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Constitutional Law - Due Process of Law - Proposed Uniform Post Conviction Procedure Act for North Dakota

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NOTES

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—PROPOSED UNIFORM POST CONVICTION PROCEDURE ACT FOR NORTH DAKOTA.—Under the common law a person convicted of crime had two remedies for challenging the validity or correctness of his conviction. Habeas corpus was available to question the jurisdiction of the convicting court over the person charged with crime or over the offense itself.[1] Another remedy, coram nobis, was used to set aside a judgment and to grant a new trial, by correcting an error of fact which would have prevented conviction had it been known to the court and the accused at the trial.[2] Neither of these remedies were substitutes for direct review.[3] The scope of the guaranteed protection of habeas corpus is as broad in the United States as it was under common law,[4] and in some jurisdictions it has been expanded by statute.[5] However, coram nobis has declined in significance, being preserved only in a few states.[6]

Most states have added various other post-conviction remedies intending to preserve or improve upon the common law protection afforded to persons convicted of crime.[7] Occasionally, the resultant complication of state post conviction remedies, in conjunction with the federal doctrine of exhaustion of state remedies, has seriously deterred claims of denial of due process.[8] This doctrine requires the pursuit of all available state remedies before a claimed denial of due process can be brought before the United States Supreme Court.[9]

The small number of cases in North Dakota in which a denial of due process is claimed requires that the post-conviction statutes and practices of other jurisdictions be reviewed to illustrate the inherent weaknesses of post-conviction remedies in North

1. Habeas Corpus Act, 31 Car. 2, c. 2 (1679). See 10 Halsbury, Laws of England § 99 (1909).
2. People v. Walton, 10 Cal. App. 2d 413, 51 P.2d 1117 (1935) (dictum).
3. 10 Halsbury, Laws of England § 101 (1909).
4. N.D. Const. art. 1, § 5; N.D.Rev Code §32-2217 (1943).
5. See 28 U.S.C. § 2255 (Supp. 1953); Ill. Ann. Stat. c. 38, §§ 826-832 (Smith-Hurd Supp. 1955); N. C. Gen. Stat. §§15-217—222 (1953).
6. People v. Smith 296 Ill.App. 636, 15 N.E.2d 604 (1938); Hawk v. State, 151 Neb. 717, 39 N.W.2d 561, 565 (1949) (dictum); Bojinoff v. People, 299 N.Y. 145, 85 N. E.2d 909 (1909).
7. *E.g.* Minn. Stat. § 547.01 (1946) (new trial); Minn. Stat. § 606.01 (1946) (certiorari).
8. Huffman v. Alexander, 197 Ore. 283, 253 P.2d 289, 290 (1953) (The defendant was sentenced to three years in the penitentiary. He served his term and was released more than two months before the Oregon Supreme Court was able to decide that the defendant should have been released on habeas corpus.)
9. *Ex parte* Hawk, 321 U.S. 114, (1944); Mohler v. State of Michigan, 216 F.2d 675 (6th Cir. 1954); Kramer v. State of Nevada, 122 F.2d 417 (9th Cir. 1941).

Dakota.[10] The practice of Illinois courts under their former statutory remedies offer the best example of a breakdown of conventional post-conviction remedies.[11] In addition, the use of the new Illinois Post-Conviction Hearing Act best shows the effect of a statute embracing the expanded concept of substantive and procedural due process first announced in *Powell v. State of Alabama.*[12] The improved federal post-conviction remedy will be discussed, since it is the basis of the Uniform Post-Conviction Act and other expanded state post-conviction remedies.[13] Finally, the proposed Act will be outlined to show how criminal process in North Dakota would be affected by its adoption.

