early common-law which considered a physical act essential to give an instrument of conveyance legal effect. Today, delivery in the physical sense is no longer required to complete a transfer, for it may be indirect or symbolic[253] or even eliminated where the transfer is oral and without a deed.[254] In short, delivery describes the *sine qua non* of a valid conveyance—the legal effect of transferring from the grantor to the grantee certain rights of ownership. Since the requirement of delivery is, in all likelihood, here to stay, a more meaningful approach to the question of the validity of a conveyance would be to ask whether the grantor can be said to have incontestably divested himself of a fee interest which was transferred to, or vested in, another person.

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that the ownership of the south farm was acquired by oral gift; that he is the absolute owner thereof.

Id. at 1253-54, 34 N.W.2d at 489-90. *See* IOWA CODE § 622.32 (1966).

253 *See* forms of "dispositive" conveyances at pt. II, *supra*.

254 Lynch v. Lynch, 239 Iowa 1245, 34 N.W.2d 485 (1948).

THE NEED FOR AN IOWA POST-CONVICTION HEARING STATUTE

INTRODUCTION

Post-conviction procedure has long been one of the weak spots in criminal law administration.[1] During the past few years post-conviction procedures[2] to correct erroneous convictions have been enacted on federal[3] and state[4] levels and have become an established part of the criminal law.[5] This development is the result of United States Supreme Court decisions indicating that states should provide adequate post-conviction remedies for the protection of constitutional rights.[6] Furthermore, post-conviction remedies have become increasingly significant as a result of the Supreme Court's changing concept of due process of law under the fourteenth amendment.[7] These changes have radically affected the minimum standards dealing with procedures considered constitutionally permissable in state administration of criminal law with the result that many convictions which were valid at the time entered would be unconstitutional by today's standards.[8] Several of these changes in constitutional requirements have been found to apply retroactively,[9] resulting in new rights

1 HANDBOOK OF THE NAT'L CONF. OF COMM. ON UNIF. STATE LAWS, UNIFORM POST-CONVICTION PROCEDURE ACT—PREFATORY STATEMENT 202 (1955) [hereinafter cited as 1955 HANDBOOK ON UNIF. STATE LAWS].

2 Post-conviction procedures could include procedures such as appeal, motion for new trial and motion in arrest of judgment. However, for purposes of this Note the term is used to refer to only those extraordinary remedies which continue to be available after the time limit for appeal and the other above-mentioned procedures has expired.

3 28 U.S.C. § 2255 (1964), first enacted by Congress in 1948, states in part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

4 ILL. STAT. ANN. ch. 38 §§ 122-1 to -7 (Smith-West 1964); MD. ANN. CODE art. 27 § 645A (1967); N.C. GEN. STAT. §§ 15-217 to -222 (Supp. 1967); ORE. REV. STAT. §§ 138.510-.680 (1967). Several states have incorporated the post-conviction remedy into the rules of criminal procedure. FLA. R. CRIM. P. 1.850 (1968). *See also* ABA INSTITUTE ON JUDICIAL ADMINISTRATION, POST-CONVICTION REMEDIES 112 (Tent. Draft Jan., 1967).

5 ABA INSTITUTE ON JUDICIAL ADMINISTRATION, POST-CONVICTION REMEDIES 1 (Tent. Draft Jan., 1967) [hereinafter cited as ABA POST-CONVICTION REMEDIES].

6 Young v. Ragen, 337 U.S. 235 (1949); Marino v. Ragen, 332 U.S. 561 (1947) (concurring opinion).

7 Merrill, *Federal Habeas Corpus and Maryland Post-Conviction Remedies*, 24 MD. L. REV. 46 (1964).

8 *See* Mapp v. Ohio, 367 U.S. 643 (1961), *rehearing denied*, 368 U.S. 871 (1961) (previously valid state convictions based on illegally seized evidence are now unconstitutional); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent defendants have a right to counsel in all serious criminal cases).

9 In discussing retrospective application of decisions, the Court in Linkletter v. Walker, 381 U.S. 618, 629 (1964), stated: "[W]e must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *See also* Johnson v. New Jersey, 384 U.S. 719 (1965); Tehan v. United States *ex rel.* Scott, 382 U.S. 406 (1965); Johnson v. Bennett, 386 F.2d 677 (8th Cir. 1967).

