12/18/56

VBN

Memorandum No. 4

Subject: Uniform Post-Conviction Procedure Act.

The Law Revision Commission was directed by the 1956 Session of the Legislature to make a study of habeas corpus proceedings. The principal concern of those who were instrumental in having this matter put on the Commission's agenda is the problem of the use of the writ of habeas corpus to attack the validity of criminal convictions, particularly in cases where unfounded claims are repeatedly made in both state and federal courts. When Mr. Martin Dinkelspiel, Chairman of the Commission on Uniform State Laws, learned of this assignment, he requested the Commission to make a study of the Uniform Post-Conviction Procedure Act to determine whether the Commission would join with the Commission on Uniform State Laws in recommending its enactment by the 1957 Session of the Legislature. The Commission decided to accede to this request and it retained Mr. Paul P. Selvin, a member of the Los Angeles Bar, to prepare a research report on the Uniform Post-Conviction Procedure Act. Mr. Selvin has submitted his report, a copy of which either is attached or has already been sent you.

When Mr. Selvin's report was received, I prepared a memorandum to the Southern Committee raising certain questions relating to the report and the matters with which it is concerned. A copy of my memorandum is attached.

The Southern Committee met with Mr. Selvin on December 15 to consider whether it would recommend that the Law Revision Commission join with the Commission on Uniform State Laws in recommending adoption of the Uniform Act in California. A copy of the report of the Southern Committee to the Commission is attached.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

12/18/56

Report of Southern Committee to the
Commission Relating to the Uniform
Post-Conviction Procedure Act

The Committee met on December 15, 1956 in Los Angeles with Mr. Paul Selvin, research consultant on the Commission's study of the Uniform Post-Conviction Procedure Act, and staff members McDonough and Nordby to discuss Mr. Selvin's report on the Uniform Post-Conviction Procedure Act. The subject was discussed in considerable detail. On the basis of this discussion, the Committee reached the following conclusions:

1. That the Uniform Post-Conviction Procedure Act should not be enacted unless the jurisdiction which is now vested by the Constitution in the Supreme Court, the district courts of appeal and the superior courts to entertain habeas corpus and coram nobis petitions challenging illegal convictions is simultaneously curtailed. If this were not done, the result would simply be that a person believing himself wrongfully convicted would have, in addition to his present right to bring habeas corpus and coram nobis proceedings in various courts to challenge the conviction, a right to bring a proceeding in the convicting court under the Act for the same purpose. Since one of the objectives of the draftsmen of the Act and of those interested in correcting the present situation is to reduce the number of legal proceedings which may be brought to challenge a conviction, the enactment of the Uniform Act in California without concomitantly curtailing habeas corpus and coram nobis jurisdiction would appear to frustrate rather than achieve improvement in the existing situation.

2. That it is at least doubtful whether the Commission should put itself in the position of recommending curtailment of existing habeas corpus and coram nobis jurisdiction by either constitutional amendment or statute,

since such a recommendation might well be misconstrued as antiliberitarian in purpose and effect, particularly insofar as persons under sentence of death are concerned.

3. That the Commission might, after further study, wish to recommend, in lieu of enactment of the Uniform Act, certain amendments of the existing statutes relating to habeas corpus and coram nobis proceedings, such as the following: (a) elimination of the writ of coram nobis and expansion of the writ of habeas corpus to cover the entire area heretofore covered by both writs in order to eliminate confusion as to which writ should be used in particular cases; (b) enactment of a provision that any petition thereafter filed which is denominated a petition for a writ of coram nobis or for other post-conviction relief from wrongful conviction should be treated as a petition for a writ of habeas corpus in order to minimize dismissal of proceedings merely because the moving papers are inartistically drawn; (c) enactment of a provision, similar to that of Section 7 of the Uniform Act, that an order making final disposition of a habeas corpus proceeding "shall clearly state the grounds on which the case was determined and whether a federal or state right was presented and decided" in order to facilitate disposition of later petitions in both state and federal courts.