Following the decision of *Powell v. State of Alabama,* the United States Supreme Court has stated that states must give persons convicted of a crime some clearly defined method by which they may claim denial of fundamental rights[14] and they must give a convicted person an opportunity to question the intrinsic fairness of a criminal process even though it appears proper on the record.[15] These fundamental rights include the assistance of counsel during questioning, arraignment and trial;[16] confrontation of prosecuting witnesses;[17] freedom from use of coerced confessions;[18] and freedom from systematic exclusion of defendant's race from the jury.[19] The asserted denial of Due Process is to be tested by all the facts in a given case.[20]

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10. See State v. Whiteman, 67 N.W.2d 599 (N.D. 1954); State v. Malnourie, 67 N.W. 2d 330 (N.D. 1954); State v. Magrum, 76 N.D. 531, 38 N.W.2d 358 (1949). A survey was made by the author to determine the incidence in North Dakota of petitions for the writ of habeas corpus and of motions for new trial based on facts outside the record. The cooperating States Attorneys of five selected counties reported that during the calendar years 1950 through 1955 there were approxmately 3,593 criminal prosecutions resulting in conviction. They also reported that during those years there were *no* petitions for the writ of habeas corpus based on criminal convictions and only one motion for new trial based on facts outside the record.

11. See Marino v. Ragen, 332 U.S. 561 (1947).

12. 278 U.S. 45 (1932).

13. 28 U.S.C. § 2255 (Supp. 1952); Ill. Ann. Stat. c. 38, §§ 826-832 (Smith-Hurd Supp. 1955); N.C. Gen. Stat. §§ 15-217—222 (1953). Uniform Post Conviction Procedure Act, Handbook of the National Conference of Commissioners on Uniform State Laws 202-215 (1955). Copies of this Act may be obtained from:
National Conference on Uniform State Laws,
1155 East Sixtieth Street,
Chicago 37, Illinois.

14. Young v. Ragen 337 U.S. 235, 239 (1948) (dictum).

15. Carter v. Illinois, 329 U.S. 173, 175 (1946)(dictum).

16. N.D. Rev. Code § 29-1303 (1943)(In North Dakota the right of assignment of counsel springs from the statute and not from the constitution.)

17. United States v. Keown, 19 F. Supp. 639 (W.D. Ky. 1937).

18. Brown v. Mississippi, 279 U.S. 103 (1936); McNabb v. United States, 318 U.S. 332 (1943) (Holding that confessions obtained from defendants after fourteen hours of contious questioning without benefit of counsel or friends were coerced and therefore inadmissible against them.)

19. Powell v. State, 61 Okla.Crim.App. 267, 63 P.2d 113 (1936) (held, defendant could not require that members of his race be included on his specific jury)..

20. Betts v. Brady, 316 U.S. 455, 462, (1942)(dictum).

ILLINOIS POST-CONVICTION PROCEDURE

Prior to 1945, prisoners in the Illinois Penitentiary were required by order of the Warden to secure assistance of counsel before they could petition Illinois courts for a writ of habeas corpus.[21] Thus prisoners who could not afford counsel were, in effect, denied the writ. The validity of this regulation was questioned in *United States ex rel Bongiorno v. Ragen,*[22] and it was regarded as an exhaustion of the state remedies, because there was *no* remedy available. As an aftermath of this decision six hundred thirty-eight petitions alleging deprivation of constitutional rights were brought before the Illinois courts within three years.[23] Many of these petitions were subsequently appealed to the United States Supreme Court;[24] however nearly all of them were denied on the ground that the petitioner had not exhausted the state remedies.[25] At that time, there were three Illinois remedies which prisoners could utilize. The first was habeas corpus, which was an independant remedy solely to challenge convictions in excess of a court's jurisdiction.[26] The second, was statutory coram nobis, which was available where new facts were presented which if known to the court would have prevented conviction.[27] The third, was a writ of error which could be used to correct items appearing on the record.[28] The three remedies had one factor in common. None of them could be used to disprove recitals of procedural due process appearing in the record.[29] Clearly not in all cases do these remedies satisfy the requirements of the broadened concept of Due Process of Law enunciated in the *Powell* case.

The inadequacy of these remedies is demonstrated by a review of several typical cases which reached the United States Supreme Court after *United States ex rel Bongiorno v. Ragen.* The first of these cases was a habeas corpus proceeding for failure to provide an attorney who would perform his duties for the accused.[30] The petition had been denied by the Illinois Supreme Court without

