-----|-----|--|----|
| Alaska | 1962 | 1 | | 1 | 1 | | |
| | 1964 | | | | | | |
| | 1966 | 8 | | 8 | 8 | | |
| | 1968 | 8 | | 8 | 6 | | 2 |
| Arizona | 1962 | 5 | | 5 | 5 | | |
| | 1964 | 19 | | 19 | 19 | | |
| | 1966 | 45 | | 45 | 41 | | 4 |
| | 1968 | 36 | | 36 | 29 | | 7 |
| California (northern) | 1962 | 85 | 1 | 84 | 84 | | |
| | 1964 | 264 | | 264 | 264 | | |
| | 1966 | 618 | 3 | 615 | 608 | | 7 |
| | 1968 | 437 | 2 | 435 | 424 | | 11 |
| (eastern) | 1962 | | | | | | |
| | 1964 | | | | | | |
| | 1966 | | | | | | |
| | 1968 | 289 | | 289 | 286 | | 3 |

TABLE 1-K—Continued

| District | Date | Total Petitions | No Court Action | Total Action | Before Pretrial | Pretrials | Trials |
|-------------------------|------|--------------------|-----------------------|-----------------|--------------------|-----------|--------|
| California (central) | 1962 | | | | | | |
| | 1964 | | | | | | |
| | 1966 | | | | | | |
| | 1968 | 263 | | 263 | 263 | | |
| (southern) | 1962 | 13 | | 13 | 13 | | |
| | 1964 | 94 | 1 | 93 | 92 | | 1 |
| | 1966 | 190 | 2 | 188 | 188 | | |
| | 1968 | 26 | 1 | 25 | 24 | 1 | |
| Hawaii | 1962 | | | | | | |
| | 1964 | 2 | | 2 | 2 | | |
| | 1966 | 3 | | 3 | 3 | | |
| | 1968 | 2 | | 2 | 2 | | |
| Idaho | 1962 | 1 | | 1 | 1 | | |
| | 1964 | 1 | | 1 | 1 | | |
| | 1966 | 4 | | 4 | 4 | | |
| | 1968 | 4 | | 4 | 4 | | |
| Montana | 1962 | 1 | 1 | | | | |
| | 1964 | 21 | | 21 | 20 | | 1 |
| | 1966 | 18 | | 18 | 16 | | 2 |
| | 1968 | 9 | | 9 | 8 | | 1 |
| Nevada | 1962 | 3 | | 3 | 3 | | |
| | 1964 | 7 | | 7 | 7 | | |
| | 1966 | 21 | 1 | 20 | 19 | | 1 |
| | 1968 | 32 | | 42 | 37 | | 5 |
| Oregon | 1962 | 21 | | 21 | 21 | | |
| | 1964 | 45 | | 45 | 41 | 1 | 3 |
| | 1966 | 23 | | 23 | 19 | 1 | 3 |
| | 1968 | 43 | 1 | 42 | 20 | 3 | 19 |
| Washington (eastern) | 1962 | 20 | | 20 | 19 | | 1 |
| | 1964 | 39 | | 39 | 27 | 4 | 8 |
| | 1966 | 53 | 2 | 51 | 36 | 7 | 8 |
| | 1968 | 24 | | 24 | 23 | | 1 |
| (western) | 1962 | 2 | | 2 | 2 | | |
| | 1964 | 20 | | 20 | 20 | | |
| | 1966 | 16 | | 16 | 16 | | |
| | 1968 | 16 | | 16 | 16 | | |

TABLE 1-L
Totals for Tenth Circuit

| District | Date | Total Petitions | No Court Action | Total Action | Before Pretrial | Pretrials | Trials |
|------------------------|------|--------------------|-----------------------|-----------------|--------------------|-----------|--------|
| Colorado | 1962 | 11 | | 11 | 11 | | |
| | 1964 | 75 | | 75 | 69 | | 6 |
| | 1966 | 66 | | 66 | 63 | | 3 |
| | 1968 | 57 | | 57 | 38 | | 19 |
| Kansas | 1962 | 41 | | 41 | 37 | | 4 |
| | 1964 | 105 | | 105 | 72 | 2 | 31 |
| | 1966 | 120 | 1 | 119 | 110 | | 9 |
| | 1968 | 94 | | 94 | 86 | | 8 |
| New Mexico | 1962 | 4 | | 4 | 3 | | 1 |
| | 1964 | 24 | | 24 | 19 | | 5 |
| | 1966 | 126 | 5 | 121 | 48 | 21 | 52 |
| | 1968 | 83 | 1 | 82 | 27 | 25 | 30 |
| Oklahoma (northern) | 1962 | | | | | | |
| | 1964 | | | | | | |
| | 1966 | | | | | | |
| | 1968 | 13 | | 13 | 10 | | 3 |
| (eastern) | 1962 | 4 | | 4 | 1 | | 3 |
| | 1964 | 6 | | 6 | | | 6 |
| | 1966 | 40 | | 40 | 36 | | 4 |
| | 1968 | 53 | | 53 | 43 | | 10 |
| (western) | 1962 | 1 | | 1 | 1 | | |
| | 1964 | 3 | | 3 | 3 | | |
| | 1966 | 5 | | 5 | 5 | | |
| | 1968 | 21 | | 21 | 16 | | 5 |
| Utah | 1962 | 13 | 1 | 12 | 12 | | |
| | 1964 | 13 | | 13 | 11 | 1 | 1 |
| | 1966 | 16 | | 16 | 15 | | 1 |
| | 1968 | 40 | 1 | 39 | 38 | | 1 |
| Wyoming | 1962 | 3 | | 3 | 3 | | |
| | 1964 | 1 | | 1 | 1 | | |
| | 1966 | 2 | | 2 | 1 | | 1 |
| | 1968 | 3 | | 3 | 3 | | |

For those states which have made substantive changes in their post-conviction procedure since 1963, the pertinent statistics from the first set of tables have been set out with the dates and data from the pertinent states in Table 2. Extensive research in the individual circuits will be required to determine the disposition of the petitions indicated below, both as to terminations and trials. Until such research can be completed, these statistics merely provide information on volume and indicate points of greatest pressure on the federal courts.

TABLE 2

STATUTORY AND RULE REVISION IN THE STATES
AND FEDERAL HABEAS CORPUS

In the following table, the second column gives the date of any statutory or rule change on post-conviction remedies in the past decade; if the column is blank present information indicates no revision within this time period. The data reflecting the numbers of habeas corpus petitions for the respective years has been extrapolated from data in Table 1.

| Name of State | Effective Date of Revision | Federal Habeas Corpus Petitions | | | |
|----------------|----------------------------|---------------------------------|------|------|-------|
| | | 1962 | 1964 | 1966 | 1968 |
| Alabama | | 13 | 104 | 163 | 153 |
| Alaska | 1968 | 1 | | 8 | 8 |
| Arizona | | 5 | 19 | 45 | 36 |
| Arkansas | 1965; 1967 | 2 | 6 | 19 | 33 |
| California | | 98 | 358 | 808 | 1,015 |
| Colorado | 1963; 1965 | 11 | 75 | 66 | 57 |
| Connecticut | | 33 | 43 | 51 | 38 |
| Delaware | 1969 | 5 | 4 | 14 | 16 |
| Florida | 1963; 1968 | 12 | 45 | 169 | 351 |
| Georgia | 1967 | 10 | 78 | 114 | 211 |
| Hawaii | | | 2 | 3 | 2 |
| Idaho | 1967 | 1 | 1 | 4 | 4 |
| Illinois | 1963; 1965 | 114 | 252 | 188 | 239 |
| Indiana | 1969 | 29 | 37 | 38 | 64 |
| Iowa | | 10 | 35 | 13 | 16 |
| Kansas | 1964 | 41 | 105 | 120 | 94 |
| Kentucky | 1965 | 9 | 19 | 45 | 56 |
| Louisiana | 1967 | 7 | 52 | 61 | 80 |
| Maine | 1963 | 5 | 1 | 7 | 10 |
| Maryland | 1959; 1965 | 54 | 279 | 186 | 187 |
| Massachusetts | | 2 | 10 | 21 | 44 |
| Michigan | 1963 | 47 | 78 | 60 | 125 |
| Minnesota | 1967; 1969 | 5 | 40 | 23 | 20 |
| Mississippi | 1966 | | 9 | 9 | 17 |
| Missouri | 1967 | 23 | 64 | 34 | 74 |
| Montana | 1967 | 1 | 21 | 18 | 9 |
| Nebraska | 1965; 1967 | 19 | 37 | 15 | 27 |
| Nevada | 1967 | 3 | 7 | 21 | 42 |
| New Hampshire | | 1 | 1 | | 4 |
| New Jersey | 1964; 1969 | 25 | 55 | 75 | 99 |
| New Mexico | 1966 | 4 | 24 | 126 | 83 |
| New York | | 210 | 716 | 472 | 540 |
| North Carolina | 1968 | 15 | 66 | 191 | 177 |
| North Dakota | 1969 | 1 | 2 | | 3 |
| Ohio | 1965; 1967 | 12 | 79 | 85 | 143 |
| Oklahoma | 1965; 1969 | 5 | 9 | 45 | 87 |
| Oregon | 1959 | 21 | 45 | 23 | 43 |
| Pennsylvania | 1966; 1968 | 80 | 184 | 388 | 386 |
| Rhode Island | | | 2 | | 2 |
| South Carolina | 1969 | | 29 | 16 | 41 |
| South Dakota | 1966 | 1 | 2 | | 4 |
| Tennessee | 1967 | 25 | 86 | 170 | 164 |
| Texas | 1967 | 30 | 101 | 259 | 410 |
| Utah | 1969 | 13 | 13 | 16 | 40 |
| Vermont | 1966 | 2 | 1 | | 1 |
| Virginia | | 44 | 159 | 213 | 542 |
| Washington | | 22 | 59 | 69 | 40 |
| West Virginia | 1967 | 37 | 82 | 218 | 94 |
| Wisconsin | | 6 | 29 | 29 | 92 |
| Wyoming | 1961; 1969 | 3 | 1 | 2 | 3 |

Correlation: The "Trilogy" and Post-1963 State Laws

Has the "trilogy" had any accelerating effect upon revision of state post-conviction procedure? Or more importantly, has there been any significant decline in federal habeas corpus activity since such revision? In most cases, as shown in data recapitulated in Part IV below, it is too early to make firm statements in answer to these questions. For either the state action has been too recent, or the necessary details from correspondents within the states has been insufficient. Nevertheless, at this point it may be useful to correlate the dates of state action in regard to post-conviction procedures (with emphasis on post-1963) with the volume of federal business indicated in the foregoing tables.

III. RECAPITULATION: THE FEDERAL "SCALE OF ADEQUACY"

The "trilogy" of 1963 cases, to a degree, represented a judicial re-statement of the legislative propositions set out in the Judiciary Act of 1948. They may also be said to represent the ultimate extreme to which the Fourteenth Amendment guarantees have been carried along a course begun with the revised habeas corpus act of 1867,³⁴ and the landmark argument by Justice Holmes in *Moore v. Dempsey* in 1923.³⁵ A century of development has now established the following: (1) the right to a fair trial, essential to due process, and the reviewability of the question of fairness is a constitutionally and federally guaranteed right; (2) the Congress and the federal courts, through the Judiciary Act of 1948, as amended in 1966, and the sequence of cases culminating in the 1963 "trilogy," have laid down explicit criteria constituting a "scale of adequacy" by which state post-conviction procedures may be evaluated; and (3) the viability of state procedures depends upon the degree to which they accommodate the fundamental requirements in the "scale of adequacy."

These requirements may accordingly be recapitulated in terms of (1) the specific provisions in 28 U.S.C. §§ 2244, 2254 and 2255; (2) the ten basic propositions set out in the "trilogy"; and (3) the purported accommodation of the federal requirements in the revised Model Post-Conviction Procedure Act of 1965.

34. *Supra* note 6.

35. 261 U.S. 86, 87-92 (1923).

1. *The Requirements of 28 U.S.C. §§ 2244, 2254, 2255*

§ 2244. **Finality of determination.**

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

(b) When after an evidentiary hearing on the merits of a material factual issue or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States released from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State courts shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence. (As amended Nov. 2, 1966, Pub. L. 89-711, § 1, 80 Stat. 1104.)³⁶

36. As amended by Act of November 2, 1966, § 1, 80 Stat. 1104, section 2244(a) remains essentially the same as originally enacted, dropping its reference to state deten-

The following extract illustrates the necessity to finalize criminal judgments and relieve the pressure on the district courts:

petitions for the writ are used not only as they should be, to protect unfortunate persons against miscarriages of justice, but also as a device for harassing court, custodial and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1, 1939 and April 1944 presented in the District Court 50 petitions for writs of habeas corpus³⁷

§ 2254. State custody; remedies in Federal courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall 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.

(c) 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.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for

tion and applying exclusively to federal detention. Section 2244(b) broadens federal court discretion in denying a writ of habeas corpus in which the applicant, on the earlier petition, deliberately withheld the newly asserted ground or otherwise abused the writ. Section 2244(c) is a new section designed to codify the *res judicata* effect of review by appeal or certiorari to the United States Supreme Court. Since exhaustion of state remedies no longer requires the act of applying for certiorari, this section would tend to put the petitioner to a choice of forums and may play a part in the strategy of defense counsel—a not altogether desirable effect. See Note, 45 TEX. L. REV. 592, 594-595 (1967) for a discussion of this new section.

37. H.R. REP. NO. 308, *supra* note 15.

the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or, the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

....

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if

able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding. (As amended Nov. 2, 1966, Pub. L. 89-711, § 2, 80 Stat. 1105.)³⁸

This section pertaining to when a person in custody pursuant to a state court judgment shall be granted an application for writ of habeas corpus was enacted for the purpose of codifying existing habeas corpus practice and is declaratory of existing law as affirmed by the Supreme Court.³⁹

Section 2255 provides that to seek federal habeas corpus, in the case of federal prisoners, petitioner must show a violation of a constitutional right, lack of jurisdiction in the sentencing court, or unreasonableness of the sentence. Any motion to vacate a sentence must be made in the court which imposed the sentence. Unless the motion and the files and records of the case conclusively rebut the presumption of relief, the court promptly serves notice on the United States attorney, grants a prompt hearing on the motion and makes findings of fact and conclusions of law thereon. If the court determines that the claims are meri-

38. Section 2254 was amended in 1966 to conform to the standards expressed in *Noia* and *Townsend* in 1963. Subsection (a) is new, restricting the entertainment of an application for a writ of habeas corpus to the sole ground that the petitioner is in custody in violation of the Constitution or laws or treaties of the United States. Subsection (b) and (c) are the same as the original section 2254. The "available procedure" set forth in subsection (c) was modified in *Noia* to mean presently available unless deliberately bypassing normal appellate procedure. Subsection (d) incorporates and expands the criterion set forth in *Townsend* raising a rebuttable presumption that the factual determinations by a state court are correct. New subsection (e) delineates responsibility for production of the record between the state and the petitioner and provides for indigency. See Note, 45 Tex. L. Rev. 592, 595-598 (1967).

39. *Irwin v. Dowd*, 359 U.S. 394 (1959).

torious, it shall then vacate the sentence, resentence or grant a new trial. Where the state rule governing motions to vacate a sentence was patterned after this section, interpretation of the section by federal courts is persuasive of the meaning of the state rule.⁴⁰

2. *The Ten Criteria of the "Trilogy"*

- (1) Under section 2254 a state prisoner is required only to exhaust those state remedies which are still open to him at the time he seeks relief in a district court. *Noia* expressly excluded the necessity of applying for a writ of certiorari to the United States Supreme Court as a prerequisite to exhaustion of state remedies.

... [O]ur decision affects all procedural hurdles to the achievement of swift and imperative justice on habeas corpus, and because the hurdle erected by *Darr v. Burford* is unjustifiable under the principles we have expressed, even insofar as it may be deemed merely an aspect of the statutory requirement of present exhaustion, that decision in that respect is . . . overruled.⁴¹

- (2) Failure to appeal at any earlier date is not a waiver of right unless intelligently and understandingly made. Waiver by petitioner is not to be inferred from the strategy or actions of counsel unless intelligently and understandingly ratified. Waiver of a federal right is a reviewable question for a federal court. ". . . [T]he federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies."⁴²

A federal court must grant an evidentiary hearing to a habeas corpus applicant under the following circumstances:

- (3) the merits of the factual dispute were not resolved at the state hearing;⁴³
- (4) the state factual determination is not fairly supported by the record as a whole;⁴⁴

40. *State v. Gibby*, 78 N.M. 414, 432 P.2d 258 (1967).

