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Criminal Procedure -- The North Carolina Post-Conviction Hearing Act: A Procedural Snare

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NOTES

Criminal Procedure—The North Carolina Post-Conviction Hearing Act: A Procedural Snare

The federal writ of habeas corpus is available to state prisoners as a guarantee that every allegation of imprisonment violative of constitutional standards will be fully and fairly considered.[1] It is the policy of the federal court system, however, to refrain from " 'upset[ting] a state court conviction without an opportunity to the state courts to correct a constitutional violation.' "[2] State courts can examine and correct these errors either during the criminal trial, on direct appeal, or upon a later collateral attack by means of the common law writs of habeas corpus[3] and coram nobis[4] or of statutorily enacted post-conviction remedies. North Carolina was the second state to adopt such a post-conviction statute.[5] Since the time of adoption, however, judicial limitations and a procedural change have led to the severe diminution of the act's effectiveness, a partial abdication of the state's role as enforcer of federal constitutional law, and a legal dilemma that cannot be remedied through ordinary judicial action.

FEDERAL REVIEW OF STATE CRIMINAL PROCEEDINGS

The federal court system has jurisdiction over all prisoners, both federal and state,[6] who assert the constitutional invalidity of their con-

1. 28 U.S.C. § 2241(c) (1970) provides in part that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . ." The legislative policy of granting a federal forum to the constitutional claims of state prisoners has often been noted and approved by the United States Supreme Court. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 430-31 (1963); Townsend v. Sain, 372 U.S. 293, 311 (1963); Hawk v. Olson, 326 U.S. 271, 274 (1945).

2. Fay v. Noia, 372 U.S. 391, 420 (1963) (quoting Darr v. Burford, 339 U.S. 200, 204 (1950)).

3. *See* note 25 *infra.*

4. *See* note 24 *infra.*

5. Case v. Nebraska, 381 U.S. 336, 338 (1965) (Clark, J., concurring). The statute is codified in N.C. GEN. STAT. §§ 15-217 to -222 (1975). Illinois enacted the first post-conviction statute in 1949; it is now codified in ILL. ANN. STAT. ch. 38, § 122 (Smith-Hurd 1973). North Carolina patterned the 1951 version of its law on the Illinois act. Miller v. State, 237 N.C. 29, 51, 74 S.E.2d 513, 528 (1953).

6. [W]here resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, . . . or because . . . the remedy afforded by the state law proves in practice unavailable or seriously inadequate . . . a federal court should entertain his petition for habeas corpus, *else he would be remediless.*

Ex parte Hawk, 321 U.S. 114, 118 (1944) (per curiam) (emphasis added). 28 U.S.C.

victions.[7] In the interests of federal/state comity, of limiting interference with the judicial processes of the states and of decreasing their own habeas corpus case load, the federal courts have developed philosophical and practical doctrines that transfer portions of the responsibility to the states while allowing the federal courts to continue as ultimate arbiters of the constitutionality of state criminal proceedings.

The first of these doctrines is that of exhaustion of state remedies.[8] The federal courts have declined to grant habeas corpus petitions until the state courts have had an opportunity to pass on all questions raised by the habeas applicant through all appropriate state procedures—that is, until all available state remedies have been exhausted.[9] The exhaustion doctrine is not a limitation on federal habeas corpus jurisdiction, which exists due to the presence of constitutional error in the trial;[10] the doctrine merely postpones the appropriate exercise of that jurisdiction to give the state courts time to correct their own errors and allow their procedure to remain undisturbed.[11]

The second doctrine adopted by the federal courts affects the amount of time the federal district court must expend on consideration of the federal habeas corpus petitions of state prisoners. In *Townsend v. Sain*[12] the United States Supreme Court held that a federal evidentiary hearing would be necessary unless the state trier of fact had previously held a full and fair hearing and found the facts of the case.[13] If a state evidentiary hearing meeting the *Townsend* requirements was held, the federal district court judge is free to accept the facts as found

§ 2254 (1970) provides the statutory guidelines for the grant of federal habeas corpus to state prisoners.

7. 28 U.S.C. § 2241(c)(3) (1970).

8. 28 U.S.C. § 2254(b) (1970) provides:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

The basic doctrine now codified in § 2254(b) was developed by the United States Supreme Court in *Ex parte* Royall, 117 U.S. 241, 250-53 (1886). For a description of the judicial history of the doctrine of exhaustion of state remedies, see Fay v. Noia, 372 U.S. 391, 417-20 (1962).