4. That it has not been demonstrated that the incidence of petitions for habeas corpus and coram nobis is so heavy as to be such an excessive burden on either state prosecuting officers, including the Attorney General, or the courts, including those of the counties in which the principal penal institutions are located, as to constitute a major problem requiring drastic action. The Committee recommends that the Commission communicate with the Attorney General, the Chairman of the Judicial Council, and possibly with the District

Attorneys' Association, requesting them to furnish the Commission with accurate and detailed information as to the extent of the burden with post-conviction proceedings presently constitute.

5. Until the Commission has considered and passed upon conclusions 1 to 4 above the Committee cannot carry its consideration of the Uniform Post-Conviction Procedure Act further. The principal question which should be decided is whether the Commission wishes the Committee to give further consideration to enactment of the Uniform Act, even though it would involve recommending curtailment of habeas corpus jurisdiction, or whether the Commission desires the Committee to consider instead other revisions of California post-conviction procedure and if so, along what lines.

The Committee recommends that Mr. Selvin be paid for his excellent report.

John D. Babbage
Stanford C. Shaw, Chairman

VBN

12/13/56

Memorandum to Southern Committee

Subject: Research Consultant's Report
On Uniform Post-Conviction
Procedure Act.

This memorandum is designed to suggest some questions for discussion at the meeting of the Southern Committee with Mr. Selvin on Saturday to discuss his study to determine whether the Uniform Post-Conviction Procedure Act should be adopted in California.

It will be remembered that this study arises out of Topic No. 17 in Resolution Chapter No. 42, Statutes of 1956: "A study to determine whether the law respecting habeas corpus proceedings, in the trial and appellate courts, should, for the purpose of simplification of procedure to the end of more expeditious and final determination of the legal questions presented, be revised."

This topic was added to the Commission's agenda on the motion of Senator Regan who acted on the suggestion of the District Attorneys' Association. Mr. Jay Martin, the legislative representative of the Association, informed me that the principal concern of the Association is with the multitudinous and repetitive petitions for writs of habeas corpus and coram nobis by persons seeking to attack the legality of sentences under which they are imprisoned. He cited the Chessman case as exemplifying the problem.

When it was learned that the Commission on Uniform State Laws was planning to introduce the Uniform Post-Conviction Procedure Act (hereinafter referred to as "The Uniform Act" or "the Act") at the 1957 Session of the Legislature, the

Law Revision Commission decided to make a study to determine whether it should join with the Commission on Uniform State Laws in recommending the enactment of the Uniform Act.

Mr. Selvin's conclusion appears to be that the Uniform Act should not be adopted in California for two basic reasons: (1) California now provides procedures for attacking sentences of conviction collaterally which meet the requirements of due process as laid down by the United States Supreme Court and which are adequate, though susceptible of some improvement in detail and (2) enactment of the Uniform Act would create a number of problems which do not now exist.

I do not necessarily disagree with Mr. Selvin's conclusion but I think that the desirability of enacting the Uniform Act may be somewhat more debatable than his report suggests. It must be remembered that the Commission's assignment is to do something about the problem of abuse of existing procedures for post-conviction attacks on sentences. Thus, our problem is not the Uniform Act or nothing; it is the Uniform Act or something better. I am not entirely convinced that the Commission would be unwise in starting with the Uniform Act and modifying it insofar as it may deem advisable as a method of carrying out its assignment under Topic No. 17. In what follows, there are presented various questions and suggestions designed to explore this possibility.

The problems with which Mr. Selvin's study is principally concerned are the following:

1. The coverage of the Uniform Act as compared with existing post-conviction procedures.
2. The consequences for the Uniform Act of the fact that the Constitution vests original habeas corpus jurisdiction in

the Supreme Court, the district courts of appeal and the superior courts.

