STUDENT COMMENTS

OHIO'S POST-CONVICTION APPEAL REMEDY

Introduction

Ohio has recently adopted legislation intended to provide a prisoner with a means of testing, in the court which originally imposed sentence, the constitutional validity of his sentence.\(^1\) This legislation is intended to provide a remedy which will supplement the writ of habeas corpus. Jurisdiction in habeas corpus proceedings lies in the court of the county in which the prisoner is confined. In recent years the courts located in counties containing state correctional institutions have been deluged with habeas corpus petitions.\(^2\)

While it is too early to ascertain the exact scope of the new statute, it is clear that the enactment was not intended to provide a remedy for illegal post-conviction restraint or other illegal restraint which does not affect the validity of the conviction. Furthermore, the Supreme Court of the United States has held that it is not the purpose of this kind of legislation to infringe on the prisoner's right of collateral attack upon his conviction\(^3\) or more specifically, to curtail the field of remedies in the nature of habeas corpus.\(^4\)

The need for this type of legislation arose with the decision in *Ex parte Hawk* (1944),\(^5\) where the Supreme Court ruled that the federal courts will not grant habeas corpus to prisoners under judgments of state courts until all state remedies have been exhausted.

In 1949 the Supreme Court, in *Young v. Page*,\(^6\) held that the doctrine declared in the *Hawk* case, presupposes the existence of some adequate remedy under state law. For this reason the *Young* case was remanded with a request that if a remedy (habeas corpus) was not available the court be so advised.\(^7\)

The clear implication was that the federal courts would refrain from intervening in the administration of criminal justice

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\(^5\) *Ex parte Hawk*, 321 U.S. 114 (1944).
\(^6\) *Young v. Ragen*, 337 U.S. 235 (1949).
\(^7\) *Ibid.*
at the state level only if the state courts provided relief similar to that available in federal courts.

The Illinois legislature responded immediately to produce the first state statute allowing a collateral attack, based on constitutional grounds, on a state conviction.\(^8\) The other states were slower to respond, even though the mandate of *Young* was restated, expanded, and clarified.\(^9\) By 1962, fourteen years after *Young*, only nine states had acted. In 1965 the Supreme Court consented to hear *Case v. Nebraska*, 381 U.S. 336 (1965), in order to decide "whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees."\(^10\) However, before the court rendered its decision, the Nebraska Legislature enacted a statute providing collateral relief from unconstitutionally obtained convictions,\(^11\) thereby making the decision moot in that jurisdiction.

In view of the *Young*, *Fay*, *Case*, and *Townsend* litigation, there is little doubt that the Supreme Court was prepared to hold that due process requires the states to provide prisoners with a local "corrective process." The concurring opinion of Mr. Justice Brennan in *Case v. Nebraska* states (at page 344):

> Our Federal system entrusts the States with primary responsibility for the administration of their criminal laws. The Fourteenth Amendment and the Supremacy Clause make requirements of fair and just procedures an integral part of those laws, and state procedures should ideally include adequate administration of these guarantees as well.

Up to this point Ohio had failed to provide such a corrective process. The State had never recognized the writ of coram nobis,\(^12\) and the writ of habeas corpus was restricted to inquiry into the jurisdiction of the sentencing court to ascertain whether its sentence was void.\(^13\) As a result, a prisoner wanting to attack his conviction for constitutional violations not apparent on the face of the record was forced to resort to a federal court.

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\(^12\) *State v. Hayslip*, 158 Ohio St. 199, 107 N.E.2d 335 (1914).
\(^13\) *In re Burson*, 152 Ohio St. 375, 89 N.E.2d 651 (1949).
This was the state of the law on July 21, 1965, when the Ohio General Assembly enacted, as an emergency measure, Senate Bill No. 383, which was identical to the statute passed by Nebraska three months earlier.

The Statutory Requirements

The following phrase-by-phrase analysis of the statute is intended to disclose the precise scope and effect of the remedy.

