UIC Law Review

Volume 8 | Issue 1 Article 7

Fall 1974

Practice and Procedure under the Illinois Post-Conviction Hearing Act, 8 J. Marshall J. Prac. & Proc. 129 (1974)

Alan Rabunski

PRACTICE AND PROCEDURE UNDER THE ILLINOIS POST-CONVICTION HEARING ACT

INTRODUCTION

The notion that the State has broad autonomy in the formulation and control of its criminal procedure is fundamental to our federal system. The primary limitation placed upon the State's interest is the Due Process Clause of the Fourteenth Amendment.[1] The State must provide an adequate procedure by which federal claims of constitutional violation can be raised and adjudicated.[2]

The post-conviction remedies available in Illinois did not always conform to this requirement. In 1947, at a time when the United States Supreme Court was inundated with habeas corpus and certiorari petitions from Illinois prisoners, three justices of that court termed the Illinois practice a "merry-go-round," a "procedural labyrinth . . . made up entirely of blind alleys."[3]

At that time Illinois provided for three post-conviction remedies: writ of error, a statutory substitute for the common law writ of error *coram nobis*, and state habeas corpus. Because of the technical restrictions placed upon each remedy, the Illinois Attorney General was able to confront indigent prisoners with the argument that they had pursued the wrong remedy.[4]

The turning point came in *Marino v. Ragen*[5] in which the Illinois Attorney General confessed error before the United States Supreme Court. Mr. Justice Rutledge castigated the Illinois post-conviction procedure in a concurring opinion:

> The trouble with Illinois is not that it offers no procedure. It is that it offers too many, and makes them so intricate and ineffective that in practical effect they amount to none. The

1. U.S. CONST. amend. XIV.

2. An apt statement of this principle is provided in Carter v. Illinois, 329 U.S. 173, 175, 176 (1946).

> A State must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process . . . . Questions of fundamental justice protected by the Due Process Clause may be raised . . . dehors the record. . . .
>
> . . . So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated.

3. Marino v. Ragen, 332 U.S. 561, 563, 567-70 (1947) (concurring opinion).

4. The historical background can be found in an article by Albert E. Jenner, Jr., *The Illinois Post-Conviction Hearing Act*, 9 F.R.D. 347 [hereinafter cited as JENNER]. See also Leighton, *Post-Conviction Remedies in Illinois Criminal Procedure*, 1966 U. ILL. L.F. 540, 566-70 [hereinafter cited as LEIGHTON]; Katz, *An Open Letter to the Attorney General of Illinois*, 15 U. CHI. L. REV. 251 (1948).

5. 332 U.S. 561 (1947).

> possibility of securing effective determination on the merits is substantially foreclosed by the probability, indeed the all but mathematical certainty, that the case will go off on the procedural ruling that the wrong one of several remedies has been followed.[6]

The Illinois legislature's response was the passage of the Post-Conviction Hearing Act.[7] The Act was designed to provide a remedy by which federal and state constitutional violations could be raised and adjudicated in a collateral proceeding.

A cursory glance at the reported opinions in Illinois reveals an enormous number of petitions filed under the Act. Because of its unique statutory purposes, some courts have termed the post-conviction proceeding sui generis.[8] The proceeding is civil in nature,[9] but is not governed by the Civil Practice Act;[10] yet, the function of the remedy is to review an existing judgment entered in a criminal case. For these reasons, it is useful to the practicing bar to fully understand the procedures which govern the post-conviction proceeding.

Other Collateral Proceedings

In Illinois there are three post-judgment collateral proceedings[11] by which a defendant may obtain relief from a judgment in a criminal case. These include the Post-Conviction Hearing Act,[12] the writ of habeas corpus,[13] and the petition under Section 72 of the Civil Practice Act.[14] In order to determine the scope of the Post-Conviction Hearing Act, it is helpful to consider the others briefly.

---

6. *Id.* at 565 (concurring opinion).
7. Act of Aug. 4, 1949, ch. 38, §§ 826-32, [1949] Ill. Laws 66th Sess. 722.
8. People v. Thomas, 51 Ill. 2d 39, 280 N.E.2d 433 (1972); People v. Myers, 44 Ill. 2d 327, 255 N.E.2d 392 (1970); People v. Clements, 38 Ill. 2d 213, 230 N.E.2d 185 (1967); People v. Airmers, 34 Ill. 2d 222, 215 N.E.2d 225 (1966); People v. Bernatowicz, 413 Ill. 181, 108 N.E.2d 479 (1952), *cert. denied*, 345 U.S. 928 (1953).
9. People v. Caise, 38 Ill. 2d 486, 231 N.E.2d 596 (1967); People v. Clements, 38 Ill. 2d 213, 230 N.E.2d 185 (1967); People v. Wilson, 37 Ill. 2d 617, 230 N.E.2d 194 (1967); People v. Alden, 15 Ill. 2d 498, 155 N.E.2d 617 (1959); People v. Wakat, 415 Ill. 610, 114 N.E.2d 706 (1953).
10. People v. Clements, 38 Ill. 2d 213, 230 N.E.2d 185 (1967).
11. The term is borrowed from Leighton, *supra* note 4. The author has divided post-conviction remedies into two broad categories: the post-trial motions and the post-judgment proceedings. The post-trial motions are further subdivided to include the motion for a new trial and the motion in arrest of judgment. The post-judgment proceedings are divided into direct and collateral attacks. Post-judgment direct proceedings include the motion to vacate judgment and the appeal. The other post-judgment proceedings are collateral attacks and are considered here.
12. Ill. Rev. Stat. ch. 38, §§ 122-1 to 122-7 (1973). The entire Act is set forth in the Appendix.
13. Ill. Rev. Stat. ch. 65, § 1 *et seq.* (1973).
14. Ill. Rev. Stat. ch. 110, § 72 (1973).

The petition provided for in Section 72[15] of the Civil Practice Act is available for all relief formerly given under the motion in the nature of a writ of error *coram nobis*. The petition can bring before the court only such matters of fact not appearing of record, which, if known at the time the judgment was rendered, would have prevented its rendition.[16] The errors of fact for which the remedy is available include duress, fraud, disability and incompetence. Thus, for example, when the defendant was insane, but the court proceeded on the assumption that the defendant was sane, a petition under Section 72 is an appropriate remedy.[17]

The petition under Section 72 cannot be used to raise errors made by the court on questions of law,[18] nor can the petition be used to correct errors appearing of record.[19] Thus, constitutional violations cannot be raised if the claim involves a fact which was known to the trial court. These errors are resolved by appeal or other post-trial motions.

The ancient origins of the writ of habeas corpus are preserved by the state and federal constitutions and by statute in Illinois.[20] The Illinois Habeas Corpus Act provides that every person imprisoned or otherwise restrained of his liberty may prosecute the writ to obtain relief from such imprisonment, if it can be proven that the incarceration is unlawful.[21] The objective of the writ is immediate relief from illegal confinement.[22] Thus, habeas corpus is available when the court which entered judgment lacked jurisdiction over the subject matter.[23] Non-jurisdictional constitutional claims, however, cannot be raised in a habeas corpus petition.[24]

Scope of the Act

The post-conviction proceeding is available to assert substantial denials of rights under either the federal or state constitution. A denial is not substantial unless prejudice results,

15. *Id.*
16. Leighton, *supra* note 4, at 565-66.
17. *Id.* at 566.
18. People v. Schuedter, 336 Ill. 244, 168 N.E. 323 (1929).
19. People v. Thon, 374 Ill. 624, 30 N.E.2d 54 (1940).
20. U.S. Const. art. I, § 9; Ill. Const. art. I, § 9 (1970); Ill. Rev. Stat. ch. 65, § 1 *et seq.* (1973). In Illinois the origin of the writ of habeas corpus dates back to the Northwest Ordinance. Ordinance of 1787, art. II, enacted by Congress under the Articles of Confederation, July 13, 1787, 1 Stat. 51.
21. Ill. Rev. Stat. ch. 65, § 1 (1973).
22. Leighton, *supra* note 4, at 579.
23. People *ex rel.* St. George v. Woods, 47 Ill. 2d 261, 265 N.E.2d 164 (1970).
24. People *ex rel.* Haven v. Macieiski, 38 Ill. 2d 396, 398, 231 N.E.2d 433, 434 (1967).

without which the outcome would probably have been different.[25] A constitutional violation which fails to meet this standard will result in a dismissal of the petition.[26]

Although Section 122-1 of the Act states that a post-conviction proceeding is available to "[a]ny person imprisoned in the penitentiary,"[27] this provision has not been construed literally.[28] Thus, in *People v. Davis*,[29] the petitioner had been incarcerated at the time the petition was filed, but the post-conviction hearing was not held until after the petitioner had been discharged from the penitentiary. The supreme court held that a post-conviction proceeding should not be denied "in every case in which the petition is not filed and the hearing completed before imprisonment ends."[30] This holding was reaffirmed in *People v. Neber*.[31] There, as in *Davis*, the petition was filed at a time when the petitioner was incarcerated. In *Neber*, the post-conviction judge had erred in failing to appoint counsel after the petitioner had made a proper request.[32] The supreme court remanded the case for further proceedings, although the petitioner had by this time completed his sentence.

Both *Neber* and *Davis* presented situations in which the petition was not held moot even though the petitioner was not imprisoned throughout the entire post-conviction proceeding. Apparently, the petitioner's incarceration at the time the petition was filed provided sufficient connection to invoke the Act.[33]

---

25. People v. Logue, 45 Ill. 2d 170, 258 N.E.2d 323 (1970); People v. Bliss, 44 Ill. 2d 363, 255 N.E.2d 405 (1970).

26. Although not expressly stated by the courts, the dismissal in these circumstances represents an application of the harmless error rule. See note 210 *infra*.

27. ILL. REV. STAT. ch. 38, § 122-1 (1973).

28. The supreme court, pursuant to its supervisory jurisdiction, has also fashioned a post-conviction remedy applicable to misdemeanants. In People v. Warr, 54 Ill. 2d 487, 298 N.E.2d 164 (1973), the court described this remedy as a "proceeding in the nature of a proceeding under the Post-Conviction Hearing Act," which would generally be governed by the same Act. The remedy as applied to misdemeanants is modified in the following respects:

A. The defendant need not be imprisoned;

B. The proceeding shall be commenced within four months after rendition of final judgment if judgment was entered upon a plea of guilty, and within six months after the rendition of final judgment following a trial upon a plea of not guilty; and,

C. Counsel need not be appointed to represent an indigent defendant if the trial judge, after examination of the petition enters an order finding that the record in the case, read in conjunction with the defendant's petition and the responsive pleading of the prosecution, if any, conclusively shows that the defendant is entitled to no relief. *Id.* at 492, 298 N.E.2d at 166-67.

29. 39 Ill. 2d 325, 235 N.E.2d 634 (1968).

30. *Id.* at 329, 235 N.E.2d at 636.

31. 41 Ill. 2d 126, 242 N.E.2d 179 (1968).

32. Notes 84-86 *infra* & accompanying text.

33. *Accord*, People v. Bain, 10 Ill. App. 3d 363, 293 N.E.2d 758 (1973).

People ex rel. Palmer v. Twomey[34] provides an illustration of a case in which the "petition" was held moot. In *Palmer*, on facts substantially similar to those in *Neber* and *Davis*, the supreme court upheld the dismissal of the "petition," although otherwise meritorious grounds were present.[35] The basis for the decision was that the petitioner was no longer imprisoned at the time of the oral arguments before the supreme court. The language in the opinion slightly modified that used in *Davis*: ". . . the fact that [the] . . . term of imprisonment has ended does not of itself serve to bar the institution of post-conviction proceedings."[36]

Although the "petition" in *Palmer* was held moot, the court did not elaborate upon the circumstances which would produce this result. It may be that the absence of such factors as the delay occasioned in *Davis*, or the refusal to appoint counsel in *Neber*, could bar the hearing in a post-conviction proceeding when the term of imprisonment has been completed. This view would limit the holdings in *Neber* and *Davis*. Without distinguishing these cases, *Palmer* impliedly rejects such an interpretation because in this case the court also had refused to appoint counsel.[37]

In *Palmer*, the "post-conviction petition" was in actuality a pro se petition requesting habeas corpus but alleging inadequate grounds. The allegations would have been appropriate in a post-conviction petition. The trial court dismissed on the authority of *People ex rel. Haven v. Macieiski*[38] and *People ex rel. Lewis v. Frye*.[39] In those cases, the court had held that the post-conviction judge was not required to disregard an improperly labeled petition and treat it as a post-conviction petition.