3. The provisions of the Uniform Act which are designed to eliminate or reduce successive applications for relief as compared with existing law.
4. The provision of the Uniform Act that an application may be filed at any time as compared with existing law.
5. The procedural provisions of the Uniform Act as compared with existing law.
6. The provisions of the Uniform Act with respect to indigent persons as compared with existing law.
7. The provisions of the Uniform Act for appellate review as compared with existing law.

These problems are discussed below.

1. The coverage of the Uniform Act as compared with existing post-conviction procedures.

Mr. Selvin points out that the Uniform Act does not in terms apply to persons convicted of misdemeanors (pp. 22-23), to persons not incarcerated (page 23) or to persons not technically under sentence (p. 23), whereas the writ of habeas corpus is available to all such persons. The point is made that it would not be desirable to have different methods of post-conviction attack for persons in these situations from those available to persons covered by the Act, both because this might create problems of which remedy to use in particular cases and because there ought to be a single comprehensive procedure for attacking

invalid convictions. This point seems to me to be well taken but I wonder whether this problem might not be met by simply amending Section 1 of the Act to cover these three situations.

Mr. Selvin also points out that the Uniform Act would not apply to certain other situations in which the writ of habeas corpus is now available: some cases arising under Sections 3700-3706 of the Penal Code (page 24); cases in which Penal Code Section 1487 provides grounds for discharge from particular custody as distinquished from imprisonment under an invalid sentence (page 24); and cases in which a sentence is carried out under improper conditions or improper restraints are imposed upon the convicted person (page 25). It seems doubtful that the Uniform Act could be amended to cover these situations, but it may be that they are so few in number and that the distinction between them and the cases to which the Uniform Act does apply is sufficiently clear that no serious practical problem would result from the enactment of the Uniform Act, even though in particular cases some doubt might exist as to whether a person should proceed under the Act or by petition for a writ of habeas corpus.

2. The consequences for the Uniform Act of the fact that the Constitution vests original habeas corpus jurisdiction in the Supreme Court, the district courts of appeal and the superior courts.

Here we encounter one of the most difficult problems which enactment of the Uniform Act in California would involve. As I understand, the basic theory of the Uniform Act is that one who believes that he is confined under an illegal sentence should have a single opportunity to present his contentions and obtain a decision as to the legality of his detention, in a proceeding brought

in the convicting court with the right to appeal from the decision of that court. Once the prisoner has had this day in court he is to have no further opportunity to challenge his conviction, at least on any ground which might have been raised in the first post-conviction proceeding (§ 8). Section 2 of the Uniform Act provides, however, that existing jurisdiction in habeas corpus vested by the Constitution in particular courts shall not be affected, save that post-conviction proceedings in such courts shall be conducted under the provisions of the Act "to the extent applicable". Section 2 was, of course, incorporated in the Act because the Commissioners of Uniform State Laws were aware that many state constitutions vest original jurisdiction in habeas corpus in various appellate and trial courts without regard to whether the court given jurisdiction was the court in which a petitioner was convicted; the section is designed to avoid having the Act held unconstitutional in that, apart from Section 2, it precludes resort to any court other than the court in which the conviction took place.

In California this problem is a particularly difficult one for the Constitution vests original jurisdiction in habeas corpus in the Supreme Court and the several justices thereof extending throughout the State, the several district courts of appeal extending throughout the State and the several justices thereof extending to their districts and the several superior courts and the judges thereof in their respective counties (report, pp. 10-11). Thus, it would appear necessary to put the following language in the bracketed portion of Section 2 if it were enacted in California: "The Supreme Court, the district courts of appeal and the superior courts and the respective justices and judges thereof". As is pointed out in the research consultant's report, if this were done the result would be that the Uniform Act would merely provide an additional method of attacking a sentence by a proceeding in the convicting court. Moreover, the Act would in some respects enlarge the jurisdiction of our various

courts to entertain post-conviction collateral attacks -- e.g., it would permit applications in the nature of coram nobis in any appellate court having habeas corpus jurisdiction and would give the superior court of the county in which a person was convicted jurisdiction to entertain an attack on his sentence even though he is not incarcerated there. It is suggested in the research consultant's report, however, that the Act might be construed to require that a proceeding be brought in the court in which the conviction took place before relief could be sought in any other superior court (page 33) or in an appellate court (page 32) (Quaere whether this suggestion is well taken).

