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Habeas Corpus in West Virginia

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STUDENT NOTE

Habeas Corpus in West Virginia

A survey of recent appellate proceedings, both at the state and federal levels, reveals a tremendous upsurge in litigation concerning the ancient writ of habeas corpus. This is due mainly to opinions handed down by the United States Supreme Court, opinions destined to have a substantial impact on the states' administration of criminal justice.[1] Such opinions have made the American public more aware of the breadth of their constitutional rights, in turn causing an expansion in the use of the habeas corpus concept of relief. There remains a high degree of confusion and uncertainty in regard to the writ. Since it is both a federal and a state remedy,

[1] Miller v. Boles, 248 F.Supp 49 (N.D. W. Va. 1965).

its status in state courts is constantly changing so as to come more in line with the federal. At the same time, its status in the federal courts is subject to change with each constitutional interpretation of an individual's rights in criminal procedure by the United States Supreme Court. One cannot make a prediction as to where the changing character of habeas corpus will lead. One can only place it in its present perspective.

Nature of the Writ

The writ of habeas corpus, often called the most celebrated writ in the English law, is of ancient origin. It was claimed by the American colonists as their brithright as Englishmen. It has found its place in both our federal and state constitutions.[2] It is indeed one of "the greatest and most effective remedies known to the law."[3]

By reason of the writ's antiquity, or the veneration in which it is held, it has not been understood as well as most of our other legal proceedings. Generally, the writ lies, where good cause has been shown, to challenge the right of one to hold another in custody or restraint. "It is directed to the person detaining another and commands him to produce the body of the prisoner with the day and cause of his caption and detention *'ad faciendum, subjiciendum et recipiendum,'* and to submit to and receive whatever the judge or court issuing such writ shall consider in that behalf."[4]

Habeas corpus was framed for the security of liberty, having been designed and adapted to the service of individual freedom.[5] It is a legal and not an equitable remedy.[6] But one must not lose sight of the fact that habeas corpus was never intended as a substitute for an appeal. It is only operative where one is detained unlawfully upon a void judgment or process, or where the court exceeds its authority in rendering the judgment. Unlike the appeal, writ of error, or certiorari, it does not exist to correct mere errors or irregularities. While these appellate processes can reverse proceedings both because they are void and for mere erroneousness, habeas corpus can only attack those which are void.[7]

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[2] U.S. CONST. art. I, sec. 9 W. VA. CONST., art. III, sec. 4.
[3] Click v. Click, 98 W. Va. 419, 422, 127 S.E. 194-195 (1925).
[4] *Id.* at 422, 127 S.E. at 195.
[5] Green v. Cambell, 35 W. Va. 698, 14 S.E. 212 (1891).
[6] *Ex parte* Mooney, 26 W. Va. 36, 53 Am. Rep. 59 (1885).
[7] *Ex parte* Evans, 42 W. Va. 242, 24 S.E. 888 (1896).

Habeas Corpus in the Federal Courts

Habeas corpus relief is available on both the federal and state levels. Since much action taken on the state level is subject to federal scrutiny, it would seem logical that the state courts would follow the federal lead. This has not, however, been the case. And, in a great many respects, this is unfortunate.

Congress granted to the federal courts the jurisdiction to grant habeas corpus to prisoners being held in violation of the Constitution in 1867.[8] Since then, a great amount of confusion has existed as to what issues could be decided. For a long time it was held that the writ could be utilized only with respect to jurisdictional issues. Gradually, however, the writ was "unleashed from its traditional jurisdictional moorings and fastened in some still-to-be-determined manner to the plastic concept of due process."[9] It materialized into its present form as a means of achieving federal due process standards in state criminal cases.[10]

This growth in the scope of federal habeas corpus is particularly significant in light of recent Supreme Court decisions expanding the constitutional rights due a state criminal, *e.g.*, the right to counsel at all stages of the litigation,[11] the privilege against self incrimination,[12] and the right to a transcript on appeal.[13] Since each of these has been designated a constitutional right of a defendant in a criminal trial, the denial of such renders the resulting judgment subject to a habeas corpus proceeding.