21. United States ex rel Bongiorno v. Ragen, 54 F.Supp. 973 (N.D. Ill. 1944); *aff'd,* 146 F.2d 349 (7th Cir. 1944).
22. 54.F.Supp. 973 (N.D. Ill. 1944).
23. Marino v. Ragen, 332 U.S. 561, 563 (1947) (dictum) (Petitions to the United States Supreme Court from Illinois during 1945, 1946, and 1947 alleging deprivation of due process in criminal procedure represent slightly more than half of the total of such petitions to the Supreme Court from all the states during those years.)
24. *E.g.* White v. Ragen, 324 U.S. 760 (1945); Woods v. Nierstheimer, 328 U.S. 211 (1946).
25. White v. Ragen *supra* note 24.
26. People v. Loftus, 400 Ill. 495, 81 N.E.2d 495, 498 (1948) (dictum).
27. Ibid.; People v. Tuohy, 397 Ill. 19, 72 N.E.2d 827 (1947).
28. People v. Loftus, *supra* note 26.
29. Ibid.
30. White v. Ragen, 324 U.S. 760 (1945).

opinion, apparently because an issue of fact was presented. Certiorari was granted by the Supreme Court, but the petition was denied on the respondent's claim that Illinois law did not allow issues of fact to be brought in an action for writ of habeas corpus, the proper remedy being coram nobis.[31] Another case was on petition for writ of error based on the common law record.[32] The petition to the Supreme Court of the United States was denied on the ground that the Illinois Supreme Court had held that the alleged deprivation of due process could not be proven on writ of error and that the petitioner should have used the other remedies provided.[33] Another case, *Marino v. Ragen*,[34] was appealed from an Illinois Circuit Court decision denying a petition for writ of habeas corpus. The Supreme Court vacated the judgment because the decision was not appealable to the Illinois Supreme Court, hence, the petitioner had been denied Due Process of Law. Each of these examples of the many cases seems proper when viewed alone. However, when considered together with the multitude of other appeals from Illinois courts they illustrate the marked tendency of those courts to submit to the recurring argument of the prosecution, that the petitioner should have utilized some other remedy.[35] Prisoners were thus forced to thread uncertainly through extended procedures before gaining the right to a federal hearing. The dilatory action of Illinois officials nearly caused the assumption by federal courts of jurisdiction in such cases without requiring prior exhaustion of Illinios remedies.[36]

Shortly after the decision of *Marino v. Ragen*, Illinois passed its present Post-Conviction Hearing Act,[37] which is patterned after the federal post-conviction statute.[38] These statutes as well as a similar North Carolina Act passed in 1951,[39] provided the foundation for the Uniform Post-Conviction Procedure Act. The present Illinois statute provides that the new and additional remedy is original and independent, and allows facts to be alleged which are outside the record, but which tend to show that the prisoner was deprived of

31. Id. at 767.
32. See Foster v. Illinois, 332 U.S. 134 (1947).
33. See note 32 *supra*.
34. 332 U.S. 561 (1947).
35. See Marino v. Ragen, 332 U.S. 561,568 (dictum) (Charactarizing Illinois precedures as described by the respondent Attorney General as a labyrinth of blind alleys, useful only in convincing the federal courts that the petitioners had used the wrong remedy.)
36. Id. at 570 (stating that the doctrine of exhaution of state remedies should not be stretched to require pursuit of the ineffective and inadequate remedies of Illinois.)
37. Ill. Laws (1949) p. 722, Ill. Ann. Stat. c. 38, §§ 826-832 (Smith-Hurd Supp. 1955)
38. 62 Stat. 967 (1948), as amended, 63 Stat. 105 (1949), 28 U.S.C. § 2255 (Supp. 1952).
39. N.C. Laws c. 1083, § 1 (1951), N.C. Gen. Stat. §§ 15-217-22 (1953).

some fundamental right. Unlike the prior remedy of habeas corpus the action is res judicata, but subject to review by the Illinois Supreme Court.[40] Thus Illinois has solved a procedural dilemma affecting hundreds of petitioners.[41] The dockets there are still crowded with petitions brought under the new procedure.[42] A reason assigned for the superficial failure of the statute is that the remedy should have been made exclusive rather than additional.[43] The proposed Uniform Law assumes the recommended form.[44]

NORTH DAKOTA POST-CONVICTION REMEDIES

Like Illinois remedies before enactment of the new procedure, the statutory North Dakota remedies of motion to set aside judgment and for new trial,[45] appeal and error,[46] habeas corpus,[47] and certiorari,[48] cannot except as specifically provided, question matters outside the record.[49] An additional "remedy" of a motion which is in the nature of coram nobis, has been allowed only three times in the form of a motion to set aside judgment where the grounds were fraud and duress.[50] The motion is also available, "under such circumstances that the court was without jurisdicition."[51] It appears that this remedy is peculiar to North Dakota. Superior to all actions in the lower courts is the discretionary right of the North Dakota Supreme Court to exercise the constitutionally granted power of superintending control.[52] This power may be exercised in emergencies to avoid a serious miscarriage of justice, wherever there is no adequate and speedy remedy.[53] Thus North Dakota has the

40. Ill. Ann. Stat. c. 38, § 832 (Smith-Hurd Supp. 1955).
41. See Marino v. Ragen, 332 U.S. 561 (1947)
42. See U. Ill. L. Forum 481, 485 (1953).
43. Ibid.
44. Uniform Post Conviction Procedure Act § 1.
45. N.D. Rev. Code c. 29-24 (1943).
46. N.D. Rev. Code c. 29-28 (1943).
47. N.D. Rev. Code c. 32-22 (1943).
48. N.D. Rev. Code c. 32-33 (1943).
49. N.D. Rev. Code § 29-2402 (Supp. 1953).
50. State v. Whiteman, 67 N.W.2d 599 (N.D. 1954); State v. Malnourie, 67 N.W.2d 330 (N.D. 1954)(The defendants in the above cases were taken together to a place where it was suspected that the body of a murder victim had been hidden. In a effort to obtain confessions of guilt police officials threatened and struck the defendant, Malnourie, and tied the defendant, Whiteman, by his wrists to a winch and to a post, telling him that he, "had better talk or be torn apart."); State v. Magrum, 76 N.D. 527, 38 N.W.2d 358 (1949) (Coroner's inquest completed by 4:30 p.m. of the day after the alleged murder victim was found. By 9:00 p.m. of the *same* day the minor defendant, without benefit of counsel or friends, was en route to the penitentiary after being arraigned, tried and convicted on his confession obtained by threats and promises of police officials.).
51. State v. Magrum, 76 N.D. 527, 38 N.W.2d 358, 359 (1949) (dictum).
52. N.D. Const. art. 4, § 86; State *ex rel* Schafer v. District Court, 49 N.D. 1127, 194 N.W. 745 (1923).
53. State *ex rel* Johnson v. Broderick, 75 N.D. 340, 358, 27 N.W.2d 849, 859 (1947) ("In this state no appeal lies from a decision in a habeas corpus proceeding. But the action of a district court in such proceeding may be reviewed and controlled through the exercise of the power of superintending control even though the trial court has entered a final order discharging the petitioner.").

remedies of appeal and error, and certiorari which cannot look behind the record and must be taken within the statutory time limits allowed.[54] The remedy of a motion for new trial falls within the preceeding category with the exception that it allows the proof of certain facts outside the record.[55] The extraordinary remedy of habeas corpus must also be based on the record and can only challenge the jurisdiction of the convicting court,[56] however, it may be taken at any time.[57] Like its original Illinois counterpart,[58] North Dakota habeas corpus is not reviewable by the high court of the state.[59] Only a motion in the nature of coram nobis and a petition for the exercise of superintending control can regularly question proceedings outside the record.[60] It appears that the existing North Dakota post-conviction remedies, though somewhat different in form are fully as complicated as were those formerly obtaining in Illinois. In North Dakota actions by convicted persons based on denial of fundamental rights are rare.[61] When such claimed denials of rights can be found in the record the existing remedies are adequate. But where denial of due process cannot be shown by the record, or does not qualify as an exception to the requirement of record proof,[62] the convicted person claiming the denial faces an intricate procedural gauntlet as formidable as the late and condemned system of Illinois.[63]

FEDERAL POST-CONVICTION REMEDIES

Federal post-conviction appeals from state courts must be taken directly to the United States Supreme Court.[64] Federal habeas corpus is broader in scope than the corresponding remedies in most states.[65] Regularity in procedural allegations is not insisted upon;[66] and the allegations of the petitions are to be construed in