It seems clear that the basic purpose of the Uniform Act could not be realized in California unless simultaneously with or following its enactment the constitutional provisions vesting original jurisdiction in habeas corpus in both trial and appellate courts and the judges thereof were amended to provide that such jurisdiction should not exist or should not be exercised in any case involving a post-conviction attack upon a conviction if and when there is a statutory procedure which provides an opportunity to attack the validity of the conviction on the ground upon which the writ of habeas corpus sought. I should think that if the Commission were to recommend the adoption of the Uniform Act, it should also recommend such a constitutional amendment. As a matter of procedure, however, it might be feasible to enact the Uniform Act first and then amend the Constitution to render Section 2 largely nugatory.

(Note: It may be possible that a constitutional amendment is not necessary and that a statute purporting to limit the exercise of habeas corpus jurisdiction in post-conviction cases in the fashion just suggested would be constitutional. I believe that the federal courts have been able to reconcile Section 2255 of the United States Judicial Code (which is substantially similar to the Uniform Act) with the federal constitutional guarantee of the writ of

habeas corpus. Moreover, the sections of the Penal Code quoted in Appendix A of the research consultant's report substantially qualify and limit the circumstances in which the habeas corpus jurisdiction granted by the Constitution may be exercised; see, for example, Section 1475 which purports to limit jurisdiction to entertain successive petitions).

3. The provisions of the Uniform Act which are designed to eliminate or reduce successive applications for relief as compared with existing law.

The Uniform Act has several provisions designed to eliminate or reduce successive applications for relief: (1) Section 1 precludes a proceeding under the Act with respect to an alleged error which has been "previously and finally litigated or waived in the proceedings resulting in the conviction or in any other proceeding that the petitioner has taken to secure relief from his conviction"; (2) Section 4 provides that a petition for relief under the Act "identify any previous proceedings that the petitioner has taken to secure relief from his conviction"; (3) Section 7 provides that an order making final disposition of a petition under the Act shall clearly state the grounds on which the case was determined and whether a federal or a state right was presented and decided; (4) Section 8 provides that any grounds for relief not raised in a proceeding brought under the Act are waived except grounds "which could not reasonably have been raised" at such earlier time.

Mr. Selvin states that numbers (1), (2) and (4) of these are substantially the same as existing California law (pp. 26 to 28, 45) and that while (3) is not -- and would be desirable because it would facilitate subsequent disposition of

claims in the federal courts -- (pp. 44, 49) it can be achieved without enacting the Uniform Act. It is not entirely clear to me, however, that the explicit provisions of the Uniform Act on points (1) and (2) are not clearer that is the present law. If they are clearer the Act might deter successive applications for relief or at least permit summary disposition of them where the present law would not. In this connection, I am not entirely convinced of the correctness of the statement on page 28 that "The Uniform Act does not purport to eliminate such grounds of collateral attack [where a basic constitutional right has been violated]. On the contrary, it expressly preserves them". I would understand the Uniform Act to mean that if, for example, in the proceedings leading to conviction the petitioner had, in the trial court or on appeal, contended that he had been deprived of the right to independent counsel and a finding had been then made that he had not been so deprived, the matter could not be relitigated in a post-conviction proceeding under the Act. I would suppose that the present law is probably the same and that he could not relitigate the question in a habeas corpus proceeding. If it is not, then I should think that the Act would broaden the effect of finality of a conviction insofar as collateral attack thereon is concerned. Nor would I suppose this to be unconstitutional.