9. *E.g.*, Johnson v. Hoy, 227 U.S. 245 (1913); Minnesota v. Brundage, 180 U.S. 499 (1901).

10. Fay v. Noia, 372 U.S. 391, 430-31 (1960).

11. R. SOKOL, FEDERAL HABEAS CORPUS 163-64 (2d ed. 1969); *see, e.g.*, Tyler v. Croom, 264 F. Supp. 415, 418 (E.D.N.C. 1967); Sligh v. North Carolina, 246 F. Supp. 865, 867 (E.D.N.C. 1965) (quoting Darr v. Burford, 339 U.S. 200, 204 (1950)).

12. 372 U.S. 293 (1963).

13. More specifically, a federal hearing is mandatory if: (1) the state court hearing did not resolve the merits of the factual dispute; (2) the state record does not fairly

at that hearing and ordinarily should do so.[14] The district court judge may always, in his discretion, rehear the evidence, despite a previous state hearing and appropriate findings of fact.[15] He may not, however, accept the state court's findings of law: "It is the district judge's duty to apply the applicable federal law to the state court fact findings independently."[16]

These doctrines, then, advance four federal court interests. First, the interest in good federal/state relations is furthered by the states' acceptance of a larger and more autonomous role in the consideration of constitutional errors within their own criminal systems.[17] Second, the federal courts have an interest in maintaining the positions of the state courts as enforcers of federal constitutional law. State court assumption of this responsibility removes from the federal courts the pressure of policing the state courts for constitutional errors while providing for more effective enforcement due to the immediacy of the state court adjudication and the dual nature of the effort.[18] Third, the increased role of the state courts in the determination of the facts behind prisoners' claims greatly decreases the caseload of the federal courts.[19] If the federal district court judge accepts the facts found in a state court hearing, he need only determine whether those facts,

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support the state's determination of fact; (3) the state court's fact finding procedure did not afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the state hearing did not adequately develop material facts; or (6) for some other reason, the state trier of fact did not afford the habeas applicant a full and fair hearing. *Id.* at 312-13. 28 U.S.C. § 2254(d) (1970) codifies all of these conditions of federal rehearing except the fourth, and adds that the state court must have had jurisdiction over the case, appointed counsel when constitutionally required, and generally granted due process of law to the habeas applicant in order for its determination of facts to be presumptively correct.

"This has been succinctly summarized by one distinguished appellate judge as meaning: 'Give the slob a hearing.'" J. Craven, Federal Writs of Habeas Corpus in the Light of Post Conviction Remedies in North Carolina 10 (June 26-29, 1966) (paper delivered at Third Annual North Carolina Trial Judges' Seminar).

14. 372 U.S. at 318.

15. *Id.*

16. *Id.*

17. Federal/state judicial relations undergo an inherent strain produced by the concurrent jurisdiction of the two court systems over these constitutional matters. It is common for states to resent greatly federal court interference with the autonomy and the orderly procedure of their criminal trials. *See* Tyler v. Croom, 288 F. Supp. 870, 873 (E.D.N.C. 1968); Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 899 (1966); Note, *State Criminal Procedure and Federal Habeas Corpus*, 80 HARV. L. REV. 422, 423 (1966).

18. *Developments in the Law: Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1094 (1970) [hereinafter cited as *Developments*].

19. *See* Tyler v. Croom, 288 F. Supp. 870, 873 n.6 (E.D.N.C. 1968) (citing U.S. COURTS AD. OFF. ANN. REP. 1967, at 135-37).

as a matter of law, entitle that applicant to habeas corpus relief.[20] The process has been likened to a decision on the pleadings,[21] and it takes a fraction of the time that could otherwise have been necessary for a full habeas corpus proceeding. Finally, it is possible that prisoners may be satisfied with the state remedies provided and never apply for federal habeas corpus relief.[22]

STATE POST-CONVICTION PROCEDURES

In order to further these same interests, the federal courts have encouraged the states to adopt post-conviction statutes.[23] These statutes extend the state court's collateral review of constitutional errors far beyond that permitted by the common law writs of coram nobis[24] and habeas corpus.[25] In order best to advance the federal court purposes such a statutory scheme should allow state review that is as broad as the review available on federal habeas corpus. The statute should afford as much protection to constitutional rights as the writ itself while shifting the full burden of fact finding from the federal to the state courts. Some statutes provide for this desired breadth of remedy,[26]

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20. *See* text accompanying note 16 *supra*.

