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Post-Trial Remedies: The Illinois Merry-Go-Round Whirls on

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CRIMINAL LAW CASE NOTES AND COMMENTS

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POST-TRIAL REMEDIES: THE ILLINOIS MERRY-GO-ROUND WHIRLS ON

Earl Pollock

Judicial interpretation of the Fourteenth Amendment in the last three decades has sharply expanded the requirements of due process in state criminal litigation.[1] In our dual system of government, a convicted state prisoner whose trial failed to meet those requirements may theoretically obtain redress in either state or federal courts.[2] On the principle of comity,[3] however, the state courts are given the first opportunity to adjudicate the prisoner's constitutional claim. Thus eligibility for direct review of the conviction by the United States Supreme Court requires that the prisoner take an appeal to the highest state court in which a decision could be had;[4] and eligibility for collateral review of the conviction in the lower federal courts on writ of habeas corpus requires that the prisoner first exhaust all available state remedies,[5] and then elicit a denial of certiorari from the United States Supreme Court.[6]

But this requirement that federal courts stay their hand until the state courts have disposed of the case presupposes that state post-trial procedures are adequate to vindicate the federal right asserted—either by appeal or collateral attack.[7] This presupposition has not always been borne out in practice.

1. The movement was initiated by Moore v. Dempsey, 261 U.S. 86 (1923) (mob-dominated trial), but received its chief impetus from the celebrated Scottsboro Cases. See Powell v. Alabama, 287 U.S. 45 (1932) (denial of effective assistance of counsel in a capital case); Norris v. Alabama, 294 U.S. 587 (1935) (systematic exclusion of Negroes from grand and petit juries). Other leading cases include Brown v. Mississippi, 297 U.S. 278 (1936) (use of coerced confessions), and Mooney v. Holohan, 294 U.S. 103 (1935) (knowing use by prosecution of perjured testimony). For subsequent refinements of these basic prohibitions, see Boskey and Pickering, *Federal Restrictions on State Criminal Procedure,* 13 U. OF CHI. L. REV. 266 (1946); *cf.* Holtzoff, *Collateral Review of Convictions in Federal Courts,* 25 B.U.L. REV. 26 (1945).

2. U.S. CONST. ART. VI (Supremacy Clause); *See* Robb v. Connolly, 111 U.S. 624, 637 (1884).

3. *See* Baker v. Grice, 169 U.S. 284, 291 (1898); Covell v. Heyman, 111 U.S. 176, 182 (1884). *Cf.* Darr v. Burford, 339 U.S. 200, 204-08 (1950); Note, *Certiorari and Habeas Corpus: The Comity Comedy,* 46 ILL. L. REV. 478 (1951).

4. 28 U.S.C. §1257 (Supp. III 1950).

5. 28 U.S.C. §2254 (Supp. III 1950): "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." The statute was intended to codify *Ex Parte* Hawk, 321 U.S. 114 (1944). See Note, 61 HARV. L. REV. 657, 664-667 (1948).

6. Darr v. Burford, 339 U.S. 200 (1950). See Note, *Certiorari and Habeas Corpus: The Comity Comedy,* 46 ILL. L. REV. 478 (1951).

7. *See* Young v. Ragen, 337 U.S. 235, 238 (1949); Marino v. Ragen, 332 U.S. 561, 564 (1947) (concurring opinion). If the state provides no remedy, or the remedy which it

A particularly flagrant example has been Illinois.[8] In a series of opinions beginning with *White* v. *Ragen*,[9] the United States Supreme Court has shown marked impatience with "the Illinois merry-go-round of habeas corpus, coram nobis, and writ of error."[10] Finally, in *Young v. Ragen*,[11] the Court indicated that unless Illinois took steps to provide an adequate procedure, the way would be open for Illinois prisoners to obtain habeas corpus relief in the federal courts without first exhausting their state remedies. In response to that opinion, and after considerable prodding by the local bar,[12] the Illinois legislature in 1949 enacted the Post Conviction Hearing Act.[13] The Act "provides for a new proceeding to afford an inquiry into the constitutional integrity of the proceedings in which the judgment was entered."[14] The new procedure has been found consistent with the Illinois constitution,[15] has received wide acclaim,[16] and has been tentatively accepted by the federal courts as an adequate state remedy which Illinois prisoners must exhaust before recourse to federal habeas corpus may be had.[17] Its acid test, however, will come with the Illinois Supreme Court's ultimate disposition of three cases remanded from the United States Supreme Court: *Jennings* v. *Illinois*, *LaFrana* v. *Illinois*, and *Sherman* v. *Illinois*.[18]

The Facts

The facts of the three cases are substantially identical. Each of the

provides is inadequate in practice, the prisoner is excused from the exhaustion requirement. 28 U.S.C. §2254 (Supp. III 1950). *See Ex Parte* Hawk, 321 U.S. 114, 117 (1944).

8. For a critique of the hopelessly inadequate post-trial remedies in Illinois prior to the Post Conviction Act, see Comment, *Collateral Relief from Convictions in Violation of Due Process in Illinois*, 42 ILL. L. REV. 329 (1947); Comment, *A Study of the Illinois Supreme Court*, 15 U. OF CHI. L. REV. 107, 118-131 (1947). During the three years preceding the 1949 October Term, 49% of all *in forma pauperis* petitions for certiorari in the United States Supreme Court came from Illinois prisoners. Chief Justice Vinson, *Work of the Federal Courts*, an address before the American Bar Association, September 7, 1949, printed in 69 Sup. Ct. V, VIII (1949).

9. 324 U.S. 760 (1945). See also Woods v. Nierstheimer, 328 U.S. 211 (1946); Carter v. Illinois, 329 U.S. 173 (1946); Foster v. Illinois, 332 U.S. 134 (1947); Marino v. Ragen, 332 U.S. 561 (1947); Loftus v. Illinois, 334 U.S. 804 (1948); Young v. Ragen, 337 U.S. 235 (1949).