Along with the expansion of constitutional rights due and owing, there has grown also the principle that the one alleging the denial of a federal constitutional right in a state court is entitled to a full and fair hearing of the claim.[14] Thus the end result has come to be that:

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[8] Act of Feb. 5, 1867, ch. 28, sec. 1, 14 Stat. 385-86.
[9] 65 W. VA. L. REV. 253, 257 (1962).
[10] *Ibid.*
[11] Escobedo v. Illinois, 378 U.S. 8 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963).
[12] Griffin v. California, 380 U.S. 609 (1965).
[13] Griffin v. Illinois, 351 U.S. 12 (1956).
[14] Where the facts are in dispute, the federal court on habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding . . . . Townsend v. Sain, 372 U.S. 293, 312 (1963).

> [A]t worst a prisoner alleging a denial of a federal constitutional right in a state court criminal proceeding will be able to subject the manner of the state court's handling of his claim to scrutiny in a federal court. Moreover, if the state court's disposition of the claim did not meet the exacting standards of 'full and fair' hearing as elaborated in "Townsend," an independent redetermination of that claim is available in the federal court—and is available as a matter of right.[15]

Habeas Corpus in the West Virginia Courts

The aforementioned United States Supreme Court cases which expanded the constitutional rights of a state criminal defendant have drastically increased the number of habeas corpus cases handled in state courts as well as federal district courts.[16] These cases have given the West Virginia Supreme Court of Appeals the opportunity to re-evaluate the scope of habeas corpus as a state post conviction remedy. This re-evaluation has not, however, measured up to expectations.[17]

At common law, habeas corpus was limited to cases in which there was showing that the lower court acted without authority in

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A subsequent Act of the 89th Congress, P.L. 79-711, approved November 2, 1966, affords finality to any state hearing which is a matter of record unless it appears or respondent admits—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional rights, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of the law in the State court proceeding . . . .

[15] 65 W. VA. L. REV. 253 (1962).

[16] More than two hundred (200) prisoners have been released from the West Virginia penal institutions since the Gideon v. Wainwright decision. Information supplied by Frank Nuzum, Assistant Director, West Virginia Department of Correction, March 31, 1967.

[17] "[S]tate habeas corpus relief [in West Virginia] conceivably could be opened to all constitutional objections which may now be advanced in federal courts." 67 W. VA. L. REV. 234 (1965).

imposing sentence.[18] If the record showed mere errors or irregularities, habeas corpus discharge was not warranted.[19] However, recent West Virginia decisions have granted relief for denial of counsel,[20] failure to provide prisoners with a transcript of the trial record,[21] failure to properly caution defendant under the recidivist statute,[22] and imposition of an improper sentence.[23] But when compared with the scope of habeas corpus in federal courts, where it is available for the violation of any constitutional right, the West Virginia court has expanded the writ's scope very little.

Another serious problem is the manner in which these errors must be shown. At common law they had to appear affirmatively on the record.[24] At the opposite pole is the present federal view that a mere allegation of denial of a constitutional right is sufficient to subject the state court's handling of the claim to the scrutiny of a federal court. The present holdings of the West Virginia Supreme Court in regard to this matter lie somewhere in between.

In the most recent pronouncement of our Court, *State ex. rel. Scott v. Boles*,[25] petitioner asserted that he had not been duly cautioned as required by the recidivist statute before additional sentence was imposed upon him. The majority of the court upheld past decisions by applying a presumption of regularity of court proceedings which can be upset only if the contrary appears on the record. "It will be presumed, where the record is silent, that a court of competent jurisdiction performed its duty in all respects as required by law."[26] The court went on to say that there is one exception with regard to this presumption, relating to the right to the assistance of counsel.[27]

However, Judge Calhoun, in a concurring opinion, outlined a possibility for future decisions:

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[18] 40 N.Y.U.L. REV. 154 (1965).
[19] *Ex parte* Evans, 42 W. Va. 242, 24 S.E. 888 (1896).
[20] State *ex rel.* May v. Boles, 149 W. Va. 155, 139 S.E.2d 177 (1964).
[21] State *ex rel.* Legg v. Boles, 148 W. Va. 354, 135 S.E.2d 257 (1964).
[22] State *ex rel.* Robb v. Boles, 148 W. Va. 641, 136 S.E.2d 891 (1964).
[23] State *ex rel.* Powers v. Boles, 149 W. Va. 6, 138 S.E.2d 159 (1964).
[24] 40 N.Y.U.L. REV. 154 (1965).
[25] 150 W. Va. 453, 147 S.E.2d 486 (1966).
[26] *Id.* at 457, 147 S.E.2d at 489.
[27] "[right to counsel] is a fundamental constitutional right provided in both the State and Federal Constitutions and will not be presumed satisfied." *Id.*

> Our task and our obligation in cases of this character, therefore, is to endeavor to interpret and apply pertinent federal court decisions. . . .
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> . . .
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> In light of the decisions of the Supreme Court of the United States, which we are obliged to follow, I do not believe that we are warranted in holding that, upon a silent record, we must presume that the requirements of due process of law were fully complied with in the trial courts in the 'duly cautioned' cases, but not in the cases involving the denial of due process of law based solely on a denial of the constitutional right to assistance of counsel. Fundamental or constitutional rights are involved in both types of cases.[28]

Considering state habeas corpus as a whole, it is thus apparent that the Supreme Court of Appeals of West Virginia has differed from federal standards in two areas with respect to habeas corpus: (1) the writ has not been opened to the denial of all constitutional rights, and (2) it is still dependent upon there being an affirmative showing of error on the record. The language of Judge Calhoun would indicate a possible solution. By interpreting and applying pertinent federal court decisions, the West Virginia court could remove the "record" limitation while coming more in line with federal concepts as to the scope of state habeas corpus.

Resort to the Federal Courts

Regardless of the scope which state courts attach to habeas corpus, the denial of any federal constitutional right will subject the issue to a federal court proceeding. "The Supreme Court of the United States is the final arbiter in relation to questions of federal constitutional law."[29] However, before this is subjected to federal perusal, there must be an exhaustion of the state remedies.[30] A case in point on this issue is *Miller v. Boles*[31] decided in 1965 by Judge Maxwell of the Northern District of West Virginia.

Miller petitioned the federal courts for a writ of habeas corpus stating allegations which, if true, would have entitled him to this

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[28] *Id.* at 466, 147 S.E.2d at 494.
[29] *Id.* at 461, 147 S.E.2d at 491.
[30] 28 U.S.C. § 2254 (1948).

relief. The court refused, however, to consider his petition on the merits, but dismissed for failure to exhaust available state remedies.

In announcing a new rule regarding the requirement of "exhaustion" the court stated that:

> Under the former practice of this Court, Miller's petition for State habeas corpus relief upon an original petition to the Supreme Court of Appeals of West Virginia, alleging claims similiar to those submitted here, would have been an adequate showing that Miller had met the requirements of 'exhaustion'. However, from this time forth such a showing is inadequate.[32]

Such a step as was taken in this case was undoubtedly necessary, since the federal courts were being deluged with habeas corpus petitions, and if these courts were to function properly, some steps had to be taken to return the problem to the state courts.

The solution developed in *Miller* was that since federal policy concerning exhaustion is to encourage and promote state court evidentiary hearings on federal claims, the requirements have not been met if a state prisoner still has available a state forum in which he can receive such a hearing.[33]

The court then discussed the methods open to the states in adopting a remedy co-extensive with federal habeas corpus.[34] In doing so the court held further that West Virginia possesses a judicially shaped common law remedy which, "if properly invoked by state prisoners, would provide for full and fair evidentiary hearings and appellate review in determining the merits of constitutional claims."[35] Both the West Virginia Supreme Court of Appeals and the circuit courts have original jurisdiction in state

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[31] 248 F.Supp. 49 (N.D. W. Va. 1965).