21. R. SOKOL, *supra* note 11, at 114.

22. Wright & Sofaer, *supra* note 17, at 901 n.21.

23. The most direct encouragement came from Justice Clark, concurring in Case v. Nebraska, 381 U.S. 336 (1965) (per curiam), who stated, "I hope that the various States will follow the lead of Illinois, Nebraska, Maryland, North Carolina, Maine, Oregon and Wyoming in providing this modern procedure for testing federal claims in the State courts and thus relieve the federal courts of this ever-increasing burden." *Id.* at 340. *See also* ABA ADVISORY COMM. ON SENTENCING AND REVIEW, STANDARDS RELATING TO POST-CONVICTION REMEDIES 2 (Approved Draft) 1968 [hereinafter cited as ABA STANDARDS]: "The continuing need for federal habeas corpus jurisdiction as a post-conviction remedy for state prisoners is thus clearly correlated to the adequacy of processes in the state courts."

24. The writ of coram nobis allows the court that rendered the original judgment in a criminal case to review the case upon a claim of an error of fact. The error must have been in existence at the time of the original proceeding but have been unknown to the court. Further, it must have affected the validity of the original hearing. E. FRANK, CORAM NOBIS: COMMON LAW—FEDERAL—STATUTORY 1 (1953).

25. The common law writ of habeas corpus was available to challenge imprisonment by decree of a court that was without jurisdiction to consider the matter. *Developments, supra* note 18, at 1045.

26. The statute granting habeas corpus jurisdiction over federal prisoners, 28 U.S.C. § 2255 (1970), provides in part:

> A prisoner . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.

This federal statute has been used as a model for a state statute that gives the state

while others limit the grounds upon which post-conviction relief can be claimed or the time within which that claim can be made.[27]

Another way that the operation of post-conviction statutes may be made more restrictive than federal habeas corpus is by the imposition of forfeiture rules. These rules hold that applicants have waived constitutional issues if they could have, but did not, raise them on direct appeal within the state court system.[28] If such a waiver occurs, the prisoner has forfeited his right to allege those issues on collateral appeal. According to *Fay v. Noia*,[29] federal habeas corpus will be granted to applicants despite the failure to raise constitutional claims on direct appeal in the state courts unless that failure to appeal is deemed an "intelligent and understanding waiver" of the right to appeal.[30] The *Fay* Court further explained that a federal judge may, upon finding that a habeas applicant has intentionally avoided raising his federal claims under the appropriate state court procedures, deny federal relief to that applicant.[31] But the test of intentional or deliberate bypass is a stringent standard; despite the interest of the federal courts in comity, allegations of unconstitutional restraint will not be ignored solely on the grounds that the habeas applicant has run afoul of state court procedures.[32]

When state procedure utilizes a more stringent waiver of forfeiture standard than the intelligent and understanding measure adopted by the federal courts, the states have again limited their ability to deal with cases cognizable on federal habeas corpus. From the federal court point of view the state forfeiture rules create the same

courts equivalent jurisdiction over state prisoners. A second model is the UNIFORM POST-CONVICTION PROCEDURE ACT, 11 UNIFORM LAWS ANN. 477 (1974), which grants jurisdiction over the same broad subject matter but which, in its original version, limited the consideration by requiring that all grounds for relief be raised in the first post-conviction petition or not at all. *Id.* at 478-79; *accord*, ABA STANDARDS, *supra* note 23, at 3. The revised version of the Uniform Act follows the waiver standards set forth in federal case law. 11 UNIFORM LAWS ANN. at 528.

27. A third model for state statutes is the Illinois Post-Conviction Hearing Act, ILL. ANN. STAT. ch. 38, § 122-1 to -7 (Smith-Hurd 1973). This statute is far more restrictive than the first two; it limits the time for initiation of post-conviction proceedings to 20 years after the applicant's conviction (unless the delay is not due to the applicant's neglect), considers claims not presented in the original or amended petition waived, and limits the subject matter of post-conviction jurisdiction to claims of substantial denial of rights under the United States or Illinois constitutions. *Id.* § 122-1, -3.

28. *Cf.* Note, *supra* note 17, at 433 (referring to this as the problem of waiver).

