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POST-CONVICTION REMEDIES IN THE 1970's

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The 1969 revisions of the Wisconsin criminal procedure code[1] made significant changes in the remedies available to individuals convicted of crimes. The new code establishes a new remedy—a post-conviction motion—and virtually abolishes the traditional habeas corpus remedy. It is the purpose of this article to study the various remedies available to the convicted criminal defendant in the trial court as well as in the Wisconsin Supreme Court. Particular emphasis will be placed upon recent case law and the changes brought about by the adoption of the new criminal procedure code. It is hoped that by obtaining a more complete understanding of the available remedies, counsel for convicted defendants will be able to utilize the remedy which best suits the client and the circumstances of the case.

At the outset something should be said of the scope and structure of the article. No attempt has been made to go beyond the limited area of remedies available to a defendant who has already been convicted who desires to attack his criminal conviction and sentence. The problem of motions after verdict are not dealt with nor are the remedies available to an individual who desires to challenge the type of incarceration, the conditions of his parole or probation, or the revocation of his parole or probation. These are problems which are based on recent federal cases and raise different procedural problems than do remedies which attack the criminal conviction. It should finally be noted that this article does not deal with the right to counsel for post-conviction motions, since the article is primarily addressed to the attorney already representing the defendant. It should be remembered, however, that this may be a problem for the defendant proceeding *pro se*.

The article will be divided into three sections. The first relates to the remedies available in the Wisconsin Supreme Court. The

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1. WIS. LAWS (1969), ch. 255.

second will deal with direct trial court remedies—that is, remedies which are part of the original criminal action which must be pursued within a specified period. The final section of this article will discuss collateral remedies which are remedies not truly a part of the original actions and which have no statutory time limitation.

I. In Which Court Should Relief Be Sought?

A judgment of conviction in a criminal case is, of course, appealable to the Wisconsin Supreme Court.[2] In every case, the very fact that the defendant has been convicted produces a viable, appealable judgment. In some cases, direct and immediate appeal to the supreme court will be appropriate. In other cases, however, direct and immediate appeal will be either inappropriate or premature. The difficulty lies in determining when a trial court remedy is either required or preferable.

In deciding whether to appeal directly to the supreme court or to pursue a remedy in the trial court, there are a number of considerations which must be borne in mind. Occupying a high priority in the catalogue of reasons which dictate a trial court remedy is the necessity for perfecting the appeal. The supreme court had indicated in numerous cases that issues must be raised in the trial court in order to be claimed on appeal. Despite this often expressed requirement and in the face of the possibility of being precluded from raising a viable issue on appeal, many attorneys have neglected to familiarize themselves with the procedures available to raise the issues in the trial court. That is not to say that every issue raised by way of a post-conviction remedy is properly and safely preserved. Certain issues must be raised at some more preliminary point in the proceedings or are deemed waived.

Post-conviction relief should also be sought in the trial court for the purpose of allowing that court to correct its own errors. Relief in the trial court will spare the client the long delays of appeal to the supreme court. The trial court remedy is usually available without elaborate briefing requirements which make appeals more costly and time consuming. It might also be argued that the trial court may be a more hospitable forum in which to raise an issue because the court may be hesitant to allow a case to go up to the supreme court where the possibility of reversal exists. Additionally, the trial court is in possession of a more intimate familiarity with the defendant and the factual underpinnings of the

2. Wis. Stat. § 974.03 (1969).

case and might be inclined to view the defendant's plea for relief more favorably. Furthermore, the trial court is freer to exercise its discretion in ordering a new trial than is the Wisconsin Supreme Court.[3] Once the case reaches the appellate court the rules governing reversal become quite rigid. The remedy in the trial court is therefore not only an easier, quicker and less expensive procedure, but is also a more satisfactory remedy for the defendant in some instances. Conversely, in other cases the very fact that the court is familiar with the case and with the defendant will be a reason to avoid the trial court.

There are also the obvious considerations. An evidentiary hearing is available in the trial court in some post-conviction procedures, while it is not available in the supreme court. A motion in the trial court will demand less of counsel's time and will probably be at a more convenient location than would an oral argument in the supreme court in Madison. It might be concluded that if there is any doubt as to (1) whether the asserted error has been properly preserved, or (2) whether the trial court will grant the relief sought, the available trial court remedies should be utilized. As will be noted below, a post-conviction remedy will not prejudice defendant's right to appeal from the judgment nor will it significantly delay an ultimate review in the supreme court. In addition to the obvious benefits accruing to the defendant, diligent use of the available trial court post-conviction remedies will have the further beneficial impact of eliminating the needless appeal and producing a more functionally efficient system of justice.

II. SUPREME COURT REMEDIES

Appeal or Writ of Error. Criminal appeals are taken by direct appeal and by writ of error. The only ostensible difference between a criminal review obtained through direct appeal and that sought by writ of error is that in an appeal the defendant's name appears as defendant, while in a writ of error case the defendant appears as plaintiff-in-error.