A. "A prisoner in custody under sentence . . ."

To qualify for the statute’s protection the petitioner must be currently in custody. While there are at present no reported Ohio cases involving this requirement, relevant cases have been adjudicated in other jurisdictions which impose the same requirement. A prisoner out on bail has been denied the right to challenge his conviction, because the court did not feel that he had met the identical requirement of the federal post-conviction appeal statute. The same result was reached in a case where the petitioner had been released on probation. The latter court went on to say that had the petitioner been paroled, he would have been in a better position, since, "A convict, paroled under Chapter 311 of Title 18 U. S. C., is in 'legal custody,' because section 4203 expressly so declares." It appears likely that Ohio would reach the same conclusion, for in Crist v. Maxwell the court, construing Section 2901.11 of the Ohio Revised Code, stated that one on parole is in technical legal custody, although he is at large and not confined.

The requirement that the petitioner be under sentence has also been adjudicated in the federal courts, which have said that if the prisoner is presently serving a sentence other than the one he presently seeks to attack, he does not meet the custody requirement of 28 U. S. C. § 2255. If the prisoner seeks to attack a sentence he has already served, while still in

17 Id. at 200.
18 Crist v. Maxwell, 9 Ohio St. 2d 29 (1967).
custody under consecutive sentences imposed in the same case, the court will deem him to have complied with the "under sentence" requirement.\textsuperscript{20} A petitioner can not invoke the statute if he has not yet begun to serve his sentence.\textsuperscript{21}

It is interesting to note, however, that in each of the cases mentioned where the petitioner has been denied standing under U. S. C. § 2255 there has been another avenue of attack which the prisoner has failed to pursue. At least one author has suggested that fairness and justice would dictate that the petitioner should be permitted to attack a conviction when he can show a reasonable relationship between the conviction and the sentence which he is serving.\textsuperscript{22}

B.

"Claiming a right to be released on the grounds that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States. . . ."

The petitioner must allege that in the proceedings which resulted in his conviction there was a denial or infringement of his rights granted in the Ohio Constitution, the United States Constitution, or both. While other jurisdictions have such a requirement, some vary it slightly. Thus Oregon requires "a substantial denial . . ., of petitioners' (constitutional) rights."\textsuperscript{23}

The federal post-conviction enactment grants relief on four grounds in addition to that of the Ohio statute.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.\textsuperscript{24}

While the Ohio statute is too new to have undergone extensive litigation over the grounds which would be adequate for

\textsuperscript{20} Russell v. United States, 306 F.2d 402 (9th Cir. 1962).
\textsuperscript{21} Ellison v. United States, 263 F.2d 395 (10 Cir. 1959).
\textsuperscript{22} Comment, 27 Ohio St. L. J. 237, 320 (1966).
\textsuperscript{24} 28 U.S.C.A. § 2255 (1965).
relief, the following matters have been adjudicated in Ohio and other jurisdictions:

The Ohio courts have granted relief where the court found an unintelligent or coerced plea of guilty.\textsuperscript{25} In view of decisions interpreting the federal post-conviction statute, the Ohio courts would probably reach a similar result where the plea or conviction was obtained by fraud or duress.\textsuperscript{26} A coerced confession may be the basis for vacating judgment under the federal statute;\textsuperscript{27} however, there is one decision which imposes the added requirement that there be a showing of a real miscarriage of justice.\textsuperscript{28}

An allegation that the indictment upon which the petitioner was convicted failed to charge an offense was held to meet the "denial-of-constitutional-rights" requirement of the Ohio enactment.\textsuperscript{29}

Under the federal act relief has also been granted where it was found that the defendant was not advised of his right to counsel,\textsuperscript{30} or that there was a failure to appoint counsel.\textsuperscript{31} Lack of effective counsel will lead to similar results, at least in those cases where the representation has been of such low caliber as to amount to no representation at all. This is determined by deciding whether or not the petitioner's right to due process has been violated.\textsuperscript{32} Other jurisdictions have differentiated between appointed counsel and one chosen by the petitioner. The reason for this rule has been explained:

