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Experience in criminal law administration has shown that defendants are sometimes convicted of crimes through procedures which do not comply with the due process requirement, or which are legally ineffective for some other reason.[1] To guard against these miscarriages of justice arising in the usual channels of criminal procedure, various post-conviction remedies have been instituted. These post-conviction remedies are extraordinary remedies and are used only when no direct procedures are available. With these post-conviction remedies the legality of incarceration and not the question of guilt or innocence is put in issue.[2] One such remedy in North Carolina is the Post-Conviction Hearing Act.[3] In 1965 this act was rewritten and substantially changed. Important changes were made in the procedure for the filing and review of petitions for post-conviction relief. Also, the grounds for review under the act were broadened considerably. However, the most significant consequence of the new act is its effect upon other remedies which had previously been available for collaterally attacking imprisonment. It is the purpose of this note to point out some of these changes and to discuss briefly some constitutional questions raised by certain provisions of the new act.

Unlike the earlier Post-Conviction Act,[4] the new act is not limited to the review of alleged substantial denials of constitutional rights. Instead, the act provides a means of review where any of the following grounds for relief are asserted: (1) that in the proceedings which resulted in conviction there was a substantial denial of constitutional rights; (2) that the court was without jurisdiction to impose the sentence; (3) that the sentence exceeds the maximum authorized by law; or (4) that the sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy.[5] Under the new

[1] For example, where the court was without jurisdiction.

[2] See generally UNIFORM POST-CONVICTION PROCEDURE ACT, 9B UNIF. LAWS ANN. 344-45.

[3] N.C. GEN. STAT. §§ 15-217 to -222 (1965 Advance Leg. Serv., No. 3).

[4] N.C. Sess. Laws 1951, ch. 1083, § 1.

[5] N.C. GEN. STAT. § 15-217 (1965 Advance Leg. Serv., No. 3).

act, as under both the earlier act[6] and prior habeas corpus procedure,[7] there must have been no previous adjudication of the assertion by any court of competent jurisdiction.[8]

The new act simplifies the procedure for filing petitions for relief[9] and clearly sets forth what is to be contained in such petitions.[10] Post-conviction proceedings are now commenced by the petitioner's filing three copies of his petition with the clerk of the superior court in the county in which the petitioner's conviction occurred.[11] The act requires the clerk to deliver one copy of the petition to the solicitor.[12] It then directs the clerk to enter receipt of the petition upon the criminal docket *and* to bring promptly the petition to the attention of the "resident judge or any judge holding the courts of the district or any judge holding court in the county."[13] This procedure seems an improvement over the earlier act, which required the petitioner himself to serve a copy on the solicitor and made no provision for directing the clerk to call the attention of the judge to the petition. Further, under the new provisions if it appears to the judge that substantial injustice may be done by any delay in hearing upon matters alleged in the petition, he may issue an order appropriate to bring the petitioner before the court without delay and may direct the solicitor to answer the petition at a time specified in the order.[14] In addition, if it appears to the judge that records of the proceedings which resulted in the petitioner's conviction are necessary for a proper determination of the allegations, upon a finding that the petitioner is indigent the judge is directed to order the county to pay the cost of furnishing such records to the petitioner.[15] This added simplicity and clarity in the provisions dealing with the preparation, filing, and processing of the petition

[6] N.C. Sess. Laws 1951, ch. 1083, § 1 at 1085.

[7] N.C. GEN. STAT. § 17-7 (1953). See *In re* Adams, 218 N.C. 379, 11 S.E.2d 163 (1940); *In re* Brittain, 93 N.C. 587 (1885).

[8] N.C. GEN. STAT. § 15-217 (1965 Advance Leg. Serv., No. 3).

[9] N.C. GEN. STAT. § 15-217.1 (1965 Advance Leg. Serv., No. 3).

[10] N.C. GEN. STAT. § 15-218 (1965 Advance Leg. Serv., No. 3).

