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MULTIPLE POST-TRIAL LITIGATION IN CRIMINAL CASES

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DURING the past fifteen years, trial and appellate courts, particularly in urban areas, have become glutted with criminal trials and appeals to the detriment of not only criminal litigation, but civil litigation as well. This article concerns the repetitious nature of post-trial litigation in criminal cases.

Before the judicial branch of government can justifiably request the legislative branch to provide additional judicial manpower and facilities, it is necessary that we be sure that the facilities which we have are being used efficiently and rationally. It is my thesis that they are not being so used. We have two systems, state and federal, which are being operated as if they were entirely independent of each other, when, in actuality, they are not. State court involvement in the criminal field is presently under the almost complete domination of the federal courts.[1] Such a condition has been created by the Supreme Court of the United States through enlargement of federal constitutional concepts to the extent that they encompass almost every facet of the investigation and adjudication of state criminal cases, through the broadened use of the fourteenth amendment,[2] and

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1. *See* Brown v. Allen, 344 U.S. 443 (1953), wherein the United States Supreme Court held that the federal district courts could order evidentiary hearings on federal claims which had already been litigated in the state court. *See also* Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

2. To date, the United States Supreme Court has incorporated through the "due process" clause of the fourteenth amendment: the fourth amendment prohibition against "unreasonable searches and seizures," Mapp v. Ohio, 367 U.S. 643 (1961); fifth amendment privilege against "self-incrimination," Malloy v. Hogan, 378 U.S. 1 (1964); sixth amendment "right to counsel," Gideon v. Wainwright, 372 U.S. 335 (1963); sixth amendment guaranty of an accused's right to a "speedy trial," Duncan v. Louisiana, 391 U.S. 145 (1968); sixth amendment guaranty of accused's "right of confrontation," Pointer v. Texas, 380 U.S. 400 (1965); and eighth amendment guaranty against "cruel and unusual punishment," Robinson v. California, 370 U.S. 660 (1962).

through the enlargement of the scope of inquiry under federal habeas corpus.[3]

This has been one of the greatest changes in the legal field in the history of our country and has come about in the short space of approximately twenty years. Much ink has been spilled and many words have been used in arguing the merits of what has occurred.[4] It is not my purpose to add to this controversy, because further discussion is futile. The transfer of authority over a state's criminal cases from the state to the federal courts is an accomplished fact.[5] Only history will tell whether the transfer was wise or not.

This sudden change has come as a great shock to most older members of the profession. In retrospect, it is strange that we should have been surprised. The same thing had been going on in all facets of our life long prior to the time it became apparent in criminal investigation and litigation.[6] It was just a little later in coming into our field of endeavor. The power of the federal government has displaced the power of the state. Perhaps this makes sense, because state boundaries mean little today. We live as a "national" people rather than as a "state" people. Our manner of living has made the locality in which we reside of less and less relevance. Furthermore, many new problems, and some old ones, cannot be readily solved on a state-by-state basis. Be that as it may, the transfer of power from state to federal government has been the greatest single phenomenon of American government to occur during this century.

The purpose of this article is to suggest that perhaps our existing

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3. *See, e.g.,* Tucker v. Payton, 357 F.2d 115 (1966), wherein the court of appeals stated that federal habeas corpus is available to a state prisoner to attack his conviction, since its denial would have the effect of delaying eligibility for parole. *See also,* Note, 80 HARV. L. REV. 422 (1966).

4. *See* Kelman, *Federal Habeas Corpus as a Source of New Constitutional Requirements for State Criminal Procedure,* 28 OHIO ST. L.J. 46 (1967); Mayers, *Federal Review of State Convictions: Some Proposals for Change,* 5 AM. CRIM. L.Q. 66 (1967); Note, 59 NW. U.L. REV. 696 (1964); Comment, 16 CATHOLIC U.L. REV. 401 (1967); Note, 3 U. SAN. FRAN. L. REV. 450 (1969).

5. *See supra* note 3.

6. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Sullivan, 332 U.S. 689 (1948); *see generally* Wabash & St. T. OP. Ry. Co. v. Illinois, 118 U.S. 557 (1886). In connection with national versus local labor regulations, *see* Hill v. Florida, 325 U.S. 538 (1945); San Diego Bldg. Trades Council v. Garman, 359 U.S. 236 (1959).

and traditional federal and state court structures, and our means of using them in the criminal law field, are not very well adapted to our present requirements and conditions in view of the complete domination of the field by the federal courts. To illustrate this point, let me outline the usual course in Oregon of a criminal case which has been investigated and tried without error. I have no reason to believe that this is not typical of most other states. The defendant is tried and convicted in the state trial court of general jurisdiction. He appeals his conviction to the Oregon Court of Appeals, an intermediate appellate court. The conviction is affirmed. He petitions the Supreme Court of Oregon for a writ of review and the writ is denied. He then commences proceedings under the Oregon Post Conviction Procedure Act,[7] which is a means of asserting in a state court that he has been deprived of a state or federal constitutional right in his original criminal investigation or prosecution. The matter is tried in the trial court of general jurisdiction. The petition for relief is denied. Defendant then appeals his denial of post-conviction relief to the Oregon Court of Appeals. The denial of relief is there affirmed. A petition for a writ of review to the Oregon Supreme Court is made and denied. The defendant then files a petition for a writ of habeas corpus in the Federal District Court for the District of Oregon. A trial is had and relief is denied. An appeal is taken to the Circuit Court of Appeals for the Ninth Circuit, and the denial of relief by way of habeas corpus is affirmed. A petition for a writ of certiorari is brought to the United States Supreme Court, and the writ is denied.[8]

There have now been three trials, three appellate reviews with written opinions, and three considerations by higher appellate courts which have refused further review. Try explaining the necessity for such triplicate procedure to a layman and see what sort of response you receive. The layman will be unable to comprehend the necessity for this sort of procedure and will immediately deride the judicial process and express his disrespect for it. I submit that the layman is correct.

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7. ORE. REV. STAT. §§ 138.510-.680 (1967).

8. Even then, litigation may not be an end. The usual principles of res judicata are inapplicable to successive habeas corpus proceedings in federal courts. Smith v. Yeager, 393 U.S. 122 (1968); Sanders v. United States, 373 U.S. 1 (1963).

Post-conviction acts similar to that of Oregon have been enacted by many states,[9] because it was thought that they would keep state cases out of federal courts if a means were provided in state courts for vindicating federal constitutional rights after regular appellate review was exhausted.[10] Oregon would now be in a better position if no such law existed. It merely provides for turning over the state legal machinery another time before the case goes its inevitable way to the federal courts. In some cases, of course, relief is granted. However, in the vast bulk of cases, it is merely another step on the way to the federal courts.

Presently, there is no practical manner whereby the described progression of the average criminal case can be constitutionally prevented, regardless of the merits of the litigation. About ninety per cent of the convicted criminals are indigents.[11] All costs are borne by public funds. Regardless of how poor his chances may be, a convicted defendant cannot be expected to do other than devote his time to continuous post-trial litigation. He has nothing to lose.

When almost every convicted defendant is going to avail himself of his complete post-trial rights regardless of the merit of his case, does it make sense to run the litigation through two different court systems? What happens in the state system after conviction in the trial court is, in most instances, relatively unimportant, because almost every facet of the case involves a federal constitutional question and therefore is going to have complete federal review. If complete federal review is the rule regardless of whether state review has been had, we cannot justify the maintenance of state post-trial litigation, appellate or otherwise. It is true that state review sometimes results in the invalidation of convictions, thus terminating post-trial litigation without resort to the federal courts. However, we must presume that these convictions would also have been invalidated had their review

9. *See, e.g.,* ILL. REV. STAT. ch. 38, §§ 122-1 to 122-7 (1969); MD. CRIM. CODE, art. 27, § 645A (1967); N.C. GEN. STAT. §§ 15-217 to 15-222 (1965); WYO. STAT. ANN. § 7-408.1 to 7-408.8 (Supp. 1967).