Ordinarily, a defendant who retains counsel of his own selection is responsible if that counsel does not faithfully serve his interests. Any other rule would put a premium upon pretended incompetence of counsel; for if the rule was otherwise, a lawyer with a desperate case would have only to neglect it in order to insure reversal or vacation of the conviction.\textsuperscript{33}

\textsuperscript{25} Machebroda v. United States, 368 U.S. 487 (1962).
\textsuperscript{26} United States v. Sobell, 142 F. Supp. 515 (1956).
\textsuperscript{27} Overman v. United States, 281 F.2d 497 (6th Cir. 1960).
\textsuperscript{28} Voltz v. United States, 196 F.2d 298, cert. denied 344 U.S. 859 (5th Cir. 1952).
\textsuperscript{29} Porter v. Greene, 4 OhioApp.2d 336, 212 N.E.2d 618 (1965).
\textsuperscript{30} United States v. Morgan, 222 F.2d 673 (2d Cir. 1955).
\textsuperscript{32} 24 C.J.S. Criminal Law §1606 (1961).
\textsuperscript{33} People v. Michell, 411 Ill. 407, 104 N.E.2d 285 (1951).
Thus attorneys have been cautioned that they must now keep more complete files in order to protect themselves against allegations of incompetence arising ten to fifteen years after they have served the petitioner.\(^3\)

An allegation that the petitioner’s conviction was secured through an illegal search and seizure would doubtlessly be valid grounds for a hearing in Ohio,\(^3\) although subject to the retroactivity limitation set by the United States Supreme Court.\(^3\) A federal petitioner’s allegation that he was not competent to stand trial at the time he was convicted is subject to review\(^3\) unless at the time of trial this was an issue which was raised and adjudicated; \(^3\) the same rule would apply in Ohio. \(^3\) When a conviction is obtained through the intentional use by the prosecutor of perjured testimony the requisite violation of the constitutional right to due process exists.\(^4\)

A conviction based on a coerced confession is within the scope of the protection given the petitioner under this statute,\(^4\) but the confession must be introduced into evidence and play some part in the petitioner’s conviction.

Infringement of right against self-incrimination gives the petitioner standing to attack his sentence.\(^4\) The same is true where there has been a violation of the rule forbidding the prosecutor to comment on the defendant’s silence.\(^4\)

The Ohio Constitution gives the prisoner the right to a fair and speedy trial, and the denial of this right enables the prisoner to use the post-conviction statute.\(^4\)

A right which may be the basis for recovery under this statute may be lost through the operation of the doctrine of waiver or res judicata. However to lose this right, the prisoner

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\(^3\) Note, 38 Ohio Bar 1314 (1965).


\(^3\) Linkletter v. Walker, 381 U.S. 618 (1965).

\(^3\) Pledger v. United States, 272 F.2d 69 (1959).

\(^3\) Hill v. United States, 223 F.2d 699 (1955).

\(^3\) Ohio Const. art. I, § 10.

\(^4\) Miller v. Pate, 17 L. ed. 2d 680, 87 S.Ct. 192 (1967).

\(^4\) Waugaman v. United States, 331 F.2d 189 (5th Cir. 1964).


\(^4\) Ohio Const. art. I, § 10.
must have acted both knowingly and intelligently.\textsuperscript{45} If the petitioner fails to appeal his sentence, he can nevertheless utilize the post-conviction statute. As a general rule, review of the petitioner's sentence is not barred by res judicata where the petition otherwise meets the requirements of the post-conviction act. Nor is the petitioner barred by any rule that prohibits him from raising constitutional errors which he could have raised earlier, unless it appears that he did so knowingly and intelligently.\textsuperscript{46} A petitioner's claims may be barred by Ohio Revised Code § 2953.22 (1965), which states: "The court need not entertain a second petition or successive petitions except for good cause shown for similar relief on behalf of the same prisoner."