[11] N.C. GEN. STAT. § 15-217.1 (1965 Advance Leg. Serv., No. 3).

[12] *Ibid.*

[13] *Ibid.* Although this section does not expressly state that the judge must be a superior court judge, the implication is that a superior court judge is required, since the petition is filed with the clerk of the superior court and is entered on the criminal docket of the superior court.

[14] *Ibid.*

[15] N.C. GEN. STAT. § 15-220 (1965 Advance Leg. Serv., No. 3). Under both the earlier act and the present act, the judge is directed to appoint counsel for the petitioner if he is indigent and requests counsel.

for relief seem a definite improvement in post-conviction relief in North Carolina, especially when it is realized that most petitions are drafted and filed by the petitioner himself or with the aid of another inmate.[16]

Many of the difficulties which have arisen involving post-conviction remedies may be traced to the multiplicity and indefiniteness of existing post-conviction remedies.[17] In recognition of this fact section 15-217 of the act states that the remedy therein provided is the exclusive remedy for challenging the validity of incarceration under any sentence of imprisonment or death.[18] The effect of this section in situations where it is applicable is to replace the writ of habeas corpus and all other common-law or statutory remedies with the new remedy.[19] However, article I, section 9 of the United States Constitution and article I, section 21 of the North Carolina Constitution provide that the "privilege of habeas corpus shall not be suspended." In light of this explicit prohibition it is possible that section 15-217, in an effort to eliminate the problems that have resulted from the multifariousness of post-conviction remedies, violates these constitutional provisions by "suspending" the writ of habeas corpus.[20]

The primary purpose of article I, section 21 and similar provisions is to guarantee the citizen who is restrained of his liberty

[16] See generally 2 HARV. J. LEGIS. 189 (1965).

[17] See UNIFORM POST-CONVICTION PROCEDURE ACT, 9B UNIF. LAWS ANN. 344, 348.

[18] Parts of § 15-217 are taken verbatim from § 1 of the Uniform Post-Conviction Procedure Act.

[19] Section 15-217 only purports to replace remedies which, prior to its enactment, had been available for attacking incarceration *under sentence of imprisonment or death.* Therefore, presumably the provision will have no effect on the continued use of habeas corpus where the petitioner is incarcerated in an insane asylum or in the child custody cases or where a prisoner is held illegally prior to trial. See, *e.g., In re* Harris, 241 N.C. 179, 84 S.E.2d 808 (1954); *In re* Habeas Corpus of Jones, 153 N.C. 312, 69 S.E. 217 (1910). It would seem that the new act would not apply in cases where the petitioner is incarcerated for civil contempt, since the act is made available to persons "incarcerated under sentence of . . . imprisonment." Presumably, it would be available to one who was held for criminal contempt if he were incarcerated in the penitentiary, Central Prison, or common jail of any county.

[20] The Supreme Court of the United States has held that article I, section 9, of the federal constitution restricts only federal action and has no effect on action by a state. Gasquet v. Lapeyre, 242 U.S. 367 (1917). See LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA 363 (1964). Accordingly, no further mention of article I, section 9, will be made.

a speedy investigation into the cause of his detention, and to secure his release unless he is legally detained.[21] Therefore it would seem that the "suspension" of the writ which is prohibited by this provision means denial to the citizen of the right to demand a speedy investigation into the cause of his detention and to secure his release if such detention is illegal, *whether or not that remedy is designated habeas corpus.*[22] Clearly, legislation which, without more, completely abolished the writ of habeas corpus would violate this purpose,[23] as would legislation which seriously curtailed the efficiency of the remedy guaranteed the citizen.[24] However, it is well established that the legislature may reasonably regulate habeas corpus so long as the legislation does not abrogate or detract from the protective force of the writ of habeas corpus as protected by the constitution.[25] Hence, it is submitted that section 15-217, merely because it replaces habeas corpus with the new remedy, does not necessarily violate article I, section 21, *provided* that the new remedy offers to every person who could have used habeas corpus

[21] See, *e.g.*, Chin Yow v. United States, 208 U.S. 8 (1908); *Ex parte* Craig, 282 Fed. 138 (2d Cir. 1922); State v. Towery, 143 Ala. 48, 39 So. 309 (1905); *Ex parte* Johnson, 1 Okla. Crim. 414, 98 Pac. 461 (1908); FERRIS, EXTRAORDINARY LEGAL REMEDIES § 4 (1926); HURD, HABEAS CORPUS 143-46 (1858).

[22] See, *e.g.*, State v. Towery, 143 Ala. 48, 50, 39 So. 309 (1905), where the court said:

> The 'suspension' of the writ which is prohibited means the denial to the citizen of the right to demand an investigation into the cause of his detention. When this right is accorded to him, all that he has a right to demand is that his case be investigated according to the usual mode of procedure in courts of justice, and that 'justice' shall be administered without sale, denial or delay.'

Id. at 309-10.

[23] See State v. Hawkins, 37 Del. 396, 183 Atl. 626 (1936); Mahaffey v. State, 87 Idaho 228, 392 P.2d 279 (1964); Madsen v. Obermann, 237 Iowa 461, 22 N.W.2d 350 (1946); Hoff v. State, 279 N.Y. 490, 18 N.E.2d 671 (1939); *Ex parte* Davis, 66 Okla. Crim. 271, 91 P.2d 799 (1939); *Ex parte Wilkins*, 7 Okla. Crim. 422, 115 Pac. 1118 (1911); Commonwealth v. Reifsteck, 271 Pa. 441, 115 Atl. 130 (1921). *But see* United States v. Anselmi, 207 F.2d 312, 314 (3d Cir. 1953), *cert. denied*, 347 U.S. 902 (1954).

[24] See Cannon v. Stuart, 3 Houst. 223 (Del. 1860); People *ex rel.* Tweed v. Liscomb, 60 N.Y. 559 (1875); *In re* Knight, 74 Okla. Crim. 321, 131 P.2d 506 (1942); *In re* Patzwald, 5 Okla. Crim. 789, 50 Pac. 139 (1897); Miskimins v. Shaver, 8 Wyo. 392, 58 Pac. 411 (1899).

[25] *E.g.*, Mahaffey v. State, 87 Idaho 228, 392 P.2d 279 (1964); Johnson v. Burke, 238 Ind. 1, 148 N.E.2d 413 (1958); Olewiler v. Brady, 185 Md. 341, 44 A.2d 807 (1945); *Ex parte* Webers, 275 Mo. 677, 205 S.W. 620 (1918); Miskimins v. Shaver, 8 Wyo. 392, 58 Pac. 411 (1899).

a remedy which is as broad and effective as habeas corpus would be under the same circumstances.[26]

But does the new Post-Conviction Hearing Act provide for every person who because of the act cannot utilize the writ of habeas corpus a remedy which is as broad and effective as habeas corpus? It is helpful to consider this question in three separate parts. First, does the new act make the new remedy available to every person who no longer may use habeas corpus because of the act? Because of the manner in which section 15-217 is drafted, it cannot be said conclusively that the new remedy is available to every person who, according to section 15-217, may no longer rely on habeas corpus. The first paragraph of section 15-217 enumerates the persons who may utilize the new remedy.[27] The second paragraph of this section states that the new remedy shall be the exclusive means of challenging the validity of incarceration under sentence of imprisonment or death.[28] Construing the section