Some examples of retrospective application are Johnson v. Denno, 378 U.S. 368 (1964)

being afforded to prisoners seeking to terminate their incarceration and to individuals who have either been paroled or served their term and are seeking to clear their record of prior convictions.[10]

As new minimum standards have been recognized, pressures have developed for broader and more efficient state post-conviction remedies to deal with these changes.[11] These new remedies must be coextensive with federal habeas corpus[12] if the states desire that the prisoner litigate the validity of his state conviction within the state courts.[13]

Model post-conviction acts[14] have been published and many states have enacted post-conviction statutes[15] to which a state could refer in drafting a post-conviction act. Therefore, it is not the purpose of this Note to discuss the content of such an act but to examine the post-conviction procedures available in Iowa and determine whether there is a need for a comprehensive post-conviction remedy designed to maintain a maximum of state control over criminal cases and reduce the post-conviction load in the federal courts.

I. Federal Habeas Corpus

In the federal courts, habeas corpus, the foremost collateral remedy, has existed in our laws since the colonial period.[16] In 1867, Congress enacted a statute[17] which made two changes greatly expanding the habeas corpus jurisdiction of the federal courts.[18] The writ was enlarged to embrace "all cases where any person may be restrained of his . . . liberty in violation of the Constitution or any treaty or law of the United States . . ."[19] and when invoked on such grounds was available to all persons whether in state or federal custody.[20] More recently the use of habeas corpus has been rapidly expanded[21]

(coerced confession); Gideon v. Wainwright, 372 U.S. 335 (1963) (appoint counsel in felony cases); Eskridge v. Washington Prison Board, 357 U.S. 214 (1958) (state required to furnish transcript of the trial to indigents on appeal).

10 *See* Note, *Post-Release Attacks on Invalid Federal Convictions: Obstacles to Redress by Coram Nobis*, 63 Yale L.J. 115 (1953); Note, *The Need for Coram Nobis*, 57 Nw. U.L. Rev. 467 (1962).

11 ABA Post-Conviction Remedies. *See also* Henry v. Mississippi, 379 U.S. 443, 453 (1965).

12 28 U.S.C. §§ 2241-55 (1964).

13 Case v. Nebraska, 381 U.S. 336, 346 (1965); Meador, *Accommodation State Criminal Procedure and Federal Postconviction Review*, 50 A.B.A.J. 928 (1964) [hereinafter cited as *Federal Postconviction Review*]; ABA Post-Conviction Remedies at 3.

14 Handbook of the Nat'l Conf. of Comm'rs on Unif. State Laws 216 (1965); 1955 Handbook on Unif. State Laws at 204; ABA Post-Conviction Remedies.

15 Ill. Stat. Ann. ch. 38 §§ 122-1 to -7 (Smith-West 1964); Md. Ann. Code art. 27 § 645A (1967); N.C. Gen. Stat. §§ 15-217 to -222 (Supp. 1967); Ore. Rev. Stat. §§ 138.510-.680 (1967).

16 U.S. Const. art. I, § 9; Fay v. Noia, 372 U.S. 391, 400 (1963).

17 28 U.S.C. § 2241 (1964).

18 Fay v. Noia, 372 U.S. 391, 426-27 (1963).

19 Irvin v. Dowd, 359 U.S. 394, 404 (1959).

20 Fay v. Noia, 372 U.S. 391, 415-17 (1963). *See also* Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 Harv. L. Rev. 657, 659 (1948).

21 Badger, *A Judicial Cul-de-Sac: Federal Habeas Corpus for State Prisoners*, 50 A.B.A.J. 629 n.34 (1964); Handbook of Criminal Procedure in the United States District Court 296-97 (West 1964).

to include relief in cases of denial of due process,[22] denial of equal protection,[23] illegal search and seizure by state authorities,[24] denial of the right to counsel,[25] use of a coerced or involuntary confession in state court criminal proceedings,[26] discrimination in the selection of jurors,[27] lack of a fair and impartial jury,[28] inability of indigent state prisoners to perfect appeal *in forma pauperis*[29] and failure to disclose evidence favorable to the accused in state proceedings.[30]

The use of federal habeas corpus as a collateral remedy by persons in custody pursuant to the judgment of a state court[31] did not appear in significant volume prior to the 1940's but since that time has become almost routine in the state administration of criminal justice.[32] However, the use of the writ by state prisoners was somewhat restricted as the Supreme Court, beginning with the decision in *Ex Parte Royall*,[33] developed the doctrine of exhaustion of state remedies. This doctrine provides that though the United States Courts have the power to grant writs of habeas corpus for the purpose of inquiring into the cause of restraint of liberty of any person in custody under the authority of a state in violation of the Constitution, they will not do so until there has been a final determination of the case in the state courts.[34] Congress later provided[35] that an application for a writ of habeas corpus would not be granted unless all state remedies were exhausted or there was an absence of effective, available state corrective process.