10. *See generally* Fairchild, *Post Conviction Rights and Remedies in Wisconsin,* WIS. L. REV. 52 (1965); Raper, *Post Conviction Remedies,* 19 WYO. L.J. 213 (1965); Note, 18 DRAKE L. REV. 98 (1968); Note, 21 MAINE L. REV. 241 (1969).

11. Oshman, *Justice for the Poor—Whither Next?,* 27 BRIEF CASE 135 (1969); Note, 1 U. SAN FRANCISCO L. REV. 326 (1967); Sargant, *Legal Aid in Criminal Appeals,* 117 N. J. L. 1067 (1967); Summers, *Tilted Scales and Criminal Justice: The Plight of the Indigent Defendant,* 5 CRIM. L. BULL. 508 (1969).

gone directly to the federal system from the state trial court. At the present time, the real Supreme Court of Oregon for criminal litigation is the Federal District Court or the Circuit Court of Appeals for the Ninth Circuit.

I suggest that if the defendant asserts a deprivation of a federal constitutional right in his appeal, or by any other post-trial means, the appeal or other litigation should go in the first instance directly into the federal system. The question immediately presents itself: how will questions of non-constitutional consequence be decided which are present in the same case? The answer is that federal courts will decide them in accordance with state law as they do in many civil cases.

If there were a means of screening out meritless post-trial litigation through a public defender or other official who examines the record for error, the difficulty could be substantially solved. However, there is no practical manner of doing this under present constitutional concepts.[12]

It is important that courts enjoy the confidence and faith of the people. Courts have no effective way of enforcing their judgments or decrees other than through the willingness of the citizenry to see that the results of litigation are enforced. When courts lose public confidence, they are no longer effective instruments of government. We cannot expect public confidence unless court business is conducted in a rational and efficient manner. It is absolutely necessary that some terminal facilities be installed in post-trial criminal litigation. The public, justifiably, cannot understand how criminal cases can be re-litigated interminably.

All of us have known of inhumane situations where convicted murderers have remained in death row for ten to fifteen years while post-trial litigation wends its interminable way.[13] Such a thing should not be possible and justifiably breeds public contempt for the judicial process. During post-trial litigation, the court has only two choices—allow the defendant bail or incarcerate him. If a person has been lawfully convicted, the public is entitled to have him segre-

12. Anders v. California, 386 U.S. 738 (1966).

13. Witherspoon v. Illinois, 391 U.S. 510 (1968); Chessman v. People, 205 F.2d 128, *cert. den.* 346 U.S. 916 (1953), *reh. den.* 347 U.S. 908 (1954); *see generally* Bedau, *Capital Punishment in Oregon*, 1903-04, 45 ORE. L. REV. 1 (1965).

gated from society, if its protection so requires, and he should not be out on bail. On the other hand, if a person has not been lawfully convicted, he is entitled to his freedom or a new trial promptly, and should not be incarcerated for years while post-trial litigation continues. Justice can only serve *both* sides if the issue of whether error has been committed is *determined promptly*.[14]

It can be argued that this voluminous post-trial litigation is necessary to make doubly sure that an innocent man is not wrongfully convicted. All of us abhor the thought that an innocent man might have been convicted. This is as it should be. On the other hand, there must be a limit to criminal post-trial procedures if they are to remain a useful and efficient tool for the purpose of review. It is possible to have so many safeguards that the system will no longer function. The only way that there can be absolute assurance that an innocent person will not be convicted is to prosecute no one. It is human to err. However, there comes a point when the insertion of further safeguards is self-defeating because the result is too cumbersome to be useful. The public will tolerate only so much duplication and inefficiency, and it is time we put our house in order.

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14. *See* Committee Report, *Appellate Delay in Criminal Cases: A Report*, 2 AM. CRIM. L.Q. 150 (1964); Covington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969).