Again, I am not entirely clear as to the meaning of the paragraphs (g) and (h) on page 28. I assume that their meaning to be that if a man has, for example, brought a proceeding under the Uniform Act raising the question of denial of right to independent counsel in the proceeding in which he was convicted and has had that contention determined against him, he could not later bring another proceeding under the Act or otherwise purporting to raise the same question. (By this I do not mean that he could not initiate such a proceeding but that it would be summarily dismissed on a showing that the issue had been

previously litigated). Indeed, the Act goes further (§ 8) and provides that he could not raise this question in a second proceeding even if he had not raised it in the first because it is a matter that could have been raised then. Thus, questions relating to deprivation of constitutional rights are made res judicata by the Uniform Act once they have been litigated, whether litigated in the proceeding leading to conviction or in a post-conviction proceeding. Of course, a later proceeding might be brought contending that the prisoner's constitutional rights were not afforded adequate protection in an earlier post-conviction proceeding -- and this is the point I understand to be made in paragraphs (g) and (h) -- but I would not suppose that a later proceeding could be brought contending only that his constitutional rights had not been afforded adequate protection in the proceeding leading to conviction. If this is a correct construction of the Uniform Act and if there is any doubt that the same principles apply in habeas corpus proceedings today, the Uniform Act would seem to make a rather important departure from existing law and one which would hold some promise of limiting or at least summarily disposing of successive applications.

4. The provision of the Uniform Act that an application may be filed at any time as compared with existing law.

Mr. Selvin points out (page 29) that the provision in the Uniform Act that a petition may be filed at any time may be more liberal than the present rule, applied in habeas corpus cases, that an applicant must explain his delay if his application is filed after a significant period of time. The experience of the federal courts under Section 2255 of the Judicial Code may be important here; conceivably, the courts have so interpreted and applied that section and,

if so, Section 1 of the Uniform Act might be similarly interpreted and applied. In any event, if a tardiness provision is deemed desirable, there could readily be added to the language quoted above some such provision as the following: "but if the petition is not filed within a reasonable time after the applicant knew or should have known of the grounds upon which he relies, he must furnish some satisfactory explanation of his delay".

5. The procedural provisions of the Uniform Act as compared with existing law.

The Uniform Act is quite specific with respect to the procedure to be followed in a proceeding brought thereunder. There are fairly detailed provisions with respect to the content and verification of the petition (§§ 3 and 4), notice to the State and its responsive pleading (§§ 3 and 6), the hearing (§ 7) and right of appeal (§ 9). The provisions with respect to the petition are designed to require the applicant to state facts rather than conclusions and to give the court essential information relating to the claim made. Yet the Act's provisions seem to be simple enough to tell a layman of some intelligence - e.g., a petitioner proceeding in pro per - what to do.

Mr. Selvin's general conclusion is that the existing California law with respect to procedure in a habeas corpus proceeding is substantially the same as that provided in the Uniform Act (See e.g., as to verification, page 33; pleading by petitioner, pages 35-37; use of affidavits, etc. in support of petition, pages 36-37; responsive pleadings by State, page 40; power to dispose of petition, page 43), with the following exceptions:

1. Only the person on whose behalf the claim is made can file under the Uniform Act while anyone can petition for habeas corpus in his behalf (pp.32-33).

2. The California cases may impose a heavier burden of pleading and frankness than does the Uniform Act (pp. 34-35).

3. In habeas corpus proceedings a writ of habeas corpus or order to show cause may be issued.

4. The State would probably be required to file a responsive pleading in all cases under the Uniform Act whereas there is often no such pleading in a babeas corpus proceeding (page 35).

5. In habeas corpus proceedings service must be made on the State whereas under the Uniform Act the clerk of the court is required to bring the petition to the State's attention.

6. The Uniform Act may require the State to participate in more hearings than it would have to do if the habeas corpus procedure is continued.