Thus, the question presented was whether to affirm these previous holdings. The court rejected its prior position, stating as follows:

> A salutary result, consistent with the intent of the Post-Conviction Hearing Act . . ., would be achieved if the circuit court, upon finding that a *pro se* petition however labeled, and however

34. 53 Ill. 2d 479, 292 N.E.2d 379 (1973).
35. Notes 38-40 *infra* & accompanying text.
36. 53 Ill. 2d 479, 484, 292 N.E.2d 379, 382 (1973). It is doubtful whether this language would permit the filing of a petition when the petitioner is not imprisoned. In People v. Bain, 10 Ill. App. 3d 363, 293 N.E. 2d 758 (1973), the court stated that Section 122-1 refers to "a person being incarcerated at the time he *institutes* a post-conviction proceeding." *Id.* at 364, 293 N.E.2d at 760 (emphasis by court).
37. As will be seen, the "petition" in *Palmer* was labeled habeas corpus. Since counsel need not be appointed to indigents seeking state habeas corpus, *Palmer* could also provide support for the view that *Neber* and *Davis* are limited to their facts.
38. 38 Ill. 2d 396, 231 N.E.2d 433 (1967).
39. 42 Ill. 2d 58, 245 N.E.2d 483 (1969).

> inartfully drawn, alleged violations of the petitioner's rights cognizable in a post-conviction proceeding, would thereafter, for all purposes, treat it as such. . . .[40]

Since the judgment was affirmed on other grounds,[41] the court's rejection of its previous holdings was unnecessary to the disposition of the case. Thus, its holding on this point was dicta. Nonetheless, the decision reflects the court's belief that a petition should be judged on its substance, rather than on the label placed upon it.

The Act requires that the alleged constitutional violations must occur "in the proceedings which resulted in [the petitioner's] conviction."[42] This language implies that errors occurring subsequent to the entry of conviction cannot be considered in a post-conviction proceeding. The case of *People v. Pier* dispels this notion with respect to constitutional violations occurring during probation revocation hearings.[43]

In *Pier*, the defendant had been placed on probation after a burglary conviction. Charges were later filed, alleging a violation of probation which the defendant subsequently admitted. At the hearing, the judge revoked the defendant's probation. Thereafter, the defendant filed a post-conviction petition, alleging that his admission was induced by the State's Attorney's unfulfilled promise to recommend a lighter sentence than he actually received.

The State contended that the probation revocation hearings were not involved in the defendant's conviction, rather, that the proceedings were related to matters which occurred subsequently. Therefore, any errors involved in the probation revocation hearing could not be considered in a post-conviction proceeding.

The supreme court felt that the view advanced by the State did not comport with the Criminal Code definition of "conviction"—a "judgment of conviction or sentence."[44] The court concluded that a post-conviction petition may properly allege constitutional violations "which [arise] in proceedings concerning the imposition of the sentence."[45]

---

40. 53 Ill. 2d 479, 484, 292 N.E.2d 379, 382 (1973).
41. Notes 34-36 *supra* & accompanying text.
42. ILL. REV. STAT. ch. 38, § 122-1 (1973). Matters arising in proceedings pursuant to the Sexually Dangerous Persons Act, *id.* § 105-1.01 *et seq.*, are not cognizable in a post-conviction proceeding. Violators of that Act are not imprisoned pursuant to a conviction; they are committed to the Department of Public Safety. People v. Lindsey, 45 Ill. 2d 115, 256 N.E.2d 808 (1970).
43. 51 Ill. 2d 96, 281 N.E.2d 289 (1972).
44. ILL. REV. STAT. ch. 38, § 2-5 (1973).
45. 51 Ill. 2d 96, 98, 281 N.E.2d 289, 290 (1972); *see* People v. Clark, 48 Ill. 2d 554, 272 N.E.2d 10 (1971); People v. Franciere, 47 Ill. App. 2d 436, 198 N.E.2d 170 (1964) (implicitly overruled by *Pier*).

Errors committed by reviewing courts[46] or by parole boards[47] may not form the basis for a post-conviction proceeding. These matters are not related to the proceedings which resulted in conviction.[48]

PROCEDURE UNDER THE ACT

The Petition

The function of pleadings in a post-conviction proceeding is to determine whether the petitioner is entitled to an evidentiary hearing.[49] Stated another way, "[t]he standing of a petitioner must appear from the allegations of the petition."[50]

A proceeding under the Post-Conviction Hearing Act is commenced by filing, with the clerk of the court in which the conviction took place, a petition, verified by affidavit.[51] The petitioner must also serve a copy of the petition upon the State's Attorney.[52] The clerk is required to docket the petition and bring it promptly to the attention of the court.[53] If the petition alleges that the petitioner is unable to pay the costs of the proceeding, leave of court must be obtained to proceed in forma pauperis. Until such an order is signed, the petition cannot be docketed.[54]

46. People v. Johndrow, 40 Ill. 2d 288, 239 N.E.2d 853 (1968).
47. People v. Ferree, 40 Ill. 2d 483, 240 N.E.2d 673 (1968).
48. *Accord*, People v. Barber, 51 Ill. 2d 268, 281 N.E.2d 676 (1972); People v. Calhoun, 46 Ill. 2d 60, 263 N.E.2d 69 (1970) (proceeding under the Uniform Criminal Extradition Act, ILL. REV. STAT. ch. 60, § 18 *et seq.* (1973)); People v. Fuca, 43 Ill. 2d 182, 251 N.E.2d 239 (1969) (hearings in aggravation and mitigation); People v. Buford, 4 Ill. App. 3d 533, 281 N.E.2d 345 (1972), *cert. denied*, 411 U.S. 933 (1973).
49. *E.g.*, People v. Derengowski, 44 Ill. 2d 476, 256 N.E.2d 455 (1970); People v. Collins, 39 Ill. 2d 286, 235 N.E.2d 570 (1968); People v. Airmers, 34 Ill. 2d 222, 215 N.E.2d 225 (1966).
50. LEIGHTON, *supra* note 4, at 573.
51. ILL. REV. STAT. ch. 38, § 122-1 (1973). Cook County Circuit Court Rule 17.4(a)(i) provides that the original petition and a copy are filed with the clerk of the Criminal Division, accompanied by the docket fee. Where the petitioner has been granted leave to proceed in forma pauperis, the docket fee is not required. Rule 17.4(a)(iii) & (iv). See also Smith v. Bennett, 365 U.S. 708 (1961). Rule 17.4(b) requires the clerk to maintain records of petitions as prescribed by general administrative order.
52. ILL. REV. STAT. ch. 38, § 122-1 (1973). The statute provides that service may be achieved by any method prescribed by Supreme Court Rule 11. ILL. REV. STAT. ch. 110A, § 11 (1973). See also Cook County Circuit Court Rule 17.4(a)(ii) to the same effect.
Appointed counsel need not be concerned with the initial petition, which is often filed pro se, the docket fee or proof of service since these matters are usually completed prior to counsel's entry in the case. Where subsequent pleadings are filed, as for example an amended petition, service must be made upon the State's Attorney. According to JENNER, *supra* note 4, at 359, service is not to be considered an integral part of the actual commencement of the proceedings.
53. ILL. REV. STAT. ch. 38, § 122-1 (1973). The proper remedy to pursue if the circuit court, its clerk, or the State's Attorney fail to process and take action upon a post-conviction petition is mandamus. People *ex rel.* Cook v. Frye, 42 Ill. 2d 270, 246 N.E.2d 254 (1969).
54. ILL. REV. STAT. ch. 38, § 122-4 (1973).

If the petitioner is without counsel and alleges that he is without means to procure counsel, the petition should state whether appointed counsel is desired.[55]

The petition must identify the proceeding in which the petitioner was convicted and the date the final judgment was entered. All previous proceedings brought by the petitioner to secure relief from the conviction must be set forth in the petition. Also, argument, citations and discussion of authorities should be omitted from the petition.[56]

The petition must be based on factual allegations[57] rather than mere conclusions.[58] Affidavits, copies of records,[59] or other relevant evidence must be attached to the petition in substantiation of its factual claims. If no such documents have been attached, the petition must explain their absence.[60]

The petition must allege facts showing a substantial denial of constitutional rights, under either the federal or state constitution or both.[61] Whenever the factual allegations, assumed to be true, do not reveal a constitutional violation, the petition is subject to a motion to dismiss. The right to a hearing is not, however, solely dependent upon whether a constitutional denial has been properly alleged. In ruling on a motion to dismiss, the court may base its decision on the contents of the petition read in conjunction with the trial transcript.[62] Where the allegations of the petition are contradicted by the record, the petition is subject to dismissal.[63]

Where, for example, no direct appeal has been taken, the petitioner's claims may be based on matters of record. In such a case, no extrinsic evidence is required, and the absence of accompanying affidavits may be sufficiently explained, provided the alleged constitutional denials are substantially borne out by matters appearing of record. Thus, in *People v. Reeves*,[64] prior to

55. *Id.* In Cook County, an affidavit must be attached to the petition by counsel that his services are being rendered gratuitously, if the petition is in forma pauperis and the petitioner is represented by counsel of his own choice. Cook County Circuit Court Rule 17.4(a) (iii).

56. ILL. REV. STAT. ch. 38, § 122-2 (1973).

57. People v. Hysell, 48 Ill. 2d 522, 272 N.E.2d 38 (1971); People v. Orndoff, 39 Ill. 2d 96, 233 N.E.2d 378 (1968).

58. *E.g.*, People v. Olson, 46 Ill. 2d 167, 263 N.E.2d 92 (1970).

59. Supreme Court Rule 471 requires that an indigent post-conviction petitioner be supplied with a copy of the transcript of his trial. ILL. REV. STAT. ch. 110A, § 471 (1973).

60. ILL. REV. STAT. ch. 38, § 122-2 (1973).

61. *Id.* § 122-1. The remedy is not available to assert the deprivation of a right attributable either to statute or court rule. *See, e.g.*, People v. Covington, 45 Ill. 2d 105, 257 N.E.2d 106 (1970); People v. Gardner, 8 Ill. App. 3d 588, 289 N.E.2d 638 (1972).

62. People v. Bliss, 44 Ill. 2d 363, 255 N.E.2d 405 (1970); People v. Slicker, 42 Ill. 2d 307, 247 N.E.2d 407 (1969).

63. *E.g.*, People v. Olson, 46 Ill. 2d 167, 263 N.E.2d 92 (1970).

64. 412 Ill. 555, 107 N.E.2d 861 (1952).

a murder trial the accused had been found insane. A purported restoration proceeding later determined the accused's sanity on a stipulation by the assistant public defender, resulting in a withdrawal of that issue from the jury. During the trial, no objection was made to the introduction of a confession taken shortly before the adjudication of insanity. Although supporting affidavits were absent, the supreme court held that a hearing was required since the *record itself* supported the allegations of the petition.[65] When claims are based on matters of record, as in *Reeves*, affidavits may supply a foundation from which the court can make an adequate search of the record.

A greater number of post-conviction proceedings involve alleged constitutional violations based on matters not appearing of record. Thus, for example, the knowing use of perjured testimony by the State to secure a conviction violates the defendant's constitutional rights to a fair trial and due processs of law.[66] Because direct appeal is limited to issues appearing on the face of the record,[67] ordinarily such claims are not considered. Usually the issue has not been presented or passed upon by the trial court. A post-conviction proceeding is an appropriate remedy for such a claim.[68] The function of supporting affidavits in this case is to provide the court with a preliminary indication as to how the petitioner intends to prove his claim. Accordingly, the petition and supporting affidavits must identify with reasonable certainty the source of the evidence, its availability and its substance.[69]

In *People v. Agnello*,[70] the petitioner alleged that the State knowingly used perjured testimony. The petition set forth a portion of a letter, purportedly received after the trial by the petitioner from a co-defendant who allegedly gave the perjured testimony. The letter contained what might be construed as an admission that a "deal" had been made between the prosecutor and the co-defendant prior to the time the latter testified at trial. The petition alleged further that if necessary the letter could be obtained. Additionally, the petition made reference to an excerpt from the transcript of the trial of another alleged accomplice, suggesting that the co-defendant had been "offered consideration" in return for his testimony. The court held the petition was adequately supported to require an evidentiary hearing.

Conversely, where the allegation is made that the State

65. *Id.* at 560, 107 N.E.2d at 866.
66. Napue v. Illinois, 360 U.S. 264 (1959).
67. CALLAGHAN'S, Ill. Crim. Proc. § 40.04 (1971).
68. *See* People v. Hoskins, 25 Ill. 2d 333, 185 N.E.2d 214 (1962).
69. People v. Farnsley, 53 Ill. 2d 537, 293 N.E.2d 600 (1973); People v. Ashley, 34 Ill. 2d 402, 216 N.E.2d 126 (1966).
70. 35 Ill. 2d 611, 221 N.E.2d 658 (1966).

knowingly used perjured testimony, a petition framed in general terms and lacking support is subject to a motion to dismiss without a hearing.[71]

To expect a petitioner to acquire supporting affidavits in every case would be unreasonable. If, for example, the claim is presented that a guilty plea was induced by a prosecutor's unfulfilled promise of leniency,[72] supporting this allegation may prove difficult. There may not be many third parties with relevant knowledge willing to produce affidavits. In cases of this type, the petition must explain the absence of supporting affidavits.[73] It is not enough to state that oral testimony of other witnesses is needed to sustain the allegations of the petition.[74] The cases of *People v. Washington*[75] and *People v. Williams*[76] clarify the nature of the explanation required.

In *Washington*, the petitioner alleged that while his sister was present, his attorney had advised him of participating in discussions with the prosecutor and the trial judge concerning the case, and of reaching an agreement with them. In return for a plea of guilty, the petitioner was to be sentenced to fourteen years. The petitioner alleged that in reliance upon this promise he pleaded guilty. The petitioner was given a twenty-five year sentence. Other allegations charged coercive methods in obtaining a confession. The petitioner did not submit affidavits from either the attorney or his sister. He alleged that his incarceration and indigence prevented him from obtaining these affidavits, but that the testimony of his attorney, his sister and the police officers who beat him would support the allegations.

With respect to the petitioner's failure to secure supporting affidavits, the court found that the petition had adequately "stated why affidavits were not attached," and had "identified every person involved by name . . . ."[77] The court held that a hearing was required since the allegations of the petition were "undisputed."[78]

In a dissenting opinion, Mr. Justice Underwood considered the petitioner's explanation for his failure to obtain supporting affidavits to be insufficient. He pointed to the petitioner's ability to draft his own affidavit and the petitioner's allegation that his

71. *E.g.*, People v. Wallace, 35 Ill. 2d 620, 221 N.E.2d 655 (1966).
72. A prosecutor's unfulfilled promise of a reduced sentence, or a misrepresentation by the trial judge of the sentence to be imposed, invalidates a plea of guilty. Machribroda v. United States, 368 U.S. 487 (1962).
73. ILL. REV. STAT. ch. 38, § 122-2 (1973).
74. *E.g.*, People v. Reed, 36 Ill. 2d 358, 223 N.E.2d 103 (1967).
75. 38 Ill. 2d 446, 232 N.E.2d 738 (1967).
76. 47 Ill. 2d 1, 264 N.E.2d 697 (1970).
77. 38 Ill. 2d 446, 449, 232 N.E.2d 738, 739 (1967).
78. *Id.* at 451, 232 N.E.2d at 740.

sister had visited him in prison the week before the petition was drafted. In view of these factors, the dissent found the petitioner's explanation inadequate. As for the purpose of the statutory requirement concerning affidavits, the opinion reasoned:

> This requirement was obviously intended by the legislature to limit plenary hearings in post-conviction matters to those instances in which defendant [*sic*] had filed with their petitions such supporting material *as was reasonably available to them.*[79]

In light of the difficulty in obtaining supporting affidavits when a petition alleges an unfulfilled promise of leniency, the reasoning of the dissent offers a more persuasive rationale for the decision reached by the majority. The opinion implies that the statutory requirement of affidavits is satisfied if the circumstances of a particular case indicate that supporting materials are not reasonably available to the petitioner.

The case of *People v. Williams*[80] provided a factual setting resembling that posed in *Washington*. In *Williams*, the petitioner also alleged that he was induced to plead guilty in reliance upon his attorney's representation of leniency; the State had allegedly agreed to a sentence ranging from six months to one year, instead of forty to eighty years, if the petitioner went to trial. The petition further alleged that after a sentence of three to seven years was imposed, the petitioner's attorney whispered to him that the court would call him back and reduce the sentence to one year. No supporting affidavits were attached to the petition. The State filed a motion to dismiss, arguing that not only had the petitioner failed to supply affidavits, but he had also provided no reasons for their absence.

The court distinguished *Washington* in only one respect—in *Washington* the petitioner attempted to explain the absence of affidavits. Otherwise, the facts were "almost identical."[81] The court held that a hearing was required, since the allegations of the petition were neither denied by the State, nor contradicted by the record. With respect to the requirement of affidavits, the court unintentionally echoed the remarks of Mr. Justice Underwood, when it said:

> [T]he only affidavit that petitioner could possibly have furnished, other than his own sworn statement, would have been that of his attorney who allegedly made the misrepresentation to him. *The difficulty or impossibility of obtaining such an affidavit is self-apparent.*[82]

It would seem that when a particular affidavit is not "rea-

79. *Id.* at 453, 232 N.E.2d at 742 (emphasis added).
80. 47 Ill. 2d 1, 264 N.E.2d 697 (1970).
81. *Id.* at 3, 264 N.E.2d at 698.
82. *Id.* at 4, 264 N.E.2d at 698 (emphasis added); *accord*, People v. Nesbitt, 5 Ill. App. 3d 123, 283 N.E.2d 294 (1972).

sonably available" to the petitioner, it is also difficult or impossible to obtain. No hard and fast rules, however, can be stated without reference to the specific allegations of a petition. There may be other circumstances in which the rationale of *Williams* can also be applied.

The Amended Petition[83]

Because most post-conviction petitions are filed pro se by prisoners who have not had the assistance of counsel, the Act provides for the appointment of counsel for indigent petitioners.[84] Supreme Court Rule 651 anticipates that appointed counsel will probably amend the petition.[85] If the petitioner requests appointment of counsel, the court must either make such an appointment or specifically find that he does not lack sufficient means to obtain counsel.[86]

As previously indicated, the post-conviction proceeding is civil in nature,[87] but it is not governed by the Civil Practice Act.[88] Section 122-5 of the Act provides, however, that with respect to amendments of petitions or any other pleading, or pleading over, or filing other pleadings, or extending the time for pleadings, the court may make any order as it deems "appropriate, just and reasonable and as generally provided in civil cases."[89]

Allegations contained in the pro se petition which are omitted from the amended petition will not be considered by the court.[90] Thus, appointed counsel must carefully draft the amended petition to incorporate all claims raised by the pro se pleader. Some attorneys have attempted to avoid this difficulty by filing a supplemental petition.[91]

Under the Civil Practice Act, a supplemental pleading may set up matters which arise after the original pleading has been

83. The discussion on petitions also applies, of course, to the amended petition.

84. ILL. REV. STAT. ch. 38, § 122-4 (1973). See also People v. Slaughter, 39 Ill. 2d 278, 235 N.E.2d 566 (1968).

85. ILL. REV. STAT. ch. 110A, § 651 (1973). See *Appellate Practice infra.*

86. *E.g.*, People v. Butler, 40 Ill. 2d 386, 240 N.E.2d 592 (1968).

87. Cases cited note 9 *supra.*

88. People v. Clements, 38 Ill. 2d 213, 230 N.E.2d 185 (1967).

89. ILL. REV. STAT. ch. 38, § 122-5 (1973). *See also* ILL. REV. STAT. ch. 110, § 46 (1973). Section 122-5 also provides for the withdrawal of petitions. The significance of this provision lies in the res judicata effects of a final judgment under the Act. See *Res Judicata and Waiver infra.*

90. *E.g.*, People v. Phelps, 51 Ill. 2d 35, 280 N.E.2d 203 (1972); People v. Wilson, 13 Ill. App. 3d 675, 300 N.E.2d 576 (1973).

91. In People v. Brock, 45 Ill. 2d 292, 259 N.E.2d 12 (1970), the original petition concerned a confession while the supplemental petition alleged the State's failure to perform an agreement upon which a guilty plea was based. Both petitions were considered on the merits. *Accord*, People v. Lee, 5 Ill. App. 3d 421, 283 N.E.2d 740 (1972).

filed.[92] It may not include matters of which the pleader was unaware at the time he filed his original pleading. Such matters should be raised by amendment.[93]

Since the post-conviction proceeding is directed toward securing relief from an existing conviction, a supplemental pleading would seem improper. The facts giving rise to the claim generally have occurred before the petition is filed. Factual matter discovered after the pro se petition is filed can be brought in by amendment. No case law appears on this question. Whether this procedure may be utilized depends upon the discretion of the judge.

In drafting the amended petition, one other consideration should be mentioned: the practice of incorporating the petition by reference should be avoided. If an amended pleading in a civil case relates to an original pleading, whether by reference or adoption, the original pleading remains a part of the record.[94] Although this rule of civil pleading can arguably be applied to a post-conviction proceeding, no reported decision has considered the matter. Because of the opinions holding that the post-conviction proceeding is not governed by the Civil Practice Act,[95] the prudent course is to restate the allegations of the pro se petition in their entirety in the amended petition, with appropriate modifications to compensate for the petitioner's lack of legal skills.

The Motion to Dismiss and the Answer

An evidentiary hearing on a post-conviction petition is not always necessary since a motion to dismiss may be granted to the State on the basis of the petition or amended petition read in conjunction with the transcript of the trial.[96] Thus, if the allegations of the petition are refuted by the record, the motion to dismiss will be granted.[97]

Section 122-5 of the Act provides that the State must file either an answer or a motion to dismiss within thirty days after the filing and docketing of the petition, or within such further time as the court allows.[98] The statute does not, however, indi-

92. ILL. REV. STAT. ch. 110, § 39 (1973). *See Kovac v. Kovac*, where the court indicated that a supplemental pleading has, in some degree, the effect of an original pleading. 26 Ill. App. 2d 29, 51, 167 N.E.2d 281, 291 (1960), *cert. denied*, 371 U.S. 818 (1962).

93. NICHOLS, Illinois Civil Practice § 1383 (1961) [hereinafter cited as NICHOLS].

94. *Id.* § 1374.

95. People v. Clements, 38 Ill. 2d 213, 230 N.E.2d 185 (1967).

96. *E.g.*, People v. Stephany, 46 Ill. 2d 153, 263 N.E.2d 83 (1970); People v. Slicker, 42 Ill. 2d 307, 247 N.E.2d 407 (1969).

97. *E.g.*, People v. Brooks, 44 Ill. 2d 35, 253 N.E.2d 381 (1969).

98. ILL. REV. STAT. ch. 38, § 122-5 (1973). *But cf.* People v. Farnsley, 53 Ill. 2d 537, 293 N.E.2d 600 (1973) (no error when State's answer was considered even though filed beyond the time provided in Section 122-5).

cate whether the motion may be supported by affidavits containing affirmative matter not alleged in the petition. The question has not produced a clear answer from the courts.

Although the Civil Practice Act is not applicable to a post-conviction proceeding, it may be useful to consider its rules by way of analogy. Under the Civil Practice Act, a Section 45 motion attacks the pleading to which it is directed, on the grounds that it is substantially insufficient in law.[99] Since the motion raises only a question of law,[100] it may not contain any allegations of fact. Affirmative matter is raised in the answer or reply.

Under the post-conviction proceeding, the courts have stated that a motion to dismiss assumes the truth of the allegations of the petition and only attacks their sufficiency.[101] On occasion, the State will attach exhibits or affidavits to the motion to dismiss.[102] No cases have directly considered the propriety of such a practice. *People v. Jennings*[103] suggests that a petition which properly alleges a constitutional denial, and complies with the affidavit requirement, "calls for an answer" from the State.[104] The decision implies that a motion to dismiss under these circumstances is inappropriate.

The case of *People v. Reeves*,[105] following along the same line, is even more telling. There, in response to a claim of incompetent counsel, the State filed a supplemental abstract to refute the allegations in the petition. The abstract contained a petition for allowance of attorney's fees and indicated the preparation made for trial, the work done at trial, and the number of interviews held with the petitioner by his appointed counsel. Since a factual issue was created, the court held that the contents of the abstract "should be raised by answer rather than by motion to dismiss."[106]

Logically extended, *Reeves* would require the State to assert all affirmative matter by way of defense in an answer. The consequence of such a requirement would be the dismissal of fewer petitions at a preliminary stage and a corresponding increase in the number of evidentiary hearings. The additional demands placed upon the courts might entail unnecessary use of resources,

---

99. ILL. REV. STAT. ch. 110, § 45 (1973).
100. Swift & Co. v. Dollahan, 2 Ill. App. 2d 574, 120 N.E.2d 249 (1954).
101. *E.g.*, People v. Wilson, 39 Ill. 2d 275, 235 N.E.2d 561 (1968).
102. *E.g.*, People v. Newell, 41 Ill. 2d 329, 243 N.E.2d 200 (1968); People v. Wilson, 40 Ill. 2d 378, 240 N.E.2d 583 (1968) (motion to dismiss contained affirmative matter); People v. Wegner, 40 Ill. 2d 28, 237 N.E.2d 486 (1968); People v. Sigafus, 39 Ill. 2d 68, 233 N.E.2d 386 (1968).
103. 411 Ill. 21, 102 N.E.2d 824 (1952).
104. *Id.* at 26, 102 N.E.2d at 827; *accord*, People v. Evans, 412 Ill. 606, 107 N.E.2d 839 (1952).
105. 412 Ill. 555, 107 N.E.2d 861 (1952).
106. *Id.* at 559, 107 N.E.2d at 863.

since many more non-meritorious petitions would be granted hearings. It may be for this reason that some courts have implicitly accepted the propriety of raising affirmative matter in a motion to dismiss.[107]

Assuming that affirmative matter may properly be contained in a motion to dismiss, it bears some semblance to a motion pursuant to Section 48 of the Civil Practice Act.[108] Section 48 furnishes a means by which a defendant may obtain summary disposition of issues of law, or of easily proved issues of fact, with a reservation of jury trial as to disputed questions of fact.[109] The motion is designed to reach matters not appearing on the face of the pleading attacked, for example, the plaintiff's complaint.[110] Thus, the defendant may raise factual matters by affidavit in support of the motion; yet, at the same time, the defendant admits the truth of all well-pleaded facts in the complaint, for the purpose of the motion.[111] In the absence of a jury demand by the plaintiff, the court may decide the motion upon the affidavits and evidence offered by the parties, even though a material and disputed question of fact is raised.[112] Alternatively, the motion may be denied without prejudice to the rights of the defendant to assert the same matter in his answer.