There is one other significant difference between the criminal review sought by direct appeal and that sought by writ of error, and it pertains to the 90 day limitation on criminal appeals. A writ of error may be issued by the clerk of the supreme court at any time within the ninety day appeal period, thereby tolling the appeal time. Counsel can then research the case and file the proper post-

3. WIS. STAT. § 974.02 (1969).

conviction motions. When he has properly preserved the various errors he desires to raise, counsel may request the supreme court to send him the writ of error which is then filed in the trial court, thus beginning the statutory procedure for appeal.[4] In this manner, counsel gains the advantage of additional time for preparation of the appeal, without running the risk of the appeal time passing. On direct appeal there is no such way of tolling the statute because the notice of appeal must be filed and served simultaneously or it is not effective.[5] Even though the appeal time is extended by a motion for a new trial, the prudent practice would dictate the issuance of a writ of error in every case. Counsel need only request the issuance of a writ of error and he may rest assured that he has protected his client's right to appeal from the judgment without compromising his post-conviction rights. It should be noted that once a writ of error or notice of appeal has been filed in the trial court, that court no longer has jurisdiction in the case and counsel must proceed on the appeal in the supreme court.[6] It must also be noted in connection with this discussion of procedural considerations involved in the problem of obtaining the criminal review that even though the issuance of a writ of error tolls the appeal period, the transcripts must still be approved by the trial court within three months of the issuance of the writ.[7] It may therefore be necessary to have the transcripts approved prior to the formal taking of the case to the supreme court by writ of error.

The reduction of the appeal time from one year prior to 1970 to ninety days under the new code[8] has increased the use of writs of error and makes the prompt issuance of the writ quite important.

Jurisdiction on Appeal. With the one exception that misdemeanor appeals are to the circuit court and not to the supreme court,[9] the Wisconsin Supreme Court has broad appellate jurisdiction in criminal cases.[10] Not only are judgments of conviction appealable directly to the supreme court,[11] but orders denying mo-

4. WIS. STAT. § 251.29 (1969).

5. WIS. STAT. § 274.11(1) (1969).

6. Hunter v. Hunter, 44 Wis. 2d 618, 621, 172 N.W.2d 167 (1969); Freeman Printing Co. v. Luebke 36 Wis. 2d 298, 302, 152 N.W.2d 861, 863 (1967).

7. WIS. STAT. § 974.04 (1969).

8. WIS. STAT. § 974.03 (1969).

9. WIS. STAT. § 974.01(1) (1969), *construed in* State v. Omernik, 54 Wis. 2d 220, 194 N.W.2d 617 (1972).

10. WIS. STAT. § 974.03 (1969).

11. WIS. STAT. § 974.03 (1969).

tions for new trials,[12] motions to withdraw guilty pleas,[13] motions to modify sentences,[14] and motions pursuant to section 974.06 are also appealable.[15] That is not to say, of course, that within these orders or judgments every error will be properly preserved, but it does indicate that counsel has various remedies to preserve error and raise it in the supreme court.

When there is more than one appealable order or judgment in a criminal case, the matter of determining which order or judgment raises the proper issue becomes crucial. It is not unusual for a decision to be made to prosecute a writ of error to review a judgment only to discover that the issue raised can only be reached by review of the post-conviction motion.[16] Rather than flirt with the possibility of being denied relief on appeal because of an incorrect determination of which order or judgment to appeal from, it would appear to be sound practice to prosecute writs of error reviewing all viable orders and judgments when there is any question of the proper writ which raises the error in question.

Unlike the defendant's broad right to appeal, the state has a limited appellate right in criminal cases, which limitation precludes prosecution appeal except in those specific situations delineated in the statute authorizing appeal by the state.[17] The defendant, however, may generally appeal from any order after judgment in a felony case, as well as from the judgment of conviction itself.[18]

Other Supreme Court Remedies. The supreme court, in addition to appellate jurisdiction, has broad supervisory control over lower courts. The court can issue writs of mandamus and prohibition to direct or prohibit certain actions by trial courts.[19] That power is seldom exerted, but is a given situation relief can be obtained prior to conviction in a criminal case by such extraordinary remedies.[20] As will be noted below, the supreme court also has original jurisdiction in habeas corpus proceedings.[21]

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12. *Id.*
13. *Id.*
14. *Id.*
15. WIS. STAT. § 974.06(7) (1969).
16. Bastian v. State, 54 Wis. 2d 240, 243, 194 N.W.2d 687, 688 (1972).
17. WIS. STAT. § 974.05 (1969), State v. Beals, 52 Wis. 2d 599, 615, 191 N.W.2d 221, 230 (1971).
18. WIS. STAT. § 974.03 (1969).
19. WIS. STAT. § 293.08 (1969).
20. *E.g.*, State *ex rel.* Howard v. O'Connell, 53 Wis. 2d 248, 192 N.W.2d 201 (1971).
21. WIS. STAT. § 292.03 (1969).