I am not wholly convinced, however, that the Uniform Act would not provide a considerably simpler procedure than does the present habeas corpus procedure. In the first place, the Act is more explicit than the present law, I think, in its requirements on a number of points, particularly with respect to the form of the petition and this would seem to be a matter of some importance inasmuch as many applications are made in pro per. More important, a habeas corpus proceeding appears to be, at best, rather cumbersome: there is the petition for the writ, followed by the issuance of a writ of habeas corpus or an order to show cause, followed by a formal return by the person having custody of the petitioner (see page 34 report) - which is considered the first pleading between the parties (page 41) - followed in turn by the petitioner's traverse (page 41). It seems to me that there would be a considerable gain in substituting the straightforward procedure of the Uniform Act for that of a habeas corpus proceeding and that this alone is an important reason for giving the Act careful consideration.

As for the possibility that the Uniform Act may impose on the State a heavier burden with respect to responsive pleadings and hearings, it might be argued, I should think, that this may be no more than a reasonable quid quo pro for the Act's intended effect of abolishing or limiting successive petitions, or providing for their summary disposition, in both State and federal courts. It may well be that the best way to achieve this end is to have a proceeding the record of which will show that the petitioner had a full and fair opportunity to present his claims, that the State filed a formal answer to claims made, and that there was a hearing in open court in which a real effort was made to ascertain the truth of the matters alleged. With such a record for the State to stand on, federal interference with State court convictions in California might dwindle to the vanishing point - and that word would probably eventually get even to the population of San Quentien and similar institutions.

6. The provisions of the Uniform Act with respect to providing counsel and other assistance to indigent applicants as compared with existing law.

Mr. Selvin states that counsel are seldom appointed for petitioners in habeas corpus and coram nobis proceedings in this State and that Section 5 of the Uniform Act would enlarge the right to counsel appointed at the court's expense (pages 38, 39). This is doubtless true but, again, these provisions of the Act may go a long way toward insulting California convictions from successful attack

in federal courts just because the record of the California post-conviction proceeding would show that the petitioner had had a full and fair day in court, with representation by counsel, on his allegation of wrongful conviction.

7. The provisions of the Uniform Act for appellate review as compared with existing law.

Section 9 of the Uniform Act gives both the petitioner and the State the right to appellate review of the disposition by the convicting court of a petition brought thereunder. Mr. Selvin points out that this will not change the present situation insofar as coram nobis proceedings are concerned (pages 45-46) but will as to habeas corpus proceedings because a petitioner cannot appeal from a denial of the writ (page 46). He suggests that Section 9 should be drafted to conform to the existing pattern of appeals in criminal cases - death sentence cases being appealable to the Supreme Court and other cases going to the district courts of appeal (page 48); this suggestion appears to be well taken /Quaere, however, whether a proceeding under the Uniform Act is a civil or a criminal proceeding; I have a vague recollection that proceedings under Section 2255 of the U.S. Judicial Code are considered to be civil proceedings/.

If the original jurisdiction of the appellate courts as preserved under Section 2 of the Act were to continue, the Uniform Act would presumably impose a heavier burden on them: in addition to passing on original petitions for relief, they would be required to

hear appeals on petitions granted or denied below. If, however, their original jurisdiction as to post-conviction matters were abolished or suspended by a constitutional amendment as suggested above, the burden on them would probably be considerably reduced not only by a reduction in the sheer number of such matters brought before them because not all cases would be appealed but because the record would have been put in order by the court below, Moreover, the fact of an appeal where taken, and its possibility where not taken, would seemingly also contribute to the record upon which the State could stand in proceedings subsequently brought in federal courts.

Conclusion

It is arguable, I think, that the Uniform Post-Conviction Procedure Act is a sound approach to the problem with which it is concerned. It provides a procedure by which to attack a conviction brought to be invalid, in the court in which the petitioner was convicted and with adequate quarantees of a full and fair hearing, including provision for appointment of counsel at State expense when requested and justified. It endeavors to insure, insofar as it is possible to do so, that the proceeding will settle, once for all, the question whether the petitioner was wrongfully convicted. The Commission might do worse, in addressing itself to the assignment it has been given in Topic No. 17, than to accept this approach

and to adapt the Act insofar as may be necessary to meet the special California problems pointed up in the research consultant's report.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary