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course would be to amend the judicial code so as to achieve this result. This has already been done to give persons domiciled in the District of Columbia and the territories a "fictitious" state citizenship for purposes of diversity of citizenship jurisdiction.[42] The literal language of the Constitution is not stretched any more in one case than in the other, particularly in light of the original meaning of the diversity of citizenship jurisdiction.

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## NECESSITY FOR NEW INDICTMENT AFTER RELEASE ON HABEAS CORPUS

With the large expansion in recent years of the use of habeas corpus in criminal proceedings questions arise as to what happens after the writ has been granted. One such question is whether the defendant can again be tried on the same indictment. In *Gavin v. Langlois*[1] the Supreme Court of Rhode Island held that one who is discharged pursuant to a writ of habeas corpus cannot again be lawfully tried under the same indictment.

In 1950 the defendant, Gavin, was indicted, tried and found guilty of murder in the first degree. While in custody in 1953, pursuant to the life sentence imposed, he filed a petition for habeas corpus. The superior court granted the petition and ordered his discharge from further custody under the original sentence. However, he was detained to face other pending charges arising out of the same events. Gavin did not contest the further detention and upon retrial in 1955 on the original indictment pleaded nolo contendere to murder in the second degree and was sentenced to thirty years in the reformatory. Then the defendant claimed that having been once discharged on habeas corpus he could not lawfully be tried again on the original indictment and sought release by habeas corpus. The Rhode Island Superior Court granted the petition and ordered the release

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The English court stated that the only part of the British Empire to which "the intestate could be said to have belonged in the circumstances is the part from which she originated." [1940] Ch. at 130. The fictitious domicile of the suggested rationale is no more fictitious than the one stated in O'Keefe.

[42]The statute provides: "(d) the word "states," as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico." 72 Stat. 415, 28 U.S.C. § 1332(d) (1958). See notes 4 and 5 supra.

The similarity between the two problems was recognized as long ago as 1851 in Prentiss v. Brennan, supra note 34.

[1]167 A.2d 747 (R.I. 1961).

of the defendant. One major factor in the present *Gavin* case was the majority's interpretation of a Rhode Island statute, which says: "No person who has been discharged upon a writ of habeas corpus shall be again imprisoned or restrained for the same cause, unless he shall be indicted therefore or convicted thereof. . . ."[2] The majority of the court thought that this statute constitutes a codification and endorsement of a basic principle of justice, *i.e.*, that the return of a new indictment is necessary for further prosecution.

The chief justice of the court registered a vigorous dissent to the majority's interpretation of the Rhode Island statute. He felt that a new indictment should not be required for further prosecution.

To the extent that the *Gavin* decision is supported by statutory interpretation it is not subject to criticism; however, the existence of any basic principle of justice calling for the interpretation as given by the majority is uncertain.

An examination of the cases upon which the majority relies as giving judicial recognition to the necessity for a new indictment adds little support to the majority's position. The questions involved in those cases have little in common with the issue of the *Gavin* case.[3] The Rhode Island court relies heavily on the Florida case of *State ex rel. Cacciatore v. Drumbright*[4] as supporting its holding.[5] In *Drumbright* the accused had been discharged on habeas corpus on the ground that the indictment in the trial court failed to state an offense.[6] However, in the *Gavin* case the validity of the indictment for prosecution in the first instance was not questioned. It is not doubted that an indictment void for defects or failure to state an offense is insufficient for further proceeding after a release on habeas corpus. In such a situation a release from custody pursuant to sentence imposed under

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[2]R.I. Gen. Laws Ann. § 10-9-29 (1956).

[3]In Day v. Smith, 172 Ga. 467, 157 S.E. 639 (1931), the prisoner was only discharged from an illegal sentence and was promptly remanded to the custody of the sheriff under the original warrants. The judgment in habeas corpus did not ajudicate the illegality of restraint under warrants not involved in the proceeding. In the case of In re Crandall, 59 Kan. 671, 54 Pac. 868 (1898), the prisoner was discharged because no offense was alleged for which he could be prosecuted. In State ex rel. Zugschwerd v. Holm, 37 Minn. 405, 34 N.W. 748 (1887), the defendant had been committed upon an examination, but was ordered discharged on habeas corpus because of a defect in proof in the examination. McConologue's Case, 107 Mass. 154 (1871) involved the issuance of a writ of habeas corpus to inquire into the validity of detention of a minor under an enlistment in the Army of the United States. The enlistment was illegal and the minor was ordered discharged from custody.