III. DIRECT TRIAL COURT REMEDIES

Motion for a New Trial. The most general post-conviction remedy is the motion for a new trial as authorized by section 974.06(1), of the Wisconsin Statutes. That section of the statutes provides:

> . . . A defendant may move in writing or with the consent of the state on the record to set aside a judgment of conviction and for a new trial in the interest of justice, or because of error in the trial or because of error in the jury instructions, or because the judgment of conviction is not supported by the evidence or is contrary to law; but such motion must be made, heard and decided within 90 days after the judgment of conviction is entered, unless the court by order made before its expiration extends such time for cause. Such motion, if not decided within the time allowed therefor, shall be deemed overruled. Filing of a motion for a new trial shall not prevent the trial court from imposing sentence.

The motion for a new trial can be used to raise both constitutional and non-constitutional errors.[22] This motion functions as the primary vehicle for the preservation of error in the trial court. The failure to raise an asserted error on a motion for a new trial may foreclose the defendant from raising the issue as a matter of right in the supreme court,[23] this being particularly true in cases challenging sufficiency of the evidence.[24]

It is essential to remember that a motion for a new trial should be made in writing and should state with particularity the grounds upon which relief is sought.[25] A review of the motions made in criminal cases reaching the supreme court demonstrates that attorneys must believe that a "shotgun" motion will cover more issues than a particularized one. The better practice is to state the objection as concisely as possible. A poorly drafted motion for a new trial or a failure to precisely identify the issues being raised can only work to the detriment of the defendant. Often, the motion for a new trial is the most important document filed by the defendant

22. The newly revised statute omits a provision for a new trial on the basis of newly discovered evidence. This omission is thought to be inadvertent. B. BROWN, THE WISCONSIN DISTRICT ATTORNEY AND THE CRIMINAL CASE 218 (1971) [hereinafter cited as BROWN].

23. *E.g.*, State v. Charette, 51 Wis. 2d 531, 187 N.W.2d 203 (1971); State v. Rudd, 41 Wis. 2d 720, 165 N.W.2d 153 (1969).

24. State v. Schneidewind, 47 Wis. 2d 110, 120, 176 N.W.2d 303, 309 (1970).

25. *See* Wis. Stat. § 971.30(2) (1969); *see also* State v. Woodington, 31 Wis. 2d 151, 183a, 183b, 142 N.W.2d 810, cert. denied, 386 U.S. 9 (1967).

in a criminal case because this motion usually will set the issues which will be raised on appeal.

The question of what type of hearing a defendant is entitled to on a motion for a new trial has not recently been considered in Wisconsin.[26] While one source indicates that it is defense counsel who decides what type of hearing is held,[27] under the supreme court's decision in *Nelson v. State*,[28] an evidentiary hearing would not be required if the record conclusively refutes the asserted errors. Judge Fairchild indicated that "how far one may go beyond the record in establishing [grounds for relief] may be open to question."[29] Counsel for defendant generally does have the option of seeking an evidentiary hearing on a motion for a new trial, but the trial court, in its discretion, may deny such a hearing if the issues have already been litigated at trial or if the record conclusively refutes the asserted error.

Motions to Modify Sentence. Many criminal appeals are motivated by the defendant's belief that he was given an excessive sentence. While the supreme court has indicated that it will review sentences,[30] in the majority of cases coming to the court, the sentences are upheld. In *Hayes v. State*,[31] the supreme court overruled a line of cases and held that the trial court has inherent power to modify a sentence if a motion is made within ninety days of its imposition. This motion may well benefit a defendant who has been sentenced without the consideration of a presentencing report. In such a case counsel may be able to demonstrate to the court that the sentence imposed was excessive. Again, the defense attorney would be well-advised to particularize the reasons he advances in seeking a modification of sentence and to submit the motion in writing.[32] While the order denying such motion is appealable, reversal will be obtained only when an abuse of discretion has been

26. *Cf.*, McDonald v. State, 193 Wis. 204, 211, 212 N.W. 635, 638 (1927), wherein the court said that the type of hearing on a motion for a new trial is within the discretion of the trial court.

27. BROWN, 218.

28. *See generally*, Nelson v. State, 54 Wis..2d 489, 195 N.W.2d 629 (1972). Nelson involved the procedure on a motion to withdraw a guilty plea, but the court's rationale would seem the same.

29. Fairchild, *Post-Conviction Rights and Remedies in Wisconsin*, 1965 WIS. L. REV. 52, 64 [hereinafter cited as Fairchild].

30. McCleary v. State, 49 Wis. 2d 263, 182 N.W.2d 512 (1971); see Comment, *Appellate Review of Sentences in Wisconsin*, 1971 WIS. L. REV. 190.