10. Mr. Justice Rutledge in Marino v. Ragen, 332 U.S. 561, 570 (1947) (concurring opinion). Joined by Justices Douglas and Murphy, Mr. Justice Rutledge urged that federal courts in Illinois make federal habeas corpus available to Illinois prisoners without waiting any longer for the establishment of an adequate remedy.

11. 337 U.S. 235, 238-9 (1949).

12. The Act was prepared and sponsored by a joint committee of the Illinois State and Chicago Bar Associations. See Jenner, *The Illinois Post Conviction Hearing Act*, 9 F.R.D. 347, 357 (1950). Mr. Jenner was chairman of this committee. His article apparently constitutes the "legislative history" of the Act.

13. ILL. REV. STAT. c. 38, §§826-832 (1951). See Note, *Post Conviction Remedies in Illinois*, 40 J. CRIM. L. CRIMINOLOGY 606 (1950).

14. People v. Dale, 406 Ill. 238, 245, 92 N.E.2d 761 (1950), holding the Act constitutional. See Jenner, *supra* note 12, at 357.

15. People v. Dale, *supra* note 14, 41 J. CRIM. L. & CRIMINOLOGY 335 (1950). On remand of the case, Dale obtained his release. See note 24 *infra*. Other Illinois Supreme Court opinions dealing with the Post Conviction Act are People v. Hartman, 408 Ill. 133, 96 N.E.2d 449 (1951), and People v. Farley, 408 Ill. 288, 96 N.E.2d 453 (1951).

16. See, *e.g.*, Chief Justice Vinson, *supra* note 8.

17. Ferguson v. Ragen, 338 U.S. 833 (1949); United States *ex rel.* Defrates v. Ragen, 181 F.2d 1001 (7th Cir. 1950); United States *ex rel.* Hamby v. Ragen, 178 F.2d 379 (7th Cir. 1949); United States *ex rel.* Peters v. Ragen, 178 F.2d 377 (7th Cir. 1949).

18. 72 S.Ct. 123 (1951). The cases were argued on November 6, 1951; the opinion was handed down on December 3, 1951.

petitioners was tried on a felony charge in the Cook County Criminal Court.[19] The prosecution offered in evidence statements signed by the defendant in which he purportedly confessed his guilt. Defense counsel moved to suppress the statements on the ground that they had been obtained by third degree methods. After a full hearing, the presiding judge denied the motion and admitted the statements in evidence. A conviction followed. No appeal was taken, apparently because of financial inability to procure a transcript of the trial proceedings.

After the passage of the Post Conviction Act, each of the petitioners applied to the trial court for a hearing.[20] Among other allegations of denial of due process,[21] each petitioner again charged that the confession admitted in evidence at his trial had been obtained by coercion.[22] In response to each petition, the State's Attorney moved to dismiss the proceeding on the ground, among others, that the claims had been conclusively adjudicated at the trial and were therefore res judicata.[23] The court, without specifying its grounds of decision, granted the motion and dismissed the petition without a hearing on the truth of the petitioner's allegations.[24]

19. LaFrana and Sherman were both charged with murder; Jennings, with armed robbery.

20. The venue of the proceedings is fixed at the court where the conviction took place. ILL. REV. STAT. c. 38, §826 (1951).

21. Jennings and Sherman also alleged that the prosecution had knowingly used perjured testimony.

22. It should be noted that the petitioners do not dispute the *fairness* of the confession hearings at their trials. They contend rather that the trial court erred in admitting the confessions.

23. Two other grounds were also given in support of the motion to dismiss: (1) that the petitioner's allegations are mere conclusions, unaccompanied by affidavits having sufficient probative force to require an answer; (2) that the facts alleged by petitioner, if true, would not constitute a denial of due process. The identical motion, in mimeographed form, is filed by the State's Attorney in each Post Conviction proceeding in the Cook County Criminal Court, irrespective of the nature of the particular allegations or the presence of supporting affidavits. Nevertheless, the motion has enjoyed spectacular success. See note 24 *infra*.

24. This has been the usual disposition of Post Conviction petitions in the Cook County Criminal Court. As of November 1, 1951, 197 had been filed. Approximately 50 were still pending. Of the remainder, only a handful have managed to survive the State's Attorney's motion to dismiss. Of this number, only three were found to present meritorious claims. All three petitioners have been given their release, although not one has had to undergo a new trial. (1) Curtis Gee (Post Conviction No. 3). This case suggests that not all judges of the Cook County Criminal Court are applying res judicata to bar the presentation of coerced confession claims in Post Conviction proceedings. Gee had been convicted of murder in 1939. In his petition, he alleged that the confession admitted in evidence at his trial had been extracted from him by physical force. Although this contention (as in Jennings' case) had been adjudicated adversely to him at the trial after a full hearing, the State's Attorney's customary motion to dismiss was overruled. The State's Attorney elected to stand on his motion and a new trial was ordered. The State's Attorney then applied to the Illinois Supreme Court for a writ of error raising two questions: whether the State is entitled to appeal a final judgment under the Post Conviction Act; and whether res judicata barred the relitigation of Gee's confession claim since it had been determined at the original trial. (Petition for Writ of Error, People v. Gee, No. 32006, filed April 23, 1951). The Petition for Writ of Error was denied without opinion. On October 16, 1951, Gee was released from custody on motion of the State's Attorney.

(2) Frank Dale (Post Conviction No. 4) alleged that he was not permitted counsel of his own choosing, that a Public Defender was instead foisted upon him. After remand by the Illinois Supreme Court (see note 15 *supra*), Dale was given a hearing, and a new trial was ordered. However, on October 16, 1951, the case was stricken from the call on motion of the State's Attorney, and Dale was released.