[4]116 Fla. 496, 156 So. 721 (1934).

[5]167 A.2d at 748.

[6]156 So. at 724.

the original indictment is justified since the court would be without jurisdiction.[7]

There is a certain amount of confusion concerning the extent of relief provided by the writ of habeas corpus. Throughout the history of Anglo-American law the writ has been subject to varying interpretations.[8] Some knowledge of the scope of relief available is important in discussing the *Gavin* case. Technically, if the court finds that the petitioner is held pursuant to a wrongful commitment, he will be discharged from such commitment. Under the English Habeas Corpus Act, of 1679, once a prisoner was discharged he could not be recommitted because it had been judicially determined that there was no probable cause for detention.[9] However, in most modern day proceedings the usual grounds for release are not that the prisoner is held without cause, but that his commitment was void for constitutional reasons, so that he may be retried.[10]

According to federal practice the issuance of a writ of habeas corpus does not guarantee release from custody.[11] The matter is discretionary with the court and the prisoner is to be disposed of "as law and justice require."[12] In state courts as well, total release, followed by subsequent rearrest for further prosecution, is not a universal requirement after the issuance of habeas corpus. One released on habeas corpus because of an illegal sentence may be held in custody for resentencing.[13]

To assert that the release on habeas corpus entitles the one dis-

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[7]Where the indictment failed to charge an offense, the prisoner was entitled to release on habeas corpus since the verdict amounted to nothing and the court was without jurisdiction. Aderhold v. Schlitz, 73 F.2d 381 (5th Cir. 1934).

[8]9 Holdsworth, A History of English Law 104-12 (1926); Jenks, The Story of Habeas Corpus, 19 L.Q. Rev. 64 (1902). The writ was well entrenched in Anglo-American law prior to the enactment of the Habeas Corpus Act of 1679. However, the origin and early history of habeas corpus is not so well known. The following statement from Jenks, is illuminating.

> "In truth there is not a little about the Habeas Corpus which requires explanation. In the first place it seems odd... that the King's writ... should have been the great engine for defeating the King's own orders.... [T]his perhaps is the most embarrassing discovery, the more one studies the ancient writs of Habeas Corpus (for there were many varieties of the article) the more clear grows the conviction, that, whatever may have been its ultimate use, the writ Habeas Corpus was originally intended not to get people out of prison, but to put them in it." Id. at 65.

[9]61 Harv. L. Rev. 657, 622 n.45 (1948).

[10]Ibid. In the principal case the defendant Gavin recognizes that there is sufficient cause to warrant his further detention.

[11]28 U.S.C. § 2243.

[12]Ibid.

[13]Ibid.

charged to total freedom is to deny recognition of the necessity for an ordered society.[14] To maintain that such absolute exemption from further imprisonment is requisite to the protection of certain civil liberties might soon destroy all civil rights, as the protection of society would become impossible. Thus, in recognition of these practicalities, various methods have been adopted to obviate the necessity of release after gaining a petition for habeas corpus.[15]

If the habeas corpus release affected only that portion of the proceeding which was illegal, there is nothing to prevent further prosecution on other unrelated elements whose legality has not been questioned.[16] In *Gavin* the indictment is such an unrelated element.

To realize the distinctive separation of the indictment from the illegality which occurred in the course of the trial in *Gavin,* it is helpful to consider the place of an indictment in a criminal proceeding. An indictment is a formal written accusation of crime by a grand jury.[17] It is a finding that reasonable grounds exist to believe that the accused has committed a crime. The purposes of an indictment are: to inform the one accused fully and clearly of the charge against him,[18]

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[14]3 Blackstone, Commentaries *133-34.

[15]"While a prisoner once discharged may not be reimprisoned, restrained or kept in custody 'for the same cause' there are many grounds for his continued restraint after a release in habeas corpus; and many controversies over what is the same cause." 1 Alexander, The Law of Arrest § 218 (1949).

[16]Where a conviction is correct, and where the error or excess of jurisdiction is the ordering of the prisoner to be confined in a penitentiary where the law does not allow the court to send him, there is no good reason why jurisdiction of the prisoner should not be reassumed by the court that imposed the sentence, in order that its defect may be corrected. In re Bonner, 151 U.S. 242, 261 (1894).

