POST CONVICTION RIGHTS AND REMEDIES IN WISCONSIN †

THOMAS E. FAIRCHILD*

In recent years the Wisconsin Supreme Court, like the courts of most of the states and the United States, has been called upon to deal with problems involving post conviction rights in many more cases than were typical of years past. This Article provides a good indication of the approach of the Wisconsin court, as interpreted by one of its members, to current issues in the post conviction area of criminal law. Justice Fairchild presents his views on the effectiveness of an appellate court when dealing with these issues. In some instances, particularly with respect to habeas corpus, he makes suggestions for improvement of post conviction procedures.

Criminal cases have heretofore accounted for only a small percentage of the decisions of the Supreme Court of Wisconsin. During the August 1962 Term (extending to August 1963), the court decided 240 reported cases, but only eleven were criminal actions. This has been fairly typical during recent years. Out of the criminal appeals the court has heard, very few have involved alleged deprivation of constitutional rights. This can be ascribed, I believe, to a high degree of conscientious observation of such rights by police, prosecutors, and trial courts in Wisconsin.

The number of criminal cases in our court for review is now burgeoning. Undoubtedly recent decisions of the Supreme Court of the United States, finding many state convictions to be based upon violations of the fourteenth amendment, have contributed to the increased activity, although only one of them appears to have made a major change in a rule of procedure in Wisconsin.

---

† This article is based upon the second August C. Backus Lecture in Criminal Law which was delivered by the Honorable Thomas E. Fairchild at the University of Wisconsin Law School on March 10, 1964.

The August C. Backus Lectures in Criminal Law are made possible by a gift in honor of the memory of Judge August C. Backus, University of Wisconsin Law Class of 1900, who had a distinguished career as a member of the practicing bar, as district attorney, and as judge of the most important criminal court in the State of Wisconsin, the municipal court of Milwaukee County. Judge Backus devoted the major part of his professional life to the improvement of the administration of criminal justice. He was largely responsible for the enactment of early probation laws and laws allowing the judge to appoint impartial psychiatric experts. It was therefore thought appropriate that lectures given in his name be in the field of criminal law administration.

* B.A. 1934, Cornell University; LL.B. 1937, University of Wisconsin; Attorney, Portage, Wisconsin, 1938-41; Attorney, United States Office of Price Administration, 1941-45; Attorney, Milwaukee, Wisconsin, 1945-48 and 1953-57; Attorney General of Wisconsin, 1948-51; United States Attorney, Western District of Wisconsin, 1951-52; Justice, Wisconsin Supreme Court since 1957.

This one is *Douglas v. California*,[1] which requires the states to furnish counsel to every indigent prisoner on at least that first appeal which is available to all as a matter of right. Other decisions invalidating convictions and therefore suggesting that there is a real chance for a successful challenge have surely encouraged prisoners to seek review.[2] Thus, although these decisions have made little change in the form of rules which have been followed in Wisconsin,[3] the knowledge that the highest Court will closely review each application of the rules, and will make its own determination of such "constitutional facts" as the voluntary character of a confession, spurs state courts, including ours, to very careful review of criminal cases.

Perhaps a word or two would be appropriate on the philosophy with which one approaches a claim that a criminal conviction is vitiated because of an alleged violation of constitutional rights. I am sure that individual judges vary widely in their attitude toward these problems, and some of the division of opinion in decided cases reflects this difference.

On the one hand, a judge recognizes the public interest in law enforcement. I happen to believe in the theory that a high degree of certainty of detection and conviction is a greater deterrent to criminal conduct than severity of sentence. Moreover, society has an interest in any possible rehabilitation of an offender that can be accomplished while he is in custody. Each release of an apparently guilty person for a defect in procedure necessarily tends to detract from widespread public belief in certainty of punishment for crime. Every release of a guilty individual is likely to delay or destroy whatever rehabilitation our penal system may be able to accomplish. Furthermore, any legitimate criticism of our penal system and its rehabilitative effect should encourage improvement of the system rather than provide a motive to free a prisoner by finding error in his conviction.

On the other hand, the public certainly has an interest in the scrupulous observance by police, prosecutors and courts of due process standards of fair procedure, and the only way to preserve such standards for innocent persons erroneously accused is to require their observance for all. Firm insistence in every case on rules of propriety and fairness, constitutional and otherwise, goes a long way toward guaranteeing the safety of all individuals, lovely or unlovely, from conviction and punishment for crimes they did not commit.

In close cases, a court is confronted with the difficult question whether to make the decision so as to deter questionable practices

---

[1] 372 U.S. 353 (1963).

[2] *E.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).

[3] *But see* Jackson v. Denno, 378 U.S. 368 (1964), requiring a change in the manner of determining whether a confession was voluntary.

of enforcement officials in similar circumstances in the future, or to uphold the particular conviction at hand so as to provide an example of the certainty of detection and prosecution as a deterrent to future crimes. All that can be said is that, faced by this dilemma, some judges will place a much higher value than others upon the disciplinary effect a decision in favor of the accused will have upon enforcement officials.

In my experience as a member of the Supreme Court of Wisconsin, it is rare that in ordering the release of a convicted prisoner, or in ordering a new trial, we can take any satisfaction from the thought that we have freed an innocent person. Usually I suspect we have freed, or given a second chance, to a guilty individual. The justification is, and must be, that the court is enforcing in this manner rules of fair procedure which, if steadfastly maintained, will prevent injustice to others. This service to the principles of our society far outweighs the disservice which may result from turning loose someone who has little concern for the rights of others.

CHALLENGES TO CONVICTION AND SENTENCE

Appeal or Writ of Error

Any defendant, convicted of an offense in circuit court or convicted of a felony in county court, may obtain, within one year after judgment, a writ of error out of, or take an appeal to, the supreme court.[4] Review of the conviction by appeal differs only in form from review by writ of error. Either type of review is confined to the record, and is the only permissible review for errors other than those which either nullify the jurisdiction of the trial court, or constitute a deprivation of fundamental constitutional rights.[5]

Appeals from justice court and county court in misdemeanor cases lie to the circuit court.[6] Apparently a writ of error out of the supreme court will not lie to review the judgment of the county court in a misdemeanor case because appeal to circuit court is available.[7]

The question of whether there should be review of sentences imposed in criminal cases, in the interests of reasonable uniformity, has recently received attention.[8] The Federal Rules of Crimi-

---

[4] WIS. STAT. §§ 958.11, .13 (1963).