29. 372 U.S. 391 (1963).

30. *Id.* at 399. The standard used is an extension of the waiver standard developed in Johnson v. Zerbst, 304 U.S. 458 (1938).

31. 372 U.S. at 433.

32. *See* Humphrey v. Cady, 405 U.S. 504, 516-17 (1972).

problems as jurisdictional and time limitations.[33] From the state's standpoint, such a system offers both advantages and disadvantages. On the positive side, it allows that state's procedural network to remain internally pure and consistent. This system not only permits the state to maintain its well-regulated criminal procedure,[34] it also allows the state an enormous amount of control over the timing of constitutional claims which can be permitted only at particular times during litigation. State courts have an interest in having these claims raised and finally adjudicated as quickly as possible. Lengthy delays decrease the accuracy of the fact finding process while making it more difficult to convict a second time should the first conviction be invalidated due to constitutional error.[35]

In *Fay v. Noia*, the Supreme Court recognized the importance of the state's autonomy[36] and the state interest protected by a forfeiture system;[37] in fact, this understanding became part of the concern for comity that underlies the federal court policy of abstention from interference with the states' regulation of criminal justice so long as federal constitutional rights are not thereby weakened.[38] To advance this concern further, the federal courts will enforce such forfeitures themselves if the habeas applicant is found to have deliberately bypassed his state remedies for strategic or tactical reasons.[39] If the state forfeiture rule prevents the state courts from hearing the claim of an applicant who has unintentionally or ignorantly failed to utilize state remedies that are no longer available to him,[40] the federal court will, of course, be forced to hold a full evidentiary hearing on the case.[41]

One disadvantage of a strict forfeiture rule on the state level is that the internal autonomy created is limited and comes at a very high

33. These problems consist of the denial of the federal concerns discussed in the text accompanying notes 17-22 *supra*.

34. *See* State v. White, 274 N.C. 220, 229-30, 162 S.E.2d 473, 478-79 (1968); *cf. Developments*, *supra* note 18, at 1094 (federal/state comity considerations include same concern).

35. Note, *supra* note 17, at 433-34 (1966); *see* Note, *State Post-Conviction Remedies and Federal Habeas Corpus*, 40 N.Y.U. L. REV. 154, 161 (1965).

36. 372 U.S. at 419.

37. *Id.* at 431-32.

38. *See* note 17 and accompanying text *supra*.

39. 372 U.S. at 439.

40. For a limited restriction of the application of the understanding and voluntary waiver rule of *Fay*, see Francis v. Henderson, 96 S. Ct. 1708 (1976).

41. *Fay* also held that the exhaustion of state remedies doctrine applies only to state remedies still available at the time the habeas writ is filed. 372 U.S. at 435. Therefore the failure of a habeas applicant to utilize state remedies in the past will not bar habeas corpus consideration.

price. Though the state retains the right to deny relief to any prisoner who has failed to follow the state's procedural rules, and thereby may gain a feeling of independence and full control of the prisoner, it has in fact left many constitutional claims wholly in the lap of the federal court system. Under the forfeiture rule the state courts will be free from the stigma of federal court review of their decisions,[42] but will forego their opportunities to take an active role in the growth and formulation of federal constitutional law[43] as well as their obligation under the supremacy clause[44] and the principles of federalism to enforce the Constitution.[45] The freedom gained is merely that of roaming at will through a severely confined space.

The advantages of this apparent state autonomy are far outweighed by other factors: the strain in federal/state regulations created when the federal courts are forced to hold hearings they feel are more appropriately held at the state level,[46] the increased delay in final adjudication, the state's loss of its proper role in the process of adjudication of federal rights, and the loss of the effectiveness of the forfeiture rule as a way of forcing prisoners to abide by state procedures.[47] For these reasons the most effective and sensible state post-conviction procedures are those that grant jurisdiction as broad as federal jurisdiction of habeas corpus petitions and follow the federal waiver principles.[48]

POST-CONVICTION RELIEF IN NORTH CAROLINA

The majority of states that have some form of statutory post-conviction procedure do not permit a prisoner to use that procedure to

42. Federal court review is a sore point with many state courts. It seems to offend the feeling of the state courts that their supremacy in their own sphere should make them wholly independent and untouchable in their decisions. *See id.* at 446-47 (Clark, J., dissenting); Note, *supra* note 17, at 423.