The Supreme Court is aware that federal habeas corpus jurisdiction has been a source of irritation between state and federal jurisdictions. It has suggested that this irritation might be reduced if the states would provide procedures for a full airing of federal claims[36] in accord with the Court's decisions in *Fay v. Noia*[37] and *Townsend v. Sain*.[38]

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22 Fay v. Noia, 372 U.S. 391 (1963); Sublett v. Adams, 362 U.S. 143 (1960).

23 Roberts v. LaVallee, 88 S. Ct. 194 (1967); Douglas v. Green, 363 U.S. 192 (1960).

24 Henry v. Mississippi, 379 U.S. 443 (1965).

25 House v. Mayo, 324 U.S. 42 (1945); Edge v. Wainwright, 347 F.2d 190 (5th Cir. 1965).

26 Bowles v. Stevenson, 379 U.S. 43 (1964); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Rogers v. Richmond, 365 U.S. 534 (1961).

27 Brown v. Allen, 344 U.S. 443 (1953).

28 Irvin v. Dowd, 366 U.S. 717 (1961).

29 Long v. District Court of Iowa, 385 U.S. 192 (1966); Chase v. Page, 343 F.2d 167 (10th Cir. 1965).

30 Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964); United States v. Maroney, 247 F. Supp. 767 (W.D. Pa. 1965).

31 28 U.S.C. § 2254 (Supp. II, 1965-66).

32 *Federal Postconviction Review.*

33 117 U.S. 241, 257 (1886). *See also* Fay v. Noia, 372 U.S. 391, 418 (1963).

34 Irvin v. Dowd, 359 U.S. 394, 485 (1959); Tinsley v. Anderson, 171 U.S. 101, 104 (1898); Hawk v. Hollowell, 1 F. Supp. 885 (D.C. Cir. 1933).

35 28 U.S.C. § 2254 (Supp. II, 1965-66).

36 Henry v. Mississippi, 379 U.S. 443, 453 (1965); *Federal Postconviction Review. See also* 28 U.S.C. § 2254(d) (Supp. II, 1965-66) in which Congress has included many of the requirements set out in decisions by the United States Supreme Court cited in notes 37 & 38 *infra.*

37 372 U.S. 391 (1963). *See also* Breitenstein, *Remarks on Recent Post Conviction Decisions*, 33 F.R.D. 454 (1963).

38 372 U.S. 293 (1963). *See also* Caffrey, *The Impact of the Townsend and Noia Cases on Federal District Judges*, 33 F.R.D. 446 (1963).

II. Iowa Post-Conviction Remedies

Post-conviction remedies which enable a defendant to collaterally attack his conviction under certain conditions are available in all American jurisdictions.[39] The remedies traditionally available are the common-law writs of *coram nobis* and habeas corpus which have been adopted by American courts for the hearing of constitutional claims.[40]

A. *Coram Nobis*

The writ of *coram nobis* was introduced in the United States as a writ for equitable relief in civil cases but has now evolved into a writ for relief in criminal cases.[41] Where the writ is employed, the conviction will be voided if the defendant can prove by a preponderance of the evidence that the court committed an error in fact.[42] The writ would issue from the court before which the alleged error occurred.[43]

Coram nobis was available during the period of the Iowa Territory[44] and during the early years of statehood,[45] but the Revision of 1860 omitted the statute providing for the writ and the statute was therefore repealed.[46] The Iowa Supreme Court held in *Boyd v. Smyth*[47] that under Iowa practice an appeal in a criminal case has the same force and effect as did the writ and as the legislature had provided a complete criminal code which did not include *coram nobis*, the writ was no longer available under the practice of this state.[48]

B. *Habeas Corpus*

In Iowa, the "only post-conviction remedy is that provided by habeas corpus under Code chapter 663."[49] The writ was specifically provided for in the Constitution of the State of Iowa[50] and as such is available to any

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39 Note, *State Post-Conviction Remedies*, 61 Harv. L. Rev. 681 (1961).

40 Note, *State Criminal Procedure and Federal Habeas Corpus*, 80 Harv. L. Rev. 422, 427 (1966).

41 E. Frank, Coram Nobis § 1.03 (1953).

42 McKinney v. Western Stage Co., 4 Iowa 420 (1857).

43 *Id.* at 423.

44 Ch. 28 [1834-44] Territorial Laws of Iowa.

45 Ch. 112 § 1960 [1851] Iowa Code provided: "Any person aggrieved by the judgment of the district court by reason of any material error in fact, may within one year after the rendition thereof obtain from the clerk of the court which rendered the judgment a writ of error *coram nobis* returnable at the next term of said court."