(3) Paul Lopez (Post Conviction No. 65) had been tried on a robbery charge and

The petitioners then applied to the Illinois Supreme Court for writ of error to review the lower court's action.[25] Each application was dismissed without argument and without any opinion apart from a cryptic form order[26] which reads in part: "It is further considered by the Court that after having examined and reviewed the petition and record in the post conviction hearing the same is found to disclose no violation or denial of any substantial constitutional rights of the petitioner under the Constitution of the United States. . . ."[27] From this judgment, the petitioners successfully applied to the United States Supreme Court for writ of certiorari *in forma pauperis*.[28] The Court, with two Justices dissenting, vacated the judgments below and remanded the cases to the Illinois Supreme Court "for further proceedings."[29]

An analysis of the decision requires a fuller exploration of the issues before the Court.

The Issues

The petitions present clear and specific allegations in respect to the extraction and use of coerced confessions to obtain convictions. Taken by themselves, and if ultimately proven true, these allegations would clearly entitle petitioners to new trials under the applicable rulings of the United States Supreme Court.[30] And as against the State's Attorney's motion to dismiss, these allegations must be taken as true.[31] It thus seems inconceivable, despite the language of its judgment order, that the Illinois Supreme Court based its decision on the ground that these allegations, without more, did not state a claim on which relief could be granted.

A more reasonable interpretation is that the court meant the petitioners were not entitled to a hearing in collateral proceedings on constitutional claims which had been adjudicated at the original trials. This analysis is consistent with the grounds urged by the State's Attorney in his motion to dismiss, and with the prior opinion of the Illinois Supreme Court sustaining the constitutionality of the Post Conviction Act.[32]

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sentenced to probation for 2 to 4 years. Two months later, he was charged with having violated probation, brought before the trial judge, and sentenced to the penitentiary for 3 to 20 years. In his petition, Lopez alleged denial of counsel *at the hearing on the probation violation*. Lopez was given a hearing and discharged in December, 1950, after having served nearly three years of his sentence.

25. As provided under the Post Conviction Act, ILL. REV. STAT. c. 38, §832 (1951).

26. The identical order has been entered by the Illinois Supreme Court in each of the twenty-five cases arising under the Post Conviction Act that have reached the United States Supreme Court on petition for certiorari. *See* Jennings v. Illinois, 72 S.Ct. 123, 125 (1951).

27. This portion of the unreported judgment orders is set out in the Jennings opinion, 72 S.Ct. at 125.

28. 341 U.S. 947, 342 U.S. 811 (1951).

29. 72 S.Ct. at 127.

30. Brown v. Mississippi, 297 U.S. 278 (1936); Chambers v. Florida, 309 U.S. 227 (1940); Canty v. Alabama, 309 U.S. 629 (1940); White v. Texas, 309 U.S. 631, 310 U.S. 530 (1940); Lomax v. Texas, 313 U.S. 544 (1941); Vernon v. Alabama, 313 U.S. 547 (1941); Lisenba v. California, 314 U.S. 219 (1941); Ward v. Texas, 316 U.S. 547 (1942); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Lyons v. Oklahoma, 322 U.S. 596 (1944); Malinski v. New York, 324 U.S. 401 (1945); Haley v. Ohio, 332 U.S. 596 (1948); Watts v. Indiana, 338 U.S. 49 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Harris v. South Carolina, 338 U.S. 68 (1949). See Boskey and Pickering, *supra* note 1, at 282-295.

31. Hawk v. Olson, 326 U.S. 271, 278-279 (1945); House v. Mayo, 324 U.S. 42, 45 (1945); Williams v. Kaiser, 323 U.S. 471, 473-474 (1945); Walker v. Johnston, 312 U.S. 275, 285 (1941).

32. People v. Dale, 406 Ill. 238, 244, 92 N.E.2d 761, 765 (1950): "The remedy provided for under the Act cannot be employed to obtain another hearing upon claims of denial

Both the petitioners and respondent adopted this interpretation. They disagreed, however, on two principal issues: (1) whether the ruling of the Illinois Supreme Court, thus interpreted, may be deemed to rest on state or federal grounds;[33] (2) assuming the decision rests on federal grounds, whether the Illinois Supreme Court's conception of federal law is correct.

In behalf of the respondent, the Illinois Attorney General argued that the Illinois court was deciding only on the scope of inquiry authorized under the Post Conviction Act; that this is exclusively a matter of state procedure, rather than federal constitutional law; that therefore the writ of certiorari should have been dismissed for lack of jurisdiction since the decision rests on an adequate nonfederal ground.[34] To this, the petitioners replied in effect: if that is what the Illinois Supreme Court meant to say, then it chose an extraordinarily poor way of saying it.[35] Admittedly the Illinois court could have held, and might yet eventually hold, that, irrespective of federal law, the Post Conviction Act does not permit the reconsideration of constitutional issues actually determined at the original trial. But in the cases at hand, the petitioners contended, the Illinois Supreme Court put aside considerations of state law, and explicitly rested its decision on its own conception of federal law; therefore it was immaterial that the ruling might have been rested on state law had the Illinois court chosen such grounds.[36]

If the Illinois Supreme Court's decision does rest on federal grounds, then that decision could be supported only if the Illinois court's conception of federal law was correct—that is, if a federal district court in habeas corpus proceedings would have been justified in denying the petitioners a hearing on their confession claims, assuming such a hearing could not be obtained through Illinois post-trial remedies.

In defense of the decision, the Attorney General contended that due process requires only a fair hearing before a court of competent jurisdiction; and that once the prisoner has obtained such a hearing at his original trial, he is thereafter precluded from collaterally attacking the court's disposition of his constitutional claim, whether erroneous or not.[37]

The petitioners, on the other hand, insisted that the applicable federal law is otherwise. Their argument ran like this: If there is a federal principle of res judicata which may be invoked in habeas corpus proceedings to foreclose a constitutional issue determined at the original trial, the principle is properly applied only when the prisoner has (or did have) a practical opportunity to appeal to a higher state tribunal and then ultimately to the United States Supreme Court. If there exists an effective deterrent to such direct attack on the trial court's determination, then an equivalent review should be available via collateral attack. Otherwise the state court's determination of the federal question would invariably be conclusive. In the instant cases, the

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of constitutional rights as to which a full and final hearing on the merits has already been held".