43. Note, *supra* note 17, at 437-38.

44. U.S. CONST. art. VI, para. 2 provides:

> This Constitution, the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

45. Wright & Sofaer, *supra* note 17, at 899. For a good discussion of whether the state could be required to grant post-conviction review commensurate with the scope of federal habeas corpus under the supremacy clause, see Note, *supra* note 17, at 435-37. The Supreme Court declined to decide this question in Case v. Nebraska, 381 U.S. 336 (1965) (per curiam).

46. *See* text accompanying notes 17-22 *supra.*

47. Note, *supra* note 17, at 437.

48. ABA STANDARDS, *supra* note 23, at 19-20; Note, *supra* note 17, at 428-38; Note, *State Post-Conviction Remedies and Federal Habeas Corpus*, 40 N.Y.U. L. REV. 154, 167-69 (1965).

raise any issue that could have been raised on direct appeal.[49] North Carolina is among those states so limiting post-conviction relief. The limitation comes not from the statute itself but from judicial construction of the statute. The original version of the North Carolina Post-Conviction Hearing Act was enacted in 1951[50] and followed the pattern of the Illinois Post-Conviction Hearing Act.[51] The Act was rewritten and broadened considerably in 1965,[52] and exists in roughly the same form at present.[53] The grounds required to activate the

49. Each of the fifty states has some form of statutory post-conviction relief. Statutory writs of habeas corpus are found in: ALA. CODE tit. 15, §§ 1-43 (1958); ARIZ. REV. STAT. ANN. §§ 13-2001 to -2027 (1956); CAL. PENAL CODE §§ 1473-1508 (West 1970 & Supp. 1975); CONN. GEN. STAT. ANN. §§ 52-466 to -468, -470 (West Supp. 1976); HAW. REV. STAT. §§ 660-3 to -32 (Supp. 1975); LA. CODE CRIM. PRO. ANN. arts. 351-376 (West 1967); MASS. ANN. LAWS. ch. 248, §§ 1-34 (Michie/Law. Co-op 1974); MISS. CODE ANN. §§ 11-43-1 to -55 (1972); N.H. REV. STAT. ANN. §§ 534:1 to :32 (1974); N.J. STAT. ANN. § 2A: 67 (West 1976); TEX. CODE CRIM. PROC. ANN. art. 11.01-.64 (Vernon 1966); VA. CODE §§ 8-596 to -609 (1957 & Cum. Supp. 1976); WASH. REV. CODE ANN. §§ 7.36.010 to .250 (1961).

Post-conviction statutes are codified in ALAS. R. CRIM. P. 35 (Supp. 1968); ARK. R. CRIM. P. 1 (Supp. 1975); COLO. R. CRIM. P. 35 (1973); DEL. SUPER. CT. CRIM. R. 35 (1974); FLA. R. CRIM. P. 3.850 (1975); GA. CODE ANN. § 50-127 (1974 & Supp. 1976); IDAHO CODE §§ 19-4901 to -4911 (Cum. Supp. 1976); ILL. ANN. STAT. ch. 38, §§ 122-1 to -7 (Smith-Hurd 1973); IND. CODE ANN. P.C. Rule 1 (Burns 1973); IOWA CODE §§ 663A.1 to .11 (Supp. 1976); KAN. STAT. ANN. § 60-1507 (1976); KY. R. CRIM. P. 11.42 (1972); ME. REV. STAT. ANN. tit. 14, §§ 5502-5508 (1964); MICH. STAT. ANN. §§ 27A.4301 to .4316 (1962); MINN. STAT. ANN. §§ 590.01-.06 (West Supp. 1976); MO. ANN. STAT. §§ 532.400-.710 (Vernon 1953); MONT. REV. CODES ANN. §§ 95-2601 to -2608 (1969); NEB. REV. STAT. §§ 29-3001 to -3004 (1975); NEV. REV. STAT. §§ 177.315-.385 (1973); N.M. STAT. ANN. § 41-23-57 (Supp. 1975); N.Y. CRIM. PROC. LAW § 440.10 (McKinney 1971); N.C. GEN. STAT. §§ 15-217 to -222 (1975); N.D. CENT. CODE §§ 29-32-01 to -10 (1974); OHIO REV. CODE ANN. §§ 2953.21-.24 (Page 1975); OKLA. STAT. ANN. tit. 22, §§ 1080-1088 (West Supp. 1976); OR. REV. STAT. §§ 138.510-.680 (1975); PA. STAT. ANN. tit. 19, §§ 1180-1 to -14 (Purdon Supp. 1976); R.I. GEN. LAWS §§ 10-9.1-1 to -7 (Supp. 1976); S.C. CODE §§ 17-601 to -612 (Supp. 1975); S.D. COMP. LAWS ANN. §§ 23-52-1 to -19 (Supp. 1976); TENN. CODE ANN. §§ 40-3801 to -3812 (1975); UTAH CODE ANN. Rule 65B(i) (Supp. 1975); VT. STAT. ANN. tit. 13, §§ 7131-7137 (1974); W. VA. CODE §§ 53-4A-1 to -11 (Cum. Supp. 1976); WIS. STAT. ANN. § 974.06 (West 1970); WYO. STAT. ANN. §§ 7-408.1-.8 (Supp. 1975). Thirty-four of these states place some sort of forfeiture restriction on the use of the statutory remedy. 24 C.J.S. *Crim. Law* § 1606(9)(b) (1961 & Supp. 1976).