In Bayless v. United States, 147 F.2d 169, 170 (8th Cir. 1945), the defendant's trial and the court's sentence were void. However, the "case stood upon the indictment for arraignment and trial as though nothing had been done."

In Mitchell v. Youell, 130 F.2d 880, 882 (4th Cir. 1942) the conviction and sentence of the prisoner was held a denial of due process. "The trial and sentence of the state court must accordingly be held for naught.... This does not mean, however, that petitioner may escape further punishment under the bill of indictment returned against him."

In Commonwealth v. Burks, 361 Pa. 35, 63 A.2d 77, 79 (1949) the petitioner was deprived of due process because he was not afforded the right to counsel. In directing that his trial was void, the court said: "[T]he indictments have not at any time been under attack and remain unaffected by the invalidity in the former proceeding.... The situation, here consequently ensuing, results from the necessary vacation and setting aside by the former proceeding as a nullity and leaves the indictment open and unsatisfied."

[17]"The indictment... is the presentation to the proper court, under oath, by a grand jury, duly impanelled, of a charge describing an offence against the law for which the party charged may be punished." Ex parte Bain, 121 U.S. 1 (1886). See also the discussion in 4 Wharton, Criminal Law and Procedure § 1723 (12th ed. 1957).

[18]4 Wharton, Criminal Law and Procedure § 1724 (12th ed. 1957).

to inform the court of such charge so that it may determine whether the facts alleged justify proceeding to trial,[19] and to enable the defendant to plead former jeopardy if he is charged with the same crime for which he has been legally convicted or acquitted.[20]

A criminal prosecution includes all the steps from the time of the formal accusation until the termination of trial, including imposition of punishment. It is often said that the proceeding before a grand jury is not a criminal action but a preliminary investigation to determine if a prosecution is to be commenced. Whether or not the indictment forms part of the criminal proceeding, it is distinct and severable from the trial.[21]

Thus on purely logical grounds it would seem that the requirement of a return of a new indictment when the validity of the original bill had not been questioned is unnecessary. The purposes of an indictment enumerated above are fulfilled upon the return of the first bill.

It is suggested that a just and practical result could be obtained by considering that when a writ of habeas corpus is issued the effect is to void the particular illegality, and the defendant stands indicted and ready for such further proceedings as are necessary to cure the former illegality.[22] The outstanding indictment is unaffected by the habeas corpus proceeding and one could legally be required to respond to the original bill.

It is submitted that many of the questions which arise in the area of post conviction procedure could be favorably resolved by eliminating the much abused habeas corpus proceeding and adopting the Uniform Post Conviction Procedure Act.[23] The act provides a

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[19]United States v. Cruikshank, 92 U.S. 542 (1875).

[20]Glasser v. United States, 315 U.S. 60 (1942).

[21]An indictment must be returned by a grand jury which is not a court, but an arm of the court or an adjunct of the court. 1 Alexander, The Law of Arrest § 32 (1949). The proceedings of a grand jury are not a trial. Adams v. State, 214 Ind. 603, 17 N.E.2d 84 (1938).

[22]In numerous other courts it has been held that when the conviction was based on an indictment that is still valid, and habeas corpus is granted releasing the prisoner from penal confinement, he may be remanded to face a new trial on the original indictment. See, e.g., Ex parte Milburn, 34 U.S. 537 (1835); Bayless v. United States, 147 F.2d 169 (8th Cir. 1945); Mitchell v. Youell, 130 F.2d 880 (4th Cir. 1942); Slack v. Grigsby, 229 Ind. 335, 97 N.E.2d (1951); People v. Caminito, 4 App. Div. 2d 697, 163 N.Y.S.2d 699 (2d Dep't 1957); Commonwealth v. Townsend, 167 Pa. Super. 71, 74 A.2d 746 (1950); Commonwealth v. Burke, 361 Pa. 35, 63 A.2d 77 (1949); Fitzgerald v. Smyth, 194 Va. 681, 74 S.E.2d 810 (1953).

[23]9B Uniform Laws Annotated 344 (1957). According to the 1960 supplement three states, Arkansas, Maryland, and Oregon, passed the Uniform Post Conviction Procedure Act. However, Arkansas has since repealed the Act because it was found