33. This is invariably a bone of contention where no opinion is written by the state court. See ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 168-69 (Wolfson and Kurland, 1951). *E.g.*, cases cited in note 35 *infra*.

34. Brief of Respondent, Jennings v. Illinois, at 5-8. This is the same position successfully taken by the Illinois Attorney General in White v. Ragen, Woods v. Nierstheimer, and Loftus v. Illinois, *supra* note 9.

35. Brief of Petitioner, Jennings v. Illinois, at 11-12. The language of the state court judgment in Williams v. Kaiser, 323 U.S. 471 (1945), and Tomkins v. Missouri, 323 U.S. 485 (1945), was even more ambiguous ("fails to state cause of action"), but in both instances the Court retained jurisdiction. *Cf.* Rice v. Olson, 324 U.S. 786 (1945).

36. *See* Steele v. Louisville & Nashville R.R., 323 U.S. 192, 197, n. 1 (1945).

37. Brief of Respondent, Jennings v. Illinois, at 12-13.

petitioners claimed that their inability to obtain a transcript of the trial proceedings constituted just such a deterrent, and that therefore a federal district court would have been unjustified in denying them a hearing on the confession issue in the absence of an appropriate Illinois remedy.[38]

Res Judicata in Federal Habeas Corpus Proceedings

In determining the applicability of res judicata in federal habeas corpus proceedings, a distinction must be drawn between issues determined in the original proceedings and issues determined in prior habeas corpus proceedings. As to the latter, the United States Supreme Court has repeatedly held that res judicata does not apply.[39] But as to issues determined in the original proceedings, either at the trial or on appeal, the rule is not so clear.

The difficulty lies in the reconciliation of two well established (but not altogether consistent) principles of federal law: (1) habeas corpus is available to correct the denial of any constitutional right; (2) habeas corpus cannot be used as a substitute for an appeal.

(1) The Supreme Court has frequently reaffirmed the principle that "habeas corpus in the federal courts by one convicted of a criminal offense is a proper procedure 'to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through *any* violation of the Constitution. . . .' "[40] (Italics added.) Thus the Court has sanctioned collateral attack when the constitutional issue presented was conviction under an unconstitutional statute,[41] lack of indictment for infamous crime,[42] mob domination of the trial,[43] double jeopardy,[44] self-incrimination,[45] denial of counsel,[46] lack of territorial jurisdiction,[47] prosecutor's knowing use of perjured testimony,[48] inducing plea of guilty by misrepresentation,[49] coerced plea of guilty,[50] suppression of testimony favorable to the defendant,[51] and

38. Brief of Petitioner, Jennings v. Illinois, at 12-22.

39. *See* Darr v. Burford, 339 U.S. 200, 214 (1950); Waley v. Johnston, 316 U.S. 101, 105 (1942). But a district court may give "controlling weight" to the denial of a similar petition on its merits. Salinger v. Loisel, *infra* note 67, codified in 28 U.S.C. §2244 (Supp. III 1950).

40. Mr. Justice Reed in Hawk v. Olson, 326 U.S. 271, 274 (1945), quoting Frank v. Mangum, 237 U.S. 309, 331 (1915). See also Smith v. O'Grady, 312 U.S. 329, 332 (1941); Bowen v. Johnston, 306 U.S. 19, 24 (1939). Pertinently the federal habeas corpus statute applies to prisoners "in custody in violation of the Constitution or of a law or treaty of the United States. . . ." 28 U.S.C. §2241 (Supp. III 1950). Judge Learned Hand would, in addition, permit the writ "whenever else resort to it is necessary to prevent a complete miscarriage of justice." United States *ex rel.* Kulick v. Kennedy, 157 F.2d 811, 813 (2nd Cir. 1946). See, in accord, Justices Frankfurter and Rutledge dissenting in Sunal v. Large, 332 U.S. 174, 187, 188 (1947).

41. *Ex Parte* Siebold, 100 U.S. 371 (1879).

42. *Ex Parte* Wilson, 114 U.S. 417 (1885). But not the sufficiency of the indictment. *In re* Coy, 127 U.S. 731 (1880).

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

44. Nielsen, Petitioner, 131 U.S. 176 (1888), *overruling Ex Parte* Bigelow, 113 U.S. 328 (1885).

45. Counselman v. Hitchcock, 142 U.S. 547 (1892). *But cf.* Matter of Moran, 203 U.S. 96 (1906).

46. Johnson v. Zerbst, 304 U.S. 458 (1938).

47. Bowen v. Johnston, 306 U.S. 19 (1939). *Contra:* Toy Toy v. Hopkins, 212 U.S. 542 (1909).

48. Mooney v. Holohan, 294 U.S. 103 (1935).

49. Smith v. O'Grady, 312 U.S. 329 (1941).

50. Waley v. Johnston, 316 U.S. 101 (1942).

51. Pyle v. Kansas, 317 U.S. 213 (1942).

deprivation of trial by jury.[52] Prior to the *Jennings* opinion, however, the Court had never decided whether coerced confession claims were also permissible on collateral attack.[53]

(2) The Court has been likewise insistent in forbidding the use of habeas corpus as an appeal.[54] Res judicata is of course merely one aspect of this prohibition, and, for purposes of this discussion, has reference only to those questions which were actually put in issue and determined.[55]

The lower federal courts have not limited their application of this principle to non-constitutional issues,[56] but have applied it to constitutional claims as well. Thus most courts have refused a second hearing when the question raised on habeas corpus was the admission of a coerced confession[57] or illegally seized evidence.[58] But Supreme Court decisions indicate that the rule barring relitigation on habeas corpus is not to be applied as a rule of thumb.[59] "The

52. Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942).

53. All of the previous coerced confession cases reaching the United States Supreme Court (note 30 *supra*) have been direct review proceedings, except for Chambers v. Florida, 309 U.S. 227 (1940). There the confession issue had not been adjudicated at the original trial. Petitioners alleged that they had been too frightened to complain that the confessions were not voluntary. The Florida Supreme Court accordingly granted leave to apply to the trial court for a writ of error coram nobis. 113 Fla. 786, 152 So. 437 (1934). A jury found against the defendants and the Florida Supreme Court affirmed. 136 Fla. 568, 187 So. 156 (1939), but the United States Supreme Court reversed, *supra.*

54. *E.g.,* Eagles v. United States *ex rel.* Samuels, 329 U.S. 304, 311 (1946); Adams v. United States *ex rel.* McCann, 317 U.S. 269, 274 (1943); Johnson v. Zerbst, 304 U.S. 458, 465 (1938). See Note, 61 HARV. L. REV. 657, 667-69 (1948).

55. The Illinois Attorney General would also apply the doctrine to foreclose constitutional issues which *could have been* raised in the original proceedings. Brief of Respondent, Jennings v. Illinois, at 5-7. For a similarly strict view, *see* Sanderlin v. Smyth, 138 F.2d 729, 731 (4th Cir. 1943); Morton v. Henderson, 123 F.2d 48, 49 (5th Cir. 1941).

56. *E.g.,* Strewl v. Sanford, 151 F.2d 648 (5th Cir. 1945) (statute of limitations); Garrison v. Hunter, 149 F.2d 844 (10th Cir. 1945) (sufficiency of the evidence); Spaulding v. Sanford, 142 F.2d 444 (5th Cir. 1944) (sufficiency of the indictment); Baker v. Hudspeth, 129 F. 2d 779 (10th Cir. 1942) (competency of the evidence).

57. Cases involving federal prisoners are apparently uniform in holding that the confession issue may not be relitigated in habeas corpus proceedings. Smith v. United States, 187 F.2d 192 (D.C. Cir. 1950); Eury v. Huff, 146 F.2d 17 (D.C. Cir. 1944); Cash v. Huff, 142 F.2d 60 (4th Cir. 1944); Miller v. Hiatt, 141 F.2d 691 (3rd Cir. 1944); Burall v. Johnson, 134 F.2d 614 (9th Cir. 1942). However, in cases involving state prisoners, federal courts seem to follow a more flexible approach. In Sharpe v. Kentucky, 135 F.2d 974 (6th Cir. 1942), the confession issue had been submitted to the jury at the original trial and determined adversely to the prisoner. No appeal was taken. The prisoner then applied for federal habeas corpus, alleging the use of a coerced confession. The district court took exhaustive evidence, but made no findings and dismissed the petition on the ground that the issue could not be properly raised in habeas corpus proceedings. 36 F. Supp. 386. The Court of Appeals reversed and remanded, directing the district court to report its findings. 135 F.2d 974. In response, the district court filed its findings and held that the petitioner's confession claim was not sustained by the evidence. The Court of Appeals affirmed. 142 F.2d 213. *Compare* Schramm v. Brady, 129 F.2d 108 (4th Cir. 1942). In United States *ex rel.* Mayo v. Burke, 93 F. Supp. 490 (E.D. Pa. 1950), the court granted a hearing on the prisoner's confession claim, but there the issue had not been adjudicated at the original trial. *Id.* at 494.

58. Price v. Johnston, 125 F.2d 806 (9th Cir. 1942); Fowler v. Hunter, 164 F.2d 668 (10th Cir. 1947); Graham v. Squire, 132 F.2d 681 (9th Cir. 1942); Taylor v. Hudspeth, 113 F.2d 825 (10th Cir. 1940). But as to state prisoners, the Fourteenth Amendment does not require exclusion. Wolf v. Colorado, 338 U.S. 25 (1949).

59. See, *e.g.,* Frank v. Mangum, 237 U.S. 309, 334 (1915). Although the ultimate decision was against the petitioner, the Court rejected the state's argument that consideration of the prisoner's claims was barred by res judicata since each had been previously adjudicated in the state court. The dissenting opinion of Mr. Justice Holmes was even more emphatic: "It is significant that the argument for the State does not go so far as

rule is not one defining power but which relates to the appropriate exercise of power. . . .(T)he rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent."[60]

What then are the "exceptional circumstances" which render the rule inapplicable? In *Moore v. Dempsey*,[61] it was mob domination of the trial that made the whole proceeding a nullity, even though the very grounds adopted by the Court as the basis for its finding of lack of due process had been unsuccessfully pressed upon the trial court in a motion for a new trial and upon the state supreme court as grounds for appeal. In *Bowen* v. *Johnston*,[62] it was a conflict between state and federal authorities on a question of territorial jurisdiction, even though the question had been adjudicated at the original trial and the prisoner had taken no appeal.

In *Tinsley* v. *Treat*,[63] a removal case, it was apparently the practical inadequacy of other remedies to correct the trial court's exclusion of vital testimony on the sufficiency of the indictment. Conversely, in *Sunal* v. *Large*,[64] the Court found no such "exceptional circumstances" on the ground that appeal had been available as a practical matter but the prisoners had not tried it.

This is much the same position taken by the Court of Appeals for the District of Columbia in *Smith* v. *United States*.[65] In rejecting a federal prisoner's confession claim, Judge Fahy pointed out the apparent conflict between "on the one hand Supreme Court opinions stating that habeas corpus is available to correct the denial of any constitutional right, and on the other hand, the decisions of the courts of appeals that convictions based on coerced confessions cannot for that reason alone be set aside on collateral attack by the habeas corpus procedure."[66] Judge Fahy would reconcile these two seemingly opposing views by permitting collateral review of the trial court's admission of the allegedly coerced confession only when appeal as a practical matter is unavailable.[67] "Such admission alone does not result in the denial of a constitutional guarantee *so long as the error is subject to correction on*

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to say that in no case would it be permissible on application for habeas corpus to override the findings of fact by state courts. It would indeed be a most serious thing if this court were so to hold, for we could not but regard it as a removal of what is perhaps the most important guaranty of the Federal Constitution." *Id.* at 348.