41. *Fay v. Noia*, 372 U.S. at 435, 438.

42. *Id.* at 438.

43. *Townsend v. Sain*, 372 U.S. 293, 313 (1963); 28 U.S.C. § 2254(d) (1).

44. 372 U.S. at 313; 28 U.S.C. § 2254 (d) (8).

- (5) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;⁴⁵
- (6) substantial allegation of newly discovered evidence;⁴⁶
- (7) the material facts were not adequately developed at the state court hearing;⁴⁷
- (8) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair factual hearing.⁴⁸

First. The purpose of the test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. If he concludes that the habeas application was afforded a *full and fair hearing by the state court resulting in reliable findings*, he may, and ordinarily should, accept the facts as found in the hearing. But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim. There is every reason to be confident that federal district judges, mindful of their delicate role in the maintenance of proper federal-state relations, will not abuse that discretion. We have no fear that the hearing power will be used to subvert the integrity of state criminal justice or to waste the time of the federal courts in the trial of frivolous claims.

Second. Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas. That was settled in *Brown v. Allen*. . . .

Third. A District Court sitting in habeas corpus clearly has the power to compel production of the complete state-court record. Ordinarily such a record—including the transcript of testimony (or if unavailable some adequate substitute, such as a narrative record), the pleadings, court opinions, and other pertinent documents—is indispensable to determining whether

45. 372 U.S. at 313; 28 U.S.C. § 2254(d) (2).

46. 372 U.S. at 313. There is no equivalent of this requirement in 28 U.S.C. § 2254.

47. 372 U.S. at 313; 28 U.S.C. § 2254(d) (3).

48. 372 U.S. at 313; 28 U.S.C. § 2254(d) (6).

the habeas applicant received a full and fair state-court evidentiary hearing resulting in reliable findings. Of course, if because no record can be obtained the district judge has no way of determining whether a full and fair hearing which resulted in findings of relevant fact was vouchsafed, he must hold one. So also, there may be cases in which it is more convenient for the district judge to hold an evidentiary hearing forthwith than compel production of the record. It is clear that he has the power to do so.

Fourth. It rests largely with the federal district judges to give practical form to the principles announced today. We are aware that the too-promiscuous grant of evidentiary hearings on habeas could both swamp the dockets of the District Courts and cause acute and unnecessary friction with state organs of criminal justice, while the too-limited use of such hearings would allow many grave constitutional errors to go forever uncorrected. The accommodation of these competing factors must be made on the front line, by the district judges who are conscious of their paramount responsibility in this area.⁴⁹

Although *Sanders*⁵⁰ involved a section 2255 motion, the Court in disposing of the issue of federal applicants under this section made it clear that the basic propositions applied to state petitioners under section 2244 as well.

- (9) At common law, the denial of a writ of habeas corpus was not res judicata; under the guarantees of the Constitution as well as the clear intention of the statute to simplify and restate traditional rights recognized at common law, a modified doctrine of res judicata applies here.⁵¹
- (10) Although the discretion vesting in the sentencing court under 28 U.S.C. § 2244, finality of determination of petition of habeas corpus, appears to permit a modified application of res judicata (*e.g.*, to terminate repetitious petitions which amount to abuse of the remedy), the constitutional concern with governmental accountability for deprivation of life or liberty requires that the relief afforded in section 2255 be treated as the material equivalent of section 2244.⁵²

49. 372 U.S. at 318.

50. *Sanders v. United States*, 373 U.S. 1 (1963).

51. *See id.* at 15-17.

52. *See id.* at 14.

Controlling weight may be given to denial of a prior application for federal habeas corpus of a § 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. . . .⁵³

No matter how many prior applications for federal collateral relief a prisoner has made, the principle elaborated . . . *supra*, cannot apply if a different ground is presented by the new application. So too, it cannot apply if the same ground was earlier presented but not adjudicated on the merits. . . .⁵⁴

3. *The Accommodations of the Revised Uniform Post-Conviction Procedure Act (1965)*

Because the provisions of this uniform act have provided a model for the enactment of legislation in a number of states, and because its basic features form the guidelines for Table 3, the 1965 Act⁵⁵ is reprinted in its entirety. Note that the changes from the 1955 Act are shown by underlining for additions and by strike out type for deletions.

In evaluating the sections of the Uniform Law which follows, criterion number 1 from the "trilogy" may be compared with section 1 of the Uniform Law; criterion number 2 with section 8; criteria numbers 4 and 7 with section 4; criteria numbers 3, 5, 6 and 8 with section 7; and criteria numbers 9 and 10 with section 2. The sections of the Uniform Law which appear to have been emulated if not adopted by specific state legislation, or rule of court, and which appear to satisfy the criteria of the "trilogy" in the process, are indicated in the appropriate columns of Table 3 in Part V of this study, for the following states: Colorado, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Vermont, West Virginia and Wyoming.

AN ACT PROVIDING AN EXCLUSIVE REMEDY FOR CHALLENGING THE LEGALITY OF INCARCERATION UNDER JUDGMENT OF CONVICTION OF CRIME FELONY AND SENTENCE OR ~~[DEATH OR]~~ IMPRISONMENT

⁵³. *Id.* at 15.

⁵⁴. *Id.* at 17.

⁵⁵. *Handbook of the National Conference of Commissioners on Uniform State Laws* 216 (1965).

THEREFOR, BUT NOT AFFECTING REMEDIES INCIDENT TO THE PROCEEDINGS IN THE TRIAL COURT AND REMEDIES OF DIRECT REVIEW OF THE JUDGMENT OF CONVICTION, AND TO MAKE UNIFORM THE LAW WITH REFERENCE THERETO

Be it enacted:

SECTION 1. [*Remedy—To Whom Available—Conditions.*]

(a) Any person convicted of a ~~crime felony~~ and incarcerated under sentence of [death or] imprisonment who claims that the conviction was obtained or that the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of this state, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy, a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy, may institute without paying a filing fee, a proceeding under this Act to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction or in any other proceeding that the petitioner has taken to secure relief from the his conviction or sentence.

(b) The remedy herein provided is not a substitute for nor does it affect any remedies which are incident to the proceedings in the trial court, or any remedy of direct review of the sentence of conviction, ~~but, Except as otherwise provided in this Act, it comprehends and takes the place of all other common law, and statutory, or other remedies which have heretofore been available for challenging the validity of the conviction or sentence, incarceration under sentence of [death or] imprisonment, and shall be used exclusively in place of them~~ lieu thereof. A petition for relief under this Act may be filed at any time.

SECTION 2. [*Exercise of Original Jurisdiction in Habeas Corpus.*] [[The Supreme Court, Circuit Court, District Court] in which, by the Constitution of this state, original jurisdiction in *habeas corpus* is vested, may entertain, in accordance with its rules, a proceeding under this Act in ~~the an~~ exercise of its original jurisdiction. In this event, the provisions of this Act, to the extent applicable, shall govern the proceeding.]

SECTION 3. [*Commencement of Proceedings—Verification—Filing—Service.*] [Except in a proceeding brought under section 2

of this Act,] the proceeding is commenced by filing a petition verified by the petitioner with the clerk of the court in which the conviction took place. Facts within the personal knowledge of the petitioner and the authenticity of all documents and exhibits included in or attached to the petition must be sworn to affirmatively as true and correct. The [Supreme Court, Court of Appeals] may by rule prescribe the form of the petition and verification. The clerk shall docket the petition upon its receipt and promptly bring it to the attention of the court and deliver a copy to the [prosecuting attorney, county attorney, state's attorney, attorney general].

SECTION 4. [*Petition—Contents.*] The petition shall identify the proceedings in which the petitioner was convicted, give the date of the entry of the judgment and sentence complained of, specifically set forth the grounds upon which the petition is based, and clearly state the relief desired. All facts within the personal knowledge of the petitioner shall be set forth separately from other allegations of facts, and shall be verified as provided in section 3 of this Act. Affidavits, records, or other evidence supporting its allegations shall be attached to the petition unless ~~or~~ the petition recites ~~shall state~~ why they are not attached. The petition shall ~~also~~ identify any previous proceedings, together with the grounds therein asserted taken by that the petitioner has taken to secure relief from his conviction or sentence. Argument, citations, and discussion of authorities are unnecessary. ~~shall be omitted from the petition.~~

SECTION 5. [*Inability to Pay Costs. Proceeding as a Poor Person.*] The petition may allege that the petitioner is unable to pay the costs of the proceeding or to employ counsel. If the court is satisfied that the allegation is true, it shall ~~order that the petitioner proceed as a poor person, and~~ appoint counsel for him. If after judgment, a review is sought by the petitioner or by the state, and the ~~reviewing hearing~~ court is of the opinion that the requested review if sought by the petitioner, is not frivolous ~~is requested in good faith,~~ and the court finds that the petitioner is unable to pay the costs of the review or to employ counsel, it shall appoint counsel for him. If inability to pay is determined, the court shall order ~~that all necessary costs and expenses incident to the proceedings in either the trial or reviewing court, or both thereto,~~ including all court costs, stenographic services, printing, and reasonable compensation for legal services, shall be paid by [the county in which the judgment is rendered.]

SECTION 6. [*Pleadings.*] Within [~~thirty—(30)~~] days after the docketing of the petition, or within any further time the court

may fix, the state shall respond by answer or motion. No further pleadings shall be filed except as the court ~~may~~ orders. At any time prior to entry of judgment, the court may grant leave, ~~at any time prior to entry of judgment,~~ to withdraw the petition. The court may make appropriate orders ~~for as to~~ amendment of the petition or any ~~other~~ pleading, ~~for or as to~~ pleading over, for filing further pleadings, or ~~for~~ extending the time of the filing of any pleading ~~other than the original petition.~~ In considering the petition or any amendment the court shall take account of substance regardless of defects of form.

SECTION 7. [*Hearing—Evidence—Order.*] [Except in a proceeding brought under section 2 of this Act,] the petition shall be heard in ~~and before any judge of~~ the court in which the conviction took place ~~and before any judge thereof.~~ A record of the proceedings shall be made and kept. All existing rules and statutes applicable in civil proceedings including pre-trial and discovery procedures are available to the parties. The court may receive proof by affidavits, depositions, oral testimony, or other evidence, and may order the petitioner brought before it for the hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the conviction judgment or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper. The court shall make specific findings of fact and state expressly its conclusions of law relating to each issue presented. ~~The order making final disposition of the petition shall clearly state the grounds on which the case was determined and whether a federal or a state right was presented and decided. This order is~~ constitutes a final judgment for purposes of review.

SECTION 8. [*Waiver of Claims.*] All grounds for relief available to claimed by a petitioner under this Act must be raised in his original, supplemental, or amended petition, ~~and~~ Any grounds not so raised or finally adjudicated or knowingly or understandingly are waived in the proceedings resulting in the conviction or sentence or in any other proceeding that the petitioner has taken to secure relief from his conviction or sentence may not be the basis for a subsequent petition, unless the court on hearing a subsequent petition finds a grounds for relief asserted therein which for reasonable cause was omitted or inadequately could not reasonably have been raised in the original, supplemental or amended petition.

SECTION 9. [*Review.*] A final judgment entered under this Act may be reviewed by the [Supreme† Court, Court of Appeals] of

this state on [appeal, writ of error] brought either by the petitioner within [] or by the state within ~~[six (6) months]~~ from the entry of the judgment.

SECTION 10. [*Uniformity of Interpretation.*] This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

SECTION 11. [*Short Title.*] This Act may be cited as the Uniform Post-Conviction Procedure Act.

SECTION 12. [*Severability.*] If any provision of this Act or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

IV. A STATE-BY-STATE SUMMARY

In addition to abstracting statutory provisions and existing court rules on the subject of post-conviction relief, a selected group from each state was invited to comment upon the process of post-conviction relief as it actually functions in that jurisdiction. The correspondence referred to herein is maintained on file in the office of Professor William F. Swindler at the Marshall-Wythe School of Law, Williamsburg, Virginia. Chief justices, attorneys general, public defenders, defense counsel, and bar association leaders in criminal law and procedure were among those canvassed. Replies were somewhat disparate, but for most of the states a realistic picture emerged.

The data in the following summaries consists of either excerpts from the replies of the individuals solicited or recapitulations of the procedure set out in the statutes and court rules in the state as verified by the responses. Where appropriate, sources of specific commentary are indicated in the text. Twelve states were given rather extended treatment, and although the remainder were covered in condensed fashion, this does not suggest that they were less significant. By the geographic and demographic variety of the twelve selected states, the summaries have covered the range of procedural postures to be found in all the states.

Alabama

Alabama criminal procedure (Alabama Code, Title 15) provides for habeas corpus review of conviction or imprisonment by petition to the

nearest circuit court. The statute permits either a summary or evidentiary hearing. In 1963, section 380 was added to Title 15, providing for availability of a transcript and record (without cost in cases of indigents) and prompt review of alleged errors by the trial court. Appeal lies to the appropriate reviewing court with discretion to order a transcript and complete record for review.

Where a prisoner successfully challenged the constitutionality of his original sentence, a second sentencing without credit for time served on the original sentence was reviewable as constituting a penalty for having exercised the original right of challenge. *Rice v. Simpson*, 271 F. Supp. 267 (M. D. Ala. 1967).

A writ of error coram nobis may be brought to raise errors in fact dehors the record. Though there is no statutory time limit, the writ may be lost for failure to make a timely bid for relief. *Butler v. State*, 279 Ala. 331, 184 So.2d 823 (1966). The writ is apparently available to test constitutional issues but is otherwise not freely granted as a post-conviction remedy. See, e.g., *Ex parte Hamilton*, 273 Ala. 504, 142 So.2d 868 (1962); *Ex parte Seales v. State*, 271 Ala. 622, 126 So.2d 474 (1961).

Alaska

Alaska's Rule of Criminal Procedure 35 purports to accomplish "the objectives of all of the constitutional, statutory, or common law writs," and accordingly Rule 60 of the Rules of Civil Procedure abolishes the writ of error coram nobis. Application for review is filed with the court in which the conviction was obtained, with discretion in this court to order an evidentiary hearing. Final judgment of this court may be reviewed by the state supreme court.

Arizona

Habeas corpus ad subjiciendum may be granted at the discretion of the trial court or members of the state supreme court. This provides a civil proceeding collaterally attacking the legality and correctness of detention. Rule 61 of the Rules of Civil Procedure permits appeal in the form of a writ of error coram nobis where the ruling of the court below "appears to the court inconsistent with substantial justice." Upon appeal from a judgment by a criminal defendant, the state supreme court is directed by statute to review the entire record.

It appears that the use of habeas corpus is largely restricted to challenges of the jurisdiction of the trial court. Constitutional due process issues are cognizable only on appeal. See *Holman v. State ex rel. Eymann*, 5 Ariz. App. 311, 426 P.2d 411 (1967); *State v. Court of Appeals Division 2*, 101 Ariz. 166, 416 P.2d 599 (1966).

Arkansas

Substantive relief is provided by Criminal Procedure Rule 1, promulgated October 18, 1965 and amended April 10, 1967. After the usual procedure for petitioning for a review of the conviction in the trial court, review may be had in the supreme court by submitting a record of the proceedings in the court below. The record required of the court below includes both written findings of fact and conclusions of law. Habeas corpus and the common law writ of error coram nobis are also available. See *Evans v. State*, 242 Ark. 92, 411 S.W. 2d 860 (1967) for the objectives of the rule, and *Fleschner v. Stephens*, 248 F. Supp. 151 (E.D. Ark. 1965) for a federal judge's evaluation.

