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Collateral Relief from Convictions in Violation of Due Process in Illinois

Philip Rubin

Collateral Relief From Convictions in Violation of Due Process in Illinois*

In recent years a considerable number of cases in the federal courts sitting in Illinois and two United States Supreme Court cases have dealt with the problem of collateral relief to prisoners in Illinois who claim that they are being held in violation of their constitutional rights. The broadened interpretation given to the due process clause[1] and to the scope of review upon habeas corpus[2] by the United States Supreme Court in the last fifteen years warrants a re-examination of the procedures available in the Illinois courts and in the federal district courts sitting in Illinois to obtain collateral relief from convictions alleged to have been obtained in violation of due process. This comment will attempt to set forth the remedies available within the state and federal courts to prisoners held in Illinois and will suggest possible improvements of the procedure in the Illinois courts.[3]

Writ of Error Coram Nobis in Illinois[4]

In Illinois the proper method of obtaining collateral relief from convictions alleged to have been obtained in violation of due process is said to be through use of the statutory motion substituting the common

* This comment also appears in 42 Ill. L. Rev. 329 (1947).

1 Right to counsel in cases of serious crimes is a fundamental constitutional right guaranteed by the due process clause of the 14th Amendment. Powell v. Alabama, 287 U. S. 45 (1932) (where the defendant in a capital case is incapable of adequately making his own defense because of ignorance, feeble-mindedness, illiteracy or the like, it is the duty of the court, whether requested to or not, to assign counsel for him as a necessary prerequisite of due process of law); Smith v. O'Grady, 312 U. S. 329 (1941) (violation of due process when defendant was tricked into pleading guilty of burglary without aid of counsel); Williams v. Kaiser, 323 U. S. 471 (1945) (denial of counsel in a robbery case); Tompkins v. Missouri, 323 U. S. 485 (1945) (ineffective representation in a murder case); House v. Mayo, 324 U. S. 42 (1945); White v. Ragen, 324 U. S. 760 (1945); Hawk v. Olson, 326 U. S. 271 (1945); De Meerleer v. People of Michigan, ... U. S. ..., 67 S. Ct. 596 (1947); *cf.* Betts v. Brady, 316 U. S. 455 (1942) (there is no absolute right to counsel under the 14th Amendment in all cases where the defendant can take care of his own interests and the issues are narrow; state court did not appoint a counsel in a robbery case); Rice v. Olson, 324 U. S. 786 (1945) (pleading guilty does not automatically waive right to counsel under the 14th Amendment); Canizio v. New York, 327 U. S. 82 (1946) (presence of counsel on day of sentence was held to correct the due process inadequacy in earlier stages of the proceeding). *See* Glasser v. United States, 315 U. S. 60, 76 (1941).

Use of a confession obtained through coercion is a denial of due process and protected by the 14th Amendment. Brown v. Mississippi, 297 U. S. 278 (1936); Chambers v. Florida, 309 U. S. 227 (1940); Ashcraft v. Tennessee, 322 U. S. 143 (1944); 327 U. S. 274 (1946); *cf.* Lisenba v. California, 314 U. S. 219 (1941).

The knowing use of material perjured testimony by a state prosecutor would make a trial unfair within the meaning of the 14th Amendment. Mooney v. Halohan, 294 U. S. 103 (1935); Pyle v. Kansas, 317 U. S. 213 (1942); *cf.* People ex rel. Whitman v. Wilson, 318 U. S. 688 (1943); Lutz v. Ragen, 324 U. S. 760 (1945).

2 See cases cited *infra* note 48; see text *infra* at note 70.

3 This comment will not deal with the problem of scope of review upon writ of error in Illinois where the reviewing court has only the common law record before it and the defendant claims he was deprived of adequate representation by counsel, but the common law record indicates that he was admonished of the meaning of his plea of guilty as required by the Illinois statute (Ill. Rev. Stat. 1945 c 38, § 732). The case of Carter v. Illinois, 328 U. S. ..., 67 S. Ct. 216 (1946) illustrates this problem.

4 For a general discussion of writ of error coram nobis in Illinois see Comment (1937) 31 Ill. L. Rev. 644.

law writ of error coram nobis.[5] In 1871 the writ of error coram nobis was abolished by statute[6] and the present method of motion in the nature of writ of error coram nobis was substituted giving the same relief that was available under the common law writ except that the motion has to be brought within five years after rendition of final judgment.[7] This provision was reenacted in substantially the same form in the Practice Act of 1907[8] and is now Section 72 of the present Civil Practice Act.[9] The common law writ of error coram nobis was a writ to the same court which rendered the judgment because of some error in fact which Tidd characterized as "not the error of the judges, and (thus) reversing it is not reversing their own judgment."[10] Although the statute is silent as to whether the motion in nature of writ of error coram nobis is available in criminal cases, it has been interpreted as applicable in criminal as well as civil cases.[11] It is even available after the Supreme Court of Illinois has affirmed the conviction of the trial court, since ". . . the original finding of the court is not disputed or contested, but the bill proceeds on the theory that newly discovered facts would produce a different decree."[12] This remedy is available for the purpose of revoking a judgment for some error in point of fact which does not appear on the face of the record and which, if known at the time the judgment was rendered, would have prevented its rendition.[13] Coram nobis is not the proper remedy

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5 Van Woods v. Neirstheimer, 328 U. S. 211 (1946); *cf.* People v. Crooks, 326 Ill. 266, 157 N. E. 218 (1927).