50. 1951 N.C. Sess. Laws ch. 1083, § 1.

51. The present version of the Illinois Act is found in ILL. ANN. STAT. ch. 38, § 122 (Smith-Hurd 1973).

52. 1965 N.C. Sess. Laws ch. 352, § 1.

53. N.C. GEN. STAT. § 15-217 (1975) provides:

> **Institution of proceeding; effect on other remedies.**—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 Department of Correction, who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of North Carolina or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of

remedy are similar to the grounds for federal habeas corpus jurisdiction under 28 U.S.C. section 2255[54] or those of the Uniform Post-Conviction Procedure Act,[55] which purports to create a remedy "fully as broad as habeas corpus."[56] Though no legislative history was kept, at least one commentator felt that the creation of such a broad remedy was the purpose of the North Carolina legislature in the writing of the Act.[57] The 1965 revision also added a second paragraph to section 15-217 that states that the new procedure does not affect or replace any remedy of direct review.[58] The wording of the section does not, however, give any indication of a forfeiture of remedy to be imposed for failure to utilize those direct remedies.

In *State v. White*,[59] despite the realization that the petitioner's failure to raise his constitutional issue on direct appeal would not bar him from federal habeas corpus relief,[60] the North Carolina Supreme Court[61] stated that petitioner's procedural default in the state court system of direct review worked a forfeiture of his rights to collateral review under the Post-Conviction Hearing Act.[62] Reviewing

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alleged error heretofore available under a writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy, as to which there has been no prior adjudication by any court of competent jurisdiction, may institute a proceeding under this Article.

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.

Section 15-217.1 provides for the manner of filing and hearing of the post-conviction petition. Section 15-218 describes the contents of the petition, and states that the applicant waives any constitutional claim not alleged in the original or amended petition. Section 15-219 waives court costs and provides counsel for indigent prisoners. Section 15-220 allows the district attorney 30 days to answer, allows withdrawal or amendment of the petition, and provides for payment for the trial records of indigent prisoners. Section 15-221 describes the post-conviction hearing itself. Section 15-222 provides for appeal of the post-conviction judgment upon application for a writ of certiorari to the North Carolina Court of Appeals.

54. *See* note 26 *supra.*

55. 11 UNIFORM LAWS ANN. 477 (1974).

56. *Id.* at 486 (Commissioners' Comment).

57. Note, *Habeas Corpus—New Post-Conviction Hearing Act*, 44 N.C.L. REV. 153 (1965).

58. For wording of the statute see note 53 *supra.*

59. 274 N.C. 220, 162 S.E.2d 473 (1968).

60. *Id.* at 229, 162 S.E.2d at 478.