California

California offers a basic post-conviction remedy in habeas corpus (California Penal Code, §§ 1473-1506) as an alternative to the type of relief and review available in certiorari (California Civil Procedure Code, §§ 1067-77) and in coram nobis (California Penal Code, §§ 1265, 1487, n. 3). The then Chief Justice of the state supreme court advised that case law has consistently expanded the remedy through habeas corpus to meet "evolving constitutional standards to such an extent that the statutory provisions . . . do not reflect completely or accurately the scope of the remedy as it now exists in California." Letter from Chief Justice Roger J. Traynor, August 15, 1969. See, e.g., *In re Bell*, 247 Cal. App. 2d 655, 55 Cal. Rptr. 705 (1967); *Application of Oxidean*, 195 Cal. App. 2d 814, 16 Cal. Rptr. 193 (1961); *Ex parte Winchester*, 53 Cal. 2d 528, 348 P.2d 904, 2 Cal. Rptr. 296, cert. denied, 363 U.S. 852 (1960). But see *In re Streeter*, 66 Cal. 2d 47, 423 P.2d 976, 56 Cal. Rptr. 824 (1967).

This is also the view of a California law professor, who wrote:

Our Supreme Court has expanded habeas corpus in a number of respects. It is now clear that it is the proper remedy to collaterally attack a conviction claimed to have been procured in violation of

constitutional rights. See *People v. Adamson*, 34 Cal. 2d 320, 210 P.2d 13 (1949). Not only has the court permitted it to be used by persons not actually in custody, but has also used it increasingly as a device to procure in effect a declaratory judgment where the petitioner does not even claim to be entitled to release. See *In re Consalves*, 48 Cal. 2d 638, 311 P.2d 483 (1957) (habeas corpus can be used to procure a declaration that an appeal was properly taken); *In re Rye*, 152 Cal. App. 2d 594, 313 P.2d 914 (1957) (declaration that consecutive sentences improperly imposed). One can still find old cases of more restrictive stripe but I have little doubt of the ability of intelligent counsel to raise almost any issue that can be raised in other states under statutory post-conviction remedies.

This correspondent appended to his letter a lengthy list of state cases concerning the use of habeas corpus for post-conviction review and relief. The cases included those which attacked judgments based on pretrial and trial errors, attacked sentences or confinements, inquired into the treatment of prisoners, questioned decisions on parole and extradition warrants, and discussed questions in relation to appeals. The writer concludes:

Another remedy that ought to be mentioned, although in a technical sense it could be said not to be a post-conviction remedy, is the petition to recall the remittitur. This enables the petitioner to reopen an appeal long after the time for rehearing in the appellate court has run. Though the older cases suggest that its use is strictly limited to situations where there were serious defects in the original appeal, almost amounting to fraud on the appellate court, in the last few years the courts have used it in a number of situations without much inquiry as to the technical requirements. Though in theory this is simply a continuation of the original appeal, it permits the defendant relief that would otherwise be collateral.

Letter from Kenneth W. Graham, Jr., September 4, 1969.

This view is counterbalanced by the statements of a San Francisco practitioner and former law clerk in the federal system, who says that he "think[s] the California Supreme Court under former Chief Justice Traynor (1) did not represent the general attitude and disposition of most lower-court judges, and (2) when the Supreme Court considers

a case it is able to devote considerably more time than any other court could probably devote to a prisoner application for post-conviction relief." The background of many trial judges, the correspondent states, tend to make them "generally anti-post-conviction relief."

As for the intermediate courts in California, there too the judges are extremely over-worked handling a flood of civil and criminal appeals. . . . Courts go out of their way in this state to affirm criminal convictions. The law in the intermediate appellate courts in California is horribly confused and, I think it is fair to say, . . . you can find a case standing for virtually any proposition. The intermediate California courts do have a position filled usually by a recent law school graduate who is assigned the duty of reviewing all applications for writs of all kinds. . . . The law clerks themselves devote much if not most of their time to non-prisoner problems. In short, the California courts—both superior and appellate—simply do not have or take the time to deal adequately (in my opinion) with the many applications for post-conviction relief that they receive. . . .

The evidentiary hearings are much more flexible in Federal courts than in California courts. In all the time I was a law clerk in the federal court, considering all the prisoners who had sought post-conviction non-appellate relief in state courts, and who subsequently filed for relief in the federal court, having been denied relief in the state system, not more than 2% or 3% received any evidentiary hearing and not more than 10% received any statement of the reasons their relief was being denied. In the Federal court, in my experience, perhaps 5% to 10% received evidentiary hearings and almost 100% of the cases resulted in individualized opinions or short orders stating the bases of any ruling. Consequently, the federal appellate courts are able to more intelligently pass upon claims that reach them. The fact that the California courts do not give reasons for their denial is a fact which the [Federal Judicial Center] committee should be especially interested in, for with the inadequate consideration in the state courts and with no basis for determining why the state courts took the action [they] did, federal courts have no basis for ruling that a state prisoner procedurally waived any claims in the state court. In the face of silent denials by the state courts, there is little alternative for federal courts but to fully consider the petitioner's allegations on the assumption that he is entitled to raise them and that he never deliberately bypassed any available state remedy.

Letter from Steven M. Kipperman, September 25, 1969.

Coram nobis is available to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition had the trial court known of it and where the lack of knowledge was not a result of the defendant's negligence. *People v. Adamson*, 34 Cal. 2d 320, 210 P.2d 13 (1949); *Williams v. Duffy*, 34 Cal. 2d 320, 197 P.2d 341 (1948); *People v. Coyle*, 88 Cal. App. 2d 967, 200 P.2d 546 (1948). It is not a proper vehicle for review of alleged denial of constitutional rights. *People v. Williams*, 253 Cal. App. 2d 560, 61 Cal. Rptr. 323 (1967); *People v. Adamson*, 34 Cal. 2d 320, 210 P.2d 13 (1949).

The problems pointed up by these observations of California, a major state in consideration of its economic and population status, are underlined by the statistics in Table 1-k in Part II of this study, concerning the Northern District of California; *see also* the data in Table 2, *supra*, and Part V, *infra*.

Colorado

Recent state adjustments of post-conviction procedure required by the 1963 "trilogy" are well illustrated by changes in Colorado law. Information provided by Justice Edward E. Pringle (member of the Federal Judicial Center committee) documents the change to a degree not yet reflected in available statutory records. As Table 1-L in Part II *supra* indicates, the volume of petitions for federal habeas corpus in Colorado has been declining steadily since 1964—the first year after the "trilogy" and two years before the systematic reform urged upon the state trial judges began to have general effect. In this connection, the following comment from Justice Pringle's opinion in *People v. Bradley*, — Colo. —, 455 P.2d 199 (1969) is pertinent:

Rule 35(a) provides that where a sentence is illegal the sentencing courts may correct it *at any time*. There is no requirement contained in the rule that such a matter must be raised on writ of error from the conviction or be thereafter waived. Moreover, this court no longer adheres to the letter of Rule 35(b) which provides that constitutional errors must be of a sort not effectively subject to review on writ of error from the conviction. We are now committed to the philosophy that error consisting of a violation of constitutional rights of a prisoner may be raised in a 35(b) proceeding so long as it was not previously raised and disposed of on

writ of error. See *De Baca v. District Court*, ___ Colo. ___, 431 P.2d 763; *Segura v. People*, ___ Colo. ___, 431 P.2d 768; *Brown v. People*, 162 Colo. 406, 426 P.2d 764; *Lauderdale v. People*, 162 Colo. 36, 424 P.2d 373; *Buckles v. People*, 162 Colo. 51, 424 P.2d 774, where we have heard constitutional issues in 35(b) proceedings and decided them on their merits, although the same issues could have been effectively raised on writ of error to the conviction. . . .

A September 10, 1969, letter from Justice Pringle adds:

Even before the *Bradley* case was announced, the federal courts in Colorado for several years recognized that the rule stated in *Bradley* was the rule in Colorado and have governed themselves accordingly. . . . All of our state judges have been instructed at our last three judicial conferences that whenever it appeared on the face of the petition that post-conviction relief would be granted if the allegations therein made were true, the trial court must *hold an evidentiary hearing and make findings of fact*. Our state judges follow this rule. Our federal judges recognize that this rule is being followed in Colorado and review the findings of fact made by the trial court and apply the provisions of [28] U.S.C. § 2254 as recently amended in determining whether they should afford an evidentiary hearing. Such evidentiary hearings are almost never granted in our federal District Courts any more.

Connecticut

The statutory provisions set out in Section 52-470 of the Connecticut General Statutes stipulates that habeas corpus applications alleging error in the conviction of a defendant may be heard by the trial court in the vicinity, and admonishes the judge to "inquire fully into the cause of imprisonment, and thereupon dispose of the case as law and justice require." Appeal is allowed only upon timely petition to the judge who held the hearing, or to a justice of the supreme court to certify a reviewable question.

An indigent state prisoner represented by a private attorney is not required to seek state habeas corpus before petitioning for federal habeas corpus where an entry fee is required by state law unless the party was represented by a public defender. *Rush v. York*, 281 F. Supp. 779 (D. Conn. 1967). See *Vena v. Warden, State Prison*, 154 Conn. 363, 225 A.2d 802 (1966) for the scope of habeas corpus in treating constitu-

tional due process questions. See also *Williams v. Reincke*, 157 Conn. 143, 249 A.2d 252 (1968).

Delaware

Supreme Court Rule 40 provides for the filing of a motion by the prisoner in the court which sentenced him, accompanied by an affidavit setting out the ground upon which relief is sought and alleging that errors or irregularities in the trial resulted in the illegal sentence. Upon due notice to the attorney general, a hearing is held by the court. Rule 35 (Criminal) of the Superior Court, amended June 1, 1969, which provides that any person convicted and sentenced by the trial court may file a motion for post-conviction relief on any meritorious claim, is much broader. Unless the record satisfies the court that the motion should be denied, notice is given to the attorney general, and a hearing is held to determine the issues and make findings of fact and conclusions of law with reference to the motion. A complete record of the post-conviction review is the result. See *Rocker v. State*, 240 A.2d 141 (Del. 1968); *Priest v. State*, 227 A.2d 576 (Del. 1967) for applications of Rule 35.

Florida

Florida Rule 1.850, adopted shortly after *Gideon v. Wainwright*, 372 U.S. 335 (1963), provides that a prisoner may move the court which imposed sentence to vacate, set aside, or correct it. Unless the motion, files, and records in the case conclusively show that the prisoner is not entitled to relief, the court is required to give notice to the prosecuting attorney of a timely hearing at which findings of fact and conclusions of law are established. See *Devlin v. State*, 192 So. 2d 786 (Fla. App. 1966). The writs of habeas corpus and coram nobis both lie in Florida within their traditional scope, but Rule 1.850 contains some limitation on habeas corpus use.

Georgia

A substantial amendment to the habeas corpus statute of Georgia was adopted in 1967, Georgia Code Annotated, § 50-127 (Supp. 1969). By its terms, a prisoner may sue a writ in the trial court in the county in which he is being detained, submitting a complete record of prior proceedings. The court is directed to serve notice on the prosecutor,

and to hold a timely hearing at which a transcript of findings of fact and conclusions of law is compiled. Defense counsel agree, however, that enforcement of the statute, particularly with reference to constitutional rights of prisoners, is virtually meaningless. Court-appointed counsel allegedly neglect to perfect appeals from trial court findings, and defense counsel at the trial level neglect or are denied opportunity to object to rulings violative of due process.

Although little used, the writ of error coram nobis is available, *Mirgala v. Bryson*, 152 Ga. 828, 111 S.E. 655 (1921), and an extraordinary motion for a new trial may be used to raise the issue of newly discovered evidence under Georgia Code Annotated, title 70, §§ 70-301 to 303 (1933).

Hawaii

Habeas corpus is the prescribed statutory process for securing post-conviction review. Hawaii Revised Statutes, §§ 660-1 to -33 (1968). Every person deprived of his liberty, except for a felony conviction, may prosecute the writ as of right, while the excepted class may seek the writ by petition to justices of the state supreme court. In the felony situation, the trial court is directed to issue a show cause order to the detaining party. In both cases, timely notice is given to the prosecuting attorney, and a full hearing with a record complete as to findings of fact and conclusions of law is held. There is no evidence of use of the writ of error coram nobis.

Idaho

Idaho is one of the states which has adopted the Uniform Post-Conviction Procedure Act. Prior to 1967 when the Act was adopted, statutory relief had largely replaced common law relief. Cf. *State v. Iverson*, 79 Idaho 25, 310 P. 2d 803 (1957) holding that coram nobis had been preempted by statutory remedies; *Beus v. Terrell*, 46 Idaho 635, 269 P. 593 (1928), limiting writ of review or writ of error to cases where no appeal is provided by law. Complete records of evidentiary hearings appear to be insured by the present statutory structure. Section 19-4901(b) of the Idaho Code exclusively supersedes all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence.

Illinois

A wealth of material was provided by correspondents in this state, but perhaps the most meaningful manner of stating the present post-conviction process in Illinois is to quote from a memorandum prepared by George J. Cotsirilos, a defense attorney in Chicago. Letter from Richard E. Eagleton, October 24, 1969.

As amended June 4, 1965, § 122-1, Chapter 38 [Illinois Criminal Procedure Code] now allows twenty years after rendition of final judgment within which proceedings may be commenced, and this period may be extended if the petitioner alleges facts showing that the delay was not due to his culpable negligence.

Remedy under the Post-Conviction Hearing Act is limited to constitutional issues and does not provide an opportunity for re-determination of guilt or innocence of defendant. *People v. Orndnoff*, 39 Ill. 2d 96, 233 N.E. 2d 378 (1968).

It is not the function of the Post-Conviction Hearing Act to have claims considered which were considered upon direct review of conviction, or which could have been presented on direct review of conviction. *People v. Thomas*, 38 Ill. 2d 321, 231 N.E. 2d 436 (1967).

To secure a plenary hearing, petitioner under Post-Conviction Hearing Act must make a substantial showing of violation of a constitutional right, and the allegation of a mere conclusion to that effect under oath will not suffice. *People v. Hill*, 39 Ill. 2d 61, 233 N.E. 2d 546 (1968). The allegations in the petition must be supported by records in the case, or by accompanying affidavits unless absence of same is sufficiently explained. *People v. Evans*, 37 Ill. 2d 27, 224 N.E.2d 778 (1967).

It is not the intent of Post-Conviction Hearing Act that constitutional claims made in the petition be adjudicated on pleadings, and function of pleadings in proceedings under the Act is to determine whether petitioner is entitled to a hearing. *People v. Clements*, 38 Ill. 2d 213, 230 N.E. 2d 185 (1967).

No extrinsic evidence is required when petitioner's claims are based on matters of record. *People v. Airmers*, 34 Ill. 2d 222, 215 N.E. 2d 225 (1966). However, when a claim of substantial constitutional denial is based on assertions beyond the record, the Act contemplates that evidence be taken. *People v. Sigafus*, 39 Ill. 2d 68, 233 N.E. 2d 386 (1968).

In the event that the trial court dismisses the petition and denies a hearing or holds a hearing but refuses to grant the relief asked

for, the decision may be appealed directly to the Illinois Supreme Court because of the constitutional nature of the claim.

Under Section 72 of the Civil Practice Act (Chapter 110, I.R.S.), a criminal defendant may petition the trial court to set aside his conviction if the trial judge was not aware of an important fact that would have affected the disposition of the case, assuming that the defendant was not at fault for failing to apprise the judge of the fact. The Section 72 petition is used to "set aside a conviction obtained by duress or fraud, or the conviction results from the excusable mistake or ignorance of the accused."

Section 72 may be used where a nonconstitutional issue which might have affected the disposition of the case was not brought to the attention of the trial court. The action must be brought within two years of the conviction unless the facts were fraudulently concealed or unless the defendant was under a legal disability. An adverse ruling on the Section 72 petition may be appealed to the Illinois Appellate Court. The State writ of habeas corpus (Chap. 65, I.R.S.), is limited in scope by the coverage of the Post-Conviction Hearing Act. The habeas corpus procedure may be used to test the duration of sentence and the application of parole procedures. *People ex rel. Gregory v. Page*, 31 Ill. 2d 592, 203 N.E. 2d 425.

Indiana

The state supreme court reorganized its post-conviction procedure by a set of rules promulgated August 1, 1969. While preserving alternate rights of appeal and habeas corpus, the rules provide for standardized forms which guide petitioners to all the material allegations required for perfecting their petitions and require a full evidentiary hearing with a written record of all proceedings and the judgment of the court. Appeal on this record lies to the supreme court. Supreme Court Rule P.C. 1 § 1(b) comprehends and exclusively supersedes all common law and statutory remedies previously available for challenging the validity of conviction or sentence. Habeas corpus is retained ostensibly for constitutional purposes. See also Supreme Court Rule P.C. 2 § 1 (belated motion for new trial) and Supreme Court Rule P.C. 2 § 2 (belated appeal).

Iowa

Habeas corpus statutes have been construed as the proper medium for collateral attack upon the validity of a conviction. It is made to the

nearest court or judge, and if disallowed the reasons for such denial must be explained and included in the return of the writ. Iowa Code § 663.7 (1966). Habeas corpus in Iowa appears available to test constitutional issues on the theory that violation of such rights divests a court of jurisdiction. See, e.g., *Frank v. Bennett*, — Iowa —, 162 N.W.2d 404 (1968); *Scalf v. Bennett*, 256 Iowa 1068, 128 N.W.2d 903 (1964).

Kansas

In 1963 Kansas adopted a post-conviction statute, Kansas Statutes Annotated § 60-1507, based substantially on 28 U.S.C. 2255. Thereafter, a committee of state judges, acting in consultation with United States District Court judges in Kansas, drafted Supreme Court Rule 121 to implement the statute and provide standardized forms for motions attacking sentences. Kansas Statutes Annotated § 60-1507 and implementing Supreme Court Rule 121 are intended to supersede all formerly available means of post-conviction review, except direct appeal of trial errors. The use of "1507 motions" has become the usual method of seeking relief, although statutory means of habeas corpus and direct appeal from judgment are still available.

Lack of legal advice handicaps many prisoners in perfecting petitions even with standardized forms. Additionally, the procedure fails to take into consideration allegations (incompetency of counsel, coercion of witnesses, unconstitutional search and seizure) which could not have appeared in the record of the trial, since, in such instances under the present practice, the courts refuse to grant evidentiary hearings.

Kentucky

Under Rule of Criminal Procedure 11.42 prisoners may petition to attack their sentences by motion in the sentencing court. Where the court is satisfied that a material question has been raised which cannot be answered on the face of the record, it is required to hold a hearing and make findings of fact and conclusions of law. A final order is thereupon entered. In the absence of a showing that the remedy by motion under Rule 11.42 is inadequate, the petition for a writ of habeas corpus will be dismissed. See, e.g., *Nicholas v. Thomas*, 382 S.W.2d 871 (Ky. 1964); *Ayers v. Davis*, 377 S.W.2d 154 (Ky. 1964).

Louisiana

Although there is a statute for "correction of illegal sentence" (Code of Criminal Procedure, article 882, Louisiana Statutes Annotated), the usual post-conviction remedy is statutory habeas corpus. Section 362, clause 9, of the Code of Criminal Procedure provides for discharge of the person in custody if "he was convicted without due process of law." This simple post-conviction feature may meet the federal standards. A summary hearing is provided with review in the state supreme court. Inadequacy of a record of post-conviction review appears to prompt a regular reliance on petitions for habeas corpus in the federal court.

Maine

In 1963, the year of the federal "trilogy," Maine made a comprehensive revision of its post-conviction procedure modernizing the remedies recognized in the common law writ of error coram nobis, and the statutory writs of error in criminal appeals and habeas corpus. A letter from the office of the Attorney General, dated October 2, 1969, advised that the existing statute is considered superior to the Uniform Post-Conviction Procedure Act of 1965. Specifically, Maine's statute clearly spells out the mechanics by which a post-conviction case is to be moved toward adjudication. Also, Maine's statute has wide application by virtue of the fact that the action is available to persons incarcerated, on parole, on probation, or fined, as well as to the juvenile offender. Cf. Note, *How Post is Post-Conviction Relief in Maine?*, 21 University of Maine Law Review 241 (1969) (pointing out that relief does not apply to a petitioner discharged from custody); *Thoreson v. State*, 239 A.2d 654 (Me. 1968).

A memorandum from the Attorney General's office describes in detail the provisions and functioning of the 1963 Maine statute:

The basis for post-conviction habeas corpus is found in Sections 5502-5508 of Title 14 of the Maine Revised Statutes. The reference sections incorporate the substantive reasons for Writ of Error in a criminal case and Writ of Error Coram Nobis into the Habeas Corpus statute. Section 5502 lays the precepts for post-conviction relief. That Section provides that any person (including any juvenile offender, or person on probation or parole) convicted of a crime (including persons fined) who claims that he is illegally imprisoned, or that errors of law of record have been made, or

that his sentence was imposed in violation of the Constitution of the United States or of this State, or that there were errors of fact not of record which were not known to the accused or to the Court and which by the use of reasonable diligence could not have been known to the accused at the time of trial and which, if known, would have prevented conviction, may institute a petition for the Writ of Habeas Corpus seeking release from illegal imprisonment, correction of any error of law of record or for the purpose of setting aside the plea, conviction and sentence. . . . [H]abeas corpus is not a substitute for nor does it affect any remedies incidental to the trial court proceedings; nor is it a substitute for other review of the sentence or conviction. A petition may be filed at any time once the conviction is final.

Section 5503 delineates the procedure for commencement of a post-conviction action. . . .

Section 5504 lists material which must be alleged in the petition in order that the particular judgment and sentence complained of be specifically described. Argument, citations and discussion of authorities are to be omitted from the petition; but may be filed in a separate document.

Section 5505 requires the Attorney General to file a responsive pleading to the petition within 20 days next following the date on which the petition was received in the Attorney General's office. . . . The hearing, although usually held in the county where the conviction occurred, may be held in any county in the State. An indigent petitioner may, on request, have counsel appointed to represent him. Amendments to the pleadings are liberally allowed. . . . The decision making final disposition of the case constitutes a final judgment for the purpose of review.

Section 5507 recites that those grounds for relief claimed by a petitioner under this post-conviction statute must be raised in the original or amended petition; and any grounds not so raised are waived unless either the State or Federal Constitution otherwise requires or any Justice, on considering a subsequent petition, finds grounds for relief asserted which could not reasonably have been raised in the original or amended petition. In any event, a petitioner appearing pro se who finds his petition dismissed for failure to recite valid facts is not precluded from again prosecuting a petition containing new material.

Section 5508 contains language relating to appeal of post-conviction actions. Both the petitioner and the State are entitled to appeal.

Although Sections 5502-5508 provide for post-conviction habeas

corpus, any court decisions relating to either Habeas Corpus, Writ of Error Coram Nobis, or Writ of Error in a criminal case may still be recited as material case law when applicable. The post-conviction statute, appearing in its present form, was enacted in 1963. Simultaneously the statutes relating to both Writ of Error in a criminal case and Writ of Error Coram Nobis were repealed. Maine's post-conviction remedy was not enacted as a result of recent Supreme Court of the United States decisions extending the rights of individuals in habeas corpus proceedings. For example, at the time the United States Supreme Court decided *Case v. Nebraska*, 381 U.S. 336 (decided May 24, 1965), the post-conviction remedy in Maine, as we know it today, had already been enacted. For many years, Maine has provided the post-conviction remedies of Habeas Corpus, Writ of Error in a criminal case, and Writ of Error Coram Nobis; and it was in 1963 that the Legislature enacted this single statute, containing all three actions, following the Legislature's awareness that petitioners were utilizing the three separate procedures, one after the other, with a single unchanged set of facts or issue of law.

A very broad interpretation of the 1963 post-conviction act was enunciated in *Green v. State*, 245 A.2d 147, 150 (Me. 1968):

Our post-conviction habeas corpus however was not intended to be a mere consolidated substitute for former remedies with their limited and fixed common law connotations, but designed as it was to be the sole and exclusive method of collateral attack upon the legality of a conviction and sentence . . . it must be given such reasonable flexibility within the spirit of the statutory enactment that it may be an effective procedural vehicle for collaterally reaching all fundamental defects in the administration of criminal justice.

Maryland

Maryland adopted the original Uniform Post-Conviction Procedure Act in 1958 and comprehensively revised it in 1965 (Maryland Acts 1965, chapter 442). A state prisoner may seek direct review by appeal from the original judgment, and if a petition for such review is unsuccessful he may then attack the conviction collaterally through the Uniform Post-Conviction Procedure Act. Article 27, § 645A of the Maryland Code Annotated (1957) provides for such attack where the alleged error has not been litigated or waived in the course of the proceedings

leading to the conviction, or on direct appeal, or on common law proceedings in habeas corpus or coram nobis. This section is implemented by Supreme Court Rules BK 40-48, and supersedes the common law writs of habeas corpus and coram nobis as a post-conviction remedy.

Massachusetts

The Commonwealth of Massachusetts, like Maine, considers that its post-conviction remedies are more flexible and effective than the revised Uniform Post-Conviction Procedure Act. In 1966, the state legislature entertained a bill providing for the adoption of the model act, but a study concluded that the existing writ of error procedure, Massachusetts General Laws, chapter 250, §§ 1, 2, 9-13 (1959), was substantially more flexible, and the bill did not pass. Cf. Bernardin, *Writ of Error in Criminal Cases*, 47 Massachusetts Law Quarterly 37 (1962).

The following is an excerpt from a letter from the Post-Conviction Division of the Massachusetts Defenders Committee, dated October 2, 1969, which suggests some of the difficulties of the general statutory procedure in practice:

We have in this state . . . a statutory procedure for the direct appeal of criminal convictions. This direct appeal is assured to every convicted person and it brings all matters of law that are preserved by objection and exception to the supreme court of this Commonwealth. Frequently the court will also examine the factual record to see whether there is sufficient evidence to warrant a finding whether it be by the jury or by the trial judge in jury waived session. We have a number of problems that arise in this course of direct appeal. An example of a serious discrepancy is that of furnishing typewritten transcripts of trial. There is a stenographer present recording in stenotype all testimony and all verbal exchanges during the course of trials in our superior court, which is the jury trial court in this state. This stenotyped record which is readable only to stenotype trained operators, is not transcribed into typewritten form unless the stenographer is paid or the court orders a transcript to be furnished the parties at government expense. If a defendant can pay for a typewritten transcript this is of great value in the preparation of his appeal. If a defendant is unable to pay then only by motion and order of the court can the transcript be obtained. Of course most defendants in felony cases do not have funds to pay for a transcript and reliance must be placed with the trial judge. Some trial judges frequently grant

typewritten transcripts and some do so very rarely. This is a source of grave inequity and injustice. There are many obstacles in the way of properly presenting a direct appeal if counsel is denied a typewritten transcript of the trial and yet this is so often the case that it is almost accepted as traditional in this state.

. . . .

In our post-conviction area of activity we use civil rather than criminal remedies. Direct appeal is a criminal remedy but we do not use this course of review. Our remedies are generally by petition for writ of error, mandamus, declaratory judgment, habeas corpus, and certiorari. All of these latter remedies are on the civil side and utilize the civil procedures available in this state.

If a prisoner has exhausted our state remedies and has gone to our state supreme court he may seek review by way of petition for writ of habeas corpus in the local federal court.

Coram nobis has been largely superseded by the writ of error, *Commonwealth v. Phelan*, 271 Mass. 21, 171 N.E. 53 (1930), and case law indicates a reliance on the writ of error to attack a conviction and sentence allegedly obtained by virtue of a denial of constitutional rights. See *Crowell v. Commonwealth*, 352 Mass. 288, 289, 225 N.E.2d 330 (1967): "Habeas corpus cannot be employed as a substitute for ordinary appellate procedure and so in general is not available where there is a remedy by writ of error or appeal. . . . The petitioner does have a remedy by writ of error. In many cases the issue of lack of representation by counsel has been raised on writ of error."

Michigan

There appears to be no clear-cut post-conviction procedure in Michigan. The Revised Judicature Act of 1961, Public Act 1961, No. 236, sets out a broad habeas corpus remedy available to any person restrained of his liberty for any cause by a state agency. Prompt return on the writ, with complete record available for review, and credit for time served on any void sentence where a prisoner is resentenced, is provided for. Coram nobis is rendered obsolete by statutory methods of correcting factual error. See *Dewey v. Smith*, 250 Mich. 377, 230 N.W. 180 (1930).

Minnesota

The Minnesota post-conviction law, Minnesota Statutes Annotated,

§§ 590.01-.06 (Supp. Vol. 38, 1970), was enacted in 1967 and substantially amended in 1969. The amended law makes possible review of the original record where a prisoner is seeking resentencing as well as discharge or new trial. Appeal from the conviction may be stayed while an application is taken to the trial court for an evidentiary hearing under the post-conviction act, so that, in the event of an adverse ruling on this issue, the transcript of the hearing will provide a more complete presentation of the factual issues on the appeal. In the case of appeal or post-conviction action, prisoners are provided with the services of a practicing attorney.

Although the post-conviction remedies under sections 590.01-.06 impliedly supersede remedies by habeas corpus and coram nobis, habeas corpus had previously been expanded to permit inquiry into alleged violations of freedoms considered to be "basic and fundamental." *State ex rel. Coe v. Tohash*, 269 Minn. 1, 129 N.W.2d 903 (1964).

Mississippi

The following description of the state post-conviction procedure was received in a letter, dated March 26, 1969, from Chief Justice W. N. Ethridge, Jr., of the Mississippi Supreme Court.

The post-conviction remedy may be divided into two categories:

(1) Where the Mississippi Supreme Court has affirmed the conviction, it is necessary that the petitioner file in this Court an application for leave to file a petition for *writ of error coram nobis* in the trial court. Miss. Code 1942 Ann. § 1992.5 (1956). If the petition states a prima facie case, the court will direct the trial court to have a hearing on it, in order to determine whether a new trial should be granted. *Smith v. State*, 155 So. 2d 494 (Miss. 1966). Mississippi Supreme Court Rule 38 provides a procedure for these applications, as follows:

"Every application for leave to file in the lower court a petition for writ of error coram nobis shall have attached the original and two executed counterparts of the petition proposed to be filed in the lower court, which shall be sworn to by petitioner. Petitioner's affidavit shall designate specifically what facts, if any, alleged in the petition are within the personal knowledge of petitioner. When the petition contains allegations of fact not within the personal knowledge of petitioner, it shall have attached affidavit or affidavits of some other person or persons having

knowledge of the facts which are not within the personal knowledge of petitioner. The failure to attach such affidavits of persons other than petitioner may be excused upon good cause shown. The petition shall state when the facts relied upon for issuance of the writ came to petitioner's knowledge, and shall state sufficient facts to show that there was no want of reasonable diligence on the part of petitioner or his counsel. The petition shall be endorsed by a statement by petitioner's counsel, if any, that he believes the petition for a writ of error coram nobis is well taken, and should be issued. The application shall be supported by a brief, and failure to file a supporting brief may be ground for dismissal. In the event leave is granted to file the petition, the original and one executed counterpart of the petition shall be withdrawn and filed in the lower court."

(2) Where the sentence was not appealed and has not been affirmed by the Supreme Court, petitioner may file a *motion in the trial court* which imposed the sentence *to vacate, set aside or correct the sentence, and to order a new trial*. This simple motion procedure is discussed in detail in the case of *In Re Broom's Petition*, 251 Miss. 25, 168 So.2d 44 (1964). Sometimes this procedure is referred to as a petition for coram nobis, but as was stated in *Broom*, the preferable method is by simple petition.

With reference to category (1), where this Court considers that the statutory coram nobis in the Supreme Court is not proper, this Court has used a relief supplemental to coram nobis. *Lang v. State*, 230 Miss. 147, 92 So.2d 670 (1957); or later hearing, *Lang v. State*, 232 Miss. 616, 100 So.2d 138 (1958).

In summary, if the sentence has been affirmed by the Mississippi Supreme Court, petitioner must first file an application in this Court for leave to apply for a new trial in the trial court. This will be granted if the application states a prima facie case and complies with the rules of this Court. If the conviction was not appealed and affirmed, petitioner can file a simple motion in the trial court for a new trial, on which he may have a hearing to determine whether he should be granted a new trial. A denial of that right is appealable to the Supreme Court. *Windon v. State*, 192 So.2d 689 (Miss. 1966). These rights to post-conviction remedies have recently been broadened by the Mississippi Supreme Court to cover post-commitment orders of the Youth Court. *Love v. State*, No. 45, 239, decided March 24, 1969, and not yet reported in the Southern Reporter. That case contains a review of the post-conviction cases, and applies their principles to the Youth Court.

Coram nobis lies not only to raise issues of facts dehors the record but to test issues of abridgment of constitutional rights. See, e.g., *Love v. State*, — Miss. —, 221 So.2d 92 (1969); *In Re Brooms Petition*, 251 Miss. 25, 168 So. 2d 44 (1964). Habeas corpus in Mississippi is limited to inquiry into the competency and jurisdiction of the tribunal. *Jackson v. Waller*, 248 Miss. 166, 156 So.2d 594 (1963); *Smith v. State*, — Miss. —, 155 So.2d 494 (1963).

Missouri

A comprehensive summary of Missouri procedure appears in an article by Louis C. DeFeo, Jr., in 20 *Journal of the Missouri Bar* 448 (1964):

Missouri Supreme Court Rule 27.26 provides a civil procedure by which one sentenced and in custody for a crime may put in issue before his trial court defects in his conviction and sentence which are so fundamental as to make the judgment itself invalid.

"Rule 27.26 affords a prisoner a convenient means for a direct attack on the judgment of conviction by motion in the original proceeding. The attack is governed by the general principles applicable to a habeas corpus proceeding within the grounds specified in Rule 27.26, and will lie only where the judgment of conviction is void or otherwise subject to collateral attack." *State v. Thompson*, Mo., 324 SW2d 133, 135.

Although called a rule of procedure, Rule 27.26 has all the attributes of a substantive remedy. Pleadings are filed. An evidentiary hearing may be conducted. The order of the court is deemed a final judgment and may be reviewed by appeal. Pertinent rules of trial and appellate procedure apply to the proceedings. . . .

....

Rule 27.26 is closely related to its historical predecessors, coram nobis and habeas corpus. Writs of error coram nobis and habeas corpus ad subjiciendum are of ancient common law origin and are presently available remedies in Missouri. Rule 27.26 provides a remedy in addition to these ancient writs. State prisoners have available all three remedies in a proper case. Habeas corpus and coram nobis are civil and not criminal proceedings; Rule 27.26 is likewise a civil proceeding governed by rules of civil procedure.

....

The application must show that the applicant is a prisoner in

custody under sentence and claiming a right to be released. As in habeas corpus, the applicant must be presently and actually in custody. *State v. Knight*, Mo. App., 351 SW2d 802. A sentence already served cannot be attacked under the Rule even though such sentence may be the basis for present punishment under the habitual criminal act. *State v. Stodulski*, Mo., 298 SW2d 420. A sentence already served may be attacked under coram nobis, . . . *United States v. Morgan*, 346 US 502. As in habeas corpus, the Rule 27.26 applicant must be seeking release. . . .

. . . Rule 27.26 is not an appeal of the original criminal trial and not the forum for reviewing trial errors. *State v. Hecke*, Mo., 328 SW2d 41, 43; *State v. Childers*, Mo., 328 SW2d 43, 45.

....

Only when the court orders a hearing does the Rule require the court to notify the prosecuting attorney of the application. However, it would be good practice if the prosecuting attorney were notified of all applications and made a response in all but patently frivolous cases.

An answer or response is not expressly required by the Rule. . . . "Defendant's allegations in support of such a motion are not to be taken as admitted merely because the State has not denied them." *State v. Richardson*, Mo., 347 SW2d 168. Thus it is not mandatory that the State deny the applicant's allegations by a responsive pleading. Of course, this does not mean that the applicant's allegations need not be rebutted at all. If the allegations of the application are not refuted by the files and records of the case or the evidence presented at hearing, on appeal the allegations will be considered as though they were true.

The question of whether or not an evidentiary hearing must be held is distinct from the question of whether the applicant is entitled to relief. The pleadings should give separate attention to this question. Erroneous denial of a hearing will result in having to relitigate the whole application.

....

Rule 27.26 states:

"Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the prosecuting attorney, grant a prompt hearing thereon, determine the issues and make finding of fact and conclusions of law with respect thereto."

....

The virtue of such a comprehensive inquiry is that successive applications raising piece-meal grounds for relief are prevented. The court must entertain successive applications which are based upon different grounds (unless there is an abuse of remedy). However, if a comprehensive record is made at the first hearing, this record becomes part of the "files and records of the case" and, to the extent that these files and records conclusively show that no relief is due the applicant, successive applications may be summarily denied.

The Rule expressly requires findings of fact and conclusions of law in cases where a hearing is conducted. We shall not discuss such cases; the directive of the Rule is clear.

....

The Rule does not expressly require written findings in cases which do not require an evidentiary hearing. However, the Missouri Supreme Court has stated:

"... undoubtedly it is good practice for a summary order of denial to show that the motion, files and records establish that the prisoner is entitled to no relief." *State v. Rutledge*, supra, 1.c., 365, 368.

....

Under Rule 27.26 the trial court may dispose of an application without a hearing, even when the application states a claim for relief and raises apparent fact issues, if the files and records of the case conclusively refute the factual allegations. . . .

....

If the trial court denies an application without a hearing because the files and records of the case conclusively refute the applicant's allegations, the appellate court will *not* presume that there are records and files which refute the allegations. The appellate court must see to believe. If no hearing is conducted, "... the factual allegations of the application as we determined them to be by a liberal interpretation, must for purposes of the appeal be accepted as true." *State v. Moreland*, supra.

....

On appeal the matter will be disposed of upon the "solemnly agreed to and officially filed transcript." Matter which is not contained in the transcript will not be considered by the court on appeal. *State v. Burrington*, Mo., 71 SW2d 319, 320. It is therefore necessary that the transcript contain all records, files, evidence, etc., which are relevant to a full and fair appellate review. If the

criminal proceeding was appealed, the court on appeal may take judicial notice of the contents of the criminal transcript.

....

Rule 27.26 states that "the Court need not entertain . . . successive motions for similar relief on behalf of the same prisoner." Where issues of fact and law have been adjudicated on the merits in a prior 27.26 proceeding, the court may summarily dismiss a subsequent application alleging the same grounds. *State v. Hurst*, Mo., 347 SW2d 177, 178.

However, the Rule does not preclude the court from entertaining successive applications if the court so chooses. . . . Nor can the Rule be read literally as authorizing the court to summarily deny all subsequent applications merely because relief under the Rule has been once denied. "If the allegations in the first motion were not the same as in the pending motion, the Rule contemplates a ruling on the merits of the second motion and a hearing thereon when its allegations and the files and records of the case are such to warrant it."

The Rule authorizes the court to summarily deny an application where the issues have been determined in a prior proceeding under the Rule. A prior adjudication upon trial and appeal or upon a habeas corpus application may also be the basis for a summary denial of a 27.26 application. These rules, however, are not premised upon the doctrine of res judicata.

In *Sanders v. United States*, 373 U.S. 1, the Supreme Court of the United States held that res judicata did not apply to judgments under 28 U.S.C. 2255 (the federal equivalent of Rule 27.26). The court reasoned that the purpose of Section 2255 "was to minimize the difficulties encountered in habeas corpus proceedings by affording the *same rights* in another and more convenient forum." Since res judicata is inapplicable to habeas corpus proceedings, it is also inapplicable to 2255 proceedings.

The common law remedies of habeas corpus and coram nobis are currently available but are restricted to their traditional scope. See, e.g., *State ex rel. Stewart v. Blair*, 351 Mo. 287, 208 S.W.2d 268 (1943); *City of St. Louis v. Franklin Bank*, 351 Mo. 688, 173 S.W.2d 837 (1943).

Montana

A comprehensive reform of post-conviction procedure was enacted by Montana in 1968, with many of the features of the revised Uniform

Act incorporated. Montana Revised Code Annotated, Chapters 26 and 27 (1947). Most important is Chapter 25, which creates a sentence review panel of trial judges who review all cases in which the sentence is alleged to be too severe. The panel reviews the entire record of the trial and may in its discretion alter the sentence. A correspondent advised that "this chapter is very favorably received by the defendants and by many defense attorneys since it removes some of the pressure to dream up some farfetched theory for an appeal where the real problem is that the sentence is believed unreasonable." Letter from M. Dean Jellison, dated October 1969.

The habeas corpus sections of the 1947 Montana Code were repealed and replaced in 1967 by sections 95-2701 to -2716 narrowing the remedy to its historical scope in recognition of the post-conviction remedy enacted in chapter 26. Coram nobis is largely superseded by the post-conviction remedy in chapter 26 but is still recognizable in its traditional scope. See, e.g., *Butler v. State*, 139 Mont. 437, 365 P.2d 822 (1961).

Nebraska

A comprehensive post-conviction statute, incorporating the basic features of the Uniform Act, was adopted in 1965 and revised in 1967. Nebraska Revised Statutes, chapter 29, §§ 29-3001 *et seq.* (Supplement 1967). See *State v. Reizenstein*, 183 Neb. 376, 160 N.W.2d 208 (1968); *State v. Fitzgerald*, 182 Neb. 823, 157 N.W.2d 415 (1968). It is now used to the virtual exclusion of the statutory provisions on habeas corpus, particularly since the state supreme court in *Harwk v. Olson*, 146 Neb. 875, 22 N.W.2d 136 (1946) emphasized the narrow scope of habeas corpus as a post-conviction remedy. A judge in Lincoln wrote that two problems have manifested themselves under the new statutory procedure: There is presently no machinery for perfecting amended petitions for post-conviction review, and since most such petitions are handwritten and are inadequate in setting forth facts sufficient to grant relief, much of the time of the trial courts is consumed in assisting informally in amending petitions. Another problem is that counsel are not appointed where the court, upon examining the records accompanying the petition, concludes that an evidentiary hearing is not justified. If relief is considered justified the court may simply serve a show cause notice on the state's attorney. Letter from Bartlett E. Boyles, November 6, 1969.

Although the post-conviction remedy lies to correct violation or in-

fringement of a constitutional right, the writ of error coram nobis remains valid to correct errors within the traditional scope of the writ. See *Parker v. State*, 178 Neb. 1, 131 N.W.2d 678 (1964).

Nevada

The revised Uniform Post-Conviction Procedure Act was adopted in 1967, Nevada Revised Statutes, §§ 177.315 to .385 (1959), with the provision that the procedure could be instituted by writ of habeas corpus. In *Marshall v. Warden*, 83 Nev. 442, 434 P.2d 437 (1967) the state supreme court ruled that since habeas corpus was a specific constitutional guarantee the Uniform Post-Conviction Procedure Act habeas corpus was essentially a supplementation of the existing writ. The result gives the prisoner the option of proceeding by traditional habeas corpus in the district where he is detained or by UPCPA habeas corpus in the district where he was convicted. The primary problem resulting from the *Marshall* rule was that remedies under the two habeas corpus statutes were not coextensive and, being substantially different, were a potential source of confusion. The difficulty engendered by the *Marshall* rule appears to have been cured by the 1969 amendments to the post-conviction relief statutes, which excepted the writ of habeas corpus from the exclusive remedy provision of the post-conviction relief statutes. Nevada Revised Statutes, chapter 177, § 177.315 (1969).

New Hampshire

The basis of post-conviction relief in New Hampshire is Revised Statutes Annotated, chapter 534, which provides for a hearing (section 534:21) and an inquiry into the sufficiency of the cause of imprisonment (section 534:22), with questions of fact to be raised by habeas corpus and heard by the trial court. Other statutory provisions which have been defined by the state supreme court as alternate forms of post-conviction review include a motion for new trial, a petition for certiorari, and a motion to withdraw a plea of guilty and set aside the sentence. In all instances, the court as a matter of course will conduct a full evidentiary hearing. Habeas corpus will lie to challenge material evidentiary facts when the alleged errors of the trial court are of a constitutional dimension. *Springer v. Hungerford*, 100 N.H. 503, 130 A.2d 538 (1957). See also *Allen v. Hancock*, 109 N.H. 254, 248 A.2d 632 (1968); *Labelle v. State*, 108 N.H. 241, 231 A.2d 480 (1967).

New Jersey

A comprehensive revision of post-conviction procedure in New Jersey was effected by the rules of court adopted September 8, 1969. These rules provide for a series of forms which effectually guide petitioners in the preparation of allegations which constitute a proper petition. They also authorize the sentencing court to order relief where it is merited on the face of the petition. Further, the rules call for a prompt and full evidentiary hearing with a written record of findings of fact and conclusions of law on all issues. New Jersey Supreme Court Rule of Criminal Procedure 3:22 provides an ". . . exclusive means of challenging a judgment rendered upon conviction of a crime." Special reference should be made to the Report of the New Jersey Supreme Court's Committee on Post-Conviction Rights of Indigents, dated October 22, 1962.

New Mexico

The post-conviction statute of 1966 is modeled upon 28 U.S.C. § 2255. A Santa Fe correspondent wrote that, "federal interpretations of that statute will prove most persuasive here." The correspondent concludes that a consequence of this conscious correlation between the state and federal law is that New Mexico trial courts tend to lay "a heavy burden of persuasion on the movant," while the appellate court appears to review any case upon its merits without predisposition toward either the state or the defense. Letter from Joseph A. Roberts, August 26, 1969.

New Mexico Statutes Annotated, chapter 41, § 41-15-8 (Supp. 1969) is reproduced under the New Mexico Rules of Criminal Procedure 21-1-1 (93) and amended therein to restrict the remedy to courts not inferior to district courts. See *State v. Fines*, 78 N.M. 737, 437 P.2d 1006 (1968) for an interpretation of rule 21-1-1 (93).

New York

A comprehensive revision of criminal procedure is being prepared for submission to the state legislature in 1970. Most of the commentary received from New York has been conditioned upon these modifications. A review of current post-conviction remedies by Professor Richard G. Denzer of Fordham University School of Law, formerly executive director of the temporary commission which prepared the proposed revisions was provided by William A. Bulman, Jr. in a letter dated October 20, 1969:

A. New York State Post-Judgment Remedies

In addition to the right of appeal from a judgment of conviction (meaning a conviction upon which sentence has been imposed), New York State provides the following post-judgment remedies to convicted defendants:

1. *Coram nobis* (motion to vacate a judgment of conviction in the nature of error coram nobis).

This motion, which must be made in the court of conviction, derives from case law (see *Lyons v. Goldstem*, 1943, 290 N.Y. 19) and has not been codified, although it is mentioned in provisions of the Code of Criminal Procedure dealing with appeals from orders denying or granting such motions (CCP §§ 517, 518 [4]).

It is a rather broad remedy accommodating a variety of contentions, including claims that the judgment was procured by fraud on the part of the prosecutor, the court or some other public official; that perjured testimony was knowingly used at the trial by the prosecutor; that prejudicial error not appearing in the record occurred at or during trial, either inside or outside the courtroom; and that the defendant was deprived of any of a number of constitutional rights chief of which (from a utility or practical standpoint) is the right to counsel.

An adverse determination (whether adverse to the defendant or to the People) is appealable (CCP §§ 517, 518 [4]).

2. *Motion for a new trial on the ground of newly discovered evidence.*

This motion, also made in the court of conviction, is provided by the Code of Criminal Procedure (§§ 465 [7], 466). It labors under a statute of limitations, the requirement being that the motion be made not more than one year after judgment (CCP § 466).

The motion requires a showing that new evidence has been discovered, since the trial resulting in the judgment, which could not have been produced by the defendant at the trial even with due diligence on his part; which is not "cumulative" in nature; and which, had it been produced at the trial, "would probably have changed the result" (§ 465 [7]).

An order denying this motion is reviewable on an appeal from the judgment of conviction. If the latter has already been argued and the judgment affirmed, the order denying the motion may be reviewed by means of a reargument of the main appeal. If the

time for taking an appeal from the judgment has expired, no appeal from the order denying the motion may be taken.