6 Ill. Laws, 1871, p. 348, § 66.

7 See *infra*, note 29.

8 Ill. Laws, 1907, p. 461, § 89.

9 Ill. Rev. Stat. (1945) c. 110, § 72. "The writ of error coram nobis is hereby abolished, and all errors in fact, committed in the proceedings of any court of record and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. When the person entitled to make such motion shall be an infant, non compos mentis or under duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years."

In discussing the characteristics of the motion in the nature of writ of error coram nobis in Illinois, references made to cases interpreting § 89 of the Practice Act of 1907 are applicable to § 72 of the present Civil Practice Act since they are identical and have been given the same construction. Seither and Cherry Co. v. Board, 283 Ill. App. 401 (1936); People v. McArthur, 283 Ill. App. 467 (1936).

10 2 Tidd (ed. of 1807), 1056; Stephen, On Pleading (1867) 118. For a short discussion of the elements of writ of error coram nobis see Moore and Rodgers, Federal Relief from Civil Judgments (1946) 55 Yale L. J. 623, 669-674. For more elaborate treatment see: Freedman, The Writ of Error Coram Nobis (1929) 3 Temple L. Q. 365; Orfield, The Writ of Error Coram Nobis in Civil Practice (1934) 20 Va. L. Rev. 423.

11 People v. Crooks, 326 Ill. 266, 157 N. E. 218 (1927); People v. Moran, 342 Ill. 478, 174 N. E. 532 (1930); People v. Dabbs, 372 Ill. 160, 23 N. E. (2d) 343 (1939); People v. Rave, 392 Ill. 435, 65 N. E. (2d) 23 (1946).

12 People v. Dabbs, 372 Ill. 160, 23 N. E. (2d) 343 (1939); *cf.* People v. Gleitsman, 396 Ill. 499, 72 N. E. (2d) 208 (1947) (coram nobis does not lie for newly discovered evidence nor to correct false testimony, particularly after the judgment of the trial court was affirmed by the supreme court). The Gleitsman case indicates that the writ would lie "if a person was insane, if he was a minor under the age of criminal liability, if he was incarcerated, so he could not produce a defense".

13 People ex rel. O'Connell v. Noonan, 276 Ill. 430, 114 N. E. 928 (1916); People *ex rel.* Courtney v. Green, 355 Ill. 468, 189 N. E. 500 (1934); People v. Rave, 392 Ill. 435, 65 N. E. (2d) 23 (1946).

when the errors relied upon were a matter of record and before the court when the judgment was rendered.[14] The rule is well established that such a motion is not available to review questions of fact which are raised by the pleadings or to correct errors of the court upon questions of law.[15]

The motion in nature of writ of error coram nobis in Illinois is an appropriate remedy to set aside a conviction obtained by duress or fraud, or where the defendant without negligence, through excusable mistake or ignorance, had been deprived of defence.[16] Thus, "a conviction based on a plea forced by fear of mob law or by other fear of the defendant induced by misconduct of the officers of the court or by other officers of the law in whose custody a confession was obtained by unlawful means", could be set aside on a motion in the nature of writ of error coram nobis.[17] However, the burden of proof is on the one seeking to set aside the judgment of conviction to prove the facts alleged in his petition or motion by preponderance of evidence.[18] Since the proceeding under this motion is said to be civil in nature and judgment thereon is final, either the state or the defendant in a criminal case is entitled to review.[19] Therefore, when the trial court discharges a petitioner upon such proceedings on the ground that he had inadequate representation by counsel, the order cannot be expunged by a mandamus proceeding on the part of the people, but must be appealed as a final judgment.[20] Where the petitioner has failed to present a defense because of his own negligence[21] or where the error claimed was not an error of fact which would have changed the sentence,[22] the remedy of writ of error coram nobis is not available.

Although the remedy of coram nobis may be appropriate where

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14 Jerome v. 5019-21 Quincy Street Building Corp., 385 Ill. 524, 53 N. E. (2d) 444 (1944).

15 Marabia v. Mary Thompson Hospital, 309 Ill. 147, 140 N. E. 836 (1923); Village of Downers Grove v. Glos, 316 Ill. 563, 147 N. E. 390 (1925); People v. Crooks, 326 Ill. 266, 157 N. E. 218 (1927).

16 See cases cited *supra* note 13.

17 People v. Crooks, 326 Ill. 266, 280, 157 N. E. 218, 223 (1927); Saunders v. State, 85 Ind. 318, 44 Am. Rep. 29 (1882); State v. Calhoun, 50 Kan. 523, 83 Pac. 38 (1893).

18 People v. Long, 346 Ill. 646, 178 N. E. 918 (1931); People *ex rel.* Courtney v. Green, 355 Ill. 468, 189 N. E. 500 (1934).

19 People v. McArthur, 283 Ill. App. 467 (1936); *cf.* People v. Cohen, 376 Ill. 382, 33 N. E. (2d) 593 (1941) (it is essentially a civil proceeding and may not be reviewed in the Illinois Supreme Court by writ of error).

20 People *ex rel.* Courtney v. Green, 355 Ill. 468, 189 N. E. 500 (1934).

21 People v. Bruno, 346 Ill. 449, 179 N. E. 129 (1931) (failure to use alibi); People v. Ogbin, 368 Ill. 173, 13 N. E. (2d) 162 (1938) (failure to use alibi known at time of trial); People v. McArthur, 283 Ill. App. 467 (1936) (where defendant failed to call a witness because of alleged hostility, he could not upon a motion in the nature of writ of error coram nobis set aside the conviction on the grounds of excusable mistake, particularly when the witness' testimony would not necessarily have proved his innocence); People v. Whitmer, 304 Ill. App. 258, 26 N. E. (2d) 150 (1940) (abstract only) (where petitioner claims he was unable to produce a piece of evidence because of illness of his counsel, and that the information did not come to his attention until entry of the judgment, relief was denied without a hearing).

22 People v. Moran, 342 Ill. 478, 174 N. E. 532 (1930); Johnston v. People, 383 Ill. 91, 48 N. E. (2d) 350 (1943).

there are claims of due process violations,[23] there have been some cases denying relief upon the ground that the technical requirements of the motion had not been met.[24] Before granting relief under such a motion the court is confronted with the requirement of finding that the errors complained of were not known to the court and are mistakes of fact rather than law.[25] The court must next decide whether or not the error was due to the negligence of the petitioner and the defense known to him at the time of trial.[26] Thus, since a proceeding in the nature of coram nobis is said to be the only proper method of obtaining a hearing upon a claim of due process violation in Illinois when this error is not part of the record,[27] relief may sometimes be denied upon technical considerations which are characteristic of the common law writ.[28]

Another serious inadequacy is the fact that the statutory motion is apparently not available after the five year limitation as set forth in Section 72 of the Civil Practice Act.[29] Incarceration[30] or alleged inability to get the necessary papers beyond the prison walls because of a prison rule[31] will not toll the five year limitation for filing the

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23 People v. Long, 346 Ill. 646, 178 N. E. 918 (1931) (attorney represented two defendants having adverse interests and entered a plea of guilty without consulting the petitioner; court held that petitioner was entitled to a hearing upon a motion for writ of error coram nobis); Saunders v. State, 85 Ind. 318, 44 Am. Rep. 29 (1882) (when defendant pleaded guilty to crime of murder because of a threatening mob, conviction was set aside upon writ of error coram nobis); *cf.* People ex rel. Courtney v. Green, 355 Ill. 468, 189 N. E. 500 (1934) (in a proceeding in the Municipal Court in Chicago judgments for misdemeanors were set aside where defendants were not represented by counsel and were ignorant and unable to understand ordinary legal terms).

24 People v. Drysch, 311 Ill. 342, 143 N. E. 100 (1924) (petitioner claimed he was beaten into pleading guilty of robbery); People v. Schuedter, 336 Ill. 244, 168 N. E. 323 (1929) (where defendant pleaded guilty to a charge of murder upon the understanding that he would only receive a 14 year sentence, the court held that writ of error coram nobis was not available since the whole matter was presented to and known to the trial judge and was no error of fact); People v. Sprague, 371 Ill. 627, 21 N. E. (2d) 763 (1939) (petitioner was convicted of the crime of accessory to murder; he claimed that he did not have an attorney and that the court was informed of this; that he entered the plea of guilty although he did not understand that the crime of accessory to murder carried the same punishment as the crime of murder; the court held that this was an error of law since the record showed that the defendant had been admonished of the consequences of a plea of guilty and the proper remedy was by writ of error).

25 See cases cited *supra* note 24.

26 See cases cited *supra* note 21.

27 Van Woods v. Neirstheimer, 328 U. S. 211 (1946); *cf.* People v. Crooks, 326 Ill. 266, 157 N. E. 218 (1927).

28 Moore and Rodgers, Federal Relief from Civil judgments (1946) 55 Yale L. J. 623, 671. "Other cases illustrate that the basis of coram nobis is narrow, and oftentimes a case that is beyond its scope is as meritorious as one within its purview." At p. 674. "The relief given in coram nobis cases is given on a technical basis."

29 Ill. Rev. Stat. (1945) c. 110 § 72; People v. Rave, 392 Ill. 435, 65 N. E. (2d) 23 (1946); People v. Austin et al., 329 Ill. App. 276, 67 N. E. (2d) 883 (1946) (abstract only).

The recent case of People v. Touhy, 397 Ill. 19, 72 N. E. (2d) 827 (1947), approves the holding of the Rave case, indicating that the 5 year limitation of § 72 applies to criminal as well as civil cases.