The procedure described above bears some similarity to the post-conviction proceeding. When the State files a motion to dismiss and attaches affidavits containing affirmative matter, the court may grant the motion or deny it, allowing the State to assert the same matters by an answer. Contrary to Section 40 of the Civil Practice Act,[113] the State's answer may be a general denial employing general issues.[114]

The motion to dismiss admits the truth of the allegations in the petition only for the purpose of determining whether the petitioner is entitled to a hearing.[115] The Act was not designed to

107. In People v. Wilson, 39 Ill. 2d 275, 277, 235 N.E.2d 561, 562 (1968), the court said: "[The petition] was not susceptible of disposition upon a motion to dismiss which made no reference to the record or to *any other material relevant to the charge.*" (emphasis added). A close examination of this language reveals the court's view that the motion to dismiss would not even be considered unless it made reference to affirmative matter.

108. ILL. REV. STAT. ch. 110, § 48 (1973).

109. Jenner & Tone, *Historical and Practice Notes*, S.H.A. ch. 110, § 48 (1971).

110. A motion under Section 48 will also reach defects appearing on the face of the plaintiff's complaint. The motion, however, was not primarily designed for that purpose since a motion pursuant to Section 45 will reach that defect. *Id.*

111. *E.g*, Awe v. Striker, 129 Ill. App. 2d 478, 263 N.E.2d 345 (1970).

112. ILL. REV. STAT. ch. 110, § 48(3) (1973).

113. *Id.* § 40.

114. People v. Clements, 38 Ill. 2d 213, 230 N.E.2d 185 (1967).

115. *E.g.*, People v. Jennings, 411 Ill. 21, 102 N.E.2d 824 (1952).

permit the adjudication of constitutional claims on the pleadings.[116]

Thus, in *People v. Airmers*,[117] after the court had initially denied the State's motion to dismiss, the petitioner refused to introduce any evidence at the hearing in support of the petition, arguing that he was under no obligation to do so since the motion had admitted all the allegations. When the petitioner elected to stand on his petition, the court granted a motion to dismiss.

The supreme court rejected the petitioner's contention that the effect of a motion to dismiss entitled him to judgment on the pleadings. The court stated:

> [W]here the [petitioner's] claims are based upon matters outside the record . . . it is not the intent of the act that these claims be adjudicated on the pleadings. The function of the pleadings in a proceeding under the act is to determine whether the petitioner is entitled to a hearing. If the trial court determines that the allegations of the petition are sufficient to require a hearing, the petitioner must be afforded an opportunity to prove his allegations.[118]

A motion to dismiss may be filed in the following instances:[119] whenever the petition has not been filed within the statutory period;[120] whenever a previous post-conviction petition has been filed; whenever a direct appeal has been taken and the conviction affirmed; and whenever the petition is not accompanied by supporting affidavits or fails to allege a constitutional violation, either in law or where the factual allegations do not establish a constitutional claim. If the motion to dismiss is denied, or the answer creates a factual issue, an evidentiary hearing will be held.

Res Judicata and Waiver

The doctrine of res judicata constitutes a significant limitation upon the right to relief in a post-conviction proceeding. The introduction of the term reflects the civil nature of the Act. The doctrine finds its application in Section 122-3, which states that

116. *E.g.*, People v. Clements, 38 Ill. 2d 213, 230 N.E.2d 185 (1967).
117. 34 Ill. 2d 222, 215 N.E.2d 225 (1966).
118. *Id.* at 226, 215 N.E.2d at 228.
119. Gaines, *The Post Conviction Hearing Act*, 39 CHI. B. REC. 418 (1958); Starrs, *The Post-Conviction Hearing Act—1949-1960 and Beyond*, 10 DEPAUL L. REV. 397 (1961).
120. Beginning July 1, 1965, the statute of limitations for post-conviction petitions was extended to twenty years. ILL. REV. STAT. ch. 38, § 122-1 (1973). Prior to that time it was never more than five years.

The 1965 amendment does not revive any right to post-conviction relief that has previously been barred by the statute of limitations. People v. Reed, 42 Ill. 2d 169, 246 N.E.2d 238 (1969). Any petition filed beyond the applicable statutory period must allege "facts showing that the delay was not due to [the petitioner's] culpable negligence." ILL. REV. STAT. ch. 38, § 122-1 (1973).

any substantial denials of constitutional rights not raised in an original or amended petition are waived.[121] The Act is not intended to provide a method by which successive evidentiary hearings could be obtained on claims previously adjudicated.[122]

A misunderstanding of the application of res judicata can have a disastrous effect upon the rights of a petitioner in a post-conviction proceeding. The questions which arise include the effect of a prior direct appeal, the effect if no direct appeal was taken or if a direct appeal is pending, and the parameters of fundamental fairness—a doctrine invoked by the courts to temper the mechanical application of res judicata and waiver.

It must be remembered that a post-conviction proceeding is a new and independent investigation which is neither a substitute for an appeal, nor a limited review by an intermediate appellate court.[123]

A dismissal of a post-conviction petition which has become final, is res judicata of all constitutional claims actually raised and all claims which could have been raised, whether or not such dismissal was appealed.[124] Alleged constitutional violations not presented in a post-conviction petition cannot be raised in any subsequent petition. This proposition is made explicit by Section 122-3 of the Act.[125]

Even though a post-conviction petition will generally be subject to statutory waiver when a previous petition has been dismissed on the merits, the doctrine of waiver has been relaxed if fundamental fairness so requires. The cases of *People v. Polansky*[126] and *People v. Slaughter*[127] illustrate this principle.

In *Polansky*, the petitioner pleaded guilty and was sentenced to a term of imprisonment. He subsequently filed a pro se petition alleging indigency and requesting the appointment of counsel. The post-conviction judge, without appointing counsel and without specifically finding that the petitioner lacked sufficient means to obtain counsel, determined that the grounds pleaded did not merit relief and dismissed the petition. Instead of appealing this dismissal, the petitioner filed a second petition which was dismissed on the grounds of res judicata and waiver. An appeal predicated on the second petition followed.

The supreme court distinguished its earlier holdings in *Peo-*

121. *Id.* § 122-3.
122. *E.g.*, People v. Cox, 34 Ill. 2d 66, 213 N.E.2d 524 (1966).
123. LEIGHTON, *supra* note 4, at 572.
124. *E.g.*, People v. Chapman, 33 Ill. 2d 429, 211 N.E.2d 712 (1965); People v. Holland, 33 Ill. 2d 246, 211 N.E.2d 265 (1965).
125. ILL. REV. STAT. ch. 38, § 122-3 (1973).
126. 39 Ill. 2d 84, 233 N.E.2d 374 (1968).
127. 39 Ill. 2d 278, 235 N.E.2d 566 (1968).

ple v. Chapman[128] and *People v. Holland*,[129] both involving successive petitions, since each petitioner there had been represented by counsel. In contrast, Polansky's petition had contained a proper request for counsel but was dismissed without any action taken by the trial court on this matter. The failure to appoint counsel was thought to thwart "the legislative purpose" of the Act and to create "due process problems . . . in attempting to thereafter apply res judicata and waiver principles predicated upon the original proceeding in which neither statutory nor due process requirements were met."[130] The court reversed, holding that the doctrines of res judicata and waiver could not be mechanically applied where considerations of fundamental fairness and due process were present.

In *People v. Slaughter*,[131] as in *Polansky*, the pro se petitioner alleged indigence and requested the appointment of counsel. The State filed a motion to dismiss, urging that a prior direct appeal was res judicata to the petition. The motion was granted. After obtaining leave to appeal this order, and after appointment of counsel by the supreme court, the petitioner filed a new post-conviction petition in the circuit court. The second petition was dismissed on the grounds that Section 122-3 prohibited the filing of more than one petition. This appeal was consolidated with the appeal from the order dismissing the original petition.[132]

The supreme court reversed, holding that the Post-Conviction Hearing Act contemplated

> . . . that the attorney appointed to represent an indigent petitioner would consult with him either by mail or in person, ascertain his alleged grievances, examine the record of the proceedings at the trial and then amend the petition that had been filed pro se, so that it would adequately present the prisoner's constitutional contentions.[133]

With respect to the original petition and the subsequent motion to amend, the court stated that the record clearly demonstrated the inadequacy of representation afforded to the petitioner.[134] In considering the second petition, the court, citing *Po-*

128. 33 Ill. 2d 429, 211 N.E.2d 712 (1965).
129. 33 Ill. 2d 246, 211 N.E.2d 265 (1965).
130. 39 Ill. 2d 84, 87, 233 N.E.2d 374, 376 (1968) (citations omitted).
131. 39 Ill. 2d 278, 235 N.E.2d 566 (1968).
132. Additionally, the petitioner appealed from an order denying motions to vacate the original petition and to file an amended petition. All three appeals were consolidated. *Id.* at 282, 235 N.E.2d at 568.
133. *Id.* at 285, 235 N.E.2d at 569.
134. The *entire* report of proceedings at the hearing on the motion to dismiss was as follows:

> "THE CLERK: Daniel Slaughter.
>
> "ASSISTANT STATE'S ATTORNEY: It's your case. We filed a written motion. In 61-1632, the crime was murder. On Nov. 24th, 1961, there was a sentence of 14 years to the Illinois State Penitentiary. There was a Writ of Error, reported in 29-Illinois (2d) 384,

lansky, held that Section 122-3 and the objective of finality "must yield when fundamental fairness so requires."[135]

The statutory doctrine of waiver embodied in Section 122-3 is to be distinguished from another application of res judicata not explicitly mentioned in the Act.[136] Where the defendant has taken a direct appeal from the judgment of conviction, the decision of the reviewing court is res judicata as to all issues appearing in the record and actually decided, and all issues which could have been presented to the reviewing court from the record.[137]

This application of res judicata was read into the Act in *People v. Dale*,[138] in response to the argument that the Act was invalid since it purported to allow nisi prius courts to overturn final adjudications by the supreme court. In *Dale*, the court held that constitutional issues previously adjudicated may not be reconsidered in a post-conviction proceeding. The court amplified its holding:

> The Act . . . does not provide for the means of refuting or disputing the original findings and judgment or the affirmance thereof, but it provides for a new proceeding to afford an inquiry into the constitutional integrity of the proceeding in which the judgment was entered.[139]

---

which was affirmed, and the order was entered down here on December 23rd, 1963. All of his allegations are nothing more than mere conclusions, and we have filed a Motion to Dismiss. They are bare allegations and the allegations affirmed are res judicata to the petition.

"ASSISTANT PUBLIC DEFENDER: Just for the record, the petitioner alleges that the entire proceedings upon which the conviction was had were grossly illegal, wanting in law and contrary to the Constitution of the United States in that, generally, his rights were violated, his constitutional rights were violated.

"THE COURT: All right, motion of the respondent to dismiss is sustained.

Id. at 280-81, 235 N.E.2d at 567.

135. *Id.* at 285, 235 N.E.2d at 569-70.

136. Still a third application of waiver is that a point not urged before the trial court waives the matter for purposes of appeal, absent plain error. Failure to object at trial waives the matter both on direct appeal and in a post-conviction proceeding.

137. *E.g.*, People v. Adams, 52 Ill. 2d 224, 287 N.E.2d 695 (1972); People v. Collins, 39 Ill. 2d 286, 235 N.E.2d 570 (1968); People v. Cox, 34 Ill. 2d 66, 213 N.E.2d 524 (1966). This includes issues raised on appeal to which no reference is made in the court's written opinion. See ILLINOIS CRIMINAL PRACTICE (Illinois Institute for Continuing Legal Education), Library of Congress no. 7B-163192, ch. 15, § 7 (1971) [hereinafter cited as ILLINOIS CRIMINAL PRACTICE], where it is suggested that a few habeas corpus decisions in federal court have assumed otherwise, although no Illinois law supports this view. *See, e.g.*, United States *ex rel.* Adams v. Pate, 418 F.2d 815, 817 (7th Cir. 1969). *See also Federal Habeas Corpus: Exhaustion of Remedies infra.*

138. 406 Ill. 238, 92 N.E.2d 761 (1950).