3. *Motion for re-sentence.*

This motion, similarly made by the defendant in the court of conviction, has not been codified but, by judicial construction, rests upon the inherent power of a court to correct an illegal sentence imposed by it. Its scope, therefore, is restricted to contentions of *illegality* and does not embrace claims of harshness or excessiveness (*People ex rel. Emanuel v. McCann*, 1960, 7 N.Y.2d 342, 345; *People v. Stodesocki*, 1963 20 App. Div.2d 551). An adverse determination has been held not to be appealable by the defendant (*People v. Stodesocki, supra*).

4. *Habeas Corpus.*

The writ of habeas corpus may be used in New York, by a prisoner, to challenge the validity of a judgment of conviction responsible for the incarceration. It is, of course, a civil remedy, provision therefor being made in Article 70 of the Civil Practice Law and Rules, which prescribes the procedure both for pursuing the remedy at *nisi prius* and for Appeals from orders or determinations there made. The petition ordinarily must be made at a term of the Supreme Court or a County Court located in the county of incarceration.

The grounds for challenge cognizable on *habeas corpus* are said, generally, to involve questions of "jurisdiction" over the person and subject matter. In actuality, the scope of the remedy (at least this phase of it) is not overly clear, and the demarcation lines between *habeas corpus* and *coram nobis* in the post judgment area are in some respects quite blurred. This causes much difficulty and confusion, especially since these motions or petitions are brought in different courts. A defendant who errs in this regard may find that he is not only pursuing the wrong remedy, but that he is in the wrong court.

B. *Proposed Omnibus Motions*

The New York Code of Criminal Procedure is in the process of thoroughgoing revision (by a New York State Temporary Commission), and a proposed new "Criminal Procedure Law" is to be submitted to the Legislature for passage at the 1970 session. This presents two "omnibus" motions in the post judgment area, each of which must be made in the court of conviction, one being a motion to vacate judgment (§ 440.10) and the other a "motion to

set aside sentence" (§ 440.20). Taken together, they accommodate every contention cognizable upon any of the four previously discussed existing motions or remedies; and, in addition, every claim which may be advanced in a federal court upon a federal habeas corpus petition attacking a New York judgment of conviction.

On the current practice in New York, which relies on an adaptation of the common law writ of coram nobis, a supplementary memorandum by Christopher Rogers, Esq., was provided by Travis H. Lewin of the Syracuse University School of Law in a letter dated August 15, 1969:

During the 1940s, the New York Courts adapted coram nobis to criminal proceedings in the landmark case of *Lyons v. Goldstein*, 290 N.Y.19, wherein the writ is used to correct errors prior to judgment which resulted in a denial of due process. As a general rule, the writ cannot be used as a substitute for an appeal nor can it be used to challenge matters appearing on the face of the record.

However, the grounds for coram nobis are numerous and, under recent court decisions, constantly expanding, and reference is hereby made to *Key No. 997 of Abbott's New York Digest* for future research.

Procedurally a writ of error coram nobis will be sufficient and a hearing will be mandated if the petition alleges facts upon which coram nobis is available, provided that the petition also alleges some supporting proof and the allegations are not clearly refuted by uncontrovertible documentary evidence.

If the petitioner is successful after a hearing, the conviction will be vacated and a new trial ordered. However, since there is no statute of limitations governing coram nobis petitions, success of the petitioner, as a practical matter, results in the dismissal of the information or indictment.

This general statement is corroborated by a memorandum from the New York County Lawyers Association, contained in a letter from Joseph L. Maged, dated September 29, 1969, which adds this observation:

A writ of Habeas Corpus has a very limited utility in New York with regard to post conviction remedies. The central rule has been that it may be used to challenge a conviction by a person in custody only where the jurisdiction of the court in which the conviction took place is an issue. Recent statutory changes open

the possibility of a broader use in the future, but the development of New York law clearly has been in the direction of the use of Coram Nobis as the principal technique for challenging convictions on the basis of wrongs not appearing on the record, and that is likely to continue. The advantage of the Coram Nobis, as distinguished from Habeas Corpus, is that Coram Nobis is heard in the Court where the conviction took place and therefore most conversant with the facts, whereas Habeas Corpus is returnable where the petitioner is in custody, which is often a very different county.

North Carolina

A recently amended post-conviction procedure act, North Carolina General Statutes, §§ 15-217 to -22, modeled after the Illinois statute, provides for a full evidentiary hearing with appointed counsel and a complete record of the proceedings, where necessary. Review may be had by certiorari to the intermediate appellate courts. For a case reviewing the original (1951) North Carolina post-conviction article see *Miller v. State*, 237 N.C. 29, 74 S.E.2d 513 (1953). Section 15-217 as amended incorporates and supersedes all common law and statutory remedies which were heretofore available for challenging the validity of incarceration under sentence of death or imprisonment.

North Dakota

Effective July 1, 1969, North Dakota adopted the Revised Uniform Post-Conviction Procedure Act. North Dakota Code Annotated, §§ 29-32-01 to -32-10 (Supp. 1969). It is anticipated that the state supreme court will rule that this act is intended to be the exclusive means of testing the validity of a trial or conviction; habeas corpus will return to its pre-trial purpose of testing the jurisdiction of the court concerned. Correspondence from Judge Adam Gefreh dated August 20, 1969, advised that it was the express intention of the legislature in enacting the new law to provide a post-conviction remedy which would meet all federal tests.

Ohio

The history of post-conviction practices in Ohio prior to 1965 is outlined in *Freeman v. Maxwell*, 4 Ohio St.2d 4, 210 N.E.2d 885 (1965). In 1965 Ohio adopted its present statute, Page's Ohio Revised Code

Annotated, § 2953.21 *et seq.* which was amended in 1967. The present statute incorporates the essential features of the Revised Post-Conviction Procedure Act and the basic criteria of the "trilogy." Since 1967, the consensus of both state and federal court opinions is that the statute does in fact preserve the safeguards advocated in federal jurisprudence.

The legislative intent in enacting the post-conviction law was to provide an alternative to the use of habeas corpus as the proper means of testing the constitutional issue raised by state prisoners. *Freeman v. Maxwell*, at 886; *State ex rel. Turpin v. Court of Common Pleas*, 8 Ohio St.2d 1, 220 N.E.2d 670 (1965). In any case where the record in the original trial is considered inadequate to determine the question (*e.g.*, whether the prisoner intelligently waived a constitutional right), the statute requires the trial court to proceed to make findings of fact and conclusions of law on the question. *Jones v. State*, 8 Ohio St.2d 21, 222 N.E.2d 313 (1966). A reviewable claim however, must be one which the petitioner could not reasonably have made at the original trial or on appeal therefrom. *Knox v. Maxwell*, 277 F.Supp. 593 (1967). Further, the validity of the constitutional claim under the statute is not in itself a basis for relief unless the court determines that original denial of the right has rendered the original judgment void or voidable. *Coley v. Alvis*, 381 F.2d 870 (1967); *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). See also *Jones v. State*, 8 Ohio St.2d 21, 222 N.E.2d 313 (1966); Comment, *Ohio's Post-Conviction Appeal Remedy*, 1 Akron Law Review 42 (1967), which criticizes the statute for being too narrow. The comment recommends mandatory appointment of counsel when a hearing is ordered, speedier resolution of the court's ruling on the petition, elimination of the custody requirement, and standardized forms for petitioner's use.

Oklahoma

Post-conviction procedures were revised periodically between 1965 and 1969. Under the principal statute, Oklahoma Statutes Annotated, title 22, § 1073 (Supp. 1969), appeals of post-conviction review are handled by the Court Referee in the Court of Criminal Appeals who obtains the original record of the case and evaluates it in relation to the detailed information set out on the form provided for prisoners. Where it is warranted, the Court of Criminal Appeals orders a full evidentiary hearing in the trial court, with a complete record. Post-conviction review under this statute is restricted to violations of petitioner's consti-

tutional rights relating to appeal. *Zeugrin v. District Court*, 419 P.2d 280 (Okla. Crim. 1966). The writs of habeas corpus and coram nobis are available within their traditional scope.

Judge Tom Brett of Oklahoma, in a letter dated August 21, 1969, reiterates a complaint made by several neighboring states: the prisoner who goes into the federal court, after his relief is denied in the state review, will offer new evidence not revealed in the state courts. The state attorney general is seeking to persuade district courts that federal habeas action should be bound by what was presented in the state hearings.

Oregon

Prior to 1959, there were several post-conviction remedies available in this jurisdiction: habeas corpus, coram nobis, motion to correct the record, and motion to arrest the judgment. Because each of these remedies had its own area of applicability and a confusion of limitations, the state adopted the Post-Conviction Hearing Act of 1959. Oregon Revised Statutes, §§ 138.510-.680. Thus, before the 1963 "trilogy" and the revised Uniform Post-Conviction Procedure Act of 1965, Oregon had established machinery for accommodating petitioners' constitutional questions with a full hearing including findings of fact and conclusions of law.

Correspondents from the state stress two problems which have developed in reference to the Oregon post-conviction process. One attorney, who engaged in a substantial amount of criminal defense work, points to the ease with which state prisoners can put an appeal into operation. A printed form is available on request to the warden of the state penitentiary; the prisoner simply fills it out and it is forwarded to the public defender who then files it with the appropriate court (Oregon has just created a new intermediate appellate court). "A great percentage of the prisoners take advantage of this route since it is at no expense to themselves." Letter from John J. Pickett, October 20, 1969.

Because of the facility with which post-conviction review can be obtained and the complete record of the review which is required, transfers into the federal district court are so frequent that they create a serious problem for the public defender. Another aspect of the problem is described in a letter of September 3, 1969, from Chief Justice William C. Perry of the Oregon Supreme Court:

The principal complaint of the members of this court in the field of federal and state relations is that even after a *de novo* hearing in the post-conviction court, at which time the defendant is given a full opportunity to present all the evidence which pertains to a denial of his constitutional rights in the trial court, the federal courts feel free to disregard the transcript and to hold a hearing *de novo* where evidence is often admitted that was never produced and could not be passed upon by the state courts.

It seems to me that a more satisfactory relationship could be established if the federal courts were to require that the hearing before them be had upon the record made by the petitioner and State in the post-conviction trial court.

Pennsylvania

The Post-Conviction Hearing Act of 1966, Pennsylvania Statutes Annotated, title 19, § 1180-1 *et seq.* (Supp. 1970), was drafted with both the "trilogy" and the Uniform Post-Conviction Procedure Act in mind. It is further implemented by Rule 1506 of the state Rules of Criminal Procedure, adopted in 1968, which requires a full evidentiary hearing and a record of findings of fact and conclusions of law on all points. Two memoranda from correspondents within the state point to some of the practical difficulties involved in administration of of the law. The first, from a Pittsburgh attorney, states:

First, as a practical matter, the form of the petition raises few problems. Rule 1501 of the Pennsylvania Rules of Criminal Procedure sets forth the form of petition and printed copies are readily available in the prisons and elsewhere. Basically, the petitioner is required to do little more than place check marks in the appropriate squares. Furthermore, if the petition is defective, the petitioner is given ample opportunity to amend. Second, the statute creates a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure. A finding of waiver is one means by which the courts can attempt to dispose of petitions summarily. However, I am not aware that the waiver doctrine has been or can be applied very rigorously. See 19 Pa. Stat. Sections 1180-4.

Finally, the major problem in these cases concerns delay. It is not uncommon for final disposition to be delayed for years, even in cases which have potential merit. . . . Because of the volume, it is not uncommon for several months to pass before a matter is set for initial hearing. The hearing, preparation and filing of

briefs, appeals, and postponements for reasons such as unavailability of witnesses can result in unbelievable delays.

Letter from Samuel J. Reich, November 10, 1969.

The second commentary, from the Defender Association of Philadelphia, is even more detailed in its description of the problems encountered in utilizing the provisions of the statute and rule of court:

Though the appointment of counsel is called for by the Act, some of our judges at first declined to appoint counsel until the appellate courts required that counsel be appointed to represent the post conviction petitioners. Later cases have come down indicating that where the petition is frivolous it may be summarily dismissed without the appointment of counsel. This generally occurs under circumstances where a prior petition has been filed raising the same grounds and, where the petitioner was represented by counsel on that petition. The right to counsel extends not only to the post conviction hearing, but, also to any appeals which might be necessary from orders denying the petitions.

With respect to the petition itself, it must first be realized that these petitions are drawn on a supplied form by the prisoners without legal help. Our Supreme Court has specifically indicated that these petitions should be viewed with an eye to ascertain any real complaints which the prisoners might have without regard to any technical deficiencies in the documents themselves. Before dismissing a petition for failing to state a claim or alleged [*sic*] sufficient facts, the court must give the petitioner an opportunity to amend and remedy any deficiencies. In addition, as a matter of practice, it is frequently sufficient to have the attorneys state on the record, at the time the case is listed for a hearing, the specific issues and allegations which [they] will raise and attempt to prove. In this regard diligent counsel rarely consider themselves limited by the allegations raised in the petitions but, view an appointment under the Post Conviction Act as requiring them to review the entire proceedings in an effort to raise each and every claim on which there might be a chance of securing relief for the petitioner. In this office we have been regarding a post conviction petition as requiring a review *de novo* of the entire proceedings and have attempted to secure a trial transcript and complete record in each and every case. Needless to say, a substantial majority of these petitions are totally without merit and, indeed, in excess of fifty per cent of them claim little more than the right to file a direct

appeal from the entry of a plea of guilty. Even in cases such as these we are careful to put the defendant on the stand and thoroughly interrogate him surrounding the circumstances of his guilty plea in order to insure that no possible avenue of relief is left unexplored.

The Pennsylvania Act has strict provisions regarding final litigation or waiver of rights under the Act but, it has been our experience that either the hearing courts or the appellate courts have declined to rule an issue waived or finally litigated unless it has in fact been specifically litigated with counsel. You will note that section four of our Act could allow a court to find waiver from the mere failure to file an appeal but, I know of no case in which any action of this sort has been taken.

The post conviction petition is initially mailed to the court by the petitioner. Our courts have gone through a number of different procedures which they have adopted and then discarded as unsatisfactory. Initially, in 1966, all post conviction petitions were referred to a "miscellaneous court" where counsel was appointed and a hearing scheduled before the same court sometime in the future. This system was subsequently discarded. These petitions were preliminarily submitted to a single judge who screened them and summarily dismissed a large number which did not meet the requirements of the Act. This procedure was discarded when a number of these summary dispositions were reversed for failure to appoint counsel and for failure to grant the petitioners leave to amend their defective petitions. Then the court adopted a procedure whereby counsel was appointed and all matters were listed for a hearing before the trial judge, as seems to be required by the Pennsylvania Rules of Criminal Procedure. This system proved too unwieldy in Philadelphia County and broke down completely. Early in 1969 the court again switched to the use of a single miscellaneous room where all post conviction petitions are heard before a single judge. Preliminarily the petitions are sent to the trial judge who may grant summary relief such as the right to file *nunc pro tunc* post-trial motions and then a direct appeal, anticipating that where a hearing can be held the defendant would be granted his rights under *Douglas v. California*. Similarly, the trial judge may order an amendment to the petition to state extraordinary reasons why the defendant has not waived his right to file the petition as a result of having previously filed a post conviction petition or, requiring a statement of facts to support the claims in the petition. After this summary review by the trial court, the matter is then scheduled for a hearing in

the post conviction room, unless, for some unusual reason, the court wishes to hear the matter itself which is occasionally done. Counsel is then appointed at the suggestion of the trial judge and the matter is listed for the hearing about one month in the future.

At present, in Philadelphia County there is an enormous backlog of many hundreds of post conviction petitions and so any time limits, such as the twenty days which the district attorney is given to file an answer, are generally ignored. There are also extreme problems encountered in bringing in prisoners who are generally in custody in the various state correctional institutions scattered throughout the state (Pennsylvania has a "dual" system of state correctional institutions and county prisons, with the former holding the long-term prisoners). Many times we will have only two or three prisoners out of a list of twenty petitions scheduled for hearing. There are also difficulties in securing witnesses who are frequently the attorneys who represented the petitioner at his original trial. These causes contribute to a great waste of time and delay in reaching dispositions on post conviction matters.

Letter from Herman I. Polleck, September 10, 1969.

Rhode Island

The most common procedure for attacking a conviction after trial is by a bill of exceptions to the state supreme court. If the conviction is sustained after a hearing on the bill, a prisoner may move for a new trial on the basis of newly discovered evidence; or if he attacks the legality of his confinement, he may seek habeas corpus with the right to an evidentiary hearing in either the trial or appellate court. Points of law which are not evidentiary may be attacked through the writ of coram nobis. Although this writ is normally returnable in the trial court, the state supreme court, according to a letter from Eugene F. Toro dated September 12, 1969, has been "generous and lenient in its jurisdiction," and has entertained an increasing number of these writs. See *Burke v. Langlois*, — R.I. — 244 A.2d 593 (1968); *Andrews v. Langlois*, 96 R.I. 461, 194 A.2d 674 (1963). In recent cases, habeas corpus appears to lie in order to test constitutional issues in the absence of a comprehensive post-conviction statutory remedy. See, e.g., *Harris v. Langlois*, 100 R.I. 196, 212 A.2d 715 (1965); *Moretti v. Langlois*, 98 R.I. 493, 205 A.2d 19 (1964).

South Carolina

The Revised Uniform Post-Conviction Procedure Act was adopted effective May 1, 1969. South Carolina Code, §§ 17-601 to -612 (Supp. 1970). This act incorporates and supercedes all common law, statutory, or other remedies heretofore available for challenging the validity of a conviction or sentence.

South Dakota

South Dakota adopted the Uniform Post-Conviction Procedure Act in 1966, South Dakota Compiled Laws, §§ 23-52-1 to 23-52-19 (1967), and in 1969 amended its habeas corpus statute to provide for appointment of counsel for all indigent petitioners. Habeas corpus use appears to be superseded by South Dakota Compiled Laws, § 23-51-3, at least for challenging the validity of a conviction or sentence. A recent case construing the post-conviction statutes is *State v. Roth*, — S.D. —, 166 N.W.2d 564 (1969).

Tennessee

The 1967 post-conviction statute, Tennessee Code Annotated, §§ 40-3801 to -3824 (Supp. 1969), closely follows the guidelines of the federal "trilogy" with emphasis on appointment of counsel and a full record of evidentiary hearings based on an amended petition. Habeas corpus and coram nobis are provided for by statute and lie within the traditional narrow scope of each writ. See *State ex rel. Holbrook v. Bomar*, 211 Tenn. 243, 364 S.W.2d 887 (1963) (habeas corpus) and *Johnson v. Russell*, 218 Tenn. 443, 404 S.W.2d 371 (1966) (coram nobis). The post-conviction statute is restricted to provide relief only for infringement or denial of constitutional rights.

Texas

The office of the state attorney general has provided a substantial body of professional studies. From this material, a pertinent summary of recent post-conviction developments in Texas is quoted below. The material appears in the 1967 edition of the *Texas Peace Officers and Magistrates Manual* prepared by the Attorney General.

Post Conviction Habeas Corpus Proceedings (Art. 11.07, C.C.P.)

Proceedings brought under the above Article have been of much

concern to the Federal and State District judges, the attorneys representing the state and the State Court of Criminal Appeals, since the great rash of Federal Writs of Habeas Corpus began a few years ago as result of the revolutionary holding of the U.S. Supreme Court in *Gideon v. Wainwright*, *Escobedo v. Illinois*, *Jackson v. Denno*, et al. In fact, the Southern and Eastern Federal Districts of Texas, where the convicts are held, were literally swamped with applications for writs and until the judges of these districts were allowed by the recent rule to transfer such cases to the Federal Court nearest the county of conviction, they hardly had time for the regular business of their courts. By a judicious distribution of some of such cases from these districts to the Western and Northern Federal districts this overload was ameliorated to some extent, although all districts were still faced with many time-consuming and expensive hearings on such applications. Most of the applications were handwritten by the prisoner himself on forms furnished to him. Some being almost illegible, almost all presenting their issues of fact, if any, in a very disorderly fashion. An agreement was worked out between the Attorney General's Office, representing the Respondent, Dr. George J. Beto, Director of the Texas Department of Corrections, and the Federal judges, wherein service on Respondent was had by the U.S. District Clerk forwarding copies of such applications by mail to the Attorney General's Office for answering. This work was, and is still being, handled by the Enforcement Division of the Attorney General's Department. This Division, consisting of fifteen lawyers and six secretaries, spent and spends over one-half of its working time on the representation of the Respondent in the Federal Courts. Needless to say, much travel is involved, although one of such attorneys is stationed full time in the Houston Division of the Southern Federal Judicial District. Most of these Federal District Court hearings are adjudicated on affidavits as in many of such cases the necessary witnesses reside outside the jurisdiction of the court, and the obtaining of such affidavits necessitates much labor that could be obviated if the Federal District Court had a fact record that it could adopt. In other words, the Federal judges need a full fact finding from a state court having the jurisdiction to hear and determine facts. A district court of the State of Texas has this power, of course, but it should be exercised by the judge thereof *making and filing his findings of the facts and conclusions of law* after holding such hearings, and causing a narration of the facts adduced in evidence upon such hearing, together with his findings of fact and conclusions of law, to be transmitted by his official court re-

porter to the clerk of the Texas Court of Criminal Appeal within ten (10) days of the date of such hearing. It should be noted here that the mere certificate by the state district judge as to the *correctness* or *identity* of a narrative of facts heard by him is not enough to satisfy the statute (Art. 11.07, Code of Criminal Procedure) as it was amended by the 60th Legislature this year, unless it is accompanied by the *judge's findings of facts and conclusions of law* based upon such evidence. Also it is the duty of the district clerk to transmit a transcript of all pleadings filed in the hearing to the clerk of the Court of Criminal Appeals within thirty (30) days. These time limits for the filing of such narration of facts or the transcript may be extended by the Court of Criminal Appeals for good cause shown. The ten (10) day time limit set by the 1967 amendment for the preparation and filing of the narration of facts seems much too short in most instances but it is not thought that there will be any trouble in getting extensions in such cases.

The only *new* portions of said Art. 11.07, C.C.P., added by the 60th Leg. is the wording of that part providing a hearing in the convicting state court on any petition for writ of habeas corpus presented therein *containing sworn allegations of fact, which, if true, would render petitioner's confinement under the felony conviction illegal, and it appearing that there are unresolved material issues of fact thereby presented*, together with the provision directing the judge conducting such hearing *to make and file his findings of fact and conclusions of law* and return same with a narration of facts and transcript to the Court of Criminal Appeals within said times and for such action thereon as is therein specified.

This new portion is not thought to invoke any radical change in the operation of the proceedings under such Article from those originally encompassed by it. It is thought that the prime purpose of such amendment was to *spell out* the action to be taken by the judge conducting the hearing, in regard to his duties to *resolve the material issues of fact* involved, as distinguished from a mere *certification* that such and such a fact was *adduced* before him. Also it gave statutory authority for the Court of Criminal Appeals to adopt such findings.

In any event, U.S. District Judge Leo Brewster of the Northern District of Texas, "broke the ice" by his holdings in the cases of *Harris v. Beto* (Jan. 7, 1967), *Castillo v. Beto* (March 10, 1967), and *Carroll v. Beto* (May 3, 1967), to the effect that an application for writ of habeas corpus filed originally in the Texas Court of Criminal Appeals by a convicted felon is not exhaustive of the

post-conviction remedies available under Texas law. Judge Brewster points out that however valuable such original filing procedure in the Court of Criminal Appeals may be for receiving a determination of legal questions shown on the record of applications so filed in said Court, it is virtually ineffective in providing the type of fact-finding hearing promulgated in *Townsend v. Sain*, 372 U.S. 293, (1963), but, he says, in effect, that the procedure in Art. 11.07, C.C.P., (even as it stood before amendment by the 60th Leg. this year) is principally designed to afford a hearing to ascertain facts and resolve questions of constitutional deprivations containing factual issues arising in Texas trial courts; that such relators have a post-conviction remedy available in the Texas Courts and the fact-finding procedure in that remedy is adequate to afford them full and fair hearings of the sort mentioned in *Townsend v. Sain*, therefore in not presenting such issues to the trial court for a factual determination as to their truth or falsity they have failed to exhaust their state remedies and are not entitled to plenary hearings in the Federal District Court. The Carroll case was duly appealed by Applicant Carroll to the U.S. Court of Appeals for the Fifth Circuit and on June 22, 1967, Judge Brewster's order denying the writ was affirmed in a per curiam opinion, giving the specific reason therefor that Applicant had failed to present his contentions to the Texas Courts in a state habeas corpus proceeding pursuant to Article 11.07, Texas Code of Criminal Procedure, 1965. In response to this holding, the other Federal District Judges began dismissing applications pending before them wherein it appeared that Applicant or Relator had not obtained such factual hearings under said Art. 11.07, C.C.P. Meanwhile, the 60th Legislature of Texas amended said Article as herein before explained. Since such time the state district judges have been called upon by many convict-applicants for such hearings. Also some have been petitioned by such convicts, without a pending application for writ of habeas corpus, for the furnishing to them of a record of their trials.

See Ex Parte Young, 418 S.W.2d 824 (Tex. Crim. 1967) for a thorough discussion of the scope and procedure of the post-conviction remedy afforded by Article 11.07 of the Code of Criminal Procedure (habeas corpus).

Utah

The state supreme court on August 20, 1969, made effective an

amendment to Supreme Court Rules of Civil Procedure 65B (f) broadening the use of habeas corpus as a test of the validity of a sentence, and Rule 65B (i) substantially incorporating the Uniform Post-Conviction Procedure Act. See *Brown v. Turner*, 21 Utah 2d 96, 440 P.2d 968 (1968) regarding the scope of habeas corpus prior to amended Rule 65B (f). Coram nobis is available in its traditional scope. *Sullivan v. Turner*, 22 Utah 2d 85, 448 P.2d 907 (1968).

Vermont

A 1966 statute, Vermont Statutes Annotated, title 13, §§ 7131-37 (Supp. 1969), incorporates into state law most of the basic features of the Uniform Act. Habeas corpus is applicable to test questions involving fundamental constitutional rights, *In re Norse*, 125 Vt. 460, 218 A.2d 456 (1966), but petitioners must make a post-conviction motion before habeas corpus petitions will be entertained. Vermont Statutes Annotated, title 13, § 7136 (Supp. 1969).

Coram nobis is available in Vermont, *Petition of Garceau*, 124 Vt. 220, 202 A.2d 266 (1964), but it will likely be treated in a fashion similar to habeas corpus.

Virginia

Virginia has no comprehensive post-conviction relief statute, and the statutory procedure governing habeas corpus is the only practical means of testing allegations of denial of defendants' rights. Virginia Code Annotated, § 8-485 (1958) relates to motions to correct any errors in the record on which conviction is based. Essentially, this provision has been interpreted as replacing the common law writ of error coram nobis.

As in most jurisdictions, habeas corpus is a civil rather than a criminal proceeding. Accordingly, it is a new action rather than a continuation of the original action. In this sense habeas corpus does offer an independent means for reviewing the record in a criminal case for the specific purpose of determining the petitioner's allegations of denial of rights. From the viewpoint of the standards set out in the "trilogy" the primary flaw in the Virginia procedure is the absence of a mandatory provision for an evidentiary hearing by the sentencing court. The theory is that if the allegations are based upon a record already in existence, the habeas court can review on the basis of this record, or, at its discretion, it can reserve the granting of a hearing. The writ of

habeas corpus in Virginia does not appear to extend beyond its traditional scope of jurisdictional inquiry. See *Brooks v. Peyton*, 210 Va. 318, 321, 171 S.E.2d 243, 246 (1969) wherein it was said that "[t]he function of a writ of habeas corpus is to inquire into jurisdictional defects amounting to want of legal authority for detention of a person on whose behalf it is asked. The court in which a writ is sought examines only the power and authority of the court to act, not the correctness of its conclusions. . . ." Cf. *Smyth v. Midgett*, 199 Va. 727, 101 S.E.2d 573 (1958).

A Richmond attorney, Maurice H. Bell, in a letter dated September 16, 1969, stresses the difficulty of getting into the federal court on a 28 U.S.C. § 2254 habeas action, because the statute appears to require exhaustion of state remedies in terms of the sentence imposed. Formerly, the state supreme court held that if the sentence was not being served, a collateral attack upon it could not be made. Since 1967, the Supreme Court of Appeals has ruled otherwise in view of the decision of the Supreme Court of the United States in *Peyton v. Rowe*, 391 U.S. 54 (1968). Prospective sentences which are not being served are permitted to be attacked. During the time when the conflict existed, however, the district courts in Virginia were obliged to follow the ruling of the United States Court of Appeals for the Fourth Circuit in *Martin v. Commonwealth of Virginia*, 349 F.2d 781 (1965).

Washington

The writ of habeas corpus is used extensively in the State of Washington as the only available post-conviction remedy other than direct appeal. There is a conflict of opinion as to its adequacy in this respect, but it does appear that its traditional scope has been considerably broadened. See *In re McNear*, 65 Wash. 2d 530, 398 P.2d 732 (1965) for comment on the present scope and procedures in determining denial of due process of law where fundamental constitutional rights are in issue. Habeas corpus applications may be filed in *forma pauperis*, with provision for a transcript, in the Supreme Court, Court of Appeals, and the Superior Court (trial court) in the county in which the applicant is confined.

West Virginia

The Post-Conviction Habeas Corpus Act was enacted and made immediately effective on January 25, 1967. It provided a post-conviction

remedy incorporating and superseding all common law and statutory remedies heretofore collaterally available for challenging the validity of a conviction or sentence. West Virginia Code, § 53-4A-1(c) (Supp. 1970). Federal court authority testifies to the adequacy of this comprehensive post-conviction remedy. *Kidd v. Coiner*, 299 F. Supp. 1380 (N.D. W. Va. 1969). See also *Sheftic v. Boles*, 377 F.2d 423 (4th Cir. 1967).

Wisconsin

A general revision of post-conviction procedure modeled after 28 U.S.C. § 2255 (1964) was under consideration in the state legislature late in 1969, but no word has been received concerning its disposition. Until such time as new statutory provisions are operative, habeas corpus under Wisconsin Statutes §§ 292.01 and .02 provide the standard means of attacking a conviction. In *State v. Kanieski*, 30 Wisc. 2d 573 —, 141 N.W.2d 196, 198 (1966), the court observed that beyond the traditional use of the writ to test jurisdiction, "we have enlarged the scope and purpose of that writ to review violations of substantial constitutional rights. . . ." Cf. Fairchild, *Post-Conviction Rights and Remedies in Wisconsin*, 1965 Wisconsin Law Review 52.

Wyoming

A state post-conviction procedure act, modeled after the 1955 Uniform Post-Conviction Procedure Act, was adopted in 1961, and very recently the state has promulgated a new set of criminal procedure rules modeled after those of the federal courts. Taken together, the statute and the new rules appear to insure full evidentiary hearings where the record accompanying the petition for post-conviction review does not permit granting or denial of the relief. See *Whitley v. State*, 293 F. Supp. 381 (D. Wyo. 1968). Cf. Raper, *Post-Conviction Remedies*, 19 Wyoming Law Journal 213 (1965).

V. APPLICATION OF THE "SCALE OF ADEQUACY"

From the summary of individual state procedures in Part IV of this study it is possible to suggest a means of evaluating the present status of the post-conviction remedies in the several states in terms of the factors set out in the "scale of adequacy" defined in Part III. Table 3 measures the specific provisions in the statutes or court rules of each state

against the criteria in the Revised Uniform Post-Conviction Procedure Act of 1965.

In constructing this table, the following jurisdictional differences have been taken into account: (1) in many states either common law action *coram nobis* or petition for habeas corpus is still the only relief available; (2) in other states the situation is the same, except that the common law process has been incorporated into a statute or a court rule; (3) in a few states a special form of habeas corpus has been adapted by statute to the specific purposes of post-conviction relief; (4) in a few states the Uniform Act has been adopted *in haec verba*; and (5) in a few states the statute goes substantially beyond the model act.

In Part III. 3. *supra*, the several sections of the Uniform Post-Conviction Procedure Act of 1965 were annotated with cross-references to selected statutes or court rules appearing in Table 3 which follows. Reference to the text of these statutes or rules will suggest the specific provisions which conform to the "scale of adequacy" which both federal and state courts are seeking.