31. Hayes v. State, 46 Wis. 2d 93, 175 N.W.2d 625 (1970).

32. WIS. STAT. § 971.30(2) (1969).

shown.[33] Conversely, the prosecution may also appeal from an order modifying sentence, but it must be established that the reduction of the sentence constituted an abuse of discretion or a violation of law.[34]

It is quite probable that as the law relating to sentencing becomes more comprehensive the motion to modify sentence will have greater significance in our overall post-conviction scheme.

Motion to Withdraw Guilty Plea. Section 971.08(2), Wis. Stat., provides that a motion to withdraw a plea of guilty or no contest must be made within 120 days of conviction.[35] In order to prevail on a motion to withdraw the plea, it must be established either that the trial court failed to comply with the requirements of *Ernst v. State*,[36] regarding trial court acceptance of a plea of guilty or that the withdrawal of the plea is necessary to correct a "manifest injustice."[37] Where it is asserted that the trial court failed to comply with the requirements of *Ernst*,[38] it is necessary to prove that the trial court failed to perform one or several of the following functions recommended to trial courts as a precondition to he acceptance of a plea of guilty:

> 1. To determine the extent of the defendant's education and general comprehension.
> 2. To establish the accused's understanding of the nature of the crime with which he is charged and the range of punishments which it carries.
> 3. To ascertain whether any promises or threats have been made to him in connection with his appearance, his refusal of counsel, and his proposed plea of guilty.
> 4. To alert the accused to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to a layman such as the accused.
> 5. To make sure that the defendant understands that if a pauper, counsel will be provided at no expense to him.
> 6. To determine that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty.[39]

33. McCleary v. State, 49 Wis. 2d 263, 273, 182 N.W.2d 512, 517 (1971).
34. State *ex rel.* Warren v. County Court, 54 Wis. 2d 613, 197 N.W.2d 1 (1972).
35. WIS. STAT. § 971.08(2) (1969).
36. 43 Wis. 2d 661, 170 N.W.2d 713 (1969).
37. State v. Reppin, 35 Wis. 2d 377, 151 N.W.2d 9 (1967).
38. Ernst v. State, 43 Wis. 2d 661, 674, 170 N.W.2d 713, 719 (1969).
39. 43 Wis. 2d at 674, 170 N.W.2d at 722.

Where it is asserted that the withdrawal of the plea is necessary to correct a "manifest injustice", the defendant must prove by clear and convincing evidence that his plea was made in any of the following nonexclusive circumstances:

> 1. He was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rule;
> 2. the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf;
> 3. the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; or
> 4. he did not receive the charge or sentence conessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement.[40]

The utility of the motion to withdraw a guilty plea has been accorded an additional dimension of late insofar as the incidence of its use to advance the assertion that some type of unfulfilled bargain or deal was made to induce the plea has markedly increased.[41] When an *Ernst* violation is alleged, the record of the taking of the plea becomes crucial. The inability to show that the court complied with *Ernst* will dictate the withdrawal of the plea unless the *Ernst* components can be implied from the record as a whole.[42] In such a case the hearing held on the motion will probably be a legal argument addressed to the record without additional evidence. In other cases an evidentiary hearing will be required to show that the defendant really did not understand the consequences of the plea or some other nonrecord *Ernst* or *Reppin* deficiency. In *Nelson*,[43] the supreme court indicated that when the trial transcript conclusively refutes the assertions of the defendant on a motion to withdraw the plea, the court may refuse to hold a hearing on the motion.

At the typical hearing on a motion to withdraw a guilty plea the defendant will produce evidence tending to show that the plea was not entered knowingly or voluntarily. The prosecutor will produce evidence to refute this argument or will simply refer to the

40. 43 Wis. 2d at 666, 170 N.W.2d at 719.

41. *See* Farrar v. State, 52 Wis. 2d 651, 662, 191 N.W.2d 214, 220 (Hallows, C.J. and Wilkie, J., concurring); Santobello v. New York, 404 U.S. 257 (1971).

42. *Compare* Martinkowski v. State, 51 Wis. 2d 237, 186 N.W.2d 302 (1971), *with* McAllister v. State, 54 Wis. 2d 224, 194 N.W.2d 639 (1972).

43. Nelson v. State, 54 Wis. 2d 489, 195 N.W.2d 629 (1972).

trial record. The defendant has the burden of proving the grounds for withdrawal of the guilty plea by clear and convincing evidence.[44] The supreme court will upset a finding of fact on a motion to withdraw a guilty plea only if contrary to the great weight and clear preponderance of the evidence.[45] On other questions, the withdrawal of a guilty plea is addressed to the discretion of the trial court except when there is a denial of a relevant constitutional right. In such cases, withdrawal is a matter of right.[46]

IV. POST-CONVICTION PROCEDURE UNDER SECTION 974.06

One of the most important innovations of the 1969 revision of the criminal procedure code was the adoption of a comprehensive post-conviction remedy statute which is codified as section 974.06, Wis. Stats.[47] Inasmuch as this is a new remedy and is completely statutory, counsel should be completely familiar with the provisions of section 974.06.[48] The Wisconsin Supreme Court first began

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44. State v. Carlson, 48 Wis. 2d 222, 179 N.W.2d 851 (1970).