30 People v. Rave, 392 Ill. 435, 65 N. E. (2d) 23 (1946).

31 People v. Austin et al., 329 Ill. App. 276, 67 N. E. (2d) 883 (1941).

As regards the prison rule in the Illinois state penitentiary which forbade the filing of any court papers without the aid of counsel see: United States ex rel. Bongiorno v. Ragen, 54 F. Supp. 973 (N. D. Ill. 1943) *Aff'd* 146 F. (2d) 349

motion. It would seem, therefore, that after the expiration of the five year limitation, there can be no collateral hearing upon a claim of due process violation in the Illinois courts unless the statute is tolled when ". . . the person entitled to make such a motion shall be an infant, non compos mentis or under duress, at the time of passing judgment."[32] It should be noted, however, that the Illinois Supreme Court has not yet found it necessary squarely to decide whether the five year limitation will apply in a case involving a constitutional claim. The court may very well say that the five year limitation does not apply in such cases.[33] It should also be noted that there are no recent decisions of the Illinois Supreme Court in which the remedy of a motion in the nature of writ of error coram nobis was attempted in a case involving constitutional rights. It is possible that the court will, in a due process case, give the petitioner relief where there is no remedy by writ of error or habeas corpus, even though some of the techincal requirements of coram nobis have not been met.

Habeas Corpus in Illinois

It is clear that a violation of due process does not necessarily come within the remedy of habeas corpus in Illinois. The Illinois courts have repeatedly held that in habeas corpus proceedings the only questions to be decided are whether the judgment challenged was entered by a court having jurisdiction of the defendant and of the subject matter, and with power to enter the order questioned,[34] and whether anything has happened subsequently to render the judgment void.[35] Habeas corpus cannot therefore be used to perform the functions of a writ of error for the purpose of reviewing errors of a court having jurisdiction of the person and the subject matter.[36] Even though the errors claimed to have occurred at the trial might have been of sufficient gravity to have caused a reversal upon a writ of error, they do not furnish sufficient grounds for granting a writ of

(C. C. A. 7th) 1945); United States ex rel. Foley v. Ragen, 52 F. Supp. 265 (N. D. Ill. 1943) *rvsd.* 143 F. (2d) 774 (C. C. A. 7th, 1944); White v. Ragen, 324 U. S. 760, 762 (1945), footnote 1.

32 Ill. Rev. Stat. (1945) c. 110 § 72.

33 See *infra* note 63.

34 People ex rel. Wayman v. Zimmer, 252 Ill. 9, 96 N. E. 529 (1911); People *ex rel.* Harris v. Graves, 276 Ill. 350, 114 N. E. 556 (1916); People ex rel. Huber v. Whitman, 277 Ill. 408, 115 N. E. 531 (1917); People *ex rel.* Hoyne v. Windes, 283 Ill. 251, 119 N. E. 297 (1918); People *ex rel.* Morris v. Hazard, 356 Ill. 448, 191 N. E. 54 (1934); People *ex rel.* Courtney v. Thompson, 358 Ill. 81, 192 N. E. 693 (1934); People *ex rel.* Merrill v. Hazard, 361 Ill. 60, 196 N. E. 827 (1935); People *ex rel.* Courtney v. Sullivan, 363 Ill. 34, 1 N. E. (2d) 306 (1936); People *ex rel.* Swolley v. Ragen, 390 Ill. 106, 61 N. E. (2d) 248 (1945); People *ex rel.* Barrett v. Bradley, 391 Ill. 169, 62 N. E. (2d) 788 (1945); People *ex rel.* Thompson v. Neirstheimer, 395 Ill. 572, 71 N. E. (2d) 343 (1947).

35 People *ex rel.* Hoyne v. Windes, 283 Ill. 251, 119 N. E. 297 (1918); People *ex rel.* Courtney v. Thompson, 358 Ill. 81, 192 N. E. 693 (1934). For the statutory provision setting forth the scope of habeas corpus see Ill. Rev. Stat. (1945) c. 65 § 22.

36 People *ex rel.* Wayman v. Zimmer, 252 Ill. 9, 96 N. E. 529 (1911); People *ex rel.* Crowe v. Fisher, 303 Ill. 430, 135 N. E. 751 (1922); People *ex rel.* Crowe v. Williams, 330, Ill. 150, 161 N. E. 312 (1928); People *ex rel.* Swanson v. Kelly, 352 Ill. 567, 186 N. E. 188 (1933); People *ex rel.* Courtney v. Prystalski, 358 Ill. 198, 192 N. E. 908 (1934); People *ex rel.* Merrill v. Hazard, 361 Ill. 60, 196 N. E. 827 (1935); People *ex rel.* Courtney v. Sullivan, 363 Ill. 34, 1 N. E. (2d) 206 (1936); People *ex rel.* Wakefield v. Montgomery, 365 Ill. 478, 6 N. E. (2d) 868 (1937); People *ex rel.* Swolley v. Ragen, 390 Ill. 106, 61 N. E. (2d) 248 (1945).

habeas corpus.[37] The constitutionality of a statute under which the petitioner was sentenced cannot be determined by habeas corpus.[38] Nor is it the proper proceeding to try the guilt or innocence of the accused.[39]