[5] *Cf.*, WIS. STAT. § 292.02 (1963); Kushman v. State *ex rel.* Panzer, 240 Wis. 134, 2 N.W.2d 862 (1942); Petition of Semler, 41 Wis. 517 (1877).

[6] WIS. STAT. §§ 958.01, .075 (1963).

[7] Denton v. State, Wis. Sup. Ct., April 23, 1964 (unreported order dismissing writ of error).

[8] See generally State v. Tuttle, 21 Wis.2d 147, 150 n.7, 124 N.W.2d 9, 11 n.7 (1963) (citing secondary materials); Boldt, *Recent Trends in*

nal Procedure allow the trial court to reduce sentence within sixty days of its imposition or final disposition of an appeal.[9] The new Illinois code of criminal procedure provides the appellate courts with power to reduce sentences.[10] In 1963, the Wisconsin court in *State v. Tuttle* concluded that it had "the power to review sentences to determine whether an abuse of discretion clearly appears, and to remand for resentencing or to modify a sentence."[11]

It is clear, however, that the Wisconsin court in *Tuttle* was not embarking upon a program of close review of criminal sentences. That case involved a substantial fine for an unaggravated automobile speeding offense and suggests no views about appropriate sentences for the types of offense where the social requirements for deterrence and the individual need for rehabilitation present greater imponderables. The court noted the great advantages possessed by the trial court which enable it to better consider all the relevant factors and to better observe the defendant than the supreme court. Thus the supreme court affirmed its strong policy against interference with the sentencing discretion of the trial court. Although the court's power to review the trial judge's sentencing decisions was asserted, that power was qualified by the assurance that "it will be a rare case where the power will be used."[12]

Right to Counsel: Appointment and Compensation

Before the Supreme Court of the United States decided *Douglas v. California,* an indigent defendant was not entitled automatically to appointment of counsel to represent him on appeal or writ of error. In accordance with statute, our court before *Douglas* considered any claims of error propounded by the prisoner, scanned the record, and appointed counsel only if we were satisfied that "review [was] sought in good faith and upon reasonable grounds."[13] If we denied counsel, as was the more frequent case, the appeal or writ of error was, after a period of time, usually dismissed for lack of prosecution.

Thus our court was screening appeals by making a tentative determination of merit before appointing counsel, and in practice the tentative determination ordinarily became final. A similar

---

Criminal Sentencing, American Crim. L.Q., Aug. 1963, p. 4; Comment, 10 DE PAUL L. REV. 104 (1960).

[9] FED. R. CRIM. P. 35.

[10] Ill. Laws 1963, at 2877, now ILL. REV. STAT. ch. 38, § 121-9(4) (1963). *Cf.* State v. Hall, 176 Neb. 295, 125 N.W.2d 918 (1964) (reducing death penalty to life imprisonment under authority of similar statute).

[11] 21 Wis.2d 147, 151, 124 N.W.2d 9, 11.

[12] *Ibid.*

[13] Wis. Stat. § 957.26(3) (1963) (language still cast in discretionary terms as to appointment of counsel despite the *Douglas* case).

practice was followed in California under a rule requiring the appellate court to make an independent investigation of the record to determine whether counsel would be of advantage to the defendant or helpful to the appellate court.

On March 18, 1963, the Supreme Court of the United States found this practice insufficient in *Douglas v. California*. The theory of the decision was that while the man of means could have a search for hidden error by counsel, the indigent could not. The Court found: "The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal."[14]

Our court promptly began to appoint counsel for every indigent who asked for a timely writ of error. That this practice will increase the number of criminal appeals which are briefed, argued, and considered on the merits is obvious. From April 1, 1963, to August 10, 1964, we appointed counsel in fifty-one cases. Compare this figure with the eleven cases previously heard in a typical year, most of which were presented by privately employed counsel. Only a few of the fifty-one cases have been argued. Most will be heard at the August 1964 Term when the increase will become apparent.

Our selection of counsel, although it presents some problems, is not a great burden in itself. We ordinarily appoint counsel from the county where conviction occurred. Our practice is to appoint the same lawyer who appeared upon the trial, except where it appears that the prisoner is claiming that his trial counsel was inadequate, or, as sometimes happens, trial counsel is unwilling to present the matter in the supreme court. Sometimes a prisoner requests a particular counsel who did not appear at the trial, but we make an independent selection.

On several occasions an appointed attorney has asked to be relieved of his assignment, reporting that he has reviewed the record and interviewed the prisoner and can find no error to urge on appeal. In these instances the court has relieved the attorney and allowed him a fee for the work he has done. The question has then arisen whether another attorney is to be appointed. Originally we took the view that the prisoner had had the benefit of search for error by competent counsel as required by the *Douglas* decision and we would not appoint a second attorney. More recently, however, the court has felt it appropriate to appoint a second attorney in order to be more certain that an effective search for error has been made.

Wisconsin has a comparatively liberal statute for the compensation of counsel. The statute requires us to fix compensation

---

[14] 372 U.S. at 358.

for services and provide for repayment of proper disbursements.[15] The compensation "shall be such as is customarily charged by attorneys in this state for comparable services." In fixing compensation, we review the attorney's time charges to determine "the character and extent of the services reasonably required."[16] We consider the schedule of minimum fees of the Wisconsin Bar, but consider that because of the certainty of payment out of the public treasury, a rate less than the scheduled rate is ordinarily adequate.[17] It is obvious that a substantial amount of public money will be involved as time goes on.