45. State v. Herro, 53 Wis. 2d 211, 191 N.W.2d 889 (1971).

46. State v. Carlson, 48 Wis. 2d 222, 179 N.W.2d 851 (1971).

47. For the history of the post-conviction remedy statute *see* Comment, *Wisconsin Post-Conviction Remedies—Habeas Corpus: Past, Present and Future*, 1970 WIS. L. REV. 1145.

48. Post-Conviction Procedure. (1) A prisoner in custody under sentence of a court claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, 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.

(2) A motion for such relief is a part of the original criminal action, is not a separate proceeding and may be made at any time. The supreme court may prescribe the form of the motion.

(3) Unless the motion and the files and records of the action conclusively show that the prisoner is entitled to no relief, the court shall:

(a) Cause a copy of the notice to be served upon the district attorney who shall file a written response within the time prescribed by the court.

(b) Appoint counsel pursuant to s. 971.01(6) [970.02(6)], if, upon the files, records of the action and the response of the district attorney it appears that counsel is necessary.

(c) Grant a prompt hearing.

(d) Determine the issues and make findings of fact and conclusions of law. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

to examine the post-conviction relief procedure of section 974.06 and the scope of protection afforded thereunder in the 1971 term of the court.

The post-conviction motion is designed to replace habeas corpus as the primary method in which a defendant can attack his conviction after the time for appeal has expired.[49] The statute itself is somewhat unusual in that subsection (2) states that the motion "is a part of the original criminal action," while subsection (6) indicates that the proceedings under this statute "shall be considered civil in nature." It is suggested that the most proper interpretation of subsection (6) is that the motion is not to be a separate action—as is a habeas corpus proceeding—it is simply an additional motion made in the existing criminal action. Like habeas corpus, however, the 974.06 proceedings are technically civil, and thus it is likely, for example, that a defendant could call adverse witnesses in a hearing on a 974.06 motion.[50] This remedy will have—and indeed has had—a significant impact on the administration of justice. The new provision takes the initial responsibility away from the state supreme court and places it upon the trial court.Most probably the trial judges will not rejoice over this additional responsibility, but it seems a more practical remedy to have the trial court preside over the motion inasmuch as it involves a

(4) All grounds for relief available to a prisoner under this section must be raised in his original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the prisoner has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

(5) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(6) Proceedings under this section shall be considered civil in nature, and the burden of proof shall be upon the prisoner.

(7) An appeal may be taken from the order entered on the motion as from a final judgment subject to ss. 974.03 and 974.05.

(8) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

49. For a relatively comprehensive discussion of the use and scope of post-conviction motions under WIS. STAT. § 974.06, see Peterson v. State, 54 Wis. 2d 370, 195 N.W.2d 837 (1972).

50. Interview with James H. McDermott, Wisconsin State Public Defender, Madison, Wisconsin, 1972.

matter with which the trial court is more familiar. The supreme court has not, however, dealt with the potentially volatile question of seeking to file an affidavit of prejudice against the judge who sat on the case at trial. According to THE AMERICAN BAR ASSOCIATION STANDARDS RELATING TO POST-CONVICTION REMEDIES,[51] a change of judge should be readily available. In Wisconsin, however, these motions have so far been heard by the trial judge in every instance except when the trial judge was unable to preside.

A trial court motion made pursuant to section 974.06 can be used to raise any constitutional or jurisdictional defect after the time for direct attack has expired.[52] A motion under section 974.06 can be made regardless of the date of conviction[53] and regardless of whether the defendant sought direct appellate review of his conviction.[54] The motion cannot be used to raise such questions as sufficiency of the evidence or jury instructions, error in admission of evidence or other procedural errors.[55] Issues decided on direct appeal cannot be relitigated under section 974.06.[56]

There has been some conjecture as to the proper interpretation to be given the word "sentence" in subsection (1) of section 974.06. It has been argued that the permissible use of the statute should be restricted to waging an attack upon the sentence in order to conform to the literal words of the statute which authorize relief "upon the grounds that the sentence was imposed in violation of the United States Constitution."[57] It is manifest, however, that the word "sentence" really means "judgment of conviction" and that this motion is appropriate for any constitutional deprivation, including those that have nothing to do with sentencing.[58]

While most of the motions filed under this statute are *pro se*, there are instances in which counsel will become involved in such proceedings. To illustrate, consider the situation where counsel has

51. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES, § 1.4(b), p. 28 (Approved Draft, 1968) [hereinafter cited as A.B.A. STANDARDS ON POST-CONVICTION REMEDIES].