[32] *Id.* at 50.

[33] "[I]f a West Virginia prisoner is to qualify for federal habeas corpus relief he must first pursue the proper available state remedy providing for a full evidentiary hearing." *Id.* at 57.

[34] "Maryland has adopted a post-conviction statute . . . . Kentucky has enacted, by Rule of Court, a remedy much like that used for collateral attack of Federal convictions. Virginia, by a series of judicial pronouncements, has broadened the scope of state habeas corpus to cover Federal Constitutional claims." *Id.* at 58.

[35] *Id.* at 58.

habeas corpus. The circuit court, a trial court of general jurisdiction, can summon witnesses and hold full evidentiary hearings. Thus a full and fair evidentiary hearing to determine the merits of a constitutional claim will be afforded any West Virginia prisoner who seeks post-conviction relief in the proper circuit court. Original applications for the writ in the Supreme Court of Appeals can only result in evidentiary hearings if that court exercises its discretion to make the writ returnable to the proper circuit court.[36]

Subsequent to this decision, the 58th Legislature of the State of West Virginia enacted a post-conviction statute in January of 1967.[37] Under this statute, any person convicted of a crime and incarcerated thereunder who contends that there was a denial of his constitutional rights (state or federal), may file a petition for a writ of habeas corpus with the clerk of the West Virginia Supreme Court of Appeals or any circuit court or criminal court. If it appears to the court from the petition, affidavits, exhibits, records and other documentary evidence attached thereto, or the record in the proceedings which resulted in the conviction and sentence, that there is probable cause to believe the prisoner is entitled to some relief, the court shall grant a writ, making it returnable to the court granting it, or the circuit court where he is incarcerated or was convicted. If it appears to this court that there is probable cause to believe that the petitioner may be entitled to some relief and the contentions have not been previously and finally adjudicated or waived, a hearing is in order. This hearing shall include the taking of evidence and passage by the court on all issues of fact, all of which shall be included in a complete record of the proceeding. Finally, when the court determines to deny or grant relief, as the case may be, an appropriate order with respect to the conviction or sentence shall be entered.[38]

It would appear that a statute such as this was the end sought by the *Miller decision.* It provides the statutory test which a prisoner must pass in order to exhaust his available state remedies; and in doing so, it further provides for a full and fair hearing on

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[36] *Id.*

[37] This statute amends Chapter Fifty-three (53) of the Code of West Virginia by adding Article Four-a (4a), providing for full post-conviction review upon the granting of a writ of habeas corpus.

[38] *Id.*

the merits of the contention unless such a hearing was held previously.

However, the key would appear to involve the interpretation which the West Virginia Court of Appeals and the various circuit courts place on the statute, particularly with respect to the first screening of the petition. Though the writ is made available for the denial of all constitutional rights, the wording of the statute allows the courts to deny it if the petition, affidavits, or lower court record "show" that the prisoner is entitled to no relief. This might be construed to mean that a silent record presumes no error, and thus contentions based on errors not shown are without merit. In this manner the Supreme Court of Appeals of West Virginia could adhere to past decisions and still stay within the confines of this legislation. If a situation analogous to *Scott* arose now, however, the better interpretation would allow the granting of the writ on a showing of probable cause, regardless of what is or is not in the record.[39] Furthermore, by making the writ returnable to a lower court (or the same court) where a full and fair hearing is held, West Virginia will have taken a giant step toward meeting the federal standards.

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[39] *Standards Relating to Post-Conviction Remedies*, in AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE:

4.2(b) If any preliminary judicial screening of pro se applications is undertaken prior to receipt of responsive pleadings, orders of final dismissal should be confined to cases of unmistakably frivolous allegations.

4.3(e) Disposition on pleadings and record of prior proceedings without appointment of counsel for the unrepresented applicant is not proper if it requires resolution of a non-frivolous question of law. *Disposition at this stage is always improper whenever there exists a material issue of fact.*"