CHALLENGING A CONVICTION BY HABEAS CORPUS

Habeas corpus, in the supreme court, is the most commonly used and most adequate remedy for claims alleging lack of jurisdiction,[18] or for claims alleging that the conviction rests upon a violation of fundamental rights under either the state or the federal constitution.[19] The writ may be used at any time to challenge lack of jurisdiction or deprivation of fundamental constitutional rights which can only be established by proof outside the record.[20] Where all the facts appear upon the record, habeas corpus ordinarily may not be used to make such challenge while the time for writ of error or appeal is still running, but may be so used after the time has expired.[21] The Wisconsin court has recently begun to advise lawyers appointed to represent prisoners on writs of error to consider whether some other form of remedy, habeas corpus in the supreme court or motion in the trial court, would be more appropriate for the particular claim the prisoner desires to make.

In almost all instances in Wisconsin the use of habeas corpus as a post conviction remedy is exclusively in the jurisdiction of the supreme court. The statutes require that "every application, made by or on behalf of a person sentenced to the state prison, must be made to the supreme court or to one of the justices thereof and shall be made returnable only to that court."[22] In some respects, however, habeas corpus is a cumbersome remedy when

---

[15] WIS. STAT. § 256.49 (1963); see WIS. STAT. § 957.26(1m) (Adden. 1963).

[16] Conway v. Sauk County, 19 Wis.2d 599, 604, 120 N.W.2d 671, 674-75, (1963), 1964 WIS. L. REV. 507.

[17] *Id.* at 604-06, 120 N.W.2d at 674-75.

[18] WIS. STAT. §§ 292.01, .02 (1963).

[19] Servonitz v. State, 133 Wis. 231, 113 N.W. 277 (1907).

[20] *Cf.* State *ex rel.* Doxtater v. Murphy, 248 Wis. 593, 602, 22 N.W.2d 685, 689 (1946).

[21] *Id.* at 602-03, 22 N.W.2d at 689. However, if the petitioner has allowed the time for appeal or writ of error to elapse, whether he shall be allowed to resort to habeas corpus is a matter within the discretion of the court. In such a case the writ does not issue as a matter of right. *Ibid.*

[22] WIS. STAT. § 292.03 (1963).

exclusively administered by an appellate court. This is especially true when the petition for the writ raises an issue of fact. Furthermore, the propriety of administering post conviction relief through an appellate court is becoming more suspect today because of the increasing number of petitions that busy appellate courts are being called upon to review. Some possible changes in post conviction procedures will be explored later in this Article.

Of course there are many situations other than that in which an individual has been sentenced to the State prison where habeas corpus is an appropriate remedy. But the circuit and county courts, the judges thereof, and the court commissioners of the various counties have power in such cases to issue the writ.[23] Although the supreme court has the power to issue the writ in these cases, it ordinarily declines to exercise its power on the ground that the remedy before the local courts and judges is adequate. Thus, recently the court denied an application on this ground from an individual who was committed to Central State Hospital because of a mental illness which appeared during the course of his prosecution for a criminal offense,[24] and has similarly denied applications from individuals challenging the legality of detention in a county jail pending trial.[25] In such cases, of course, the court might be called upon to review, on appeal or writ of error, the order entered by the circuit or county court.[26]

Procedure for Handling Applications for Habeas Corpus

Most applications to the Wisconsin Supreme Court for habeas corpus are not prepared by attorneys, and thus they vary greatly in form and in the adequacy of the information furnished. The court has recently begun using a standard form, with blanks to be filled in, so that the pertinent information will be elicited. Our clerk routinely sends these forms to prisoners who request them, or who send in petitions which they have prepared.[27] A questionnaire seeking information as to indigency is also provided.

Our court's ordinary procedure in handling an application from an inmate of the prison is as follows. The application and any supporting papers are reviewed by one of the justices, together with one of our law clerks, and then a recommendation is made

---

[23] *Ibid.*

[24] State *ex rel.* Blunt v. Schubert, Wis. Sup. Ct., Feb. 5, 1964 (unreported).

[25] *E.g.*, State *ex rel.* McGinnis v. Victor, Wis. Sup. Ct., Sept. 18, 1963 (unreported).

[26] WIS. STAT. § 274.05 (1963) provides, however, that review may be denied where a prisoner is being held for trial.

[27] The form was adapted from the forms devised by the United States District Court for the Northern District of Illinois. See *Application for Writs of Habeas Corpus and Post Conviction Review of Sentences in the United States Courts*, 33 F.R.D. 363 (1963).

and acted upon by the court at a conference. The standards applied at this stage could be loosely compared to those which apply on demurrer in a civil action, except that the rule of liberal construction in favor of the pleader does not apply. General statements such as an allegation that a confession was "coerced" are given little weight unless the details are also set forth.

Several recent cases illustrate examples of reasons for denying a petition at this stage. A petition was denied because it merely set forth conclusions and did not state the necessary supporting facts.[28] A petition was dismissed as premature when made by a petitioner who was serving a sentence which he did not challenge, because it challenged a consecutive sentence which had not commenced to run.[29] A petition, raising a simple question of law which had been decided adversely to petitioner in other cases, was dismissed upon review of the application.[30] Another petition, alleging that the police had coerced a confession, was dismissed because it appeared that petitioner had later pleaded guilty while represented by counsel.[31]

If, after reviewing a petition, the court concludes that an arguably meritorious claim has been made, an order to show cause why a writ of habeas corpus should not be granted is issued to the warden of the institution where the petitioner is incarcerated. A return is then made. The warden's return, considered with the petition, may demonstrate the absence of merit so convincingly that the petition will be denied without hearing. Otherwise, after the return is made, oral argument will be ordered and the matter considered.

Although this remedy is spoken of as habeas corpus, under our procedure the actual writ of habeas corpus is never issued.[32] As we have seen, the application may be denied after its initial review if the court concludes that no arguably meritorious claim has been made. Even if there appears to be merit to the petition, the writ is not issued, but rather the warden is ordered to show cause why a writ should not be issued. Furthermore, if after the warden has made his return to the order to show cause and a hearing has been held, the court decides in favor of the petitioner, the writ still is not issued. In such a case the court issues an order that the warden release the prisoner or deliver him to the proper sheriff for further proceedings, reciting that "the peti-

[28] Petition of Anderson, Wis. Sup. Ct., April 23, 1964 (unreported).

[29] Petition of Hansen, Wis. Sup. Ct., May 27, 1964 (unreported).