The Illinois Supreme Court and circuit courts have concurrent jurisdiction to entertain applications for writs of habeas corpus.[40] The petitioner can apply to the supreme court, to a court of competent jurisdiction in the county where he is held, or to a court of competent jurisdiction in the county from which he was committed.[41] However, the supreme court generally refuses to entertain original applications when the record on its face indicates a possibility of a trial in that court upon an issue of fact.[42] No appeal or writ of error lies to review the order or judgment in a habeas corpus proceeding for the discharge of a prisoner in a criminal case, as the order or judgment in such a proceeding is not considered final in Illinois.[43] However, mandamus on the part of the people can be invoked to compel a court to expunge an order when a judge of the circuit or criminal court has erroneously set aside a judgment of conviction and has released a petitioner from custody in a habeas corpus proceeding.[44] When a writ of habeas corpus is denied in the Illinois courts, the petitioner can apply for writ of certiorari from the United States Supreme Court if a federal question is involved.[45] It can readily be seen that the great emphasis placed upon merely testing jurisdiction makes habeas corpus an inadequate method of obtaining a hearing upon a claim of due process violation resulting in conviction.[46]

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37 People *ex rel.* Swolley v. Ragen, 390 Ill. 106, 61 N. E. (2d) 248 (1945).

38 People v. Jonas, 173 Ill. 316, 50 N. E. 1051 (1898); People v. Strassheim, 242 Ill. 359, 90 N. E. 118 (1909).

39 People *ex rel.* Mortenson v. O'Brien, 371 Ill. 351, 20 N. E. (2d) 782 (1939).

40 Ill. Rev. Stat. (1945) c. 65 § 2 "Application for the writ shall be made to the court or judge authorized to issue the same, by petition signed by the person for whose relief it is intended, or by some person in his behalf, and verified by affidavit; provided, that such application shall be made to the Supreme Court or to a court of competent jurisdiction of the city or of the county in which the person in whose behalf the application is made, is imprisoned or restrained, or to a court of competent jurisdiction of the city from which said person was sentenced or committed or of the county from which said person was sentenced or committed."

41 *Ibid.*

42 See cases cited *infra* note 57.

43 Hammond v. People, 32 Ill. 446 (1863) (Writ of error will not lie to review an order rendered upon the hearing of a habeas corpus proceeding in absence of statute; reviews English and early America cases); Ex Parte Thompson, 93 Ill. 69 (1879); People *ex rel.* Magee v. McNally, 221 Ill. 66, 77 N. E. 544 (1906); People *ex rel.* Maglori v. Siman, 284 Ill. 28, 119 N. E. 940 (1918).

44 People v. Jonas, 173 Ill. 316, 50 N. E. 1051 (1898); People *ex rel.* Maglori v. Siman, 284 Ill. 28, 119 N. E. 940 (1918); People *ex rel.* Carlstrom v. Shurtleff, 355 Ill. 210, 189 N. E. 291 (1933); People *ex rel.* Courtney v. Prystalski, 358 Ill. 198, 192 N. E. 908 (1934); People *ex rel.* Courtney v. Sullivan, 363 Ill. 34, 1 N. E. (2d) 206 (1936).

45 Since the denial of habeas corpus by one of the lower courts of Illinois is not reviewable by any other court, it is a decision by the highest court of the state in which a decision can be had and therefore subject to review by the Supreme Court of the United States, 43 Stat. 937 (1925), 28 U. S. C. A. § 344 (1943); Betts v. Brady, 316 U. S. 455 (1942); *cf.* Largent v. Texas, 318 U. S. 418 (1943).

46 People v. Neirstheimer, 395 Ill. 572, 71 N. E. (2d) 343 (1947) (where petitioner who was convicted of murder claimed upon application for writ of habeas corpus from the Illinois Supreme Court that he was held incommunicado prior to his trial and that he was deprived of his right to counsel, the court held that these were not sufficient grounds for granting a writ of habeas corpus since in such a proceeding only jurisdiction can be attacked).

Treatment of Due Process Claims from Illinois in the Federal Courts

While the federal courts have the power to release petitioners held by the states in violation of their constitutional rights upon application for writ of habeas corpus,[47] this power is used very carefully and will only be exercised after petitioner has shown that he has exhausted the remedies available to him within the state courts.[48]

The federal district courts in Illinois and the Seventh Circuit Court of Appeals have held that in order to exhaust state remedies in Illinois it is necessary to apply for a writ of habeas corpus in each of the courts available under the Illinois practice.[49] However, when previous decisions have foreclosed any relief in the Illinois Supreme Court through habeas corpus, it is not necessary to attempt to secure such relief before applying to the federal district court.[50] The federal court has no jurisdiction to entertain a petition for writ of habeas corpus where petitioner has failed to appeal to the Supreme Court of Illinois from an adverse ruling in a coram nobis proceeding,[51] or has not applied for certiorari to the United States Supreme Court after the Illinois Supreme Court has affirmed the lower court's ruling denying coram nobis.[52] If petitioner originally applied for habeas corpus in an Illinois state court and was denied relief on the merits, exhaustion of state remedies requires that he apply for certiorari to the United States Supreme Court before petitioning for habeas corpus in the federal courts.[53] When an interpretation of an Illinois law is involved in the application for writ of habeas corpus in the federal court, the

47 14 Stat. 385 (1867); 28 U. S. C. A. § 453 (1928) "The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he . . . is in custody in violation of the constitution . . ." For early history of this provision and habeas corpus generally in the federal courts, see *In re* Neagle, 135 U. S. 1 (1889).