60. Chief Justice Hughes in Bowen v. Johnston, 306 U.S. 19, 26-27 (1939).

61. 261 U.S. 86 (1923).

62. 306 U.S. 19 (1939). *Contra,* under similar circumstances: Toy Toy v. Hopkins, 212 U.S. 542 (1909).

63. 205 U.S. 20 (1907). See Mr. Justice Frankfurter's comment on the case in Sunal v. Large, 332 U.S. 174, 186 (1947) (dissenting opinion).

64. 332 U.S. 174 (1947). "Appeals could have been taken in these cases, but they were not. It cannot be said that absence of counsel made the appeals unavailable as a practical matter. . . . Defendants had counsel. Nor was there any other barrier to the perfection of their appeals. . . ." *Id.* at 177.

65. 187 F.2d 192 (1951).

66. *Id.* at 197.

67. *Cf.* Salinger v. Loisel, 265 U.S. 224, 231 (1924): "Among the matters which may be considered and given controlling weight are: (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case, and (b) a prior refusal to discharge on a like application." Judge Fahy's analysis is also consistent with such cases as Bridges v. Wixon, 326 U.S. 135 (1945), and Eagles v. United States *ex rel.* Samuels, 329 U.S. 304 (1946), where questions of the sufficiency of the evidence were litigated on habeas corpus. In both instances, petitioner was detained under an administrative order not subject to judicial review.

an appeal and there is no indication of any deterrent to an appeal such as lack of counsel."[68] (Italics added.)

The Transcript Obstacle in Illinois

Although no deterrent to appeal was found in the *Smith* case,[69] the petitioners adopted its rationale, and insisted that in their cases there existed just such a deterrent: the failure of Illinois to provide a method by which indigent prisoners may obtain a transcript of their trial transcript without cost to themselves (except where the death penalty has been imposed).[70] Certainly if such "exceptional circumstances" would entitle a federal prisoner to a relaxation of the res judicata rule, the same principle should apply *a fortiori* where federal habeas corpus relief is sought by a state prisoner. The federal prisoner, after all, has already had his day in a federal court.[71]

As was made clear at oral argument, the petitioners have never contended that the state's denial of the transcript to indigent prisoners constitutes in itself an independent violation of the Constitution, such as a denial of equal protection of the laws.[72] The constitutional right for which they seek redress is instead the right to have coerced confessions excluded from their trials. The denial of the transcript is therefore pertinent only insofar as it bears upon the availability of appeal as an adequate remedy to vindicate that right.

At least thirty states,[73] as well as the United States government[74] and England,[75] make such a transcript, or an adequate substitute, available without cost to their indigent prisoners for purposes of appeal. The American Law Institute in 1930 proposed that this practice be uniformly adopted.[76]

68. 187 F.2d at 197.
69. *Ibid.*
70. ILL. REV. STAT. c. 38, §769a (1951).
71. This may explain why federal courts have applied the res judicata rule more flexibly when dealing with state prisoners. See note 57 *supra.*
72. See, *e.g.,* Dowd v. United States *ex rel.* Cook, 340 U.S. 206, 19 A.L.R. 2d 784 (1951) (prison officials prevented petitioner from sending out appeal papers; constitutes denial of equal protection). *Accord,* Cochran v. Kansas, 316 U.S. 255 (1942).
73. (In each state where the statutory provision is not entirely clear, the practice thereunder has been established by correspondence with the clerk of the state supreme court.) ARIZ. CODE ANN. §44-2525 (1939); ARK. STAT. ANN. §22-357 (1947); CALIF. CODE OF CIVIL PROCEDURE §274 (Deering, 1949); CONN. GEN. STAT. §3615, §8796 (1949) (Public Defender statutes); FLA. STAT. ANN. §924.23 (1944); IDAHO CODE §19-2402 (1948); IND. STAT. ANN. §4-3511 (Burns, 1946); IOWA CODE ANN. §793.8 (1950); KY. REV. STAT. §28.460 (1948); LA. REV. STAT. tit. 15, §555 (1950); MICH. STAT. ANN. §27.341 (1938); MISS. CODE §1640 (1944); MO. REV. STAT. §13354 (1943); MONT. REV. CODES §93-1904 (1949); NEB. REV. STAT. §24-342 (1948); NEV. STAT. XX §11029.03 (Supp. 1950); N.Y. CRIM. CODE tit. 66, §456 (McKinney, 1945); N.C. GEN. STAT. §7-89 (1944); N.D. REV. CODE §27-0606 (1944); OHIO GEN. CODE §1552 (Page, 1938); OKLA. STAT. tit. 20, §111 (1937); ORE. COMP. L. ANN. §93-276 (1940); S.C. CODE §596 (1942); TENN. CODE §1108, §8819 (Williams, 1934) (narrative bill of exceptions permitted in lieu of stenographic transcript); TEXAS CODE OF CRIM. PROCEDURE Art. 760(6) (Vernon, 1950); UTAH CODE ANN. §21-0-8 (1943); VA. CODE ANN. §8-330 (1950) (narrative bill of exceptions permitted in lieu of stenographic transcript); WASH. REV. STAT. §42-5 (Remington, 1932); W. VA. CODE §5251 (Michie, 1949); WIS. STAT. §252.20 (1945). Four states permit defendants to obtain the transcript without cost in special cases. ILL. REV. STAT. c. 38, §769a (1951) (only when death penalty is imposed); N. J. STAT. ANN. §2:195-22 (1939) (only when conviction is for first degree murder and sentence is death); PA. STAT. ANN. tit. 19, §1232 (Purdon, 1930) (only when conviction is for first degree murder; VER. STAT. REV. §1421 (1947) (only when sentence is death or imprisonment for ten years or more). We are indebted to Don H. Reuben, Student Editor of the Journal, for research underlying this compilation.
74. 28 U.S.C. §1915 (Supp. III 1950).
75. The Criminal Appeal Act, 1907, 7 Edw. VII, c. 23, §16.
76. A. L. I., CODE OF CRIMINAL PROCEDURE §447 (1931).