[30] Petition of Prostok, Wis. Sup. Ct., June 30, 1964 (unreported); Petition of Hemmis, Wis. Sup. Ct., Feb. 24, 1964 (unreported).

[31] Petition of Stoeckle, Wis. Sup. Ct., March 25, 1954 (unreported).

[32] State *ex rel.* Casper v. Burke, 7 Wis.2d 673, 678, 97 N.W.2d 703, 707 (1959); State *ex rel.* Doxtater v. Murphy, 248 Wis. 593, 598-99, 22 N.W.2d 685, 687 (1946); *In re* Exercise of Original Jurisdiction, 201 Wis. 123, 129, 229 N.W. 643, 646 (1930). See also WIS. STAT. ch. 292 (1963).

tioner having had a hearing such as he would have had had the writ of *habeas corpus* been issued, it is considered that the issuance of the writ be omitted."[33]

This procedure allows the court to consider the merits of the matter "without necessitating the expense and hazard of bringing the defendant from the place of incarceration to the court room."[34] Where the probability of the petitioner's success is high, however, the court may treat the order to show cause virtually as if it were the writ of habeas corpus, and admit the prisoner to bail. This was done pending the ultimate decision in *State ex rel. Hake v. Burke.*[35]

Prior to the warden's return, the petitioner, if indigent, usually proceeds *pro se.* The statutes provide that counsel can be appointed in a proceeding for habeas corpus provided the court is satisfied "that review is sought in good faith and upon reasonable grounds."[36] Although this standard is inadequate with respect to an appeal or writ of error ever since the decision in *Douglas v. California,*[37] our court does not consider *Douglas* to require appointment as a matter of course whenever a writ of habeas corpus is being sought. Thus, in accordance with the statute, counsel is appointed by the court only after it has been decided that the application is arguably meritorious. Our court often waits until after the warden has made his return before appointing counsel in order to see whether the return will convincingly negate the arguable merit of the petition.

In cases where the petition and the return raise no material issue of fact not determinable from the record, there are before the court only questions of law which are then decided. A recent example is *State ex rel. Derber v. Skaff,*[38] where the prisoner had been convicted upon trial to the court, but claimed that the waiver of jury trial disclosed by the record was an insufficient waiver under our statute.[39] The waiver had been made in open court by petitioner's counsel in his presence. The court held this a sufficient waiver and denied the writ. A recent example of a decision favorable to the petitioner, reached after argument of an issue of law, is *State ex rel. Hake v. Burke,*[40] although this case involved the prisoner's right to a conditional release under a valid

---

[33] *E.g.,* State *ex rel.* Burnett v. Burke, 22 Wis.2d 486, 494, 126 N.W.2d 91, 96 (1964).

[34] *In re* Exercise of Original Jurisdiction, 201 Wis. 123, 129, 229 N.W. 643, 646. A similar procedure in the federal court system was approved in Walker v. Johnston, 312 U.S. 275 (1941).

[35] 21 Wis.2d 405, 124 N.W.2d 457 (1963).

[36] WIS. STAT. § 957.26(3), (4) (1963).

[37] 372 U.S. 353 (1963).

[38] 22 Wis.2d 269, 125 N.W.2d 561 (1964).

[39] WIS. STAT. § 957.01(1) (1963).

[40] 21 Wis.2d 405, 124 N.W.2d 457 (1963).

sentence, rather than a challenge to the validity of the conviction. On occasion, though extremely rare, the Attorney General has confessed error on behalf of the State at this stage and the petitioner has been ordered released, or remanded to the sheriff for a new trial.[41]

It is obvious, however, that many claims of deprivation of constitutional rights will raise issues of fact which are not resolved by the record. Claims of improper inducement to confess, plead guilty, or waive counsel; claims that the petitioner lacked sufficient intelligence or information to make an intelligent waiver; or claims that appointed counsel did not render effective assistance, ordinarily must rest upon allegations of facts which are outside the record.

We must recognize that a seven man court, following the rigorous schedule necessary to dispose of a substantial amount of appellate work, would constitute a very awkward trier of fact. Thus, since our court has the power by statute to refer any issue of fact arising before us to a circuit court for determination,[42] this is the procedure we follow where an issue of fact arises in habeas corpus proceedings.

For example, in 1959 we referred to the circuit court for Fond du Lac County an issue of fact as to whether certain advice and information relevant to intelligent waiver of counsel had been given to petitioner before arraignment.[43] This information did not appear on record, but the circuit court found, upon hearing testimony, that it had been given. In a much more recent case, we referred to the circuit court for Racine County certain issues of fact as to the intelligence of petitioner and certain suggestions he claimed were made to him before arraignment which were relevant to determination of whether waiver of counsel was understandingly made.[44] After the finding of fact was made, the court concluded from all the circumstances that the prisoner did not freely and intelligently waive his right to counsel, and ordered him turned over to the sheriff for further proceedings according to law. Fact issues have been referred to circuit courts in several other proceedings which are still unresolved.

Sometimes the claim made in the petition appears arguably meritorious, and a return is ordered, but reliable documents furnished in support of the return clearly demonstrate that petition-

---

41 State *ex rel.* Smith v. Burke, Wis. Sup. Ct., Nov. 13, 1964 (unreported); State *ex rel.* Cather v. Burke, Wis. Sup. Ct., July 20, 1964 (unreported); State *ex rel.* Cornell v. Burke, Wis. Sup. Ct., Dec. 20, 1963 (unreported).

42 WIS. STAT. § 251.12 (1963).

43 State *ex rel.* Casper v. Burke, 7 Wis.2d 673, 97 N.W.2d 703 (1959).

44 State *ex rel.* Burnett v. Burke, 22 Wis.2d 486, 126 N.W.2d 91 (1964).

er's claims are incredible. Although an issue of fact is posed in form, the court does not refer the matter for a finding of fact, if convinced that a trial could produce no different result. One such petition was denied where identical claims had been made and fully heard in the United States District Court and the judge had expressly found the petitioner's testimony wholly incredible.[45] In another, petitioner claimed he had pleaded guilty in reliance upon his counsel's guarantee that if he did, he would be sentenced to one year, but if he did not, the judge would order more charges brought and sentence him to ten years.[46] The court determined the claim incredible in view of an affidavit of counsel denying the claim, the improbability that counsel would make such a statement, and the improbability that if counsel had made it, petitioner would, after receiving a four and one-half year sentence, remain silent about it for eighteen months. In still another case the file was sent to the district attorney for prosecution for false swearing, after the petition was denied.[47]

The Possibility of a Post Conviction Remedy in the Trial Court

In several recent typical years only a half-dozen or fewer petitions for habeas corpus were disposed of with sufficient formality to be reflected in Judicial Council statistics.[48] The number of such applications has increased, however, and the court has accorded them more formal and probably more thorough treatment.

From April 1, 1963, to August 11, 1964, some eighty-five petitions for habeas corpus were filed, along with twelve petitions for other writs, such as mandamus, raising similar problems. These figures include claims of improper imprisonment under valid sentences, but in most instances the petition challenges the conviction. The great majority of these eighty-five petitions have been denied without requiring a return, appointing counsel, or holding a hearing. Orders to show cause were issued in approximately fourteen instances. In two instances, petitions which were contested by the State have resulted in release from prison and remand for further proceedings, presumably a new trial.[49]

It would seem to be no coincidence that approximately two weeks before the increase in petitions commenced, the United States Supreme Court rendered its decision in *Gideon v. Wainright*.[50]

[45] Petition of Schmitt, Wis. Sup. Ct., March 25, 1964 (unreported).
[46] Petition of Wrege, Wis. Sup. Ct., Aug. 3, 1964 (unreported).
[47] Petition of O'Neill, Wis. Sup. Ct., July 6, 1964 (unreported).
[48] Six petitions for habeas corpus were denied in unreported cases during the August 1960 Term, WIS. JUDICIAL COUNCIL, 1961 JUDICIAL STATISTICS A-2; only three petitions were disposed of during the August 1961 Term, WIS. JUDICIAL COUNCIL, 1963 BIENNIAL REPORT M-2.
[49] State *ex rel.* Barth v. Burke, 24 Wis.2d 82, 128 N.W.2d 422 (1964); State *ex rel.* Burnett v. Burke, 22 Wis.2d 486, 126 N.W.2d 91 (1964).
[50] 372 U.S. 335 (1963).

In *Gideon* the Court held that the sixth amendment guarantee of assistance of counsel to criminal defendants was made obligatory upon the states by the fourteenth amendment. While other states have since complained of the flood of petitions which they have received as a result of the *Gideon* decision, Wisconsin has not been presented with so large a problem because it has provided counsel for indigent defendants (at least in felony cases) since the earliest days.[51] Few of the petitions filed with us claim failure to supply counsel, although several claim that appointed counsel did not adequately advise or represent the accused. It may be fairly supposed, however, that many of the petitions based on other grounds were ignited by the spark of Gideon's success.

It may be of interest to note at this point that in Wisconsin we have had no serious difficulty over the availability to prisoners of transcripts of trials resulting in conviction and sentence to imprisonment.[52] A 1913 statute made it compulsory for a certified transcript to be filed with the court, and a certified duplicate to be filed with the warden.[53] The availability of a transcript at public expense, the statutory procedure for the printing of briefs for indigents at state expense,[54] and the provision by law for appointment of counsel in felony cases[55] (although it is recognized that such appointment must now be made in serious misdemeanors also[56]) have relieved Wisconsin from much of the burden other states now bear in bringing their procedures into compliance with present standards of due process.

Whether the increase in petitions following *Gideon* imposes an unworkable burden on the court may be open to argument. But the size of the problem, coupled with the awkwardness of handling issues of fact by reference, is sufficient to suggest that it is desirable to provide for a post conviction procedure which would be brought before a circuit or county court, and reviewed in the supreme court upon appeal or writ of error.

Three present post conviction remedies available in the trial court are, however, worthy of mention. The writ of error coram nobis may be issued by the court which tried the case. It was recognized at common law in Wisconsin, and is now recognized by statute.[57] Our court's decisions have closely restricted it, and its usefulness is limited.[58] It is to be granted by the trial court

[51] Carpenter v. County of Dane, 9 Wis. 274 (1859); Wis. Laws 1862, ch. 80.

[52] Transcripts must be provided for indigents making an appeal. Griffin v. Illinois, 351 U.S. 12 (1956).

[53] Wis. Laws 1913, ch. 484, now part of WIS. STAT. § 252.20 (1963).

[54] WIS. STAT. § 251.19 (1963).

[55] WIS. STAT. § 957.26(2) (1963).

[56] Melvin v. Burke, Criminal No. 63-C-52, E.D. Wis., Aug. 27, 1963.

[57] WIS. STAT. § 958.07 (1963).

[58] Houston v. State, 7 Wis.2d 348, 96 N.W.2d 343 (1959); Wilson v. State, 273 Wis. 522, 78 N.W.2d 917 (1956); State v. Stelloh, 262 Wis. 114,

"only in cases where it quite clearly appears that an error of fact existed before judgment but for which error the judgment would not have been entered."[59] The alleged error of fact must be one which does not appear on the record. It is discretionary with the trial court. Refusal to issue will be reversed only for abuse of discretion.[60] It will not be granted on the ground that the conviction was obtained by perjured or mistaken testimony.[61] It has been held not to be a proper remedy to reach an alleged failure to advise of right to counsel.[62] Apparently, however, the writ was issued in one instance to investigate allegations that a jury had been tampered with.[63]

It is obvious that unless the scope of the writ of error coram nobis be broadened by statute or rule, or unless a number of prior decisions of this court be overruled, this writ does not often afford an adequate remedy in the trial court for setting aside a conviction obtained in deprivation of constitutional rights. It may well be, however, that the Wisconsin court will consider broadening the scope of the writ of error coram nobis so as to be a more useful post conviction remedy.

A second remedy in the trial court is a motion for a new trial. Such motion may be granted within one year for any cause for which a new trial may be granted in civil cases.[64] One permissible ground in civil cases is the interest of justice.[65] Just how far one may go beyond the record in establishing such ground may be open to question.[66]

Our court has very recently held that a trial court has jurisdiction to act on a motion to withdraw a plea of guilty.[67] The motion was based on alleged facts claimed to show that the plea was not voluntary and had been improperly induced. The court held that the motion was directed to the discretion of the court in the interest of justice and that the court had the inherent

---

53 N.W.2d 700 (1952); State v. Turpin, 255 Wis. 358, 38 N.W.2d 495 (1949); State v. Dingman, 239 Wis. 188, 300 N.W. 244 (1941); State v. Wagner, 232 Wis. 138, 286 N.W. 544 (1939); Gelosi v. State, 218 Wis. 289, 260 N.W. 442 (1935); Ernst v. State, 181 Wis. 155, 193 N.W. 978 (1923); *In re* Ernst, 179 Wis. 646, 192 N.W. 65 (1923).

59 Ernst v. State, *supra* note 58 at 158, 193 N.W. at 979.

60 State v. Wagner, 232 Wis. 138, 286 N.W. 544 (1939); Gelosi v. State, 218 Wis. 289, 260 N.W. 442 (1935).

61 State v. Dingman, 239 Wis. 188, 300 N.W. 244 (1941).

62 State v. Turpin, 255 Wis. 358, 38 N.W.2d 495 (1949).

63 Note, 2 WIS. L. REV. 191 (1923), which indicates coram nobis issued in Fertig v. State, 100 Wis. 301, 75 N.W. 960 (1898), although this does not appear from the report of the case.

64 WIS. STAT. § 958.06 (1963).

65 WIS. STAT. § 270.49 (1963).

66 See Millay v. Milwaukee Auto. Mut. Ins. Co., 19 Wis.2d 330, 120 N.W. 2d 103 (1963); Estate of Noe, 241 Wis. 173, 5 N.W.2d 726 (1942).

67 Pulaski v. State, 23 Wis.2d 138, 126 N.W.2d 625 (1964).

power to consider it. The motion was considered timely when served and filed within one year after the court found the defendant guilty upon his plea. This case demonstrates a third post conviction remedy available in trial court.

I have suggested that it might be desirable to provide by statute or court rule for an adequate post conviction remedy, either in the trial court where the conviction took place, or in some court which might acquire special experience in the field. Perhaps the circuit court for Dodge County, where the State prison is located, might be a good selection. Such a remedy could be adapted from the one now provided by the statutes of Illinois.[68] A prisoner may bring the proceeding if he asserts that his conviction was based on a substantial denial of his constitutional rights.[69] He files his petition with the clerk of the trial court, and serves a copy on the district attorney.[70] The state answers or moves to dismiss.[71] The court may receive proof by affidavits, depositions, oral testimony, or other evidence, and may order the prisoner brought before the court for the hearing.[72] If the court finds for the petitioner, it enters appropriate orders with respect to the judgment or sentence and as to rearraignment, retrial, custody, bail, or discharge.[73] An appeal to the supreme court is provided.[74] No such proceeding shall be brought more than five years after the challenged judgment unless petitioner alleges facts showing delay was not due to his culpable negligence.[75] Any claim of substantial denial of constitutional rights not raised in the petition is deemed waived.[76] Counsel is appointed for an indigent petitioner.[77]

The Uniform Post Conviction Procedure statute[78] would create a remedy somewhat similar to the Illinois Act. It has been adopted by Maryland[79] and Oregon.[80] North Carolina has a somewhat similar act.[81] Arkansas adopted the Uniform Act in 1957,[82] but repealed it in 1959.[83] In the federal system, a prisoner under

---

68 ILL. REV. STAT., ch. 38 art. 122 (1963).
69 ILL. REV. STAT., ch. 38 § 122-1 (1963).
70 ILL. REV. STAT., ch. 38 § 122-1 (1963).
71 ILL. REV. STAT., ch. 38 § 122-5 (1963).
72 ILL. REV. STAT., ch. 38 § 122-6 (1963).
73 ILL. REV. STAT., ch. 38 § 122-6 (1963).
74 ILL. REV. STAT., ch. 38 § 122-7 (1963).
75 ILL. REV. STAT., ch. 38 § 122-1 (1963).
76 ILL. REV. STAT., ch. 38 § 122-3 (1963).
77 ILL. REV. STAT., ch. 38 § 122-4 (1963).
78 9B UNIFORM LAWS ANN. 344.
79 Md. Laws 1958, ch. 44, now MD. ANN. CODE art. 27, §§ 645A-J (Supp. 1964).
80 Ore. Laws 1959, ch. 636, now ORE. REV. STAT. §§ 138.510-.680 (1963).
81 N.C. GEN. STAT. §§ 15-217 to 222 (1953).
82 Ark. Acts 1957, No. 419.
83 Ark. Acts 1959, No. 227, § 1.

sentence which is subject to collateral attack may move the sentencing court to vacate, set aside or correct the sentence.[84]

Perhaps if the applications arrive at no faster pace than in the past twelve months, our supreme court could continue to handle them without undue burden. It must be recognized, however, that where an application has any merit at all, it is very likely to involve some issue of fact which cannot be resolved by the record, and a procedure whereby the supreme court gives preliminary consideration, then refers issues for fact finding, and ultimately decides the case seems unnecessarily cumbersome. Speaking as an individual, I would advocate the creation of a post conviction procedure in the trial court, subject, of course, to review on appeal by the supreme court if desired by either party. Of course the creation of such remedy could not constitutionally abolish the writ of habeas corpus.[85]

CHALLENGES TO TREATMENT UNDER VALID SENTENCE

Up to this point, I have dealt primarily with challenges a prisoner may make to the validity of his conviction and sentence. Prisoners do, however, seek the aid of the court from time to time to protect various interests of theirs even assuming the validity of the sentence under which they have been confined. They have challenged denial of discretionary parole; refusal of conditional release, or mandatory parole; revocation of parole. And, prisoners occasionally, have sought judicial intervention with respect to treatment received in prison.

Parole and Conditional Release

Tyler, a life-term prisoner who had served the minimum term after which parole may be granted at the discretion of the Department of Public Welfare,[86] attempted to obtain judicial review of denial of his parole under the statutes governing review of administrative decisions.[87] In early 1963 our court held that a prisoner's interest in parole is not a legal right or privilege and that the Department's refusal of parole is not a decision reviewable under the statutes.[88] Great weight was given to the highly discretionary nature of the parole power granted to the Department by statute.[89] The court noted also the broad general rule

---

84 28 U.S.C. § 2255 (1958).

85 WIS. CONST. art. I, § 8.

86 WIS. STAT. § 57.06(1)(a) (1963) provides a life-term prisoner must serve twenty years, less a deduction earned for good conduct ("good time"), before being eligible for parole.

87 WIS. STAT. ch. 227 (1963).

88 Tyler v. State Dept. of Pub. Welfare, 19 Wis.2d 166, 119 N.W.2d 460 (1963).

89 WIS. STAT. § 57.06(1)(a) (1963).

in other states to the effect that refusal of parole is not subject to judicial review.[90]

Our court recently denied an application for writ of habeas corpus to review a revocation of parole.[91] Petitioner was paroled while serving a sentence for theft. He had previously been convicted for possession and use of marijuana. The Department of Public Welfare insisted that because of his record of narcotics offenses he sign an agreement to give a urine specimen to the police department vice squad, at any time during his parole, upon request. Petitioner refused, arguing that he was no longer under sentence for a narcotics violation; but when he persisted in refusal, the Department returned him to prison. Here, of course, the very highly discretionary power of the Department over conduct of a parolee was involved.[92]

It is conceivable, though perhaps unlikely, that the Department might make such wholly unreasonable, arbitrary and capricious demands upon a parolee as to cause the court to intervene; but I venture no prediction as to what circumstances would call for such action or whether this case will ever arise.

Our court has recognized a prisoner's right to conditional release on parole where the Department has made a mistake of law in applying the statute to the facts. The statutes provide a formula under which prisoners may earn "good time" which may be forfeited for various reasons by the Department.[93] When a prisoner has served his term, less "good time" earned and not forfeited, the statute provides that he "shall be released on parole" until the expiration of the maximum term or until earlier discharged from parole by the Department.[94]

Certain difficulties of interpretation have arisen in applying the conditional release provisions to particular circumstances. Several prisoners have tested the Department's interpretation by habeas corpus. In two recent cases the court agreed with the Department and denied habeas corpus.[95] Similarly, habeas corpus was denied in two cases where the prisoner had earned a conditional release by good conduct, but had later been returned to the prison for violation of parole.[96] But in November 1963, we upheld the con-

---

[90] 19 Wis.2d at 172-73, 119 N.W.2d at 465 (citing cases).
[91] Petition of Ahmed Bey, Wis. Sup. Ct., Feb. 25, 1964 (unreported).
[92] See WIS. STAT. § 57.06(3) (1963).
[93] WIS. STAT. § 53.11 (1963).
[94] WIS. STAT. § 53.11(7) (1963).
[95] State *ex rel.* Stenson v. Schmidt, 22 Wis.2d 314, 125 N.W.2d 634 (1964); State *ex rel.* Gegenfurtner v. Burke, 7 Wis.2d 668, 97 N.W.2d 517 (1959).
[96] Petition of Simek, Wis. Sup. Ct., Aug. 5, 1964 (unreported); Petition of Derouin, Wis. Sup. Ct., June 22, 1964 (unreported).

tention of a prisoner, and ordered him released on parole.[97]

Challenges to Administrative Decisions Concerning Treatment

Of course there are a great many disciplinary decisions made by prison and Department personnel which affect the interests of prisoners, but if the prisoners' interest in parole does not have sufficient standing as a right or privilege to make denial of parole reviewable under the statutes, it is difficult to suppose that such disciplinary decisions would be reviewable. Whether a set of facts will ever arise under which judicial intervention would seem appropriate in any of these fields via some remedy other than the statutes is open to conjecture. Certainly some clearly palpable wrong going beyond debatable use of judgment or discretion would have to be established.

On several occasions our court has denied relief where a prisoner has complained about the treatment he has received. In 1957, a prisoner complained that he was forced to work with a hostile prisoner and that his request for a transfer had been denied. We dismissed a petition for injunctive relief on the ground that it related to a matter of internal prison discipline beyond the scope of judicial review.[98]

Recently the court received a prisoner's petition for a writ of mandamus to compel the circuit court to grant him relief. The petitioner had alleged that he was being subjected to cruel and unusual punishment and to corporal punishment in that he was allowed a shower, change of underwear, and a clean sheet and towel only once a week; was allowed only two pair of pants per month; and was allowed only one quart of hot water each day. The petition was denied.[99]

In 1963, a prisoner alleged that he required certain medical treatment which was not being afforded him, and that certain treatment which he was given had been improperly administered. He sought habeas corpus and injunctive relief. The court denied the petition, pointing out that a prisoner is permitted to communicate with the State Department of Public Welfare without censorship; that it is the duty of the Department to examine all institutions and inquire into management of the persons therein; and that the administrative remedy must be exhausted before application to the court.[100]

---

97 State *ex rel.* Hake v. Burke, 21 Wis.2d 405, 124 N.W.2d 457 (1963).

98 *In re* Petition of Medloch, Wis. Sup. Ct., Dec. 20, 1957 (unreported order denying a restraining order).

99 State *ex rel.* Stoeckle v. Wilkie, Wis. Sup. Ct., Oct. 22, 1963 (unreported order denying petition).

100 Petition of O'Connor, Wis. Sup. Ct., Sept. 16, 1963 (unreported memorandum decision).

Another petition in 1963 was from a prisoner who had escaped and been recaptured. Various prison disciplinary measures were invoked, including confinement for several months and forfeiture of accrued "good time." In addition to being disciplined, he was also convicted and sentenced for the crime of escape. His petition was really a challenge to the validity of the conviction and sentence, claiming it was second jeopardy for the same offense. The petition was denied on the ground that prison discipline which makes more onerous the service of an existing sentence is not deemed an additional placing in jeopardy in the constitutional sense, and does not bar a prosecution for the same infraction of discipline, if the infraction happens also to be a crime.[101]

I do not venture to predict whether, or under what circumstances, our court might conclude that a prisoner had shown a right to judicial relief. It would, however, be too broad a statement to say that the court would never grant relief under any circumstances.