46 Ch. 4 § 31 [1860] Iowa Code provided: "All public and general acts passed prior to the present session of the General Assembly, and all public and special acts the subject thereof are revised in this code, or which are repugnant to the provision thereof, and hereby repealed, subject to the limitations and with the exceptions herein expressed."

47 200 Iowa 687, 205 N.W. 522 (1925).

48 *Id.* at 693, 205 N.W. at 524. *See also* State v. Harper, 220 Iowa 515, 258 N.W. 886 (1935).

49 Larson v. Bennett, 160 N.W.2d 303 (Iowa 1968); *accord*, Bolds v. Bennett, 159 N.W.2d 425 (Iowa 1968) (concurring opinion).

50 Iowa Const. art. 1 § 13.

person illegally restrained.[51] This Note is concerned only with the application of the writ as a post-conviction remedy in criminal cases.

Habeas corpus is not to be used in lieu of an appeal,[52] nor to provide a forum to determine the guilt or innocence of the petitioner, nor to pass upon errors in his trial, nor to retry facts and pass upon the sufficiency of the evidence to sustain the charge.[53] Traditionally, the writ would issue only to determine whether the court had *jurisdiction* to render judgment in the case in question,[54] and if it was to be granted, the petition must have alleged facts which if proved would make a prima facie showing of no jurisdiction.[55]

A petition for a writ of habeas corpus must be made to the judge or court most convenient in point of distance to the place of incarceration.[56] A more remotely located judge or court may refuse to consider the petition unless a sufficient reason is stated in the petition for not submitting it to the most convenient forum.[57] "[C]onvenience or preference of an attorney or witness or other person interested in the release of the applicant shall not be sufficient reason to authorize a more remote court or judge to assume jurisdiction."[58]

The Iowa courts have judicially expanded the scope of habeas corpus in state proceedings by abandoning the traditional jurisdiction restrictions to issuance of the writ.[59] It would appear that this expansion was an attempt to keep Iowa habeas corpus abreast of the rapidly changing federal concepts. The Iowa Supreme Court held in *Sewell v. Lainson*[60] that to deprive defendant of any constitutional right resulted in a denial of due process which is a jurisdictional question for the purpose of habeas corpus in Iowa. The court stated:

> We think under the modern holdings of the Supreme Court of the United States we are bound to consider any infringement of the constitutional rights of those accused of crimes as denials of due process. . . .
>
> The United States Supreme Court has apparently avoided the long-established rule that the only material question of habeas corpus is jurisdiction by making due process a jurisdictional question.
>
> . . . .
>
> Since the federal courts have announced the principle that

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51 Note, *Habeas Corpus in Iowa*, 3 DRAKE L. REV. 30 (1953), deals briefly with various uses of the writ of habeas corpus in Iowa.

52 Ford v. State, 258 Iowa 137, 138 N.W.2d 116 (1965).

53 Scalf v. Bennett, 147 N.W.2d 860 (Iowa 1967); Farrant v. Bennett, 255 Iowa 704, 123 N.W.2d 888 (1963).

54 "Unless there was no jurisdiction in the court, the judgment is not void and may not be collaterally attacked by habeas corpus." Scalf v. Bennett, 147 N.W.2d 860, 863 (Iowa 1967). *See also* Nelson v. Bennett, 255 Iowa 773, 123 N.W.2d 864 (1963).

55 Rogers v. Bennett, 252 Iowa 191, 105 N.W.2d 507 (1960).

56 *Id.*

57 IOWA CODE § 663.3 (1966).

58 IOWA CODE § 663.4 (1966).

59 *See generally* Note, *State Criminal Procedure and Federal Habeas Corpus*, 80 HARV. L. REV. 422, 428 (1967).

60 244 Iowa 555, 57 N.W.2d 556 (1953).

> in habeas corpus proceedings they will examine the records in courts of various states to determine whether the petitioner's rights under the Constitution of the United States have been denied him and so lack of jurisdiction in the state court appears, we think it incumbent upon us to make the examination for ourselves.[61]

Furthermore, not only the right to counsel which is provided by statute,[62] but the right to *effective* counsel in criminal proceedings is specifically included within the scope of habeas corpus review.[63] The Iowa Supreme Court has repeatedly held that failure of the court to appoint effective counsel in criminal proceedings, provided defendant does not voluntarily and intelligently waive the right to counsel, is a denial of due process under the fourteenth amendment of the Constitution.[64] It should be noted, however, that the Code does not provide for counsel in habeas corpus proceedings[65] and the Iowa Supreme Court has held that habeas corpus proceedings are civil actions.[66] Therefore the state may at its discretion provide counsel[67] but is not bound to do so under the state[68] or Federal[69] Constitution in habeas corpus proceedings.[70]

Though the Iowa courts have attempted to deal with the changing federal concepts, the expansion of Iowa habeas corpus has not resulted in a post-conviction remedy sufficient to deal with all asserted violations of federal constitutional rights.[71] The United States Supreme Court, by reversing an Iowa court decision, has effectively expanded the scope of Iowa habeas corpus and thereby increased the availability of Iowa's only post-conviction remedy. In the

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61 Sewell v. Lainson, 244 Iowa at 564-66, 57 N.W.2d at 562.