52. Peterson v. State, 54 Wis. 2d 370, 195 N.W.2d 837 (1972); State v. Smith, 55 Wis. 2d 304, 198 N.W.2d 630 (1972).

53. State *ex rel.* Warren v. County Court, 54 Wis. 2d 613, 191 N.W.2d 1 (1972); *In re* Maroney, 54 Wis. 2d 638, 196 N.W.2d 712 (1972).

54. Peterson v. State, 54 Wis. 2d 370, 195 N.W.2d 837 (1972).

55. State v. Langston, 53 Wis. 2d 228, 191 N.W.2d 713 (1971).

56. Peterson v. State, 54 Wis. 2d 370, 195 N.W.2d 837 (1972). *Accord*, Sanders v. United States, 373 U.S. 1 (1963).

57. WIS. STAT. § 974.06(1) (1969).

58. *See* Kaufman v. United States, 394 U.S. 217 (1969).

been appointed by the trial court to represent an inmate who has filed a 974.06 motion or when he has been appointed to represent a defendant on appeal and finds for some reason that his only available remedy is a 974.06 motion. While the procedure is set out by the statute itself, the supreme court has upheld the procedure of appointing counsel as a matter of course rather than requiring the trial judge to comply with subsection (3) of the statute which provides for prescreening of motions.[59] If counsel is appointed he has the essential duty of going over the trial record to ascertain whether any other errors have been made. The reason this duty is so important is that the defendant has only one motion under this statute as a matter of right[60] and the denial of this initial motion may foreclose the opportunity for subsequent post-conviction review.

The Wisconsin court has not as yet had the occasion to pass upon the procedure which must be followed by the trial court in determining a 974.06 motion. The federal courts, interpreting the federal post-conviction relief statute, 28 U.S.C. § 2255, have discussed the procedure. As subsection (3) of the statute provides, the court must grant a "hearing" unless it appears conclusively that the prisoner is entitled to no relief. While the granting of a hearing is generally within the discretion of the trial court, when an assertion of fact is made in the post-conviction motion which has any factual support at all in the record or which goes to a relevant constitutional right, a hearing should probably be ordered.[61] Thus, where there are any substantial factual allegations beyond bald assertions, the court should grant a hearing. In cases where the assertions are absurd or mere conclusions, no hearing is needed.[62] Additionally, the court may order a response from the district attorney and then decide not to grant a hearing.[63] In cases in which a relevant constitutional right has allegedly been denied defendant, the court should be more willing to grant a hearing unless there is clearly no arguable merit to the contention.[64]

Even if a hearing is granted on the motion, the trial court has further discretion in determining whether the petitioner should be

59. Peterson v. State, 54 Wis. 2d 370, 195 N.W.2d 837 (1972); Nelson v. State, 54 Wis. 2d 489, 195 N.W.2d 629 (1972).

60. WIS. STAT. § 974.06(4) (1969).

61. Sanders v. United States, 373 U.S. 1 (1963).

62. Poole v. United States, 438 F.2d 325, 326 (8th Cir. 1971).

63. Mitchell v. United States, 359 F.2d 833, 835-36 (7th Cir. 1966).

64. Kaufman v. United States, 394 U.S. 217 (1969).

brought to the hearing and whether or not evidence should be taken.[65] While the cases generally require an evidentiary hearing where there is a "substantial issue of fact" to be resolved,[66] quite clearly "it requires something more than making wild and unsupported charges to create issues of fact."[67] It can thus be concluded that the presence of the petitioner and an evidentiary hearing are not necessary unless (1) there is a substantial issue of fact, and (2) there is something to support the contention beyond the mere allegation. The additional support could come from the defendant himself, from trial counsel, from the record, or from the prosecutor. The determinations as to the necessity for ordering an evidentiary hearing on the motion and the necessity or desirability of the presence of the petitioner at such hearing are discretionary and will be upset only for an abuse of that discretion.

Regardless of the procedure employed, the court must issue findings of fact and conclusions of law. Pursuant to the dictate of the court in *Peterson v. State*,[68] the court is obliged to conduct an independent review of the record, determining the merit of each issue raised by the petitioner on the basis of its own study of the record and not on the basis of the evaluation and recommendation of the court-appointed attorney. The supreme court disapproved the practice of appointing counsel who would ferret out the arguable issues and then discard the issues which appeared to him to have no merit. Inasmuch as the defendant is entitled to only one full collateral review as a matter of right, this requirement should not be burdensome upon the trial courts. The defendant has the burden of proof in making the 974.06 motion.[69]

Subsection (7) of section 974.06 provides that the order entered denying the motion is appealable. The supreme court has indi-

65. Sanders v. United States, 373 U.S. 1 (1963).

66. *See* Stirone v. Markley, 345 F.2d 473, 480 (7th Cir. 1965); *see also* A.B.A. STANDARDS ON POST-CONVICTION REMEDIES, § 4.6(a), p. 16.

67. United States v. Mathison, 256 F.2d 803, 805 (7th Cir. 1958).

68. 54 Wis. 2d 370, 195 N.W.2d 837 (1972); Nelson v. State, 54 Wis. 2d 489, 195 N.W.2d 629 (1972).