48 Mooney v. Halohan, 294 U. S. 103 (1935); Ex Parte Hawk, 321 U. S. 114 (1944) and cases cited there.

49 United States ex rel. Foley v. Ragen, 143 F. (2d) 774 (C. C. A. 7th, 1944); People *ex rel.* Ross v. Neirstheimer, 148 F. (2d) 8 (C. C. A. 7th, 1945); Randall v. Becker, 60 F. Supp. 656 (E. D. Ill. 1945).

50 United States *ex rel.* Howard v. Ragen, 59 F. Supp. 374 (N. D. Ill. 1945) (case involved the reincarceration of a parole violator after the original sentence had expired); *cf.* Potter v. Dowd, 146 F. (2d) 244 (C. C. A. 7th 1944), noted in 39 Ill. L. Rev. 417 (1945) and 58 Harv. L. Rev. 456 (1945) (in a case arising from Indiana, the 7th Circuit Court of Appeals held that it is not necessary to exhaust the state remedy of habeas corpus when this is apparently futile); Williams v. Dowd, 153 F. (2d) 328 (C. C. A. 7th 1946), noted in 22 Ind. L. J. 189 (1947) (makes no reference to the requirement that the petitioner exhaust his remedy of habeas corpus in the Indiana courts before petitioning the federal district court). Habeas corpus in Indiana is for all practical purposes an adequate remedy only to a prisoner confined within the county in which he was convicted. See Note (1947) 22 Ind. L. J. 189.

51 United States ex rel. Gordon v. Ragen, 157 F. (2d) 766 (C. C. A. 7th, 1946).

52 United States ex rel. Johnston v. Cary, 141 F. (2d) 967 (C. C. A. 7th, 1944); *cert. denied* 323 U. S. 717 (the petitioner had also failed to apply for habeas corpus in the state courts).

53 *Ibid.* People of State of Illinois ex rel. Davidson v. Bennett, 153 F. (2d) 271 (C. C. A. 7th, 1946) (after denial of habeas in the trial court it is necessary to apply to United States Supreme Court for certiorari); *cf.* United States ex rel. McCarthy v. Ragen, 153 F. (2d) 609 (C. C. A. 7th, 1946) (where petitions for habeas corpus were denied in an inferior court and in the Illinois Supreme Court on the merits it is necessary to apply for certiorari to United States Supreme Court in order to exhaust state remedies). *See* People ex rel. Herndon v. Neirstheimer, 63 F. Supp. 594, 595 (E. D. Ill. 1945).

Circuit Court of Appeals has held that it is bound by the decision of the Illinois Supreme Court.[54]

Two United States Supreme Court cases in recent years have dealt with elements of exhaustion of state remedies in Illinois. In the case of *White* v. *Ragen*[55] the Court held that it was unnecessary to apply for writ of certiorari to the United States Supreme Court in order to exhaust state remedies when an application for writ of habeas corpus has been denied without opinion by the Supreme Court of Illinois, and hence it could not be said that the petition for habeas corpus was denied on its merits rather than on adequate state grounds. This opinion dealt with the claims of two petitioners, one claiming that he had been convicted of "obtaining money and goods by means of the confidence game" without having been given adequate representation by counsel, and the other petitioner claiming that he was convicted of murder through the known use of perjured testimony. The Court acknowledged that the petitioners' allegations presented a *prima facie* case of constitutional violations,[56] but could not consider the merits of their claims, because the Supreme Court of Illinois may have denied the petitions for habeas corpus upon adequate state grounds. The adequate state grounds in these cases may very well have been the practice of the Illinois Supreme Court of refusing to entertain original applications for habeas corpus where the record on its face indicates the possibility of a trial in that court on an issue of fact.[57] The Court further held that dismissing certiorari in these two cases under these circumstances did not bar application for relief to a federal district court grounded on the federal rights which the Supreme Court of Illinois has allegedly denied, but any other state remedies, if available, must be exhausted before applying to the federal district court.[58]

In *Van Woods* v. *Neirstheimer*,[59] the petitioner was adjudged guilty of murder in the Criminal Court of Cook County in 1940, and was sentenced to serve ninety-nine years in the state penitentiary. In 1945 he filed two identical petitions for habeas corpus, one in the Criminal Court of Cook County, and the other in the Randolph County Circuit Court in which he claimed that he was forced to sign a confession of murder after he had been beaten and threatened. He also alleged that he could not employ counsel and that he was not adequately represented by the counsel appointed by the court, that the public counsel would not allow the petitioner to explain the circumstances surrounding the confession and entered a plea of guilty despite the petitioner's repeated assertions of innocence. The applications were denied in both state courts for failure to state a cause of action and neither court wrote an opinion explaining the denial. These cases were brought to the United States Supreme Court on certiorari and both denials of habeas

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54 Whitten v. Bennet, 141 F. (2d) 295 (C. C. A. 7th, 1944); United States ex rel. Reno v. Ragen, 151 F. (2d) 447 (C. C. A. 7th, 1945).

55 324 U. S. 760 (1945); noted in 34 Ill. B. J. 535 (1946).

56 See *supra* note 1.

57 People ex rel Swolley v. Ragen, 390 Ill. 106, 61 N. E. (2d) 248 (1945); *cf.* North Chicago Hebrew Congregation v. Board of Appeals, 358 Ill. 549, 193 N. E. 519 (1934). *See* United States ex rel Hall v. Ragen, 60 F. Supp. 820, 824 (N. D. Ill. 1945).

58 See cases cited *supra* note 48.

59 328 U. S. 211, (1946).

corpus were considered together. The Court, in an opinion written by Justice Black, dismissed the suit on the ground that the denials of application for habeas corpus in the trial courts could have rested upon adequate state grounds since the proper remedy for relief from judgments violating due process of law in Illinois is provided by a statutory substitute for the common law writ of error coram nobis. In answer to the petitioner's claim that this remedy was no longer available to him because the five year statutory limitation had been exceeded, the Court said that it would be necessary to obtain an adverse ruling by the Illinois Supreme Court on an attempt to obtain relief through the statutory substitute of writ of error coram nobis before the Supreme Court could assume that the petitioner had no remedy in the state of Illinois.

In the recent case of *United States ex rel. Rooney* v. *Ragen*,[60] however, the Seventh Circuit Court of Appeals appears to have eliminated the requirement of filing a motion in the nature of writ of error coram nobis before obtaining relief in the federal courts when the statutory limitation of five years has expired. The court points out that four months prior to the *Van Woods* case, the Illinois Supreme Court in *People* v. *Rave*[61] definitely held that the remedy of writ of error coram nobis is not available unless it is brought within five years after rendition of the final judgment as provided by Section 72 of the Civil Practice Act. "It is, therefore, difficult to comprehend the statement of the court in the *Van Woods* case upon any basis other than that the law of Illinois, as decided by the Supreme Court in the *Rave* case, was not called to its attention."[62] The court then reversed an order denying an application for writ of habeas corpus and remanded the case to the district court. The court felt that since the remedy of writ of error coram nobis was apparently no longer available because eleven years had elapsed since the final judgment in the case, it could not interpret the *Van Woods* case to require the petitioner to make a futile application before giving him relief upon his claim of due process deprivation.[63]

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60 158 F. (2d) 346 (C. C. A. 7th, 1946), *Cert. denied* ... U. S. ..., 67 S. Ct. 1532 (1947). Petitioner in applying for writ of habeas corpus in the federal district court claimed he was convicted of murder through the known use of perjured testimony and he had not been allowed to institute court action because of a prison rule forbidding it.

61 392 Ill. 435, 65 N. E. (2d) 23 (1936). The case of People v. Austin et al., 329 Ill. App. 276, 67 N. E. (2d) 883 (1946), decided after the Van Woods case, was also relied upon to show that the remedy of a motion in nature of writ of error coram nobis was not available after the five year statutory limitation has expired. See text *supra* at note 29.

62 The Rave case actually was relied on by petitioner Van Woods and was cited to the Supreme Court. Page 12 of petitioner's brief.

63 It was the position of the Attorney General of the state of Illinois in the state's petition for rehearing in this case that the Rave case is not binding in a case where a constitutional question is presented. "In the Rave case, although the prisoner had been confined in the penitentiary for five years, he made no showing that his attempts to communicate with the state or federal courts had been interfered with." Therefore, the Attorney General argues that since there was no constitutional issue presented in the Rave case it should not be construed as setting a five year limitation for invoking coram nobis where there is a claim that attempts to communicate with the courts have been interfered with. The Attorney General further contends that the Austin Case is not authoritative because it is a decision of an appellate court" . . . and under Illinois appellate jurisprudence, one who appeals to the appellate court waives all questions arising under the state and federal constitutions."

To sum up: before obtaining relief in the federal district courts through habeas corpus proceeding upon a claim of a federal right, the petitioner in exhausting his state remedies in Illinois must apply for a writ of habeas corpus in each of the courts available to him under the Illinois statute; he must apply for certiorari from the Supreme Court of the United States when a denial of the writ of habeas corpus is upon the merits, but not when habeas corpus is denied without opinion by the Illinois Supreme Court. It is also necessary to file a motion in the nature of writ of error coram nobis, if applicable, but not after the five year limitation. If the motion is filed, there must be an appeal from an adverse ruling to the highest court in Illinois followed by an application for certiorari to the United States Supreme Court.

The Problem

As yet it appears that the state of Illinois does not have an adequate procedure for obtaining collateral relief from unconstitutional convictions, particularly after the five year period during which the motion under Section 72 is available. One answer to this problem, of course, is that the state of Illinois need not provide an adequate procedure for collateral attack of convictions obtained in violation of due process, because there is an adequate remedy in habeas corpus proceedings in the federal courts. However, a better solution to this problem would be an affirmative attempt to set up procedures within the state of Illinois whereby basic constitutional rights may be protected. It is particularly important that an adequate procedure for collateral attack of unconstitutional convictions be provided since, in at least one respect, the requirement of due process in Illinois has not kept pace with the standards of United States Supreme Court decisions of recent years. In Illinois no duty rests upon the court to provide legal assistance unless the defendant states under oath that he needs it.[64] This is quite different from the Supreme Court's ruling that it is the responsibility of the court to provide legal assistance, whether asked for or not, in cases involving serious crimes when the defendant is incapable of defending himself, or of making an intelligent waiver of his right to counsel.[65] Since the requirement of due process in recent years has also been extended to cover situations in which the defendant has been convicted on the strength of a confession procured by coercion,[66] or where he was convicted through the known use of material perjured testimony,[67] it should be the duty of the state of Illinois to provide an adequate method

64 Ill. Rev. Stat. (1945) c. 38, § 730, "Every person charged with a crime shall be allowed counsel and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense . . ." People v. Loftus, 395 Ill. 479, 70 N. E. (2d) 573 (1946) (where the Illinois Supreme Court refused to reverse a conviction for armed robbery and burglary even though the accused advised the court that he had no funds to employ counsel, but failed to so state under oath); People v. Corbett, 387 Ill. 41, 55 N. E. (2d) 74 (1944); People v. Childers, 386 Ill. 312, 53 N. E. (2d) 878 (1944); People v. Corrie, 387 Ill. 587, 56 N. E. (2d) 767 (1944); People v. Bernovich, 391 Ill. 141, 62 N. E. (2d) 691 (1945).

The Illinois constitution, it appears, is capable of a broader interpretation than is set forth in the statute. Art. II § 9. "In all criminal prosecutions the accused shall have the right to appear and defend in person by counsel . . ."

65 See *supra* note 1.

66 *Ibid.*

67 *Ibid.*

whereby such convictions may be attacked collaterally within the state courts. It should be as much a responsibility of the states to provide a forum for the protection of fundamental constitutional rights as it is of the federal courts. The fact that relief may eventually be obtained in the federal courts after exhaustion of state remedies is no reason for refusing to improve the remedies available within the Illinois courts.

Possible Remedies

A step in the right direction might be to eliminate the five year limit in filing a motion in the nature of writ of error coram nobis in cases where the petitioner claims he was the victim of an unconstitutional conviction. In this class of cases the common law limitation of laches would appear to be more appropriate than an arbitrary five year limit.[68] However, at best, the relief available under a writ of error coram nobis is very uncertain.[69] The technical requirements of coram nobis are too inflexible for the protection of fundamental constitutional rights, particularly since these requirements are by no means easy to apply to any given situation. While the removal of the present five year limitation for filing a motion under Section 72 of the Civil Practice Act would be desirable since this is apparently the only collateral relief available within Illinois at the present time, it would still fail to meet the need of a flexible procedure in these cases.

A more desirable approach to this problem would be to change the nature of habeas corpus in Illinois to correspond with the treatment given habeas corpus proceedings attacking unconstitutional convictions in the federal courts. In the case of *Johnson* v. *Zerbst*,[70] where the petitioner alleged that he was convicted without having had the aid of counsel, the court held that if the allegation was true, or if petitioner had not made an intelligent waiver of counsel as guaranteed by the Sixth Amendment, the trial court lost jurisdiction to convict, the resulting judgment is void, and the court could grant petitioner relief upon a writ of habeas corpus.[71] In *Waley* v. *Johnston*,[72] the court held that the writ of habeas corpus was an appropriate remedy in the federal courts where there was a claim that the petitioner was coerced into pleading guilty to a charge of kidnapping, and there was no indication of this in the record, making an appeal by writ of error of no value. Habeas corpus is appropriate in the federal courts in "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."[73]

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68 Strode v. The Stafford Justices, 23 Fed. Cas. 236, No. 13, 567 (C. C. Va. 1810) (in a case decided by Chief Justice Marshall on circuit, the writ of coram nobis was granted fourteen years after judgment); Bronson v. Schulten, 104 U. S. 410 (1881); Kemp v. Cook, 18 Md. 130, 79 Am. Dec. 681 (1861); Scott v. Rees, 300 Mo. 123, 253 S. W. 998 (1923).

69 See discussion in text *supra* at note 27.

70 304 U. S. 458 (1938).

71 Walker v. Johnston, 312 U. S. 275 (1941) (petitioner is entitled to a hearing upon a writ of habaes corpus when he claims that he was induced to plead guilty to an indictment for a federal offense without the aid of counsel and in ignorance of that right where record does not contradict the petitioner's claim).

72 316 U. S. 101 (1942).

73 *Id.* at 105.