Thus it seems that Ohio follows the federal rule\textsuperscript{47} that a claim will not be barred which urges a different ground in the new application or that urges the same ground, if the earlier motion was not adjudicated on the merits. The statute does not give one who has been found guilty of a crime the right to have the case heard over again. It is intended merely to provide a remedy in those cases where there has been a denial of a constitutional right. Therefore, most petitions relating to procedure only will be dismissed for failure to present a constitutional issue. Thus an error in the indictment is not grounds for attack.\textsuperscript{48} However it is the conclusion of one writer that there are three exceptions to this rule.

This rule is subject to certain exceptions, such as when the indictment or information shows that the court lacked jurisdiction of the prisoner, or when the indictment or information fails to charge an offense under any reasonable construction, or charges a nonexistent federal offense. A further exception is when the indictment charges the defendant with a federal crime, but shows on its face that the defendant did not commit the crime.\textsuperscript{49}

Likewise, a contention that the statute under which the accused was prosecuted is unconstitutional cannot be raised by a petitioner seeking post-conviction relief, since such a question should have been raised by direct attack.\textsuperscript{50} Errors or irregu-

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\textsuperscript{45} Jones \textit{v.} State, 8 O. St. 21, 222 N.E.2d 313 (1966).
\textsuperscript{46} Ibid.
\textsuperscript{47} Sanders \textit{v.} United States, 373 U.S. 1 (1963).
\textsuperscript{48} Stegall \textit{v.} United States, 259 F.2d 83 (6th Cir. 1958).
\textsuperscript{49} 27 Ohio St. L. J. 237, 327 (1966).
\textsuperscript{50} Banks \textit{v.} Warden of Md. Penitentiary, 151 A.2d 897, 220 Md. 652 (1959).
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larities during or after the trial do not warrant the granting of relief under this statute unless the error is of such a magnitude as to deprive the accused of one or more of his constitutional rights. Nor would the statute be usable merely because of defects regarding the impaneling and selection of a jury.\(^5\) The conduct of a trial judge is not open to review unless it amounts to prejudicial error sufficient to raise a constitutional question.\(^5\) One area of judicial conduct which may become favored among convicts seeking relief will be that of pretrial publicity.\(^5\)

The *Robinson* case points out three of the serious drawbacks of allowing the denial of an impartial jury as a ground for collateral relief. First, there are several ways of correcting such errors besides the use of collateral attack. When the defendant believes that the pretrial publicity has made it difficult for him to have an impartial jury, he may move for a change of venue or for a continuance until the public clamor has subsided. When publicity believed to be prejudicial occurs during the trial, the defendant can move for a mistrial or request the trial judge to caution the jury to keep an open mind. And of course, the defendant can perfect an appeal.\(^5\)

Other matters which the courts have held not to be grounds for granting relief under the statute include illegality of arrest, detention, or search and seizure and irregularities in the preliminary proceedings.\(^5\)

C.

"... may file a verified petition at any time in the court which imposed sentence, stating the grounds relied upon and asking the court to vacate or set aside the sentence."

The facts upon which the constitutional claim is predicated should be set forth in a petition in the court which originally imposed the sentence being attacked. If the petition is refused at this point, mandamus should be used. The statute also allows the petition to be filed at any time, thus removing the burden of a statute of limitation.


\(^5\) Comment, 27 Ohio St. L. J. 237, 322 (1966).

D.

"Unless the petition and files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the prosecuting attorney, and grant a prompt hearing thereon. . . ."

This portion of the statute requires that where there are issues of fact involved or where the file does not conclusively show that the allegations of the petitioner are false, or that there is no reasonable probability of their truth, the applicant shall be granted a hearing. This is one of the major areas of dissatisfaction with the statute, for there has been a reluctance on the part of judges to grant a prompt hearing or to grant any hearing at all. There have been petitions which have been held up to a year without disposition, and the Ohio Supreme Court has decreed that one year is an excessive delay, while a six-month period is not. The proper method to compel a hearing is through mandamus.56

The presence of the applicant at his hearing appears to be a matter within the discretion of the court.58 The judge should balance all of the interests of both the court and the prisoner in making his decision on this matter, and as long as it is not arbitrary the decision is conclusive on appeal.