139. *Id.* at 245, 92 N.E.2d at 765. *Dale* has been extended to apply the doctrine of res judicata to any post-conviction proceeding in which constitutional claims are raised, having been previously afforded direct review on appeal by either the supreme court or the appellate court. *E.g.*, People v. Arnold, 45 Ill. 2d 113, 256 N.E.2d 809 (1970); People v. Bright, 42 Ill. 2d 331, 247 N.E.2d 426 (1969); People v. Kamsler, 39 Ill. 2d 73, 233 N.E.2d 415 (1968).

Consequently, those alleged constitutional violations appearing on the face of the record which were not presented on appeal are waived and cannot be raised in subsequent post-conviction proceeding.[140] This result is not changed even if the post-conviction petition is filed before the reviewing court hands down its opinion.[141]

The doctrine of res judicata may have serious consequences, since the appointed post-conviction counsel will often not be handling the direct appeal. To avoid the rigors of the doctrine, the appointed post-conviction attorney should consult with the attorney handling the direct appeal to determine if any constitutional claims are being raised. The post-conviction petition should then be amended to include all such claims.[142] Failure to adopt this procedure will result in the waiver of all constitutional violations appearing on the face of the record. Here, the application of waiver and res judicata does not rest on Section 122-3, but upon the principle announced in *People v. Dale*.[143]

Just as the supreme court has relaxed the doctrine of waiver where a prior post-conviction petition has been dismissed, if fundamental fairness so requires, this exception will also be extended to cases where a direct appeal has been taken.[144]

In the case of *People v. Hamby*,[145] the petitioner sued out a writ of error to review his conviction. The record indicated that the petitioner had disagreed with his counsel as to the issues to be raised on review. During the pendency of the review, the petitioner filed a pro se post-conviction petition. When the writ of error was later denied, the State moved to dismiss the petition on the grounds of res judicata. The petitioner sought review of the order granting the State's motion.

The court's treatment of the doctrine of waiver was as follows:

---

140. *E.g.*, People v. Mamolella, 42 Ill. 2d 69, 245 N.E.2d 485 (1969).

141. In People v. Walker, 6 Ill. App. 3d 909, 286 N.E.2d 812 (1972), the court stated:

> Once an issue is presented on direct appeal to a court of review, it cannot properly be considered at a post-conviction hearing even though at the time of the hearing the reviewing court has not passed on the question.

Id. at 911, 286 N.E.2d at 815.

142. ILLINOIS CRIMINAL PRACTICE, *supra* note 137, at ch. 15, § 4.

143. 406 Ill. 238, 92 N.E.2d 761 (1950).

144. *See also* People v. Raymond, 42 Ill. 2d 564, 248 N.E.2d 663 (1969). The burden is on the petitioner to show why the doctrine of waiver should not be applied. *See, e.g.*, People v. Hill, 44 Ill. 2d 299, 255 N.E.2d 377 (1970).

The doctrine of waiver has been relaxed when new constitutional principles are held retroactive even though an appeal has previously been taken. *E.g.*, People v. Strader, 38 Ill. 2d 93, 230 N.E.2d 569 (1967). This can occur when the United States Supreme Court has effected a change in the law as applied to the states through the Fourteenth Amendment.

145. 32 Ill. 2d 291, 205 N.E.2d 456 (1965).

> As to the waiver, we are constrained to disagree under the peculiar facts here presented. It is true that we have consistently held that where review has once been had by writ of error, including presentation of a bill of exceptions, any claims which might have there been raised, but were not, are considered waived. . . . We consider the waiver principle a salutary one, conductive to the effective enforcement of the rules which society has established for its protection, but we have not hesitated to relax its application where fundamental fairness so requires.[146]

The petitioner attempted to have his attorney raise certain issues on review. Since the attorney apparently considered these issues lacking in merit or unavailable on the record, the court refused to apply res judicata.[147]

Where an appeal of the conviction has been bypassed, whether by inadvertence, design or indigence, errors in the trial not of constitutional dimension cannot be raised in a subsequent post-conviction proceeding.[148] However, in this instance, the petition can properly allege constitutional violations appearing on the face of the record, as well as those errors beyond the record, since the failure to appeal does not invoke the doctrine of waiver in respect to these claims.

Even though a direct appeal has been taken, waiver will not preclude a post-conviction petition which raises constitutional violations beyond the record. If no direct appeal has been taken, the post-conviction remedy is broader, since the petition can also properly allege constitutional violations appearing on the face of the record. This does not necessarily mean that a post-conviction petition should be filed in lieu of a direct appeal, as such a practice waives all non-constitutional errors.

Therefore, a defendant having meritorious claims both constitutional and non-constitutional in dimension will be in a better position if the direct appeal is taken. Additionally, he will have the option of postponing the filing of his post-conviction petition until the appeal is decided, or of immediately filing a post-conviction petition, making sure to include in the petition all constitutional errors being urged on appeal. Thus, the attorney for a defendant in such cases should not consider the post-conviction petition as a substitute for the direct appeal.

The latter option contemplates the filing of the petition while the appeal is still pending. This procedure is permissible because the petitioner need not pursue a direct appeal to conclusion as a condition precedent to the right to file a post-conviction peti-

146. *Id.* at 294, 205 N.E.2d at 458 (citations omitted).
147. *Id.*
148. *E.g.*, People v. Rose, 43 Ill. 2d 273, 253 N.E.2d 456 (1969), *appeal after remand*, 48 Ill. 2d 300, 268 N.E.2d 700 (1971).

tion.[149] If the petition is dismissed, or relief is denied after a hearing, an appeal from this ruling may be consolidated with the direct appeal.[150] Technically, the appellate court will consider the two appeals separately, but the effect is to bring before the court two separate records. The brief for the consolidated appeal must distinguish between the two appeals. In *People v. McCarroll*,[151] the defendant's brief argued the issues in one appeal interchangeably with those in the other. Although the court considered the appeals separately, it rejected the notion that the direct appeal and post-conviction appeal could be "indiscriminately commingled."[152]

On the other hand, a defendant whose only claims are of constitutional magnitude may file a post-conviction petition and bypass the direct appeal without waiving any claims. The post-conviction proceeding will adequately provide him with the opportunity to raise all alleged constitutional violations whether they appear on the face of, or beyond, the record.

The post-conviction proceeding is not entirely coextensive with a direct appeal. Although their purposes differ, under some circumstances they may overlap to some degree, possibly requiring the use of both. When used together, they must be coordinated with one another for maximum efficacy; otherwise claims may be waived. When used separately, claims available in one may not be available in the other.

Federal Habeas Corpus: Exhaustion of Remedies[153]

The Post-Conviction Hearing Act was designed to "bridge the gaps" between pre-existing Illinois remedies and federal habeas corpus.[154] A writ of habeas corpus may be sought on behalf of a person in custody pursuant to the judgment of a state court if

> . . . it appears that the applicant has exhausted the remedies available in the courts of the State, or . . . there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.[155]

---

149. *Id.*; People v. Blades, 7 Ill. App. 3d 748, 288 N.E.2d 701 (1972) (Nos. 71-226 & 72-110, Unpub'd opinion).

150. In People v. Moore, 42 Ill. 2d 73, 246 N.E.2d 299 (1969), *rev'd on other grounds*, 408 U.S. 786 (1972), this practice was implicitly approved. See also ILLINOIS CRIMINAL PRACTICE, *supra* note 137, at ch. 15, § 4.

151. 10 Ill. App. 3d 249, 294 N.E.2d 52 (1973). The court cited *Moore*, note 150 *supra*, as precedent for this practice.

152. 10 Ill. App. 3d 249, 253, 294 N.E.2d 52, 56 (1973).

153. *See generally* Comment, *Federal Habeas Corpus: Its Uncertain Effects on Illinois Law*, 59 NW. U.L. REV. 696 (1964).

154. People v. Wakat, 415 Ill. 610, 114 N.E.2d 706 (1953); *see* JENNER, *supra* note 4.

155. 28 U.S.C. § 2254(b) (1970). Section 2254(c) provides as follows:

Although the exhaustion provision is based on the doctrine of abstention rather than federal jurisdiction,[156] it is usually a prerequisite to the filing of a petition.[157] In *Fay v. Noia*,[158] the Supreme Court construed the exhaustion provision to refer only to those remedies available to the applicant at the time he petitions for federal habeas corpus, not to those remedies that might have been available at any time.

When the petition for federal habeas corpus raises constitutional violations beyond the record, which have not been previously considered on appeal or in a post-conviction proceeding, the federal court will dismiss for failure to exhaust state remedies.[159] If, however, the petitioner's conviction has been affirmed on direct review, the question arises whether the failure to institute post-conviction proceedings should result in a dismissal of the federal petition on the grounds that the petitioner has not exhausted his state remedies. If the federal court dismisses, any subsequent post-conviction petition will be met by the doctrine of res judicata.

As previously stated, alleged constitutional violations appearing on the face of the record which were not presented on appeal are waived and cannot be raised in the post-conviction proceeding. Unless considerations of fundamental fairness are present and the petitioner can fit within the exception announced in *People v. Hamby*, the post-conviction petition will be dis-

---

> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.

The exhaustion provisions were codifications of judicially developed doctrines. *See Ex parte* Hawk, 321 U.S. 114 (1944).

156. Fay v. Noia, 372 U.S. 391 (1963).

157. *But see* United States *ex rel.* Durso v. Pate, 426 F.2d 1083 (7th Cir. 1970), *cert. denied*, 400 U.S. 995 (1971), *aff'g* 299 F. Supp. 647 (N.D. Ill. 1969). In *Durso*, although the federal district court thought that the petitioner had failed to exhaust his remedies, it considered his claims on the merits. An examination of the prior direct appeal reveals that this belief may have been erroneous. 40 Ill. 2d 242, 239 N.E.2d 842 (1968), *cert. denied*, 372 U.S. 1111 (1969).

158. 372 U.S. 391 (1963).

159. *E.g.*, United States *ex rel.* Wax v. Twomey, 465 F.2d 352 (7th Cir. 1972) (suppression of psychiatric reports at trial); United States *ex rel.* Waldron v. Pate, 380 F.2d 94 (7th Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968) (disqualification of jurors); United States *ex rel.* Calhoun v. Pate, 341 F.2d 885 (7th Cir. 1965), *cert. denied*, 382 U.S. 945. Although the petition in *Calhoun* was properly dismissed for failure to exhaust state remedies, the court erroneously assumed that state habeas corpus would reach the allegation that the prosecution had knowingly used perjured testimony. In Illinois, habeas corpus is not available to assert non-jurisdictional constitutional claims. Notes 20-24 *supra* & accompanying text. The court also failed to mention the Illinois Post-Conviction Hearing Act, the appropriate remedy for such a claim. Notes 66-68 *supra* & accompanying text.

When no appeal is taken, the exhaustion provision requires that a post-conviction petition be filed. *E.g.*, United States *ex rel.* Green v. Pate, 411 F.2d 884 (7th Cir. 1969).

missed.[160] Although this judgment may be appealed, it will likely be affirmed. The net result is that the petitioner, having exhausted his state remedies, can once again enter federal court requesting habeas corpus.

Where the conviction has been affirmed on direct review, but there has been no post-conviction proceeding, the federal court is faced with a serious dilemma. When ruling on the petition for habeas corpus, the court may consider the petitioner's claims on the merits by holding that the waiver doctrine renders the post-conviction proceeding an ineffective state remedy; alternatively, the court can hold that the petitioner has failed to exhaust his state remedies on the grounds that fundamental fairness may provide the Illinois courts with an opportunity to consider constitutional violations not presented on the direct appeal.

The federal courts are reluctant to choose the first option because the doctrine of abstention embodies a policy of providing the states with the first opportunity to rule upon constitutional claims of state prisoners. By choosing the latter option, however, the federal court will force the petitioner to return to the state courts, where his post-conviction petition faces the likely prospect of dismissal on the grounds of res judicata. The federal courts have not yet provided a clear answer to this problem.

In *United States ex rel. Millner v. Pate*,[161] the petitioner sought federal habeas corpus after the Supreme Court of Illinois had denied, without opinion, an untimely motion for leave to appeal from a decision affirming his conviction. The petitioner contended that the Illinois Post-Conviction Hearing Act was not a meaningful state remedy. The claims urged in federal court were not raised on his prior appeal and would therefore be considered waived.[162] The seventh circuit refused to assume that the Illinois courts would apply the waiver doctrine. The court pointed to the petitioner's claim of disagreement with counsel concerning the issues to be raised on appeal. Apparently this factor permitted the court to find analogous circumstances to those which had led the Supreme Court of Illinois to relax the doctrine of waiver in *Hamby*. As in *Hamby*, the court implied that petitioner's claim of disagreement could be presented to the Supreme Court of Illinois if a post-conviction petition were denied. Consequently, the habeas corpus petition was dismissed for failure to exhaust state remedies.[163]

160. Notes 144-47 *supra* & accompanying text.
161. 425 F.2d 249 (7th Cir. 1970).
162. In his petition for federal habeas corpus, the petitioner claimed error in the admission of a statement violating his Fifth Amendment right.
163. *Millner* was relied upon in United States *ex rel.* Little v. Twomey, 477 F.2d 767, 774-75 (7th Cir. 1973). In that case the petitioner alleged

In *United States ex rel. Allum v. Twomey*,[164] although the court of appeals affirmed a dismissal of the petition for habeas corpus, the question raised in *Millner* was again presented.[165] The result in *Allum*, though dicta, was completely different. Unlike Millner, Allum had failed to object at the trial to the admission into evidence of certain in-custody statements.[166] Apparently, the Illinois appellate court did not consider this claim, since the issue had not been properly preserved for review.