61. Review of post-conviction procedures was performed by the North Carolina Supreme Court until October 1, 1967. *See* notes 66-69 and accompanying text *infra.*

62. 274 N.C. at 232, 162 S.E.2d at 480. For a forerunner of *White* in regard to the original statute, see Miller v. State, 237 N.C. 29, 74 S.E.2d 513, *cert. denied*, 345 U.S. 930 (1953).

the federal habeas corpus procedures set out in *Fay* and *Townsend*, the court suggested that a federal judge's discretionary ability to disregard the state findings as unreliable and relitigate the issue eliminates the necessity for state court adjudication of all constitutional errors.[63] The North Carolina Supreme Court therefore seems unwilling to enforce federal law and share in the habeas corpus function of the federal courts. *White* placed a clear limitation on the Post-Conviction Hearing Act: the Act could be used to adjudicate only those constitutional deprivations that petitioner was prevented from raising earlier due to factors beyond his control.[64]

Until 1967 North Carolina's post-conviction procedure was similar to that of other states utilizing a strict forfeiture rule.[65] The situation became unique when the 1967 Session of the North Carolina General Assembly created the North Carolina Court of Appeals,[66] and transferred the final review of post-conviction procedures to that court.[67] After October 1, 1967, post-conviction hearings could be reviewed only upon application for writ of certiorari to the court of appeals; these hearings were the only type of case for which court of appeals review was the final adjudication.[68] Further, the post-conviction hearings present the only situation in which appeals to the court of appeals are not granted as a matter of right.[69]

This procedural change has made it difficult if not impossible to modify judicially the interpretation placed on the Post-Conviction Hearing Act by *State v. White*. The court of appeals, as a lower appellate court, cannot overturn a supreme court decision, but the supreme court is unable to modify its own holding since it no longer reviews post-conviction cases. The court of appeals seems to deal with this situation by deciding cases on non-*White* grounds whenever it is possible to do so.[70] Frequently this is accomplished by refusing relief

63. 274 N.C. at 229, 162 S.E.2d at 479.

64. *Id.* at 226-27, 162 S.E.2d at 477 (quoting Miller v. State, 237 N.C. 29, 51, 74 S.E.2d 513, 528-29 (1953)).

65. *See, e.g., In re* Sterling, 63 Cal. 2d 486, 407 P.2d 5, 47 Cal. Rptr. 205 (1965). *See also* 24 C.J.S. *Crim. Law* § 1606(9)(b) (1961).

66. 1967 N.C. Sess. Laws ch. 108.

67. 1967 N.C. Sess. Laws ch. 108, § 7A-28; *id.* ch. 523.

68. *Id.* ch. 108, § 7A-28. *See* Steed, *The North Carolina Court of Appeals—An Outline of Appellate Procedure*, 46 N.C.L. REV. 705, 709 (1968).

69. Steed, *supra* note 68, at 724.

70. The court of appeals has cited *White* only four times. Of these, only one citation was in reference to the forfeiture standard set forth in that case. *See* State v. Bell, 14 N.C. App. 346, 349, 188 S.E.2d 593, 595 (1972). Even this one usage of *White* was in a situation where the forfeiture it created did not restrict the remedy

on the ground that no substantial constitutional question was raised rather than facing the forfeiture issue raised by *White*.[71] In one case[72] the court of appeals went so far as to order a remand to the trial court, which had held the post-conviction hearing, to make a finding of fact on the substantiality of petitioner's claim that his guilty plea was involuntary.[73] This decision is not erroneous, but it circles the jurisdictional issue of the substantiality of the constitutional claim in order to avoid confronting the fact that *State v. White* might deny jurisdiction automatically for failure to allege coercion on direct appeal.

While the court of appeals' reluctance to follow the rule of *White* appears to minimize the problem presented by the case, in fact this reluctance creates a more formidable obstacle. With *White* on the books superior court judges feel bound to follow it; they are unlikely to be swayed from their refusal to grant post-conviction relief on the ground that the court of appeals seems to ignore the *White* decision. The confusing conflict of *White* and the court of appeals cases makes it difficult for criminal defendants to judge which forum (federal or state) should properly receive their constitutional claims. The existence of *White* also creates a temptation in the trial courts to follow the lead of the court of appeals and decide that no substantial constitutional violation exists so as to avoid the forfeiture problem created by the presence of such a violation. Finally, the discretionary nature of the appeals process in these cases induces the court of appeals to avoid deciding any case raising an unavoidable forfeiture question under *White*.