54. N.D. Rev. Code §§ 29-2806, 29-2808 (1943) (Six months is the maximum time regularly allowed on appeal and error); N.D. Rev. Code § 32-3301 (1943) (Certiorari may be granted at the discretion of the Supreme Court to prevent a miscarriage of justice).
55. N.D. Rev. Code § 29-2402, (1) (4) (7) (Supp. 1953).
56. *E.g. Ex parte* Moore, 71 N.D. 274, 300 N.W. 37 (1941).
57. N.D. Rev. Code § 32-2233 (1943).
58. Ill. Ann. Stat. c. 65, § 22 (Smith-Hurd 1936).
59. Carruth v. Taylor, 8 N.D. 166, 77 N.W. 617 (1898) (leading case); See note 53 *supra*.
60. State v. Magrum, 76 N.D. 527, 38 N.W.2d 358 (1949) (coram nobis); State *ex rel* Schafer v. District Court, 49 N.D. 1127, 194 N.W. 745 (1923) (superintending control).
61. See report of author's survey *supra* note 10.
62. See note 55 *supra*.
63. See Jenner, The Illinois Post-Conviction Hearing Act, 9 F.R.D. 347 (1950).
64. *Ex parte* Hawk, 321 U.S. 114, 117 (1944) (dictum) (When appeals to the United States Supreme Court have been exhausted habeas corpus will lie in federal district court.)
65. Waley v. Johnston, 316 U.S. 101, 105 (1942) (dictum).
66. Baker v. Ellis, 194 F.2d 865 (5th Cir. 1952).

the petitioner's favor.[67] "It extends also to those exceptional cases where the writ is the only effective means of preserving his rights."[68] The writ will lie when the time for appeal has expired,[69] except for impeachment of the record of conviction.[70] Nor will it lie to correct the record.[71]

A supplemental statute was enacted in 1948 which provides a simplified remedy to correct erroneous convictions without resort to habeas corpus.[72] It contains a special provision for appeals without cost to prisoners unable to pay; and is not restricted to an examination of the record. This statute is the basic post-conviction procedure statute from which the Illinois,[73] North Carolina[74] and Uniform post-conviction acts are derived. The Supreme Court has held that even the exhaustion or lapse of the above federal remedies will not preclude further action where sound reason exists for failure to seek earlier relief.[75] In those instances an action in the nature of coram nobis will lie to examine facts outside the record to determine whether the petitioner's fundamental rights have been protected.[76] Since the decision in *Powell v. State of Alabama,* which was directed primarily to state authority, Congress and the federal courts have diligently attempted to insure that every convicted person, indigent or not, will be assured of full and prompt Due Process of Law under the Fifth Amendment.[77] Apparently, the several states have been less diligent in securing the substantive constitutional rights of convicted persons, perhaps because they have not recognized the problem.

PROVISIONS OF THE UNIFORM POST-CONVICTION PROCEDURE ACT

The Uniform Law proposed by the National Conference of commissioners on Uniform States Laws and approved by the American Bar Association attempts to provide complete state protection

67. Anderson v. Eidson, 191 F.2d 989 (8th Cir. 1951)
68. See note 65 *supra.*
69. Johnson v. Zerbst, 304 U.S. 458 (1938).
70. Williams v. Huff, 146 F.2d 867 (D.C.App. 1945) (order discharging writ of habeas corpus reversed on other grounds.)
71. See 28 U.S.C. § 2255 (Supp. 1952) (This statute affords a method of correcting the record, making resort to habeas corpus for this purpose unwarranted.)
72. See note 71 *supra.*
73. Ill. Ann. Stat. c. 38 §§ 826-832 (Smith-Hurd Supp. 1955).
74. N.C. Gen. Stat. §§ 15-217—22 (1953).
75. United States v. Morgan, 346 U.S. 502 (1954) (Continued litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed only under circumstances compelling such action to achieve justice.).
76. *Id.* at 572.
77. See note 72, *supra;* Lisbena v. California, 314 U.S. 219 (1941) "As applied to a criminal trial denial of due process is the failure to observe the fundamental fairness essential to the very concept of justice."

of procedural and substantive Due Process of Law. The proposed act combines features of the Federal, Illinois and North Carolina post-conviction acts. "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 Act, 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. A petition for relief under this Act may be filed at any time."[78] Thus stated the Act would encompass the North Dakota remedies of habeas corpus,[79] and motion to set aside judgment and for new trial,[80] but it would not be a substitute for appeal and error[81] nor certiorari.[82] Under this Act an apparently perfect record does not bar the examination of allegations of denial of fundamental rights provable only outside the record.