62 IOWA CODE §§ 775.4, 777.12 (1966). *See generally* Note, *Adequate Appellate Review for Indigents: A Judicial Blend of Adequate Transcript and Effective Counsel*, 52 IOWA L. REV. 902 (1967).

63 *See* Heiden v. United States, 353 F.2d 53 (9th Cir. 1965); Note, *Criminal Procedure—Waiver of Right to Counsel—Entry of Plea of Guilty Under Federal Rule of Criminal Procedure* 11, 52 IOWA L. REV. 118 (1966).

64 Larson v. Bennett, 160 N.W.2d 303 (Iowa 1968); Ashby v. Bennett, 152 N.W.2d 228 (Iowa 1967); Scalf v. Bennett, 147 N.W.2d 850 (Iowa 1967); Birk v. Bennett, 141 N.W.2d 576 (Iowa 1966); Buteaux v. Bennett, 256 Iowa 1068, 129 N.W.2d 651 (1963).

65 IOWA CODE § 663 (1966) makes no provisions for appointment of counsel for indigents. IOWA CODE § 336A (1966) makes no provisions for counsel in habeas corpus cases. Ch. 410 [1967] Iowa Acts 799, provides that the state will reimburse counties for the payment of fees of court appointed attorneys representing an indigent party bringing a habeas corpus action in state courts.

66 Bolds v. Bennett, 159 N.W.2d 425 (Iowa 1968) (concurring opinion); Waldon v. District Court, 256 Iowa 1311, 130 N.W.2d 728 (1963).

67 Larson v. Bennett, 160 N.W.2d 303 (Iowa 1968).

68 Waldon v. District Court, 256 Iowa 1311, 130 N.W.2d 728 (1963).

69 Sanders v. United States, 373 U.S. 1 (1963); Roach v. Bennett, 392 F.2d 743 (8th Cir. 1968).

70 *But see* Brown v. Allen, 344 U.S. 443, 502 (1952); Larson v. Bennett, 160 N.W.2d 303 (Iowa 1968) (dissenting opinion); Hampton v. Oklahoma, 368 F.2d 9 (10th Cir. 1966); Note, *Iowa Criminal Law—A Need for Reform*, 51 IOWA L. REV. 883, 928-30 (1966); Note, *Constitutional Law—Habeas Corpus—Indigent's Right to Counsel*, 50 IOWA L. REV. 1246 (1965).

71 "So far as we can ascertain, neither the Iowa legislature nor the Iowa Supreme Court has liberalized the rules for consideration of post-conviction attacks asserting federal constitutional rights have been violated in the proceedings resulting in conviction." Johnson v. Bennett, 386 F.2d 677, 678 (8th Cir. 1967).

case of *Smith v. Bennett*,[72] the Iowa district court had held that prisoners filing a petition for a writ of habeas corpus in the Iowa district courts must pay the four dollars filing fee as the waiver of the fee only extended to indigents in criminal actions. Following an unsuccessful appeal to the Iowa Supreme Court, the prisoners appealed to the United States Supreme Court.[73] The United States Supreme Court reversed the Iowa court and held that in failing to extend the privilege of habeas corpus to its indigent prisoners the state had denied them equal protection of the laws in violation of their constitutional rights.[74] Furthermore, it was noted that the state remedy may offer review of questions not involving federal rights and therefore not reviewable in a federal habeas corpus proceeding.

The state of Iowa contended that denial of state habeas corpus was not in violation of constitutional rights as petitioners could still apply to the federal courts for a writ of habeas corpus. To this allegation the United States Supreme Court replied, "it would ill behoove this great State, whose devotion to the equality of rights is indelibly stamped upon its history, to say to its indigent prisoners seeking to redress what they believe to be the State's wrong: 'Go to the federal court.' "[75]

The cases of *Grindstaff v. Bennett*[76] and *Roach v. Bennett*[77] provide a recent example of the lag resulting in the process of judicial expansion of state habeas corpus. A more liberal post-conviction remedy providing for a plenary hearing of new factual allegations on habeas corpus petitions would probably have resulted in the factual disputes being resolved in the state court structure.