REFORM OF NORTH CAROLINA PROCEDURE

The *White* decision, then, is not only the product of an unwise and unworthy attempt on the part of the North Carolina Supreme Court to avoid the appropriate role of the North Carolina state courts in the

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further than federal habeas corpus would have. Post-conviction relief could as well have been denied in that case under the voluntary waiver rule of *Fay*. Further, the use of *White* in *Bell* was actually part of a secondary or alternate holding. The primary holding of the case was that defendant's claimed deprivation was so insubstantial as to constitute harmless error. *Id.*

71. *See, e.g.*, State v. Smith, 8 N.C. App. 348, 174 S.E.2d 651 (1970); Dixon v. State, 8 N.C. App. 408, 174 S.E.2d 683 (1970). As there is no post-conviction jurisdiction under § 15-217 and *White* unless a defendant is claiming under a constitutional ground that is substantial and that could not have been raised previously, cases decided in the absence of either of these criteria are correctly decided.

72. Battle v. State, 8 N.C. App. 192, 174 S.E.2d 299 (1970).

73. *Id.* at 195-96, 174 S.E.2d at 301-02.

adjudication of federal constitutional questions;[74] it is an error that, through a procedural fluke, has achieved the unique status of a seemingly immutable precedent. The unfortunate consequence is that it will be extremely difficult to correct this error so that the North Carolina court system can once more exercise its power and autonomy as final fact finder for consideration of the constitutional propriety of the convictions of state prisoners.

Change might be accomplished in one of three ways: first, the court of appeals could reverse the supreme court's decision in *White*. It is arguable that the lower court could do so since they are the final arbiters of post-conviction matters.[75] Such action, however, would violate the standard rules of *stare decisis* and might not be effective due to the misleading nature of a record in which an inferior court has "overruled" the case law of a higher court. Second, the supreme court could consider one post-conviction case in order to overturn the *White* decision. It is possible that some extraordinary writ might be used for this purpose. The highly unusual nature of this remedy, though arguably appropriate in this situation, makes it unlikely that it will be utilized. Further, the supreme court would have to circumvent the fact that the court of appeals is statutorily designated as the court of last resort in such cases.[76] Finally, the statute could be amended to bar the forfeiture doctrine expressed by *White*. This possibility is the most likely and the most effective of the solutions. Although the statute itself seems to present a remedy as extensive as federal habeas corpus, the only way to allow the statute to operate as intended is to amend it expressly to exclude only constitutional deprivations that the applicant knowingly and voluntarily failed to raise on appeal for strategic or tactical purposes.[77]

CONCLUSION

Without a legislative amendment or extraordinary judicial action, the North Carolina criminal justice system will remain a captive of its own procedure. The system will be unable to change, and therefore unable to shape and control the changes in the administration of criminal justice that future conditions may warrant. The result will be a permanent inability to live up to the potential of the North Carolina

74. *See* text accompanying notes 42-45 *supra*.
75. *See* sources cited in note 68 and accompanying text *supra*.
76. N.C. GEN. STAT. § 7A-28 (1969).
77. *See* sources cited in notes 29-32 and accompanying text *supra*.

Post-Conviction Hearing Act, and a permanent strain in state and federal court relations as the federal courts repeatedly discover that "no hearing of any sort was accorded petitioner . . . in the courts of North Carolina despite a modern and enlightened procedural machinery adequately designed to determine the basis of historical facts underlying constitutional questions and to review such questions."[78]

ELLEN KABCENELL WAYNE

Criminal Procedure—United States v. Santana: A Reinterpretation of the Katz Reasonable Expectation of Privacy Test

In its application of fourth amendment protection against unreasonable searches and seizures[1] the United States Supreme Court has become increasingly sensitive to the policies that are the foundation of that amendment since the appearance of the "reasonable expectation of privacy" standard in *Katz v. United States*[2] in 1968. *Katz* represented a philosophical shift in the Court's approach to governmental intrusions into citizens' lives, moving the focus from the location and structural components of the area invaded toward a more flexible and somewhat subjective standard that requires an examination of circumstances in which an individual may justifiably rely upon an expectation of privacy.[3]

In the recent case of *United States v. Santana*[4] the Court appears to have misread and misapplied the *Katz* standards. Officers of the Philadelphia Narcotics Squad, acting on probable cause but without a warrant, had driven to defendant Santana's residence and, finding her in her doorway, proceeded to arrest her. The Court found that San-

78. Anderson v. North Carolina, 221 F. Supp. 930, 931 (W.D.N.C. 1963).

1. The full text of the amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

2. 389 U.S. 347 (1968). The phrase "reasonable expectation of privacy" comes from Justice Harlan's concurring opinion. *Id.* at 361; *see* note 51 *infra.*

3. 389 U.S. at 352-53.

4. 96 S. Ct. 2406 (1976).