The court may also appoint counsel to represent the petitioner. Unfortunately this too is left to the discretion of the court. Courts in other jurisdictions have held that a petitioner is constitutionally entitled to the appointment of counsel; however it will probably take a similar ruling by the United States Supreme Court before Ohio will adopt this rule.

The Ohio Court of Appeals has denied an indigent petitioner the right to a court-appointed attorney to prosecute an appeal from an adverse ruling on his petition:

There is no constitutional or statutory provision for the appointment or fixing of compensation of counsel for an indigent prisoner to prosecute an appeal from a judgment or order entered on a petition to vacate or set aside sentence filed under the provisions of Section 2953.21, Revised Code.

57 Ibid.
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Section 2953.24, Revised Code, is not applicable, for it relates only to the appointment of counsel for the petitioner to prosecute the vacation proceedings in the court in which sentence was imposed. Sections 2941.50 and 2941.51, Revised Code, are limited in their applicability to appeals to the assignment of counsel to conduct an appeal from a finding of guilty of a felony made at the time of the hearing at which sentence is imposed.60

However, the writer feels there is some doubt as to the validity of this decision, in view of an earlier United States Supreme Court case which stated:

Once a state chooses to establish appellate review in criminal cases, the equal protection clause of the Fourteenth Amendment requires that the state not foreclose indigents from access to any phase of that procedure because of their poverty, and such principle is not to be limited to direct appeals from criminal convictions but extends alike to state post-conviction proceedings.61

E.

"... determine the issues and make findings of fact and conclusions of law with respect thereto."

It is the petitioner who has the burden of proving the truth of those allegations on which he has based his request for relief.62 This is because there is a presumption that the proceedings which resulted in his conviction were regular and proper.63 The types of evidence and the manner in which it is presented are within the discretion of the trial judge; this evidence has been held to include the trial record, oral testimony of any new witnesses necessary to determine facts not presented at the trial, and depositions.64 Rulings based on the personal recollection of the trial judge are improper, since they do not afford the petitioner an opportunity to confront the witnesses against him.65

If it is disclosed that the prisoner did not receive a fair trial, it does not necessarily follow that he must be released. The statute provides:

"If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution or the Consti-

62 Davis v. United States, 226 F.2d 834 (6th Cir. 1955).
63 People v. Morris, 3 Ill.2d 437, 121 N.E.2d 810 (1954).
stitution of the United States, it shall vacate and set aside the judgment, and shall discharge the prisoner or resentence him or grant a new trial, as may appear appropriate. Costs shall be taxed as in a habeas corpus proceeding.”

If the court makes a finding in favor of the state, this is equivalent to an affirmance of the conviction. If the court makes a finding against the state, this revests the court with jurisdiction, and it may (as the statute indicates) discharge the prisoner, resentence him, or grant a new trial. The granting of a hearing under the statute depends on whether the prisoner has offered sufficient allegations to create a question of fact regarding his constitutional rights, and once this question is raised, the application can not properly be denied without a hearing. 66

An appeal from a decision under the statute is controlled by Chapter 2505 of the Revised Code. 67 This rule was adopted, since a petition to vacate sentence is a civil action and it is therefore logically controlled by rules ordinarily applicable to civil proceedings. 68 Consequently it is necessary for the petitioner to file a notice of appeal within twenty days after the judgment on his petition is rendered. 69 A motion to vacate sentence under the statute is not considered a part of the proceedings in the original criminal prosecution, but rather an independent civil suit. 70 In addition, since the action is considered civil in nature, it has been held that there is no authority to appoint counsel to represent the petitioner on appeal from an adverse ruling. 71

Recommended Amendments to the Statute

Ohio has adopted a statute designed to provide a prisoner with a fast, efficient method of testing the legality of his sentence. The enactment enables him to circumvent the crowded docket of those courts hearing habeas corpus petitions and return to the court which originally passed judgment on him.