The United States Supreme Court had held, in *Townsend v. Sain*,[78] that where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, and these facts are disputed, the federal court must hold an evidentiary hearing if the applicant did not receive a full and fair evidentiary hearing in the state court in either the trial or collateral proceeding.[79] The Court did not intend to require state courts to hold hearings and make findings which satisfy this requirement, as the conduct of such hearings is largely controlled by state law. However, it indicated that if states had a sufficiently inclusive remedy the state proceedings would eliminate the need for federal hearings.[80]

In *Grindstaff*,[81] an Iowa district court, without a hearing, denied the petitioner's second habeas corpus petition in which, for the first time, he

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72 252 Iowa 976, 109 N.W.2d 703 (1961).
73 Smith v. Bennett, 365 U.S. 708 (1961).
74 *Id.* at 713. The court noted that in this case the decision did not extend to all indigent habeas corpus petitioners but only to indigent habeas corpus petitioners in criminal cases.
75 Smith v. Bennett, 365 U.S. 708, 713 (1961).
76 389 F.2d 55 (8th Cir. 1968).
77 392 F.2d 743 (8th Cir. 1968).
78 372 U.S. 293 (1963).
79 *Id.* at 312. *See also* Whitefield v. Hanges, 222 F. 745 (8th Cir. 1915).
80 372 U.S. at 313 n.9.
81 Grindstaff v. Bennett, 389 F.2d 55 (8th Cir. 1968).

alleged that his confession of guilt had been the product of coercion. He then filed a habeas corpus petition in the Iowa Supreme Court where it was denied again without an evidentiary hearing. Petitioner next appealed the denial and when his appeal was denied[82] he resorted to the United States District Court where the petitioner was again denied a writ of habeas corpus without a hearing. From this denial an appeal was taken to the Court of Appeals for the Eighth Circuit where the case was remanded to the federal district court with directions to hold an evidentiary hearing to resolve the factual dispute whether applicant's guilty plea was the product of coercion.[83]

The petitioner in *Roach*[84] was not accorded an adequate opportunity in the state hearing to show that his plea of guilty was involuntary as a result of his mental incompetency. The Iowa Supreme Court denied Roach's petition[85] as did the federal district court. The Circuit Court of Appeals, because petitioner had not had an adequate hearing as to his competency, ruled that the petitioner was entitled to a plenary hearing.[86] The case was reversed and remanded to the federal district court with instructions to stay further proceedings until appellant filed a new petition in the state district court to conduct a plenary hearing on the claims of incompetency or involuntariness of the plea. In the event the state court then denied appellant a hearing he could file an application to reopen the proceeding in the federal district court wherein a plenary hearing would be held.

In arriving at this decision the Court of Appeals for the Eighth Circuit noted that "it is compelling that the federal system entrust the states with primary responsibility in their criminal cases" and that "a full and fair hearing in the state courts would make unnecessary further evidentiary proceedings in the federal courts."[87] "The State of Iowa unfortunately has not yet passed a post-conviction act, whereby the sentencing court can more conveniently and adequately pass upon the previous proceedings."[88]

Merely holding a full evidentiary hearing is not enough to eliminate the need for a full review in the federal courts. The federal courts must be able to look to the records of the state's trial and hearing and determine whether the petitioner has been granted "a full and fair hearing" either during the trial process or the collateral proceedings. To facilitate such an investigation, the state court judges should explicitly differentiate between their findings of fact and their conclusions of law.[89] The states should also provide verbatim transcripts of all hearings on federal issues.[90]

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82 State v. Grindstaff, 147 N.W.2d 611 (Iowa 1967).
83 Grindstaff v. Bennett, 389 F.2d 55 (8th Cir. 1968).
84 Roach v. Bennett, 392 F.2d 743 (8th Cir. 1968).
85 Roach v. Bennett, 148 N.W.2d 488 (Iowa 1967).
86 Roach v. Bennett, 392 F.2d 743 (8th Cir. 1968).
87 *Id.* at 747.
88 *Id. See also* Pope, *Suggestions for Lessening the Burden of Frivolous Applications*, 33 F.R.D. 409 (1962).
89 28 U.S.C. § 2254(d) (Supp. II, 1965-66); Case v. Nebraska, 381 U.S. 336, 346 (1965); *Federal Postconviction Review. Contra*, Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 522-23 (1963).
90 *Federal Postconviction Review* at 930.