69. Crail v. United States, 430 F.2d 459 (10th Cir. 1970). A.B.A. STANDARDS ON POST-CONVICTION REMEDIES, § 4.6(d) provides:

> The allocation between the applicant and respondent of the burden of proof on the issues of fact is primarily a corollary of the underlying substantive law governing the claims advanced. Ordinarily, the proponent of factual contentions, whether the applicant's proof of the elements of a prima facie case or the respondent's proof of affirmative defenses should have the burden of establishing those facts by a preponderance of evidence.

cated, however, that appellate counsel will be appointed to represent an indigent only when it appears that the issues raised in an appeal from a denial of a 974.06 motion are arguable.[70] Even if the court does appoint counsel, there is a presumption that the lower court correctly disposed of the motion,[71] and the appellate court will not reverse a factual determination unless it is contrary to the great weight and clear preponderance of the evidence.[72]

There have been less than ten cases decided by the Wisconsin Supreme Court dealing with the motion, its scope, purpose, and overall utility in the criminal justice system. Two concepts emerge, however, from the early decisions. First, the 974.06 motion is to be the primary, and possibly the only remedy available to a convicted defendant after the time for appeal has expired. Secondly, the supreme court wants the trial court to give full, meaningful consideration to the motions—at least in the first instance. Appeals from orders denying post-conviction motions will not routinely be heard, such appeals being reserved for the unusual situation raising new or unique questions. The new remedy has the fundamental effect of shifting the basic obligation for collateral review of criminal convictions from the supreme court back to the trial court. The obvious danger inherent in this shift, however, is that the trial courts will give these motions summary consideration, which eventuality would have the inevitable result of returning the work-load to the supreme court. To effectuate the basic purpose of the 974.06 motion and to avoid the regressive possibility suggested above, the burden incumbent on the trial courts must be shared by defense counsel and the district attorneys. The trial court must not rest content with the issuance of a one sentence order denying relief, or simply denying relief on the basis of "harmless error" or some other aphorism. Under 974.06 the defendant is entitled to one last, full, and meaningful attempt to overturn his conviction. If the court and counsel are prepared to assist the inmate to that end, the new procedure will work. Otherwise it will add only red-tape to an already complicated system.

V. Extraordinary Remedies

Coram Nobis. The writ of error *coram nobis* is a discretionary writ directed to the trial court to correct errors of fact which were

70. Peterson v. State, 54 Wis. 2d 370, 195 N.W.2d 837 (1972).
71. Amer v. United States, 367 F.2d 803, 806 (8th Cir. 1966).
72. *See* State v. Herro, 53 Wis. 2d 211, 191 N.W.2d 889 (1971).

unknown at trial and which, if known, would have prevented judgment from being entered.[73] In recent years the scope of *coram nobis* has been so restricted as to make it almost useless.[74] The best—or worst—illustration of the problem presented by *coram nobis* is in *State v. Kanieski*,[75] wherein the supreme court declined to reach a number of issues in an appeal from a denial of a writ of error *coram nobis* because the errors were raised by the wrong remedy. Almost six years later, the same court, in *State ex rel. Kanieski v. Gagnon*,[76] did reach the merit on habeas corpus and determined that the evidence was insufficient to convict Kanieski and ordered him discharged after twenty years' incarceration. In this case the procedural limitations of *coram nobis* precluded the court from reaching the merits.[77]

Whatever the previous limitations on *coram nobis*, the remedy has now apparently been abolished by the revision of the criminal procedure code and has been merged within the provisions of section 974.06. The issuance of a writ of error *coram nobis* was authorized prior to 1969 by section 958.07, Wis. Stats. (1967). This section was abolished when the criminal procedure code was revised in 1969, and apparently merged within the post-conviction remedy statute.[78] While there have been no Wisconsin cases on this point, the provisions of the new post-conviction statute allow a motion to be made on any ground "subject to collateral attack." Inasmuch as a writ of error *coram nobis* is a collateral remedy,[79] an action formerly brought by *coram nobis* can now be brought under section 974.06. This same result has been reached by federal courts considering the availability of *coram nobis* subsequent to the adoption of the post-conviction relief statute, providing the section 2255 remedy.[80]

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73. State v. Randolph, 32 Wis. 2d 1, 3, 144 N.W.2d 441, 443 (1966).

74. *See* Fairchild, *supra* note 29, at 63-64.

75. State v. Kanieski, 30 Wis. 2d 573, 141 N.W.2d 196 (1966).

76. State *ex rel.* Kanieski v. Gagnon, 54 Wis. 2d 108, 194 N.W.2d 808 (1972).

77. The procedural morass into which Kanieski fell was the result, in part, of seeking the wrong remedy himself. Additionally, Kanieski sought federal relief subsequent to the denial of his writ of error coram nobis. This had the result of denying him relief for approximately three years.