In Illinois, however, the prisoner must pay for his own,[77] and, moreover, must do so within one hundred days after conviction.[78] If he lacks the necessary funds,[79] his theoretical right of appeal may prove illusory, since his record on writ of error in the Illinois Supreme Court would then consist merely of the formal common law record.[80] This includes only the indictment, a stenographic transcript of the arraignment,[81] and the clerk's perfunctory entries of the plea, trial, and judgment. The Illinois Supreme Court has consistently refused to extend its review in such cases to facts and circumstances dehors the common law record.[82] Furthermore, the common law record cannot be impeached except by other matter of record.[83] Unless the record itself substantiates the prisoner's claim, relief is unavailable by writ of error. Thus the court has summarily, without even a hearing, affirmed convictions where the constitutional claim was, for example, denial of counsel,[84] incompetent counsel,[85] state-suborned perjury,[86] and coerced plea of guilty.[87] The petitioners' coerced confession claims would have received the same curt treatment.[88]

But the real bite of the denial of the transcript is that it effectively bars any real opportunity for direct review by the United States Supreme Court. The Court has reluctantly ruled that its scope of review over judgments of the Illinois Supreme Court is governed by the Illinois practice; and hence a judgment must be affirmed if no due process violation is apparent on the face of the common law record.[89]

The Jennings Decision

The Court never explicitly resolves the preliminary jurisdictional issue: whether the Illinois Supreme Court's judgment order rests on state or federal grounds. Indeed, Chief Justice Vinson's language in the majority opinion

77. ILL. REV. STAT. c. 37, §163b (1951).

78. This is the time allowed for the filing of the bill of exceptions and transcript with the trial judge for his certificate of correctness. ILL. REV. STAT. c. 110, §259.70A (1951). At the time of Jennings' conviction, only fifty days were allowed. The rule was amended to its present form in 1950.

79. This appears to be the rule, rather than the exception. See Jenner, *supra* note 12, at 350; Comment, 15 U. OF CHI. L. REV. 107, 125 (1947).

80. See the Illinois Supreme Court's "announcement" in People v. Loftus, 400 Ill. 432, 433-434, 81 N.E.2d 495, 497 (1950).

81. This is required by Rule 27A of the Illinois Supreme Court, ILL. REV. STAT. c. 110, §259.27A (1951). The rule was adopted in 1948 to avoid due process claims based on the absence in the common law record of either a recital of appointment of counsel or a warning by the court of the consequences of a plea of guilty.

82. See Comment, *A Study of the Illinois Supreme Court,* 15 U. OF CHI. L. REV. 107, 125-126 (1947); and cases cited in notes 83 through 88 *infra.* Nor may affidavits be incorporated in the common law record. People v. Twitty, 405 Ill. 60, 89 N.E.2d 827 (1950).

83. People v. Day, 404 Ill. 268, 88 N.E. 727 (1950); People v. Hambleton, 399 Ill. 388, 71 N.E.2d 293 (1948); People v. Haupris, 396 Ill. 208, 71 N.E.2d 68 (1947).

84. People v. Creviston, 396 Ill. 78, 71 N.E.2d 25 (1947); People v. Loftus, 395 Ill. 479, 70 N.E.2d 573 (1946), 400 Ill. 432, 81 N.E.2d 495 (1948).

85. People v. Kocielko, 404 Ill. 54, 87 N.E.2d 778 (1950); People v. Witt, 394 Ill. 405, 68 N.E.2d 731 (1946), *cert. denied,* 329 U.S. 797 (1946).

86. People v. Davis, 402 Ill. 229, 83 N.E.2d 58 (1949).

87. People v. Van Horn, 396 Ill. 496, 72 N.E.2d 187 (1947); People v. Pond, 390 Ill. 237, 61 N.E.2d 37 (1945), *cert. denied,* 326 U.S. 749 (1945).

88. People v. Geddes, 396 Ill. 522, 72 N.E.2d 191 (1947); People v. Grant, 385 Ill. 61, 52 N.E.2d 261 (1944), *cert. denied,* 323 U.S. 473 (1944). This was conceded by the Attorney General at oral argument. *See* Jennings v. Illinois, 72 S.Ct. 123, 126 (1951).

89. Foster v. Illinois, 332 U.S. 134 (1947); Carter v. Illinois, 329 U.S. 173 (1946).

seems to suggest that one of the reasons for remanding the cases to the Illinois Supreme Court is to clarify the grounds of decision.[90] But the rest of the opinion makes it clear that clarification of this issue would serve no real purpose. Disposition of the three cases is left to the Illinois and lower federal courts. There is no need for further action by the Court.[91] The actual basis of the Illinois Supreme Court's judgment is therefore of only academic interest now.

Possible doubt as to its jurisdiction, however, did not prevent the Court from passing on the substantive issues presented. The Court premises its reasoning on the proposition that the petitioners are held in custody in violation of federal constitutional rights (1) if their allegations are true and (2) if their claims have not been "waived" during or after trial by failure to seasonably assert them.[92] "Petitioners are entitled to their day in court for resolution of these issues."[93] The Court accordingly vacated the judgments below and remanded the cases to the Illinois Supreme Court with directions to advise the petitioners whether such a determination can be had under the Post Conviction Act. Most important, if the Illinois Supreme Court replies in the negative, "*petitioners may proceed without more in the United States District Court.*"[94] (Italics added.) Two Justices dissented, both on jurisdictional grounds. Mr. Justice Minton was of the opinion that the Illinois Supreme Court's judgment rested on an adequate state ground, while Mr. Justice Frankfurter would have dismissed the writs for want of a properly presented federal question.