The petitioner sought federal habeas corpus, contending that the exhaustion provision was inapplicable because no state remedy was available. Upon examination of the trial record, the court of appeals concluded that the petitioner had been competently represented by retained counsel. Furthermore, the petitioner did not dispute this finding. Without explicitly stating whether the outcome depended upon these factors, the court implied that it was influenced by them to some degree. The court stated:

> [W]e agree with petitioner that this [fundamental fairness] exception has only been applied in fairly clear-cut situations, none of which fits this case. Second, even if a broader and more subjective test of fundamental fairness is applicable, our own appraisal of the record leads us rather confidently to the conclusion that there is nothing fundamentally unfair in the application of the waiver rule to the issue petitioner seeks to raise.[167]

Recognizing that a series of futile proceedings would ensue if the exhaustion provision were found applicable, the court proceeded to determine whether the petitioner had waived the federal claim by failing to raise the issue in state court.[168]

If Allum had been sent back to the Illinois courts to seek a post-conviction proceeding, he would have been in substantially the same position as Millner, even though Allum had failed to object at trial. Since both cases involved claims appearing of record, the post-conviction petitions would in all likelihood face dismissal on the grounds of res judicata (in the absence of fundamental fairness).

"the indifference and hostility of appellate counsel" as one of the grounds in support of his petition for habeas corpus.

164. 484 F.2d 740 (7th Cir. 1973).

165. Relief was denied because the petitioner had deliberately bypassed state procedural requirements. A failure to raise federal claims in the state courts, "whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures," allows the federal courts to deny relief even if the federal claims were not considered on the merits in the state court. Fay v. Noia, 372 U.S. 391, 438-39 (1963).

166. In the petition for habeas corpus, it was argued that these in-custody statements were improperly admitted under the rule of Escobedo v. Illinois, 378 U.S. 478 (1964).

167. 484 F.2d 740, 743 (7th Cir. 1973).

168. Note 165 *supra*.

The solution offered in *Millner* implies that the federal courts may infer the presence of fundamental fairness if the petitioner raises the issue in his petition for habeas corpus. A petitioner can gamble by choosing not to make this allegation, provided he has other meritorious claims properly preserved in the record which were not previously raised on appeal. Like Allum, he can then argue that he is left without an adequate state remedy since no exception to the waiver rule is applicable.[169]

The solution provided in *Allum* presents even greater complexities for the federal court. *Allum* implies that the court should search the record to determine whether the doctrine of waiver is applicable. If this process reveals that fundamental fairness might provide the Illinois courts with an opportunity to consider previously "waived" issues, then the petition for habeas corpus should be dismissed. But, in examining the record to determine whether it should exercise jurisdiction, the court will necessarily consider issues bearing on the merits. A dismissal for failure to exhaust remedies implies that fundamental fairness may be present. While such a determination is not binding, this entire process utilizes circuitous methods to answer a crucial question—whether the petitioner has available an effective state remedy.

Judicial economy might be better served if the court resolved the case on the merits without determining whether fundamental fairness was present, rather than examining the record to decide whether the court should exercise its jurisdiction. It is significant that *People v. Hamby* represents an exception of limited application designed by the Supreme Court of Illinois to promote the purposes of the Post-Conviction Hearing Act. Since it is not frequently invoked by the Illinois courts, its use in the federal courts may produce results which *Hamby* was designed to avoid.

The reasoning of Judge Will in *United States ex rel. Gates v. Twomey*,[170] though concerned with a more limited question than that posed in *Millner* and *Allum*, merits consideration. In *Gates*, the Illinois Appellate Court for the First District had affirmed the petitioner's conviction. After the Supreme Court of Illinois denied leave to appeal, the petitioner sought federal habeas corpus, raising the same issues urged on his direct appeal. The court stated the question:

> Because [the petitioner] has failed to [file a post-conviction petition] this omission must be deemed a failure to exhaust his state

169. If the petitioner has many claims which were not previously raised on appeal, the federal court might find that this factor alone implies the presence of fundamental fairness.

170. 325 F. Supp. 920 (N.D. Ill. 1971).

> remedies if, but only if, he could now raise those contentions which he urges herein in the post-conviction hearing.[171]

Recognizing that the Supreme Court of Illinois had relaxed the doctrine of waiver with respect to issues actually raised and decided on appeal in only one instance, Judge Will concluded that it was "unlikely that the Illinois courts would not apply the doctrine of res judicata."[172] Accordingly, the court held that the petitioner did not have an effective state court remedy, and proceeded to the merits.[173]

Gates is distinguishable from *Millner* and *Allum*, since in those cases the petition for habeas corpus raised claims not decided upon by the Illinois courts. Nonetheless, the rationale of *Gates* may be applicable. Absent the unusual circumstances present in *Millner*, *Gates* recognized that it is unnecessary for a petitioner to "show that precisely those points raised in the federal court were previously raised in the state courts or may no longer there be raised."[174]

Where a direct appeal has been taken, the Illinois courts apply the waiver doctrine nearly as often to issues actually raised and decided as to issues which could have been presented. For the federal courts to consider the doctrine of fundamental fairness as being broader in one case than in the other is to determine a question not yet resolved by the Supreme Court of Illinois.

Discovery

One problem which recurs in the administration of post-conviction petitions is the inability of appointed counsel to reliably evaluate the precise factual basis of a pro se petition, even though the petition is apparently grounded on a substantial claim. The filing of an inordinate number of petitions only compounds this difficulty. The Supreme Court of Illinois has indicated that the function of the post-conviction proceeding is not satisfied unless the appointed attorney "ascertains the basis of [the petitioner's] complaints, shapes those complaints into appropriate legal form and presents them to the court."[175]

One method of ascertaining the basis of the petition is

171. *Id.* at 921.
172. *Id.* at 925. In People v. Keagle, 37 Ill. 2d 96, 224 N.E.2d 834 (1967), the Supreme Court of Illinois had ruled upon a claim on direct appeal; subsequently, the court considered the same issue in reviewing the dismissal of a post-conviction petition. The claim, however, was "highly technical" and "unrelated to guilt or innocence." *Id.* at 101, 224 N.E.2d at 837.
173. *See* Coley v. Alvis, 381 F.2d 870 (6th Cir. 1967) (Ohio law).
174. 325 F. Supp. 920, 921 (N.D. Ill. 1971). *See, e.g.*, United States *ex rel.* Gonzales v. Follette, 414 F.2d 788 (2d Cir. 1969); Cotner v. Henry, 394 F.2d 873 (7th Cir. 1968), *cert. denied*, 393 U.S. 847 (Indiana law). See special note at p. 166 *infra*.
175. People v. Slaughter, 39 Ill. 2d 278, 285, 235 N.E.2d 566, 569 (1968).

through the discovery process. The use of discovery procedures, even if limited in scope, could assist the appointed attorney in ferreting out the unsubstantial petitions, as well as providing the evidentiary basis for those meritorious claims which require further attention.

Since the Civil Practice Act does not govern proceedings under the Post-Conviction Hearing Act, it would seem that civil discovery rules are inapplicable. No direct treatment of discovery is found, however, either in a statute or court rule, except for the reference in Section 122-6 of the Act that "the court may receive proof by . . . depositions."[176] Although this section implies the existence of at least a limited discovery process, it is unclear whether it contemplates the use of civil or criminal discovery rules, and whether it impliedly excludes the application of civil discovery procedures other than depositions. The first case to construe this section was *People v. Rose*.[177]

In *Rose*, the supreme court had granted the petitioners a hearing, and directed that a different judge preside at the post-conviction proceeding because of the possibility that the trial judge would be called as a witness.[178] In an attempt to discover whether the judge had received evidence off the record at the trial, the petitioners served the trial judge, the assistant State's Attorney and the bailiff with notices to appear for discovery depositions. When none appeared, the petitioners moved for "relief pursuant to Rule 219" to order their appearance. The post-conviction judge refused to make such an order. The witnesses testified at the hearing and were subject to cross-examination.

On appeal, the petitioners, citing Section 122-6, contended that since the post-conviction proceeding is civil in nature, the civil discovery rules apply, and the judge should have ordered the witnesses to appear. Further, the petitioners argued that the testimony of the trial judge should have been excluded.[179] The supreme court disagreed:

> In our opinion section 6 of the Post-Conviction Hearing Act contemplates the use of evidence depositions and does not refer to discovery depositions. As with many orders for discovery and the imposition of sanctions for failure to comply therewith, the trial court's refusal to order the witnesses to appear for deposi-

176. ILL. REV. STAT. ch. 38, § 122-6 (1973).
177. 48 Ill. 2d 300, 268 N.E.2d 700 (1971).
178. The prior appeal can be found at 43 Ill. 2d 273, 253 N.E.2d 456 (1969).
179. The petitioners apparently sought to invoke Supreme Court Rule 219(c) (iv). The rule provides that a witness may be barred from testifying, if a party, or any person at the instance of or in collusion with a party, unreasonably refuses to comply with any discovery procedures or any court order entered pursuant thereto. ILL. REV. STAT. ch. 110A, § 219(c) (iv) (1973).

> tion was an exercise of the court's discretionary powers and its decision should not be reversed unless there has been an abuse of discretion. The witnesses appeared, testified and were cross-examined at length. Under the circumstances shown in this record, the refusal to order the witnesses to appear for deposition was not an abuse of discretion.[180]

The decision does not indicate whether any other discovery procedures, civil or criminal, apply to post-conviction proceedings. Further, it is unclear whether criminal Rule 414[181] or civil Rule 212(b)[182] is to guide the post-conviction judge in determining whether to issue an order compelling an appearance for an evidence deposition. The requirements differ under Rules 414 and 212(b).[183]

The opinion in *Rose* implies that a post-conviction judge has discretion to permit discovery. Although the scope of discovery is not clearly defined, an appropriate court rule could remedy the situation.

Presence of Petitioner at Hearing

Though the Sixth Amendment to the United States Constitution[184] guarantees to a defendant in a criminal case the right to be present at his own trial, the rights of a petitioner under a post-conviction proceeding are derived from the statute, and no such guarantee applies. Section 122-6 provides that the court may, in its discretion, "order the petitioner brought before the court for the hearing."[185]

The right, however, is not absolute. The petitioner has no right to be present at the hearing on the motion to dismiss, since it merely involves the pleadings and the sufficiency of the petition, and no evidence is presented.[186] The courts have recognized the risks and expenses which arise in transporting prisoners to courtrooms.

If an evidentiary hearing is granted in which a factual issue must be resolved, the petitioner's presence at the hearing may, in some instances, be necessary.[187] Again, the right is not absolute, and no determination will be disturbed on appeal unless

180. 48 Ill. 2d 300, 302, 268 N.E.2d 700, 701 (1971).
181. ILL. REV. STAT. ch. 110A, § 414 (1973).
182. *Id.* § 212(b).
183. Under Rule 414, it must appear to the court that the deposition "is necessary for the preservation of relevant testimony because of the substantial possibility it would be unavailable at the time of hearing or trial." *Id.* § 414. These requirements are much stricter than those in Rule 212(b), which permits evidence depositions when specified degrees of unavailability are shown. *Id.* § 212(b).
184. U.S. CONST. amend. VI.
185. ILL. REV. STAT. ch. 38, § 122-6 (1973).
186. *E.g.*, People v. Wilson, 40 Ill. 2d 378, 240 N.E.2d 583 (1968); People v. Hamby, 39 Ill. 2d 290, 235 N.E.2d 572 (1968).
187. *E.g.*, People v. Adams, 4 Ill. 2d 453, 123 N.E.2d 327 (1954).

there is a clear showing of prejudice,[188] or an abuse of discretion.[189]

Where the petitioner's presence is desired by counsel to assist in presenting the case, a request or showing establishing the necessity for such presence must be made.[190] In *People v. Cummins*,[191] the petitioner alleged that the State's Attorney induced him to forego his right to counsel, either by promises or misrepresentation. The State's Attorney testified orally at the hearing and was subject to cross-examination. The petitioner was not present. It was held to be no abuse of discretion for the hearing judge to accept the petitioner's affidavit instead of his oral testimony, since "no request or showing was made that [his] presence would be necessary."[192] Even if a proper request or showing is made, a motion to bring the petitioner before the court for the hearing may be denied where his testimony would not change the result.[193]

Motion for Substitution of Judges

Proper venue in a post-conviction proceeding lies in the court in which the conviction took place.[194] Efficiency of judicial administration favors this approach. The creation of a factual issue is more readily resolved in the court where the original prosecution occurred because the witnesses and the record are accessible.[195]

In a criminal case, the defendant has an absolute right to substitution of judges, if he makes a proper request, verified or accompanied by affidavit, within ten days after he learns that his case has been assigned to a specific judge.[196] No such right exists in a post-conviction proceeding, even though the judgment towards which the remedy is directed was entered in a criminal case.