[26] Support for this conclusion may be found in the somewhat analogous situation which has arisen with respect to article I, section 9, of the United States Constitution as a result of 28 U.S.C. § 2255 (1958). Section 2255 provides that an application for a writ of habeas corpus in the federal courts shall not be entertained if the applicant could apply for relief by motion to vacate or if he has filed a motion and was denied relief, unless the remedy by motion is inadequate or ineffective to test the legality of his detention. It is well established that, notwithstanding article I, section 9, where a motion to vacate offers an effective remedy, it is not unconstitutional to refuse to entertain an application for habeas corpus where the applicant has failed to file a motion or such a motion was refused. See United States v. Hayman, 342 U.S. 205 (1951); Madigan v. Wells, 224 F.2d 577 (9th Cir. 1955), *cert. denied,* 351 U.S. 911 (1956); United States v. Anselmi, 207 F.2d 312 (3d Cir. 1953), *cert. denied,* 347 U.S. 902 (1954); Close v. United States, 198 F.2d 144 (4th Cir.), *cert. denied,* 344 U.S. 879 (1952); Jones v. Squier, 195 F.2d 179 (9th Cir. 1952); Barrett v. Hunter, 180 F.2d 510 (10th Cir.), *cert. denied,* 340 U.S. 897 (1950). See generally 20 A.L.R.2d 965 (1951). *But see* 59 YALE L.J. 1183 (1950).

Perhaps the most distinguishing aspect of § 2255 is that it specifically provides that habeas corpus shall remain available in situations where the motion to vacate is "inadequate or ineffective to test the legality of . . . detention." The North Carolina act has no such provision.

[27] "Any person imprisoned in the penitentiary, Central prison, common jail of any county or imprisoned in the common jail of any county and assigned to work under the supervision of the State Prison Department . . . may institute a proceeding under this article."

[28] "The remedy herein provided is not a substitute for nor does it affect any remedies which are incident to the proceedings in the trial court, or any remedy of direct review of the sentence or conviction, but, except as otherwise provided in this article it comprehends and takes the place of all other common-law and statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment, and shall be used exclusively in lieu thereof."

as a whole,[29] it is possible to conclude that the new remedy is the exclusive remedy *only* as to persons who are enumerated in the first paragraph of the section. Under this construction the act is not exposed to the possibility of violating article I, section 21, since the persons who may use the act are the only ones who may no longer use habeas corpus.[30] By this same construction, however, the only persons who may utilize the new remedy are those persons enumerated in the first paragraph of Section 15-217. But, as the comments to the Uniform Post-Conviction Procedure Act point out,[31] the primary purpose of the language in section 15-217 is to avoid the multiplicity of existing post-conviction remedies by consolidating all such remedies into a single procedure for obtaining post-conviction relief. By limiting the availability of the new remedy in North Carolina to persons enumerated in section 15-217, the statute has departed from this objective, since habeas corpus and other post-conviction remedies remain available to all persons not enumerated in section 15-217, *i.e.,* to all persons who cannot utilize the new remedy. Fortunately, this flaw in the statute could easily be corrected by replacing the unnecessary enumeration of persons

[29] See 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4703 (3d ed. 1943).

[30] The second paragraph could also be construed to mean that the new remedy is the exclusive means of challenging "incarceration under sentence of death or imprisonment." Indeed, since the purpose of § 15-217 is to avoid the multiplicity of post-conviction remedies by consolidating all such procedures into a single remedy, this would seem a reasonable interpretation of the provision. Under this construction it is likely that § 15-217 would violate article I, section 21, unless the list of persons in the first paragraph of § 15-217 includes every one who might be considered as imprisoned under sentence of death or imprisonment. For example, persons confined in a *city* jail are not enumerated as being eligible for relief. Although persons are usually confined in a city jail pending trial or transportation to another place of confinement, it is conceivable that some persons in a city jail might be treated as incarcerated under sentence of imprisonment. If so, then such a person could not be denied both habeas corpus and relief under the new act without violating article I, section 21. In such a situation the court could do one of two things: it could (1) read into the statute words which are not there and permit the petitioner to utilize the new act, or (2) rule that the petitioner could seek relief through a writ of habeas corpus.