78. In enumerating those sections which had been recodified under the revised criminal procedure code, the editors of the Wisconsin Statutes Annotated indicate that sec. 958.07 of the 1967 statutes has been recodified as sec. 974.06(1) of the 1969 Wisconsin statutes. WIS. STAT. § 974.06 (1971).

79. 18 AM. JUR. 2d *Coram Nobis* § 2, pp. 451, 452 (1965); *see also* Houston v. State, 7 Wis. 2d 348, 350, 96 N.W.2d 343, 344 (1959).

80. *E.g.*, Moore v. United States, 329 F.2d 821, 822 (8th Cir. 1964), cert. denied, 379

Habeas Corpus. Until the criminal procedure code was revised in 1969, habeas corpus was the only way in which a convicted defendant could attack his conviction after the time for appeal had expired.[81] The creation of the post-conviction procedure under section 974.06 manifestly changes the use of habeas corpus. Section 292.01(1) of the Wisconsin Statutes provides that habeas corpus is available "subject to . . . § 974.06." Section 974.06(8) requires that a post-conviction motion be made prior to the application for a writ unless a 974.06 motion "is inadequate or ineffective to test the legality of his detention." Section 292.03 requires that habeas corpus petitions filed by persons sentenced to state prisons state whether or not a 974.06 motion has been filed.

It is thus clear from the revised statutes that in the typical case a 974.06 motion must precede a petition for a writ of habeas corpus. While there is no case authority as yet on point, it would also seem likely that not only must a 974.06 motion precede a habeas corpus petition, but that the 974.06 motion must raise the same alleged errors as are raised subsequently in the petition for habeas corpus. Thus a prisoner who raises issues A, B, and C in a 974.06 motion, cannot, after its denial, file a petition for habeas corpus raising issues X, Y, and Z. The same issues raised in the habeas corpus petition must have been denied in the 974.06 motion. Inasmuch as it is unlikely that one court would grant collateral relief via habeas corpus following a denial of a post-conviction motion, in the typical case habeas corpus will not afford a criminal defendant relief from his conviction. Despite the restrictions on habeas corpus caused by the post-conviction motion statute, such legislation has universally been upheld against the challenge that it suspends the right to habeas corpus.[82]

Habeas corpus will still occupy an important place in our criminal justice system. It will continue to be used to test bindovers from a preliminary hearing,[83] and extradition determinations.[84] In addition, it will serve as a means of challenging the action of correctional administrators in revoking parole or probation[85] or in other

U.S. 858 (1964); Jenkins v. United States, 325 F.2d 942, 945 (3rd Cir. 1963); *but see* United States v. Morgan, 346 U.S. 502 (1953).

81. Parins, *Habeas Corpus Review*, 42 WIS. BAR BULLETIN 20 (Oct. 1969).

82. Stirone v. Markley, 345 F.2d 473 (7th Cir. 1965); Cantu v. Markley, 353 F.2d 696 (7th Cir. 1966).

83. State *ex rel.* Hanna v. Blessinger, 52 Wis. 2d 448, 190 N.W.2d 199 (1971).

84. State *ex rel.* Welch v. Hegge, 54 Wis. 2d 482, 195 N.W.2d 669 (1972).

85. State *ex rel.* Bernal v. Hershman, 54 Wis. 2d 626, 196 N.W.2d 721 (1972); State *ex rel.* Johnson v. Cady, 50 Wis. 2d 540, 185 N.W.2d 306 (1971).

types of action taken subsequent to conviction.[86] The writ is apparently also the method to be used by juveniles in collaterally challenging their delinquency adjudications.[87]

Under the new criminal procedure code, jurisdiction in habeas corpus cases has been given concurrently to the supreme court and to the circuit and county courts in the county of detention.[88] This is in keeping with the supreme court's desire to shift the workload on these collateral remedies to the trial court, but also indicates that the number of such petitions will greatly diminish under the new code. Now that a 974.06 motion is available to a defendant regardless of when he was convicted, habeas corpus is fundamentally superseded by a post-conviction motion in the mine-run case.

VI. CONCLUSION

The revised criminal procedure code provides counsel with a variety of post-conviction remedies. In order to best serve the needs of the defendant, an early, informed and expeditious determination of the most efficient remedy available must be made. In some cases this will be immediate appeal; in many cases, however, counsel is really acting to the detriment of his client by not seeking initial relief in the trial court. It is the duty of counsel to make certain that the remedy fits the crime.

86. State *ex rel.* Edwards v. McCauley, 50 Wis. 2d 597, 184 N.W.2d 908 (1971); State *ex rel.* Farrell v. Schubert, 52 Wis. 2d 351, 190 N.W.2d 529 (1971).

87. See Parins, *Habeas Corpus Review*, 42 WIS. BAR BULLETIN 20 (Oct. 1969).

88. WIS. STAT. § 292.03 (1969).