---

188. *E.g.*, People v. Smith, 42 Ill. 2d 547, 248 N.E.2d 85 (1969).
189. *E.g.*, People v. Ashley, 34 Ill. 2d 402, 216 N.E.2d 126 (1966).
190. People v. Cummins, 414 Ill. 308, 111 N.E.2d 307 (1953).
191. *Id.*
192. *Id.* at 311, 111 N.E.2d at 309.
193. People v. Adams, 4 Ill. 2d 453, 123 N.E.2d 327 (1954).
194. ILL. REV. STAT. ch. 38, § 122-1 (1973).
195. On a petition for a writ of habeas corpus, venue is proper in the court at the place of imprisonment or restraint, or in the court where the conviction occurred. ILL. REV. STAT. ch. 65, § 2 (1973). Since a post-conviction proceeding may be instituted only in the court in which the conviction took place, the burden of these petitions does not fall entirely on the courts handling habeas corpus proceedings.
196. ILL. REV. STAT. ch. 38, § 114-5(a) (1973); People v. Etheridge, 78 Ill. App. 2d 299, 223 N.E.2d 437 (1966). If a proper request is made beyond the ten-day period, the ruling is subject to the discretion of the trial court, but the defendant is entitled to a hearing on the motion. ILL. REV. STAT. ch. 38, § 114-5(c) (1973). *See also* ILL. REV. STAT. ch. 146, § 1 (change of venue in civil cases); § 18 (change of venue in contempt proceedings) (1973).

In *People v. Mamolella*,[197] the Supreme Court of Illinois, without referring to the venue provision of Section 122-1 of the Act, stated:

> [W]e find no error in the denial of defendant's petition for a change of venue in this proceeding. In the absence of a showing that defendant would be substantially prejudiced, the post-conviction petition should be heard by the same judge who rendered the original judgment.[198]

When the post-conviction judge may be biased or may be called as a witness since he has knowledge not appearing in the record, the judge should recuse himself and the proceeding should be assigned to another judge.[199]

The original trial judge is probably more familiar with the case, thus providing an expeditious resolution of the matter. The element of time may, however, dim his recollection. Some may contend that the rule places the judge in substantially the same position as if a motion for a new trial were presented to him. According to this view, no prejudice results in requiring the same judge to consider the post-conviction petition, since he is merely being given the opportunity to correct previous errors. Furthermore, a procedure which allows frequent substitution of judges would operate to frustrate the purposes of the post-conviction proceeding, since a judge would find it more difficult to evaluate prior rulings of a colleague on the bench than to reconsider his own.

On the other hand, the integrity of a post-conviction proceeding may be seriously compromised by permitting the original judge to preside. He is not unfamiliar with the background of the case, nor is he unaware of prior occurrences. More important is the fact that the post-conviction proceeding is a "new and independent investigation,"[200] which was designged to afford a complete remedy to those claiming constitutional denials. The broad discretion placed in the post-conviction judge on matters of fact and law should be balanced by a less restrictive policy on reassignment.[201]

The Hearing and the Proof

If the motion to dismiss is denied, or the answer creates a factual issue, an evidentiary hearing will be held.[202] Section 122-

197. 42 Ill. 2d 69, 245 N.E.2d 485 (1969).
198. *Id.* at 73, 245 N.E.2d at 487. For this proposition the court cited People v. Sheppard, 405 Ill. 79, 90 N.E.2d 78 (1950), a case involving the writ of *coram nobis*.
199. *E.g.*, People v. Wilson, 37 Ill. 2d 617, 230 N.E.2d 194 (1967).
200. LEIGHTON, *supra* note 4, at 572.
201. ABA STANDARDS RELATING TO POST-CONVICTION REMEDIES § 1.4, Commentary (Tent. Draft 1967).
202. See *The Motion to Dismiss and the Answer supra.*

6 refers only indirectly to the subject of hearings.[203] No mention is made of the rules by which the hearing is to be governed.

Since the post-conviction proceeding has been characterized as civil in nature, the petitioner bears the burden of proving the allegations of his petition[204] by a preponderance of the evidence.[205] As in other cases tried by the court without a jury, the credibility and weight of the evidence is for the trial judge to determine.[206] Reviewing courts have often stated that unless his determination is shown to be "manifestly erroneous," it will be affirmed.[207]

In *People v. Bracey*,[208] the Supreme Court of Illinois relaxed the burden of proof required of the petitioner when his claim rests on perjured testimony. Prior to *Bracey*, the petitioner had to establish that the perjured testimony was so material to the issue tried as to have probably controlled the result.[209] Because this burden was not entirely consonant with the federal "harmless-error" rule, announced in *Chapman v. California*,[210] the court reallocated the burden of proof as follows:

> Once the condemned use of perjured testimony has been established, *Chapman* [dictates] that the burden then be placed on the State to establish beyond a reasonable doubt that the perjured testimony did not contribute to the conviction.[211]

In addition to the burden of persuading the trier of fact that the allegations made in the petition are true, the petitioner also has the burden of producing evidence. Thus, the petitioner cannot elect to stand on his petition, even though it has been found

---

203. The statute provides in relevant part: "In its discretion the court may order the petitioner brought before the court for the hearing." ILL. REV. STAT. ch. 38, § 122-6 (1973).

204. *E.g.*, People v. Bracey, 51 Ill. 2d 514, 283 N.E.2d 685 (1972).

205. *E.g.*, People v. Wease, 44 Ill. 2d 453, 255 N.E.2d 426 (1970). *But see* People v. Somerville, 42 Ill. 2d 1, 245 N.E.2d 461 (1969) (clear and convincing evidence); People v. Logue, 45 Ill. 2d 170, 258 N.E.2d 323 (1970) (clear demonstration).

206. *E.g.*, People v. Wease, 44 Ill. 2d 453, 255 N.E.2d 426 (1970) (credibility of witnesses); People v. Anderson, 5 Ill. App. 3d 838, 284 N.E.2d 51 (1972) (weight of testimony).

207. *E.g.*, People v. Bracey, 51 Ill. 2d 514, 283 N.E.2d 685 (1972). *Cf.* People v. Thomas, 20 Ill. 2d 603, 170 N.E.2d 543 (1960), *cert. denied*, 365 U.S. 887 (1961). In *Thomas*, minor variances in testimony at the hearing from that given at the trial were explained by the lapse of time.

208. 51 Ill. 2d 514, 283 N.E.2d 685 (1972).

209. *E.g.*, People v. Ostrand, 35 Ill. 2d 520, 221 N.E.2d 499 (1966); People v. Lewis, 22 Ill. 2d 68, 174 N.E.2d 197 (1961), *cert. denied*, 368 U.S. 876. *Ostrand* and *Lewis* were explicitly overruled by *Bracey*.

210. 386 U.S. 18 (1967). In the circumstances of a particular case, not all constitutional errors are prejudicial requiring reversal. Some errors may be deemed harmless. But the court must be able to declare a belief that "it was harmless error beyond a reasonable doubt." *Id.* at 24. In Fahy v. Connecticut, 375 U.S. 85 (1963), the rule stated would achieve the same result: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Id.* at 86-87.

211. 51 Ill. 2d 514, 520, 283 N.E.2d 685, 690 (1972).

legally sufficient to require a hearing.[212] If the petitioner either fails or refuses to produce evidence in support of his claims, the petition will be denied,[213] since the petitioner has not sustained his burden of going forward with the evidence.

When the State denies the allegations of the petition, or pleads an affirmative defense, the question arises whether the burden of producing evidence ever shifts to the State. In *People v. La Frana*,[214] the petition alleged a coerced confession. At the hearing it was undisputed that the petitioner's wife and his attorney were not permitted to see him until after he had signed a confession. The petitioner's testimony as to his physical condition after the confession was corroborated by his wife and his attorney. In addition, photographs of the petitioner, records of the county jail, and the testimony of the county physician led the court to say:

> But where it is conceded, or clearly established, that the defendant received injuries while in police custody, and the only issue is how and why they were inflicted, we have held that something more than a mere denial by the police of coercion is required. Under such circumstances the burden of establishing that the injuries were not administered in order to obtain the confession, can be met only by clear and convincing testimony as to the manner of their occurrence. . . .
>
> . . . .
>
> The testimony on behalf of the [State] falls short, in our opinion, of meeting the burden which rested upon it.[215]

This decision implied that unless the evidence produced by the petitioner is conceded by the State or clearly established, the burden does not shift to the State.

Section 122-6 of the Act grants to the post-conviction judge broad discretion as to the type of evidence he may receive at the hearing.[216] The court may receive proof by testimonial evidence, affidavit, depositions,[217] or other evidence which may support the petition.[218] Thus, evidence lacking probative value may be excluded.[219] The court may admit evidence which bears on the petitioner's credibility,[220] or find that a privilege has been waived.[221] It is within the sound discretion of the court to de-

212. People v. Airmers, 34 Ill. 2d 222, 215 N.E.2d 225 (1966).
213. *Id.*
214. 4 Ill. 2d 261, 122 N.E.2d 583 (1954).
215. *Id.* at 267-68, 122 N.E.2d at 586.
216. ILL. REV. STAT. ch. 38, § 122-6 (1973).
217. See *Discovery supra.*
218. People v. Jenkins, 12 Ill. App. 3d 833, 299 N.E.2d 155 (1973) (No. 56870, Unpub'd opinion).
219. *E.g.*, People v. Ponder, 10 Ill. App. 3d 613, 295 N.E.2d 104 (1973); People v. Mims, 10 Ill. App. 3d 147, 294 N.E.2d 71 (1973).
220. *E.g.*, People v. Wilson, 13 Ill. App. 3d 675, 300 N.E.2d 576 (1973).
221. *E.g.*, People v. Peaslee, 7 Ill. App. 3d 312, 287 N.E.2d 309 (1972) (No. 71-381, Unpub'd opinion).

termine whether a witness who has violated an exclusion order should be permitted to testify.[222] The record of the original trial or any relevant excerpts from the transcript may be considered.[223] The judge need not read the original transcript, at least where the decision would be the same if he had done so.[224]

The petitioner's presence at the hearing may be ordered, but, as previously indicated, this matter is discretionary.[225] Thus, factual issues may be tried upon affidavits in lieu of oral testimony, even if the effect is to preclude the petitioner from testifying in his own behalf.[226] If the petitioner offers false testimony at the hearing, the court has the inherent power to hold him in contempt for obstructing or interfering with the administration of justice.[227]

The Act does not require the judge to enter special findings of fact and conclusions of law.[228] In *People v. Hamby*, the court was unable to determine from the record why the trial judge had dismissed the amended petition. The court observed:

> The ambiguity here existing demonstrates the desirability of incorporating a brief statement of the trial court's findings or reasons therefore [*sic*] into the written order or oral pronouncement of a ruling.[229]

Owing to the fact that this practice has not been regularly followed,[230] the need for an appropriate court rule is apparent. Any such rule should apply in all cases of dismissal whether or not a hearing is granted. The purpose of requiring special findings is to provide the appellate courts with a basis upon which an adequate review can be made. This rationale applies whether

---

222. *E.g.*, People v. Gibson, 42 Ill. 2d 519, 248 N.E.2d 108 (1969).

223. *E.g.*, People v. Hall, 413 Ill. 615, 110 N.E.2d 249 (1953).

224. *E.g.*, People v. Thomas, 20 Ill. 2d 603, 170 N.E.2d 543 (1960), *cert. denied*, 365 U.S. 887 (1961).

225. Notes 184-93 *supra* & accompanying text.

226. *E.g.*, People v. Cummins, 414 Ill. 308, 111 N.E.2d 307 (1953). Notes 190-92 *supra* & accompanying text.

227. People v. Bennett, 51 Ill. 2d 282, 281 N.E.2d 664 (1972). The petitioner who gives false testimony at the hearing may also be prosecuted for perjury. *See, e.g.*, People v. Harper, 43 Ill. 2d 368, 375, 253 N.E.2d 451, 454 (1969). The attorney has a duty to warn his client of the possible consequences of a false allegation in a petition. People v. Wilson, 39 Ill. 2d 275, 277, 235 N.E.2d 561, 562 (1968). The statutory crime of perjury also applies to verified pleadings and affidavits. ILL. REV. STAT. ch. 38, § 32-2(a) (1973); Loraitis v. Kukulka, 1 Ill. 2d 533, 116 N.E.2d 329 (1953).

228. Section 122-6 states: "If the court finds in *favor* of the petitioner, it shall enter an appropriate order . . . ." ILL. REV. STAT. ch. 38, § 122-6 (1973) (emphasis added). The statute does not, however, require "an appropriate order" when relief is denied or the petition is dismissed. Furthermore, it is unclear whether an order would be appropriate if it merely contained a statement of the ultimate disposition of the case.