Venue of the action is the place of conviction, and may be brought by persons with or without funds, who, at the discretion of the court need not appear. Under conventional habeas corpus statutes the petitioner is regularly required to be present at the hearing.[83] It appears that this requirement can be used by petitioners having groundless claims to obtain a free ride out of the penitentiary to the nearest court.[84] Several objectives are met by the provisions recited in this paragraph. First, the court at the place of confinement will only consider petitions which arise from its own proceedings, the remaining petitions being returned to the convicting courts. Second, the rights of indigent prisoners are protected, since the costs of such actions are chargeable to the county where judgment was rendered.[85] Third, an incentive for making harrassing repetitions and groundless petitions for writs of habeas has been removed, since a petitioner need not be present at his hearing.[86]

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78. Uniform Post-Conviction Procedure Act, § 1.
79. N.D. Rev. Code c. 32-22 (1943).
80. N.D. Rev. Code c. 29-24 (1943).
81. N.D. Rev. Code c. 29-28 (1943).
82. N.D. Rev. Code c. 32-33 (1943).
83. *E.g.* N.D. Rev. Code § 32-2212 (1943).
84. Dorsey v. Gill, 148 F.2d 857, 862 (D.C. App. 1945) (dictum) "The most extreme example is that of a person who, between July 1939 and April 1944 presented in the District Court 50 petitions for habeas corpus;" Mazakahomni v. State, 75 N.D. 73, 25 N.W.2d 772, 778 (1947)(dictum).
85. Uniform Post-Conviction Procedure Act, § 5.
86. See note 84 *supra*.

The Act further provides that petitioners must gather all the facts and documents, known to him, which support his claim and present them in this single action. Unless presented in the original petition all claims will be waived, except where new facts later arise of which petitioner could not reasonably have had knowledge. Final disposition of the petition is res judicata, and constitutes a final judgment for the purposes of review. This final judgment would be reviewable by the supreme court of the adopting state.[87] It will be observed that the Uniform Post-Conviction Procedure Act has been designed to insure a simple, speedy and effective means of raising and disposing of constitutional questions arising out of crimnial process.

CONCLUSION

The Uniform Post-Conviction Procedure Act appears to provide a fair and effective remedy to such persons as may fall victim to the error of state law enforcement officials and the courts. The provisions of the almost identical Illinois Post-Conviction Hearing Act have been fully tested and proved in recent Illinois and Supreme Court decisions.[88] The mandate of *Powell v. State of Alabama* requires that state courts provide Due Process of Law in fact as well as form. The substantive guarantees of fundamental rights cannot be insured where available post-conviction remedies only allow examination of facts found in the record,[89] or are restricted to particular or extraordinary facts found outside the record.[90] The laws of North Dakota as construed, are not adequate to give full application to the expanded concept of Due Process of Law as prescribed by the United States Supreme Court. North Dakota needs, and the Uniform Post-Conviction Procedure Act can provide, an effective antidote to the toxin of unconstitutional criminal prosecution regardless of the form in which it should appear.

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87. Uniform Post-Conviction Procedure Act §§ 7-9. (The waiver of claims not stated and res judicata character of the final order are designed to prevent groundless and repetitious claims of denial of due process. The final order is made reviewable by the adopting state's supreme court to provide a uniform and adequate state remedy.)

88. *E.g.* People v. Evans, 412 Ill. 616, 107 N.E.2d 839 (1952) (directing that pauper's petitions be liberally construed); People v. Dale, 406 Ill. 238, 92 N.E.2d 761 (1950) (upholding constitutionality of the Act). See also State v. Hackney, 240 N.C. 230, 81 S.E. 2d 778 (1954) (This is the third and latest North Carolina interpretation of its Post-Conviction Act.)

89. Carter v. Illinois, 329 U.S. 173, 175 (1946) (dictum).

90. See State v. Magrum, 75 N.D. 527, 38 N.W.2d 358 (1949) (fraud and duress).