As a result of other recent developments, the use of Iowa habeas corpus apparently does not provide adequate post-conviction relief for some state prisoners. By resorting to the federal courts, it is sometimes possible for convicts serving consecutive or excessive sentences to obtain relief which is unavailable in the state courts because of restrictions in the use of Iowa habeas corpus.

It is well settled in Iowa that a state prisoner has no right to a writ of habeas corpus unless he is entitled to immediate release.[91] This rule is in accord with the decision of the United States Supreme Court in *McNally v. Hill*,[92] holding that the writ may not be used in the federal courts as a means of securing a judicial decision of a question which, even if determined in the prisoner's favor, could not result in his immediate release.

The *McNally* decision is, however, no longer a restriction to issuance of a writ of habeas corpus in the federal courts. Beginning with the case of *Parker v. Ellis*,[93] the Supreme Court has progressively given a more liberal interpretation to the requirement that a favorable decision for petitioner result in termination of incarceration and also to the requirement that he be physically restrained before the petition will be considered.[94] At present a state prisoner may test the legality of his imprisonment by habeas corpus though a favorable decision would relieve him of but one of two or more uncompleted or unserved consecutive sentences.[95]

In the case of *Peyton v. Rowe*,[96] the Supreme Court specifically overruled *McNally*[97] and held that a prisoner serving consecutive sentences is "in custody" under any of the terms of section 2241 of 28 U.S.C. and that "the statute does not deny the federal courts power to fashion appropriate relief other than immediate release."[98]

Under the present conditions, a state prisoner incarcerated in Iowa who desires to challenge the legality of one of two or more consecutive sentences would be forced to resort to the federal courts as his only alternative to waiting until he had begun to serve the challenged sentence. Such a forced waiting period works an injustice on the prisoner in that it delays the time

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91 Wright v. Bennett, 257 Iowa 61, 63, 131 N.W.2d 455, 456 (1964); West v. Lainson, 235 Iowa 734, 17 N.W.2d 411 (1945).

92 293 U.S. 131, 135 (1934).

93 362 U.S. 574 (1960) (dissenting opinion). Chief Justice Warren and three others joining in the dissent, stated:

> It is quite true that the statute provides that the writ of habeas corpus will not issue unless the applicant is "in custody," 28 U.S.C. § 2241(c). But the statute does not impose the same restriction upon the grant of relief. Rather, the federal courts are given a broad grant of authority to "dispose of the matter as law and justice require." 28 U.S.C. § 2243. In the case at bar, the "in custody" prerequisite to issuance of the writ is no longer relevant, because the function of the writ—to provide and to facilitate inquiry into the validity of the applicant's claim—has already been fully served. . . . Under the circumstances of this case, "law and justice" require that the patent invalidity of Parker's conviction be proclaimed.

94 28 U.S.C. § 2241(c)(3) (1964).

95 Walker v. Wainwright, 88 S. Ct. 962 (1968).

96 88 S. Ct. 1549 (1968).

97 McNally v. Hill, 293 U.S. 131 (1934).

98 Peyton v. Rowe, 88 S. Ct. 1549, 1556 (1968).

when he would be considered for parole and extends the time of his incarceration under the void sentence during the consideration of the habeas corpus petition and resultant hearings and appeals.[99]

The case of the prisoner serving an excessive sentence is similar in that at present there is no means by which he may attack, in the Iowa courts, the excessive portion of his sentence until he has served that portion properly imposed. Here again he is forced to resort to the federal courts. As he is required to remain incarcerated under an excessive sentence, the prisoner would be deprived of consideration for parole[100] and, should he win a favorable decision, would be illegally detained during habeas corpus proceedings and appeals.

Closely associated with the "in custody" provisions are cases where an individual has served his term, has been paroled or released on probation[101] and has then discovered that he was deprived of his constitutional rights or that he has some basis upon which collateral relief should be granted. A means should be provided whereby such a person can by right, clear his record of a prior conviction rather than relying on executive pardon.[102] The existence of a habitual criminal statute[103] imposing greater penalities for subsequent offenses increases the need for such a remedy.[104]

III. Conclusion

The foregoing examples are not intended as a compilation of the shortcomings of an attempt to judicially expand a restrictive habeas corpus statute.[105] They are, rather, an attempt to point out instances of the time lag which necessarily exists in judicial expansion resulting in multiple habeas corpus petitions and appeals.[106] Furthermore, they are an attempt to

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99 Iowa Code § 673.40 (1966).

100 This problem has been recognized by the Iowa Supreme Court in the case of State v. English, 242 Iowa 248, 254, 46 N.W.2d 13, 16 (1951). The court stated:

> We have held that when the sentence is alleged to be excessive only, defendant's remedy is by habeas corpus when he has served the period properly imposed and is still detained. But to apply the rule here would work manifest injustice, since the defendant would for all practical purposes be deprived of his right to the consideration of the board of parole.

101 The federal writ extends to those on parole (Jones v. Cunningham, 371 U.S. 236 (1963)) and to those on probation (Benson v. California, 328 F.2d 159 (9th Cir. 1964)).

102 Iowa Const. art. IV § 16; Iowa Code §§ 248, 747.7 (1966).

103 Iowa Code § 747 (1966).

104 Nat'l Conf. of Comm'rs on Unif. State Laws, Uniform Post-Conviction Procedure Act § 1 (1965) states: "Any person who has been convicted of, or sentenced for, a crime . . . may institute, without paying a filing fee, a proceeding under the Act to secure relief." Ore. Rev. Stat. § 138.510 (1967) states: "Except as provided . . . any person convicted of a crime under the laws of this state may file a petition for post-conviction relief . . . ." ABA Post-Conviction Remedies, at § 1.1 suggests: "There should be one comprehensive remedy for post-conviction review (i) of the validity of judgements of conviction or (ii) of the legality of custody or supervision based upon a judgement of conviction."

In each of these examples there is no requirement that the party seeking post-conviction relief must be physically restrained before the courts will consider his petition.

105 Iowa Code § 663 (1966).

106 *See* Grindstaff v. Bennett, 389 F.2d 55 (8th Cir. 1968).

demonstrate that judicial expansion will be a continuous process if the State of Iowa desires to maintain the scope of its only post-conviction remedy coincident with federal habeas corpus.

It is important to keep in mind that the initial step in preparation and filing of applications for collateral relief will in most cases be done by prisoners without assistance of counsel, without sufficient legal materials and without sufficient legal knowledge to produce a concise, effective petition. As a result, the state and federal judges must weed through large numbers of poorly constructed petitions to find the few valid claims.[107] This burden would be substantially reduced if states would provide one remedy at least as broad as federal habeas corpus,[108] whereby a petitioner could fully air all claims, factual and legal,[109] through the use of a standard form.[110]

The federal courts have repeatedly called for action by states to provide adequate post-conviction procedures which would enable the states to handle the majority of their criminal cases.[111] In response, the Iowa courts have attempted to deal with the rapid expansion of federal habeas corpus using the limited tools available to them by way of judicial expansion. The next move, if Iowa heeds the advice of the federal courts, is for the state legislature to furnish a post-conviction remedy[112] providing procedures for a full airing of federal claims in accord with the recent United States Supreme Court decisions.[113] Indeed, the Iowa courts, for lack of a sufficient remedy, should not be compelled to say to a state prisoner seeking to redress what he believes to be the state's wrong: Go to the federal court.

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107 In Brown v. Allen, 344 U.S. 443, 498 (1952), Mr. Justice Frankfurter noted that of 3702 applications granted over a seven year period only 67 resulted in release from prison. In the concurring opinion Mr. Justice Jackson, commenting on the flood of frivolous applications stated, "[h]e who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search," 344 U.S. at 537.

108 *Federal Postconviction Review* at 930.

109 *Id.* at 929; Case v. Nebraska, 381 U.S. 336, 346 (1965) states: "State statutes should provide a postconviction process at least as broad in scope as existing Federal statutes under which claims of violation of constitutional right asserted by State prisoners are determined in Federal courts under the Federal habeas corpus statutes."

110 A state prisoner in Iowa, desiring to file a petition for a writ of habeas corpus in the federal district court may obtain a standard form without cost from the office of the clerk of the district court.

An example of a standard form application for a writ of habeas corpus in the federal courts is found in 33 F.R.D. 391-408 (1964). ABA POST-CONVICTION REMEDIES at 98 contains a model form of application to be used in conjunction with a broad post-conviction relief statute.

111 Case v. Nebraska, 381 U.S. 336, 344 (1965) (concurring opinion); Henry v. Mississippi, 379 U.S. 443, 453 (1965); Roach v. Bennett, 392 F.2d 743, 747 (8th Cir. 1968); Johnson v. Bennett, 386 F.2d 677 (8th Cir. 1967).

112 Bolds v. Bennett, 159 N.W.2d 425, 431 (Iowa 1968) (dissenting opinion).

113 States should take into account the decisions in Sanders v. United States, 373 U.S. 1 (1963); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963). Many of the Court's suggestions have been incorporated in the provisions of 28 U.S.C. § 2254(d) (Supp. II, 1965-66).