It is clear that such judicial relief has been granted in other jurisdictions.[102] The earlier attitude of the courts toward challenges to treatment is summarized in an old Virginia case: "[The convicted felon] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State."[103] But a different approach is suggested in a 1944 case decided by the Sixth Circuit. There the court said that "A prisoner retains all the rights of an ordinary citizen, except those expressly, or by necessary implication, taken from him by law."[104] And a 1961 New York case illustrates the marked change in judicial thinking with respect to treatment of prisoners:

> [I]t seems quite obvious that any *further* restraint *in excess* of that permitted by the judgment or constitutional guarantees should be subject to inquiry. An individual, once validly convicted . . . . is not to be divested of all rights and unalterably abandoned and forgotten by the remainder of society. . . .
>
> The State's right to detain a prisoner is entitled to no greater application than its correlative duty to protect him from unlawful and onerous treatment.[105]

The Wisconsin constitution prohibits the infliction of cruel and

---

101 State v. Gruender, Wis. Sup. Ct., Sept. 5, 1963 (unreported order denying writ of habeas corpus); *accord,* People v. Garmon, 177 Cal. App.2d 301, 2 Cal. Reptr. 60 (Dist. Ct. App. 1960); State v. Williams, 57 Wash.2d 231, 356 P.2d 99 (1960); *In re* Petition of Schmitt, Wis. Sup. Ct., Sept. 9, 1963 (unreported).

102 Note, 110 U. PA. L. REV. 985 (1962); Note, 72 YALE L.J. 506 (1963).

103 Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

104 Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944).

105 People *ex rel.* Brown v. Johnston, 9 N.Y.2d 482, 485, 174 N.E.2d 725, 726, 215 N.Y.S.2d 44, 45-46 (1961).

unusual punishments[106] and our statutes require that prison officials "uniformly treat the inmates with kindness. There shall be no corporal or other painful and unusual punishment inflicted upon inmates."[107] Although these are vague standards, except for the prohibition against corporal punishment, they are standards which would be open to judicial interpretation and enforcement in a proper case. However, the almost total absence of petitions claiming violation of these standards suggests an absence of plausible claims of violation.

There are a number of cases from other jurisdictions where courts have enforced, or at least considered as enforceable, particular basic rights of prisoners. Freedom of religion is one such enforceable right. The Court of Appeals for the Second Circuit[108] has recently held that a complaint alleging religious persecution by prison officials stated a cause of action under the Civil Rights Act.[109] The New York Court of Appeals has held that under the constitution[110] and a New York statute[111] a Muslim could compel the prison authorities to permit him to engage in religious services and seek spiritual advice, subject to reasonable rules and regulations.[112] Other cases have recognized the right to engage in religious practices with reasonable limitations, while upholding the limitations imposed under the particular circumstances.[113]

Other decisions enforce, or at least recognize, the right of prisoners to transmit their petitions to the courts, particularly when seeking review of their convictions. In at least one case[114] a federal court has held that prisoners may have a cause of action under the Civil Rights Act[115] if books and materials for legal study in order to prepare petitions to the courts are unreasonably kept from them. Similarly, our court received a letter from a prisoner, attaching a copy of a letter sent to the Director of the Department of Public Welfare, saying in part, that he had "recently had no end of trouble obtaining legal materials, books,

---

106 WIS. CONST. art. I, § 6.

107 WIS. STAT. § 53.08 (1963).

108 Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961).

109 REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958).

110 N.Y. CONST. art. I, § 3.

111 N.Y. CORREC. LAW § 610.

112 Brown v. McGinnis, 10 N.Y.2d 531, 180 N.E.2d 791, 225 N.Y.S.2d 497 (1962).

113 *In re* Ferguson, 55 Cal.2d 663, 361 P.2d 417, 12 Cal. Reptr. 753, *cert. denied* 368 U.S. 864 (1961), 9 U.C.L.A.L. REV. 501 (1962); McBride v. McCorkle, 44 N.J. Super. 468, 130 A.2d 881 (1957); see Kelly v. Dowd, 140 F.2d 81 (7th Cir.), *cert. denied*, 321 U.S. 783 (1944).

114 Bailleaux v. Holmes, 177 F. Supp. 361 (D. Ore. 1959), *rev'd sub nom.* Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961).

115 REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958).

pamphlets, etc. for research purposes, in my appeal efforts." In his letter to the chief justice he said he included a copy of his letter to the Department so that it could not be said that he had made "no showing of any effort in any manner or form on his part to correct this situation." This prisoner, however, did not ask for any action by the court. Evidently he sent us the letter in order to make a record which might be useful in some future proceeding.

Other decisions touch upon claims that prisoners have been unreasonably denied or limited in communication by mail[116] and upon claims that particular prison practices have involved discrimination because of race.[117] These few decisions, which upheld the action of the prison authorities upon the facts presented, have not seemed, however, to produce any clear general principles in these fields. One can make no more definitive summary than to say that courts will continue to recognize the vast area in which those who administer the correction system must be free to exercise their discretion,[118] although courts will undoubtedly devise remedies to enforce certain basic constitutional and statutory standards of treatment.

CONCLUSION

Recently, increasing judicial attention has been focused upon the requirements of due process which must be observed by a state in dealing with those accused of crime. This attention has brought about an increase in post conviction challenges to conviction. Furthermore, as courts begin to give attention to prisoners' complaints of abuse at the hands of correctional administrators, the judicial burden will be increased that much more. This Article has not been an exhaustive review of post conviction rights and remedies. Rather, I have sought to point out some of the important problems which our court is now facing as it deals with the increasing number of cases in the post conviction area of criminal law. What this increase of business indicates is that in Wisconsin we may well give thought to improving various aspects of the procedure by which we dispose of such claims.

---

116 Note, 110 U. PA. L. REV. 985, 996-97 (1962) (citing cases).
117 Note, 110 U. PA. L. REV. 985, 1001-03 (1962) (citing cases).
118 *But see* Note, 72 YALE L.J. 506 (1963).