The majority opinion is also significant for what it does *not* say. The Court completely ignores two early holdings which indicated that a state prisoner's inability to appeal is immaterial in determining his eligibility for federal habeas corpus.[95] Even more conspicuous by its absence in the opinion is any mention of the effect of the pre-conviction adjudication of the peti-

90. 72 S.Ct. at 127. This was the Court's disposition of Loftus v. Illinois, 334 U.S. 804 (1948).

91. Unlike Loftus v. Illinois, *supra* note 90, the instant cases were not continued on the Court's calendar pending further consideration by the Illinois Supreme Court.

92. 72 S.Ct. at 127. On "waiver," see Yakus v. United States, 321 U.S. 414 (1944), and cases cited therein. Conceivably Jennings and Sherman might have waived their perjury claims (*supra* note 21) by failing to assert them at the trial or on motion for new trial, but it is difficult to see how any of the three petitioners could have waived their confession claims. Each vigorously fought the admission of the allegedly coerced confessions.

93. 72 S.Ct. at 127. As discussed *infra*, the opinion ignores the fact that the petitioners have already had a "day in court" on their confession claims!

94. *Ibid.*

95. Markuson v. Boucher, 175 U.S. 184 (1899); United States *ex rel.* Kennedy v. Tyler, 269 U.S. 13 (1925). In both cases, the Court affirmed the district court's denial of habeas corpus, holding that all available appellate remedies had not been exhausted, since neither petitioner had sued out a writ of error from the state court of last resort to the United States Supreme Court. Petitioner Markuson attempted to explain his failure to do so on the ground that he lacked funds to employ counsel. Petitioner Kennedy had pleaded inability to furnish bonds required on appeal. The Court did not feel that either circumstance justified a departure from the exhaustion rule. 175 U.S. at 186, 269 U.S. at 19. Although in both cases the unexhausted remedy was writ of error in the United States Supreme Court, they have been understood by some lower federal courts as holding that poverty is no excuse for failing to exhaust *state* remedies as well. See United States *ex rel.* Rheim v. Foster, 175 F.2d 772, 773 (3rd Cir. 1949); *Ex Parte* Stonefield, 36 F. Supp. 453, 456 (W.D. Ky. 1941); *Ex Parte* Sharpe, 36 F. Supp. 386, 388 (W.D. Ky. 1941), *rev'd on other grounds sub nom.* Sharpe v. Kentucky, *supra* note 57. Potter v. Dowd, 146 F.2d 244, 247 (7th Cir. 1944) represents a more liberal view. The court held that the facts that petitioner was "without means of hiring counsel and of paying for a record for use in perfecting an appeal from the judgment dismissing his petition for writ of error coram nobis" were sufficient to satisfy the exhaustion requirement.

tioners' confession claims. The opinion expressly recognizes that a prisoner may forfeit constitutional claims by "waiver,"[96] but is silent as to the ostensibly basic controversy: whether such claims may be similarly foreclosed by the doctrine of res judicata. This omission, coupled with a literal reading of the Chief Justice's remarks, would suggest a tacit rejection of res judicata as a defense to constitutional claims in federal habeas corpus proceedings. Yet it hardly seems likely that such a far-reaching step would be announced by mere implication. At best, the decision must be limited to the particular facts of the cases before the Court.

As applied to those facts, the decision seems an eminently desirable one. True, a state prisoner has no federal constitutional right to an appeal,[97] and much less any right to an appeal *in forma pauperis*. He is, however, entitled to the protection of the federal courts from errors of the trial court amounting to state denial of due process, if redress cannot be had in the state courts. Otherwise enforcement of the guarantees of Fourteenth Amendment would be left exclusively to the states. This would be contrary to the principal reason for existence of our federal system of courts.[98]

Once this right to protection by the federal courts be admitted, it is difficult to avoid the Court's conclusion. The *form* of this protection, after all, should hardly be the controlling consideration. If direct review by the United States Supreme Court is cut off by the failure of the state to provide its indigent prisoners a transcript without cost, then it would seem that collateral review should be available via federal habeas corpus, notwithstanding any rule of res judicata ordinarily applicable to the claims of *federal* prisoners.

Alternatives Open to the Illinois Supreme Court

On remand, assuming that the petitioners are able to sustain their claims of poverty, the Illinois Supreme Court could dispose of the cases by any one of at least four methods.

(1) The court could hold that one's inability to appeal is irrelevant to the permissible scope of inquiry under the Post Conviction Act, which, as a matter of state law, does not permit the reconsideration of issues adjudicated at the trial. The petitioners would then of course have immediate access to the federal courts.

(2) The court might conceivably find that some method of obtaining direct review of the trial proceedings by writ of error is still available to the petitioners. This seems doubtful in the apparent absence of any Illinois authority, statutory or judicial, for review by a narrative bill of exceptions, a "bystander's bill," or the "judge's notes."[99]

(3) The court could hold, as Mr. Justice Frankfurter contended in his dissenting opinion, that the federal claims had not been properly presented in the petitioners' applications to the trial court for a Post Conviction hearing

96. See note 92 *supra*.

97. The right of appeal "is not essential to due process provided that due process has already been accorded in the tribunal of first instance." State of Ohio *ex rel.* Bryant v. Akron Park District, 281 U.S. 74, 80 (1930). *See* Cobbledich v. United States, 309 U.S. 323, 325 (1939); Luckenback v. United States, 272 U.S. 533, 536 (1926). But if the state extends the right of appeal to some members of a class of defendants, it must constitutionally extend the same right to all members of that class. See Dowd v. United States *ex rel.* Cook, note 72 *supra*.

98. *Cf.* DOBIE, FEDERAL JURISDICTION AND PROCEDURE 3 (1928): "One almost instinctively shudders at what might have been had the Constitution been turned over to the tender interpretative mercies of the courts of the states. . . ."

99. See Mr. Justice Frankfurter dissenting, 72 S. Ct. at 128-29, n. 2.