However, this latter construction does to some extent depart from the general rule that a statute should be construed as a whole. See note 29, *supra.* Further, the North Carolina court has held that where a statute is fairly susceptible of two interpretations, one constitutional and the other not, the court will adopt the former and reject the latter. *E.g.,* State v. Casey, 201 N.C. 620, 161 S.E. 81 (1931); Jenkins v. State Bd. of Elections, 180 N.C. 169, 104 S.E. 346 (1920).

[31] See UNIFORM POST-CONVICTION PROCEDURE ACT, 9B UNIF. LAWS ANN. 344, 351.

eligible for relief with a clause making the new remedy available to any person incarcerated under sentence of imprisonment or death.

It would seem that any ground of relief which could have been asserted by a writ of habeas corpus may now be raised under the new act, since section 15-217 expressly states that the petitioner may assert that the sentence is subject to collateral attack "upon any ground of alleged error heretofore available under a writ of habeas corpus . . . ."

Finally, does the new act subject the petitioner to any procedural or jurisdictional restrictions or handicaps which make the new remedy less effective than habeas corpus would have been under the same circumstances? The procedure for filing a petition relief and instituting the proceedings under the new act seem no more restrictive or less effective than has been the case under habeas corpus procedure.[32] Nor does there appear to be any reason why the hearing under the new act would be less adequate than the hearing which has heretofore been available upon a writ of habeas corpus.[33] Also, the means of review of a final judgment is the same as has been available under prior habeas corpus procedure.[34]

[32] *Compare* N.C. GEN. STAT. §§ 15-217 to -217.1 (1965 Advance Leg. Serv., No. 3), *with* N.C. GEN. STAT. §§ 17-4 to -8 (1953). *But see* N.C. GEN. STAT. § 17-5 (1953), which permits an application for a writ of habeas corpus to be made by *any* person on behalf of a party who is illegally restrained, and N.C. GEN. STAT. § 17-8 (1953) which authorizes any justice of the supreme court or judge of the superior court to issue a writ of habeas corpus where any person is illegally detained *even though* no application for relief has been made. Section 15-217.1, the section which sets out the procedure for filing petitions for relief under the new act, does not necessarily exclude the possibility of some one other than the prisoner filing a petition since it provides: "The proceeding shall be commenced by filing. . . ." But *quaere* whether § 15-217 of the new act which provides that "any person imprisoned . . . may institute a proceeding under this article" means that only the petitioner himself may file a petition for relief under the new act.

[33] *Compare* N.C. GEN. STAT. § 15-221 (1965 Advance Leg. Serv., No. 3) *with* N.C. GEN. STAT. § 17-32 (1953). Whether the petitioner is to be present at the hearing is committed to the discretion of the judge. N.C. GEN. STAT. § 15-221 (1965 Advance Leg. Serv., No. 3). This appears to have been the rule for habeas corpus procedure. N.C. GEN. STAT. § 17-15 (1953) ("If the writ requires it, the officer . . . shall produce the body of the party . . . .").

[34] N.C. GEN. STAT. § 15-222 (1965 Advance Leg. Serv., No. 3), of the new act provides that review of final judgment under the act shall be by writ of certiorari. Likewise review of a refusal to order the discharge of the habeas corpus applicant is by writ of certiorari. See *In re* Croom, 175 N.C. 455, 95 S.E. 903 (1918); State v. Burnette, 173 N.C. 734, 91 S.E. 364 (1917).