POST-CONVICTION REMEDIES PROVIDED
IN COMMON LAW, STATE STATUTES
AND COURT RULES
(overleaf)

TABLE
POST-CONVICTION REMEDIES PROVIDED IN COMMON

| Uniform Post-Conviction | | | | | |
|-------------------------|---|------------------------------------|---------------------------|-----------------------------|---------------------------|
| State | Habeas Corpus | Coram Nobis | Remedy Defined | Saving Clause | Procedure |
| AL | ALA. CODE tit. 15, §§ 1-43 (1958) | C/L | | | |
| AK | ALAS. STAT. tit. 12, § 12.75.010-12.75.230 (1962) | | S. CT. R. CRIM. P. 35(b) | RULE 35(c) | RULE 35(d) |
| AZ | ARIZ. REV. STAT. §§ 13-2001 to -2027 (1956) | | | | |
| AR | ARK. STAT. ANN. §§ 34-1701 to -1746 (1947) | C/L | S. CT. R. CRIM. P. 1(A) | RULE 1(B) | RULE 1(A), (B), (C) |
| CA | CAL. PENAL CODE § 1473 (West 1970) | C/L; tit. 9, ch. 4, § 1265 | | | |
| CO | COLO. REV. STAT. §§ 65-1-1 to -1-21 (1963) | | RULE 35(b) | | RULE 35(b) |
| CT | CONN. GEN. STAT. ANN. §§ 52-466 to -470 (1960) | | | | |
| DE | DEL. CODE ANN. tit. 10, §§ 6901-6918 (1953) | | SUPER. CT. CRIM. R. 35(2) | RULE 35(a) | RULE 35(a) |
| FL | FLA. STAT. ANN. §§ 79.01-.12 (1964) | C/L | S. CT. R. CRIM. P. 1.850 | | RULE 1.850 |
| GA | GA. CODE ANN. tit. 50, §§ 50-101 to -127 (1933) | | tit. 50, § 50-127(1) | | tit. 50, § 50-127(4) |
| HI | HAWAII REV. STAT. ch. 660, §§ 660-1 to -33 (1968) | | | | |
| ID | IDAHO CODE § 19-4201 <i>et seq.</i> (1948) | | § 19-4901(a) | § 19-4901(b) | § 19-4902 |
| IL | ILL. ANN. STAT. ch.65, §§ 1-39 (1959) | C/L | ch. 38, § 122-1 | | ch. 38, § 122-5 |
| IN | IND. STAT. ANN. §§ 3-1901 to -1925 (1968) | §§ 9-3302, 3303, 3306, 3307 (1968) | S. CT. R. P. C. 1, § 1(a) | RULE PC 1, § 1(b) | RULE PC 1, § 2 |
| IA | IOWA CODE ANN. §§ 663.1 -.40 (1950) | | | | |
| KS | KAN. STAT. ANN. §§ 60-1501 to -1507 (1964) | C/L | | S. CT. R. 121(c) | § 60-1507(b); RULE 121(f) |
| KY | KY. REV. STAT. ch. 419, §§ 419.020-.130 (1970) | C/L | | S. CT. R. CRIM. P. 11.42(1) | RULE 11.42(4), (5), (6) |

3

LAW, STATE STATUTES AND COURT RULES

Procedure Act or Equivalent

| Petitions | Indigency | Pleadings | Hearings | Waiver | Appeals | Denial of Petition |
|----------------------|-------------------------|----------------------|---------------------------|----------------------|--|---------------------------|
| RULE 35(e) | RULE 35(f) | RULE 35(g) | RULE 35(h) | RULE 35(i) | RULE 35(j) | RULE 35(g) (2) |
| RULE 1(A) | RULE 1(D) | RULE 1(E) | RULE 1(E) | RULE 1(H) | RULE 1(F) | RULE 1(C) |
| | | | RULE 35(b) | | RULE 35(b) | |
| | | | RULE 35(a) | | | |
| | | | | | RULE 1.850 | RULE 1.850 |
| tit. 50, § 50-127(2) | | tit. 50, § 50-127(6) | tit. 50, § 50-127(6) | tit. 50, § 50-127(1) | tit. 50, § 50-127(11); tit. 6, § 6-701 | tit. 50, § 50-127(10) |
| § 19-4903 | § 19-4904 | § 19-4906 | § 19-4907 | § 19-4908 | § 19-4909 | |
| ch. 38, § 122-2 | ch. 38, § 122-4 | ch. 38, § 122-5 | ch. 38, § 122-6 | ch. 38, § 122-3 | ch. 38, § 122-7 | |
| RULE PC 1, § 3 | RULE PC 1, § 2 and 9(2) | RULE PC 1, § 4 | RULE PC 1, § 5 | RULE PC 1, § 8 | RULE PC 1, § 7 | RULE PC 1, § 6 |
| RULE 121 (e) | RULE 121 (e), (f) | | § 60-1507(b); RULE 121(h) | | § 60-1507(d) | § 60-1507(c); RULE 121(d) |
| RULE 11.42-(2), (3) | RULE 11.42-(4), (5) | RULE 11.42(5) | RULE 11.42-(5), (6) | | RULE 11.42-(7) | |

TABLE 3

POST-CONVICTION REMEDIES PROVIDED IN COMMON

| | | | Uniform Post-Conviction | | |
|-------|--|-------------|-------------------------|-------------------------|--------------------------|
| State | Habeas Corpus | Coram Nobis | Remedy Defined | Saving Clause | Procedure |
| LA | LA. CRIM. PRO. CODE ANN. art. 351 <i>et seq.</i> (West 1967) | | | | |
| ME | ME. REV. STAT. ANN. tit. 14, §§ 5501-5546 (1965) | C/L | tit. 14, § 5502 | tit. 14, § 5502 | tit. 14, §§ 5503, 5505 |
| MD | MD. CODE ANN. art. 42, §§ 1-28 (1957) | C/L | art. 27, § 645A(2) | art. 27, § 645A(e) | |
| MA | MASS. GEN. LAWS ANN. ch. 250, §§ 1 <i>et seq.</i> (1959) | | | | |
| MI | MICH. COMP. LAWS ANN. §§ 600.4301-.4379 (1963) | | | | |
| MN | MINN. STAT. ANN. §§ 589.01 <i>et seq.</i> (1947) | | | § 590.01 | § 590.01 |
| MS | MISS. CODE ANN. §§ 2815-40 (1942) | § 1992.5 | | | |
| MO | MO. STAT. ANN. §§ 532.010 <i>et seq.</i> (1949) | C/L | S. CT. R. 27.26 | RULE 27.26(a), (b) | RULE 27.26 |
| MT | MONT. REV. CODE ANN. §§ 95-2601 to -2608 (1947) | C/L | § 95-2601 | | § 95-2602 |
| NB | NEB. REV. STAT. ch. 29, § 29-2801 <i>et seq.</i> (1943) | C/L | ch. 29, § 29-3001 | | ch. 29, § 29-3001 |
| NV | NEV. REV. STAT. ch. 34, §§ 34.360-.680 (1957) | | ch. 177, § 177.315(1) | ch. 177, § 177.315(2) | ch. 177, § 177.325 |
| NH | N.H. REV. STAT. ANN. ch. 534, §§ 534:1-.32 (1955) | | | | |
| NJ | N.J. STAT. ANN. tit. 2A, §§ 2A:67-1 <i>et seq.</i> (1952) | | S. CT. R. CRIM. P. 3.22 | RULE 3:22-3 | RULE 3:22-1; RULE 3:22-7 |
| NM | N.M. STAT. ANN. ch. 22, §§ 22-11-1 <i>et seq.</i> (1953) | | ch. 41, § 41-15-8 | | ch. 41, § 41-15-8-B |
| NY | N.Y. CPL & R, art. 70, §§ 7001-12 (McKinney 1963) | C/L | | | |
| NC | N.C. GEN. STAT. §§ 17-1 <i>et seq.</i> (1965) | | § 15-217 | § 15-217 | § 15-217.1 |
| ND | N.D. CODE ANN. tit. 32, § 32-22-01 <i>et seq.</i> (1960) | | tit. 29, § 29-32-01 (1) | tit. 29, § 29-32-01 (2) | tit. 29, § 29-32-03 |

—CONTINUED

LAW, STATE STATUTES AND COURT RULES—Continued

Procedure Act or Equivalent

| Petitions | Indigency | Pleadings | Hearings | Waiver | Appeals | Denial of Petition |
|-------------------------|--------------------------------------|-------------------------|-------------------------|---------------------------------------|----------------------------|----------------------------|
| tit. 14, § 5504 | tit. 14, § 5506 | tit. 14, § 5505 | tit. 14, § 5505 | tit. 14, § 5507 | tit. 14, § 5505, § 5508 | tit. 14, § 5507 |
| S. CT. R. BK41 | RULE BK42 | RULE BK 43 | RULE BK44 | art. 27, § 645 A(c); RULE BK 48 | RULE BK46, BK 47 | RULE BK 48 |
| § 590.01 | § 590.01(2); § 590.05 | § 590.03 | § 590.04 | | § 590.06 | § 590.04 |
| RULE 27.26- (c) | RULE 27.26- (h),(k),(l) | | RULE 27.26- (e) | | RULE 27.26- (i) | RULE 27.26(d) |
| § 95-2603 | | § 95-2605 | § 95-2605 | | § 95-2608 | § 95-2607 |
| | ch. 29, § 29- 3004 | | ch. 29, § 29- 3001 | | ch. 29, § 29- 3002 | ch. 29, § 29- 3003 |
| ch. 177, § 177.335 | ch. 177, § 177.345(1), (2),(3) | ch. 177, § 177. 325 | ch. 177, § 177.365 | ch. 177, § 177.365 | ch. 177, § 177.385 | ch. 177, § 177. 375 |
| RULE 3:22-8 | RULE 3:22- 6-(a)-(d) | RULE 3:22-9 | RULE 3:22- 10 | RULE 3:22-4 | RULE 3:22-11 | RULE 3:22-4 and 3:22-5 |
| | ch. 41, § 41- 15-8-B | | ch. 41, § 41- 15-8-B | | ch. 41, § 41- 15-8-E | ch. 41, § 41-15- 8-D |
| § 15-218 | § 15-219 | § 15-220 | § 15-221 | | § 15-222 | |
| tit. 29, § 29- 32-04 | tit. 29, § 29- 32-05 | tit. 29, § 29- 32-06 | tit. 29, § 29- 32-07 | tit. 29, § 29- 32-08 | tit. 29, § 29- 32-09 | tit. 29, § 29-32- 06(2) |

TABLE 3

POST-CONVICTION REMEDIES PROVIDED IN COMMON

| | | | Uniform Post-Conviction | | |
|-------|--|-----------------|------------------------------------|-------------------------------|--|
| State | Habeas Corpus | Coram Nobis | Remedy Defined | Saving Clause | Procedure |
| OH | OHIO REV. CODE ANN. tit. 27, §§ 2725.01 <i>et seq.</i> (Page 1953) | | tit. 29, § 2953.21(A) | | tit. 29, § 2953.21(B), (C) |
| OK | OKLA. STAT. ANN. tit. 12, §§ 1331-1355 (1961) | C/L | tit. 22, § 1073 | | CT. CRIM. APP. R. 25 |
| OR | ORE. REV. STAT. ch. 34, §§ 34-310-730 (1968) | | ch. 138, § 138.530 | ch. 138, § 138.540(1) and (2) | ch. 138, § 138.560 |
| PA | PA. STAT. ANN. tit. 12, §§ 1871-1907 (1967) | | tit. 19, §§ 1180-2; 1180-3 | tit. 19, § 1180-2 | tit. 19, § 1180-5; S. CT. R. CRIM. P. 1506 |
| RI | R.I. GEN. LAWS §§ 10-9-1 to -9-32 (1956) | C/L | | | |
| SC | S.C. CODE § 17-601 (2) (Supp. 1970) | | tit. 17, § 17-601(a) | tit. 17, § 17-601(b) | tit. 17, § 17-603 |
| SD | S.D. COMP. LAWS tit. 21, §§ 21-27-1 to -27-29 (1967) | | tit. 23, § 23-52-1 | tit. 23, § 23-52-2 | tit. 23, § 23-52-5; § 23-52-6 |
| TN | TENN. CODE ANN. §§ 23-1801 to -1839 (1955) | § 40-3411 | § 40-3805 | | § 40-3803; § 40-3806 |
| TX | TEX. STAT. ANN. (C. CRIM. P.) arts. 11.01-.64 (1966) | | | | |
| UT | UTAH CODE ANN. tit. 78; Civil P. R. 65B(f) (1953) | C/L | S. CT. R. C. P. 65 B(f); 65B(i)(1) | | RULE 65B(i)(1) |
| VT | VT. STAT. ANN. tit. 12, §§ 3951-3985 (1958) | C/L | tit. 13, § 7131 | | tit. 13, § 7133 |
| VA | VA. CODE tit. 8, §§ 8-596 to -609 (1950) | | | | |
| WA | WASH. REV. CODE ANN. tit. 7, §§ 7.36.010-.36.250 (1961) | | | | |
| WV | W.VA. CODE ch. 53, §§ 53-4-1 to -4-13 (1966) | C/L | ch. 53, § 53-4A-1 | ch. 53, § 53-4A-1 (e) | ch. 53, § 53-4A-3 |
| WI | WIS. STAT. ANN. §§ 292.01-.46 (1958) | § 958.07 (1958) | | | |
| WY | WYO. STAT. tit. 1, §§ 1-810 to -855 (1957) | | tit. 7, § 7-408.1 | | tit. 7, § 7-408.1 |

—CONTINUED

LAW, STATE STATUTES AND COURT RULES—Continued

Procedure Act or Equivalent

| Petitions | Indigency | Pleadings | Hearings | Waiver | Appeals | Denial of Petition |
|---------------------------------|---|---------------------------------|---|-----------------------|---|---|
| tit. 29, § 2953.21(A) | tit. 29, § 2953.24 tit. 22, § 1074 | tit. 29, § 2953.21(D) | tit. 29, § 2953.22 | | tit. 29, § 2953.23(B) | tit. 29, § 2953.23(A) |
| ch. 138, § 138.580 | ch. 138, § 138.590 | ch. 138, § 138.610 | ch. 138, § 138.620 | ch. 138, § 138.550(3) | ch. 138, § 138.650 | ch. 138, § 138.640 |
| tit. 19, § 1180-5 | tit. 19, § 1180-12 | tit. 19, § 1180-8 | tit. 19, § 1180-9 | tit. 19, § 1180-4 | tit. 19, §§ 1180-10; 1180-11 | tit. 19, § 1180-9 tit. 19, § 1180-10 |
| tit. 17, § 17-604 | tit. 17, § 17-605 | tit. 17, § 17-606 (a) | tit. 17, § 17-607 | tit. 17, § 17-608 | tit. 17, § 17-609 | tit. 17, § 17-606 (b), (c); § 17-608 |
| tit. 23, § 23-52-7 § 40-3804 | tit. 23, § 23-52-8 § 40-3813; § 40-3821 | tit. 23, § 23-52-9 § 40-3814 | tit. 23, § 23-52-12 §§ 40-3809; 40-3810; 40-3811 | tit. 23, § 23-52-15 | tit. 23, §§ 23-52-14; 23-52-17 § 40-3822 | § 40-3809; § 40-3812 |
| RULE 65B-(i)(2) | RULE 65B-(i)(5); RULE 65B(i)(9) | RULE 65B(i)(6) | RULE 65B(i)(7) | RULE 65B(i)(4) | RULE 65B(i)(10) | |
| tit. 13, § 7132 | tit. 13, § 7137 | | tit. 13, § 7133 | | tit. 13, § 7135 | tit. 13, § 7134 |
| ch. 53, § 53-4A-2 | ch. 53, § 53-4A-4 | ch. 53, § 53-4A-6 | ch. 53, § 53-4A-7 | ch. 53, § 53-4A-1(c) | ch. 53, § 53-4A-9 | ch. 53, § 53-4A-3 |
| tit. 7, § 7-408.2 | tit. 7, § 7-408.4 | tit. 7, § 7-408.5 | tit. 7, § 7-408.6 | tit. 7, § 7-408.3 | tit. 7, § 7-408.7 | |