229. 32 Ill. 2d 291, 294, 205 N.E.2d 456, 458 (1965).

230. THE ABA STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE: ILLINOIS COMPLIANCE, Post-Conviction Remedies, § 4.7, Commentary (1974). The study indicates that the use of special findings has not become a regular practice in hearing courts.

the dismissal has been on the pleadings,[231] or the petition has been denied after a hearing.

Relief Available under the Act

At the conclusion of the evidentiary hearing, the post-conviction judge must determine whether the petitioner has proven the allegations of his petition by a preponderance of the evidence. If the court finds in favor of the petitioner, an "appropriate order" must be entered with respect to the judgment or sentence in the former proceedings,[232] and such supplementary orders as to rearraignment, retrial,[233] custody, bail, or discharge as may be necessary and proper.[234]

When the petition is denied, Rule 651[235] provides that the clerk of the trial court shall at once mail or deliver to the petitioner a notice of the entry of a final order in any post-conviction proceeding. Where the clerk fails to comply with these requirements, considerations of fundamental fairness will preclude the denial of an appeal.[236]

Appellate Practice

Since 1971, appeals from a final judgment of the circuit court in any post-conviction proceeding lie to the appellate court in the district in which the circuit court is located.[237] Both the petitioner and the State have the right to appeal an adverse judgment.[238]

---

231. The scope of appellate review should not affect this rationale. On appeal from a dismissal of a petition without a hearing, the question is whether the result reached by the post-conviction judge was correct, and not whether the reasoning was appropriate. People v. Smith, 40 Ill. 2d 140, 239 N.E.2d 814 (1968). The workload of the appellate courts would undoubtedly be assisted by a requirement of special findings.

232. ILL. REV. STAT. ch. 38, § 122-6 (1973).

233. *E.g.*, People v. Weakley, 45 Ill. 2d 549, 259 N.E.2d 802 (1970).

234. ILL. REV. STAT. ch. 38, § 122-6 (1973).

235. ILL. REV. STAT. ch. 110A, § 651 (1973).

236. *E.g.*, People v. Allen, 7 Ill. App. 3d 249, 287 N.E.2d 171 (1972).

237. ILL. REV. STAT. ch. 110A, § 651(a) (1973). The permissive language of Section 122-7 ("Any final judgment . . . may be reviewed by the Supreme Court as an appeal in civil cases.") has been interpreted by the supreme court as a grant of authority to provide for review in post-conviction proceedings by court rule. LEIGHTON, *supra* note 4, at 576.

The Illinois Constitution of 1970 vests broad rule-making power in the supreme court with respect to control over direct appeals. ILL. CONST. art. VI, § 4(b) (1970). Section 122-7 of the Act should be repealed because it conflicts with Supreme Court Rule 651(a), the governing authority. Fins, *Need for Coordination of Illinois Statutes with New Constitution and Supreme Court Rules Effective July 1, 1971*, 5 JOHN MAR. J. PRAC. & PROC. 1, 26 (1971).

238. *E.g.*, People v. Hryciuk, 5 Ill. 2d 176, 125 N.E.2d 61 (1954); People v. Juerke, 6 Ill. App. 3d 559, 286 N.E.2d 110 (1972). An order directing a new trial is a final judgment which is appealable by the State. People v. Joyce, 1 Ill. 2d 225, 115 N.E.2d 262 (1953).

Issues raised before the trial court cannot be raised for the first time on appeal.[239] Although the proceeding is civil in nature, Supreme Court Rule 651(d) states that the procedure on appeal "shall be in accordance with the rules governing criminal appeals, as near as may be."[240] Since the proceeding relates to alleged constitutional denials in a criminal prosecution, the plain error rule would seem applicable.[241] The doctrine of fundamental fairness supports this view.[242]

On appeal, an indigent petitioner is entitled to a copy of the transcript and to be represented by court-appointed counsel.[243]

Rule 651(c) was amended in 1969 to implement the court decisions[244] with respect to the duties of an attorney representing an indigent petitioner in a post-conviction proceeding. In *People v. Slaughter*, the court stated:

> The Post-Conviction Hearing Act provides that counsel shall be appointed to represent indigent prisoners who request counsel, and it also provides that a petition may be amended or withdrawn. . . . These provisions were included because it was anticipated that most of the petitions under the Act would be filed *pro se* by prisoners who had not had the aid of counsel in their preparation. To the end that the complaints of a prisoner with respect to the validity of his conviction might be adequately presented, the statute contemplated that the attorney appointed to represent an indigent petitioner would consult with him either by mail or in person, ascertain his alleged grievances, examine the record of the proceedings at the trial and then amend the petition that had been filed *pro se*, so that it would adequately present the prisoner's constitutional contentions. The statute can not perform its function unless the attorney appointed to represent an indigent petitioner ascertains the basis of his complaints, shapes those complaints into appropriate legal form and presents them to the court.[245]

Supreme Court Rule 651(c) requires that the court record affirmatively show an appointment of counsel[246] and the appointed counsel's discharge of certain duties. This showing may

239. *E.g.*, People v. Brouhard, 53 Ill. 2d 109, 290 N.E.2d 206 (1972).

240. ILL. REV. STAT. ch. 110A, § 651(d) (1973). Numerous matters in criminal appeals are governed by civil appeals rules. See Supreme Court Rule 612. *Id.* § 612. On civil appeals see 5A NICHOLS, *supra* note 93, § 5629 *et seq.* (1962).

241. ILL. REV. STAT. ch. 110A, §§ 366(b), 615(a) (1973).

242. *E.g.*, People v. Kane, 5 Ill. App. 3d 60, 282 N.E.2d 496 (1972). Although the constitutional right to remain silent was not raised in the post-conviction petition, on appeal it was considered and rejected on the merits.

243. ILL. REV. STAT. ch. 38, § 122-4; ch. 110A, § 651(c) (1973). Whether an indigent petitioner is entitled to appointment of counsel in a post-conviction proceeding is not governed by the doctrine of Gideon v. Wainwright, 372 U.S. 335 (1963). See Ross v. Moffitt, 94 S. Ct. 2437 (1974).

244. People v. Garrison, 43 Ill. 2d 121, 251 N.E.2d 200 (1969); People v. Slaughter, 39 Ill. 2d 278, 235 N.E.2d 566 (1968).

245. *Id.* at 284-85, 235 N.E.2d at 569 (citations omitted).

246. ILL. REV. STAT. ch. 110A, § 651(c) (1973).

be made by a certificate of the petitioner's attorney.[247] The record must contain a showing

> . . . that the attorney has consulted with the petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional right, has examined the record of the proceedings at the trial, and has made any amendments to the petition filed pro se that are necessary for an adequate presentation of petitioner's contentions.[248]

Only "necessary" amendments need be made. Thus, the failure to amend the pro se petition does not constitute a violation of the rule, in the absence of a showing that "specific, identifiable evidence exists."[249]

When the record does not contain an affirmative showing that the appointed counsel's duties have been discharged, the petitioner is deemed to have been inadequately represented.[250] Such a finding will result in the reversal of a judgment dismissing the petition, even though the issues raised in the post-conviction proceeding would be barred by res judicata due to a prior direct appeal.[251]

Conclusion

In the last forty years, the concept of due process has expanded, intensifying the conflict between state and federal authorities over the administration of criminal justice. Since the State has the primary responsibility for the administration of its criminal laws, it may prescribe the procedures by which this system is governed. The State must, however, provide a post-conviction remedy for the vindication of federal rights. If the frequency with which state prisoners resort to the federal courts is to be minimized, this remedy must be adequate and effective.

Certain phases of criminal proceedings involve constitutional questions appearing of record. Ordinarily, these questions can be resolved by the process of appellate review, since the record will adequately reflect the issue. Other constitutional claims cannot be determined on direct appeal because the record will not furnish the basis for such review. The Post-Conviction Hear-

247. People v. Roebuck, 7 Ill. App. 3d 7, 286 N.E.2d 149 (1972) (rule does not require a certificate, provided the record otherwise shows compliance).

248. Ill. Rev. Stat. ch. 110A, § 651(c) (1973). An affirmative showing in the record is not required with respect to proceedings in which the petition was dismissed prior to January 1, 1970, the effective date of the rule, provided the representation was in fact adequate. People v. Loy, 52 Ill. 2d 126, 284 N.E.2d 634 (1972); People v. Williams, 5 Ill. App. 3d 56, 282 N.E.2d 503 (1972).

249. *E.g.*, People v. Stovall, 47 Ill. 2d 42, 46, 264 N.E.2d 174, 176 (1970), *cert. denied*, 402 U.S. 997 (1971).

250. *E.g.*, People v. Terry, 46 Ill. 2d 75, 262 N.E.2d 923 (1970).

251. People v. Brittain, 52 Ill. 2d 91, 284 N.E.2d 632 (1972).

ing Act, though not limited to these latter claims, was designed primarily for them.

The post-conviction proceeding provides a remedy by which state and federal claims of constitutional denial can be raised and adjudicated in a collateral proceeding. The Act does not replace other collateral remedies, such as state habeas corpus or the petition under Section 72. Rather, like these remedies, the post-conviction proceeding is a new and independent investigation which is neither a substitute for an appeal, nor a limited review by an intermediate appellate court.

Although the post-conviction proceeding has been termed civil in nature, its unique statutory purposes have led some courts to describe it as sui generis. The procedures by which the remedy is governed should not, however, depend upon whether the proceeding is characterized as civil or criminal. The purposes of the Act are not furthered by labeling it one or the other. The Supreme Court of Illinois has recognized this principle in its requirement that the petition must be judged on its substance.

The quality of the proceeding could be further improved by the adoption of court rules permitting discovery and requiring the entry of special findings, and by providing a less restrictive policy with respect to assignment of judges. The procedures must be adapted to promote the unique purposes of the Act and to ensure that a fair hearing will not be denied.

Alan Rabunski

NOTE: In *United States ex rel. Williams v. Brantley*, No. 73-1883 (7th Cir., Aug. 29, 1974), petitioner failed to appeal the dismissal of a post-conviction petition after his conviction had been affirmed. As this issue went to press, the court of appeals broadly held that a federal habeas corpus petition "should be dismissed for failure to exhaust this state remedy only if there is direct precedent indicating that under the particular circumstances of a prisoner's case the waiver doctrine will be relaxed." The opinion stated that the Illinois courts' application of res judicata and waiver renders the Post-Conviction Hearing Act an "ineffective" remedy as to claims appearing of record.

State prisoners may apparently file a federal petition after the conviction is affirmed and forgo the post-conviction remedy if all claims appear of record, thus restricting most state petitions to claims beyond the record. Illinois courts could avoid this result by limiting res judicata and waiver to issues actually decided on appeal; hence, claims appearing of record, but not raised on appeal, could be adjudicated in a post-conviction proceeding. But, if res judicata and waiver are applied as in the past, the court of appeals "will not allow" itself "to become a part of this merry-go-round procedure."

APPENDIX

Post-Conviction Hearing Act

ILL. REV. STAT. ch. 38, §§ 122-1 to 122-7 (1973).

122-1. Petition in the Trial Court.

Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Article. The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit. Petitioner shall also serve another copy upon the State's Attorney by any of the methods provided in Rule [11] of the Supreme Court. The clerk shall docket the petition upon his receipt thereof and bring the same promptly to the attention of the court. No proceedings under this Article shall be commenced more than 20 years after rendition of final judgment, unless the petitioner alleges facts showing that the delay was not due to his culpable negligence.

122-2. Contents of Petition.

The petition shall identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and clearly set forth the respects in which petitioner's constitutional rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Argument and citations and discussion of authorities shall be omitted from the petition.

122-3. Waiver of Claims.

Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived.

122-4. Pauper Petitions.

If the petition alleges that the petitioner is unable to pay the costs of the proceeding, the court may order that the petitioner be permitted to proceed as a poor person and order a transcript of the proceedings delivered to petitioner in accordance with Rule of the Supreme Court. If the petitioner is without counsel and alleges that he is without means to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel.

122-5. Proceedings on Petition.

Within 30 days after the filing and docketing of the petition, or within such further time as the court may set, the State shall answer or move to dismiss. No other or further pleadings shall be filed except as the court may order on its own motion or on that of either party. The court may in its discretion grant leave, at any stage of the proceeding prior to entry of judgment,

to withdraw the petition. The court may in its discretion make such order as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of filing any pleading other than the original petition, as shall be appropriate, just and reasonable and as is generally provided in civil cases.

122-6. Disposition in Trial Court.

The court may receive proof by affidavits, depositions, oral testimony, or other evidence. In its discretion the court may order the petitioner brought before the court for the hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to rearraignment, retrial, custody, bail or discharge as may be necessary and proper.

122-7. Review.

Any final judgment entered upon such petition may be reviewed by the Supreme Court as an appeal in civil cases.