However, to the extent that the new act limits the petitioner to applying for relief only in the superior court in which his conviction occurred,[35] the new act is clearly more restrictive than habeas corpus. Since the year that article I, section 21, was adopted as a part of the constitution, North Carolina has by statute permitted a petitioner seeking habeas corpus to apply to any justice of the supreme court or any judge of the superior court.[36] In addition, the supreme court has said that under article I, section 18, of the constitution it has the power to issue a writ of habeas corpus.[37] Further, courts in a number of states having constitutional provisions similar to article I, section 21, have held that the effect of such a provision is to insure the writ of habeas corpus as it existed at common law;[38] and at common law the habeas corpus applicant was clearly not limited to seeking relief in any single court.[39] Therefore, it is likely that in any situation where the petitioner could not obtain as effective relief in the superior court in which he was originally convicted, the court would hold that the new act, by limiting him to such court, had unconstitutionally detracted from the protective force of habeas corpus. However, as stated previously, courts recognize that in spite of constitutional provisions such as article I, section 21, the legislature has the power to regulate reasonably habeas corpus by statute.[40] This factor is especially significant since there are legitimate purposes to be served by requiring a petitioner to seek post-conviction relief in the court where he was convicted. It is here that the records of the proceedings resulting in his conviction may be found, as well as witnesses and officers of the court who are familiar with the proceedings.[41] In addition, by requiring post-conviction proceedings to be con-

[35] N.C. GEN. STAT. § 15-217.1 (1965 Advance Leg. Serv., No. 3).

[36] N.C. GEN. STAT. § 17-6 (1953).

[37] See *In re* Schenck, 74 N.C. 607 (1876). Notice how § 2 of the UNIFORM POST-CONVICTION PROCEDURE ACT, 9B UNIF. LAWS ANN. 354, deals with the situation where the state constitution vests courts with jurisdiction to issue writs of habeas corpus.

[38] See People v. Morhous, 183 Misc. 51, 49 N.Y.S.2d 110 (Sup. Ct. 1944); *Ex parte* Davis, 66 Okla. Crim. 271, 91 P.2d 799 (1939); *Ex parte* Wilkins, 7 Okla. Crim. 422, 115 Pac. 1118 (1911); *In re* Patzwald, 5 Okla. Crim. 789, 50 Pac. 139 (1897); Servonitz v. State, 133 Wis. 231, 113 N.W. 277 (1907).

[39] See HURD, HABEAS CORPUS 147-48 (1858).

[40] See note 25, *supra.*

[41] *Cf.* Parker, *Limiting the Abuse of Habeas Corpus,* 8 F.R.D. 171, 175 (1949). See generally SOKOL, A HANDBOOK OF FEDERAL HABEAS CORPUS (1965).

ducted where the original proceedings were held, the burden of the numerous petitions for such relief is more evenly spread among the superior courts throughout the state, since the courts located near prisons may no longer be overburdened with habeas corpus petitions.

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Constitutional Law—Right of Counsel—State and Lower Federal Court Interpretations of Escobedo

The historic Supreme Court decision of *Escobedo v. Illinois*,[1] which extended the right to counsel to some point prior in time to the actual trial of an accused,[2] has engendered a wealth of theoretical discussion of the problems it encompassed.[3] The state and lower federal courts have had to face many of these problems on a practical rather than theoretical plane. The following categories constitute some of the most critical areas that have required interpretation.

I. FAILURE TO INFORM THE ACCUSED OF HIS CONSTITUTIONAL RIGHTS AND THE ABSENCE OF A REQUEST FOR COUNSEL

In situations where an accused was not advised of his right to counsel or to remain silent in the accusatory stage of an investiga-

[1] 378 U.S. 478 (1964).

[2] The defendant Escobedo was arrested, handcuffed, and taken to police headquarters for interrogation concerning the murder of his brother-in-law. A lawyer, previously retained, made two futile attempts to see Escobedo at headquarters. During the interrogation the defendant was confronted with a statement solicited from another suspect accusing him of the crime. Without the benefit of his attorney's advice, the defendant made incriminating statements in response to this accusation that lead to his subsequent conviction. The Supreme Court reversed and remanded stating:

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," Gideon v. Wainwright, 372 U.S., at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

Id. at 490-91.

[3] See, *e.g.*, Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47 (1964); Note, 43 N.C.L. REV. 187 (1964).