This gives him the advantage of having his case heard at a place where those connected with the hearing can normally be produced in a convenient and inexpensive manner. An additional advantage is that the trial judge is familiar with the case.

66 Taylor v. United States, 193 F.2d 411 (10th Cir. 1952).
70 Ibid.
and hence better able to understand the general allegations of a petition drawn up by the applicant himself.

It is the practice in Summit County to assign all post-conviction appeals to the judge who originally heard the case. However, if for some reason the petitioner feels he will not receive a fair hearing from the trial judge, he may move for a change of venue or ask for a special assignment.

The author recommends that the Ohio statute be amended to include all five grounds of relief available under the federal post-conviction statute. This would render the enactment fluid enough to permit the court to determine the proper remedy on a-case-by-case-basis and would make available to the court as guides the numerous federal decisions interpreting the federal act.

A major defect in the statute is that it allows the court to hear the motion at its leisure. Since the remedy was designed to test the legality of the incarceration, if it fails to operate quickly, it obviously cannot fulfill its objective. Apparently the judiciary does not always recognize this purpose of the statute. Therefore, the writer suggests that the act be amended to compel the court to rule on the petition by the end of the next term of court.

In addition to exhibiting a general unwillingness to rule promptly, when the courts do act, they too frequently dismiss the petition without a hearing. Hearings have been refused even in cases where the alleged deprivation could not be determined from an examination of the files and records. This is in direct conflict with the statute, which clearly requires a hearing under such circumstances. However, there is little that can be done to cure this problem through legislation.

It is recommended that the discretionary power of the court to appoint counsel be replaced with a provision granting a mandatory right to counsel once the court has determined that a hearing shall be held. In addition to serving the prisoner, such an arrangement would relieve the judiciary of the necessity of unraveling, preparing, and presenting a petitioner’s claim for him. It is standard practice in Summit County to appoint counsel in all cases in which a hearing has been granted.

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72 Interview with the Honorable Steven Colopy, Summit County Court of Common Pleas, February 14th, 1967.
74 Turpin v. Stark County, supra note 56.
75 Note 72 supra.
The author suggests that the legislature review the possibility of dispensing with the custody requirement and make the statute available to a person convicted of any crime. This would make it available to those who have not yet begun to serve, or to those who have already completed, their sentence in addition to those now confined. As was mentioned earlier, the federal requirement of custody is easily circumvented by other approaches not available to a prisoner seeking relief in Ohio. This approach would not be unique, for Oregon adopted a post-conviction statute two years before ours which has no custody requirement.\(^76\)

The American Bar Association Project on Minimum Standards for Criminal Justice has in its commentaries to its tentative draft of Post-Conviction Remedies stated, with reference to this suggestion:

> The proposal in the standard to permit immediate review of a sentence not yet being served would eliminate one of the most frustrating elements of present post-conviction practice. Where consecutive sentences have been imposed, the immediate release condition can unreasonably postpone for years judicial consideration of the validity of a challenged conviction or sentence while the unchallenged sentences are being served. One of the most prevalent complaints about post-conviction review is the difficulty, once a conviction has been set aside, of mounting a new prosecution many years after the crime. Should a retrial be necessary, it is to the great advantage of the prosecution and the defense to marshal their respective cases while the evidence is fresh and the witnesses are available. Long delay can also jeopardize the capability of an applicant to establish the invalidity of his conviction or sentence.\(^77\)

Finally, since most petitions are drawn and filed without legal assistance, it would seem desirable for the state to prepare and make available a standardized form of application for relief. This approach has been adopted in New Jersey and the Northern (federal) District of Illinois.\(^78\) This arrangement would protect a petitioner who overlooks, or improperly alleges, an important point of a meritorious claim. Moreover the form could be designed to elicit from the petitioner the history of all prior proceedings, including prior applications for post-conviction relief.

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\(^77\) Post-conviction Remedies, American Bar Association Project on Minimum Standards for Criminal Justice. (January 1967 Tentative Draft.)

\(^78\) Comment, 17 W. Res. L. Rev. 1367, 1388 (1966).