not to say that all discretion should be removed from the trial court in granting or denying continuances;[89] but certainly where it is clear from the record that an attorney could not possibly had performed properly in the amount of time allowed, there is no justification of indulging in presumptions which serve no fuction other than to effectively deny an important constitutional right.[90]

The character and extent of the administrative defects just discussed indicate a serious lack of perspective on the part of the Indiana Supreme Court in regard to its duty to safeguard constitutional rights. If the Indiana right to counsel is to maintain its deserved status, it is essential that the court adopt measures of enforcement which will substantially guarantee the necessary protection.

FEDERAL HABEAS CORPUS AND THE EQUAL PROTECTION CLAUSE

Lawrence Cook was convicted of murder on July 23, 1931, sentenced to life imprisonment, and removed to the Indiana State Prison on the following day. Under existing law he had six months to perfect an appeal to the Indiana Supreme Court. Within this period Cook, with the aid of other prisoners, prepared the necessary appeal papers and attempted to send them to the circuit court in which he was convicted. His efforts were thwarted by prison authorities in pursuance of a prison regulation against sending out legal papers.

On March 11, 1949, having run the perplexing gamut of state remedies and after more than seventeen and one-half years of incarceration, Cook was discharged from custody. The Federal District Court for the Northern District of Indiana granted his petition for a writ of habeas corpus and ordered his unconditional release on the ground that the suppression of his appeal documents had denied him the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution. This decision was affrimed by the Court of Appeals for the Seventh Circuit.[1]

Justice Black, speaking for a unanimous Supreme Court, vacated the judgments of the two lower courts. While accepting Cook's contention that he had been denied equal protection of the laws, the Court thought that an actual appellate determination of the merits of his conviction would cure this

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considered by any lawyer in fifteen minutes." Emmert, C.J., dissenting in Schmittler v. State, 93 N.E.2d 184, 192, 195 (Ind. 1950).

89. Delays because of newly discovered evidence or other emergency should be discretionary with the trial judge and reviewed only for abuse of discretion.

90. See 26 NOTRE DAME LAW. 118 (1950).

1. United States *ex rel.* Cook v. Dowd, Warden, 180 F.2d 212 (7th Cir. 1950).

defect. Upon remand, the District Court was instructed to allow the state of Indiana a reasonable time to afford an adequate review. Only in the event of Indiana's failure to do so is he to receive an unconditional discharge.[2]

The sequence of events culminating, in 1951, in the above disposition of Cook's bid for freedom was remarkably protracted and therefore worthy of note.[3] In 1937, he filed a petition for a writ of error coram nobis in the circuit court in which he was convicted. In the course of the coram nobis proceedings,[4] which dragged on until 1944, three special judges presided and the matter reached the Indiana Supreme Court twice,[5] with no change in petitioner's status resulting.

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2. Dowd v. United States *ex rel.* Cook, 71 Sup. Ct. 262 (U.S. 1951).

3. It should not be inferred that Indiana is the only state in which the exhaustion of state remedies is a long and needlessly technical ordeal. In the well known *Nebraska Hawk* cases petitioner has pursued his freedom through nineteen hearings without success. FRANK, CASES ON CONSTITUTIONAL LAW 765 (1950). For a partial description of these proceedings see *Ex parte* Hawk, 321 U.S. 114 (1944).

4. Writ of error coram nobis will lie in Indiana where some fact exists which was not in issue at the trial and which demonstrates that the trial court judgment was incorrect on the merits. George v. State, 211 Ind. 429, 6 N.E.2d 336 (1936). IND. STAT. ANN. § 9-3301 (Burns Repl. 1946). No court has jurisdiction to entertain a petition for coram nohis where petitioner alleges matters which were or could have been adjudicated in prior coram nobis proceedings. IND. STAT. ANN. § 9-3302 (Burns Repl. 1946). Where new facts appear, petitioner must, in the absence of unusual circumstances, exhaust his state remedy of coram nobis before he may resort to habeas corpus in the federal district court. Jones v. Dowd, 128 F.2d 331 (7th Cir. 1942); *Ex parte* Botwinsky, 314 U.S. 586 (1942). This remedy has not been exhausted until its denial has been appealed to the state supreme court and a petition for writ of certiorari has been filed with the United States Supreme Court and denied. Darr v. Burford, 339 U.S. 200 (1950); *Ex parte* Davis, 318 U.S. 412 (1943). *But cf.* Wade v. Mayo, 334 U.S. 672 (1948).

In the district court's memorandum opinion dismissing Cook's first petition for habeas corpus, the court said: "Another ground urged by respondent for dismissal of the petition is that the petitioner has not yet exhausted his state court remedies, and that therefore, this court lacks jurisdiction. Inasmuch as the petitioner has been denied the right to prosecute his appeal pursuant to the pronouncement by the Indiana Supreme Court in the habeas corpus action initiated in LaPorte County; and further, since he has failed in his efforts to have that denial reviewed on certiorari by the United States Supreme Court, it would appear that he has met the test laid down in *Ex parte* Hawke, 321 U.S. 114 (1944), for bringing a petition of habeas corpus in the federal court." Since petitioner in the *Cook* case pursued the remedy of coram nobis in the circuit court but failed to appeal the final decision of that court to the Indiana Supreme Court, the District Court's opinion leaves to speculation the reason why petitioner was not required to completely exhaust that remedy. (The court quite possibly considered the frustrating and confusing legal knot in which these proceedings had ended. See note 5 *infra.*)

Prior to State *ex rel.* McManamom v. Blackford Circuit Court 95 N.E.2d 556 (1950), coram nobis was apparently available only within five years from the date of conviction unless recourse to this remedy was prevented by state action or insanity. IND. STAT. ANN. § 9-3301 (Burns Repl. 1946). This statute was declared unconstitutional by the above case.

5. In the first case the petitioner appealed from the denial of a motion for a nunc protunc entry sought to reinstate an order in a coram nobis proceeding granting a new trial after that order had been withdrawn by the trial court. Cook v. State of Indiana, 219 Ind. 234, 37 N.E.2d 63 (1941).

Later the petitioner sought from the Indiana Supreme Court a mandamus to the trial court to try the issues presented by the coram nobis petition. Grounds stated were that the trial court exceeded its jurisdiction when it allowed the state's answer to be withdrawn

In 1945, Cook petitioned the Jennings County Circuit Court for a writ of habeas corpus.[6] The denial of this petition was affirmed by the Indiana Supreme Court,[7] and certiorari to the United States Supreme Court was denied.[8] In its opinion affirming the refusal of the writ by the circuit court the Supreme Court of Indiana indicated that the denial of petitioner's right to appeal did not nullify the judgment against him and intimated that his proper remedy was to petition that court for a delayed appeal.[9] Following this suggestion, Cook petitioned for permission to perfect a delayed appeal on September 4, 1946. His affidavits were considered together with those filed by the State attorney general and one by the defense attorney. The latter's affidavit stipulated that his failure to appeal the case was not influenced by Cook's impecunious condition. The petition was denied.[10] Once again

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and by sustaining the latter's demurrer. The court stated that where the trial court has jurisdiction of the person and subject matter, the correct remedy for improperly permitting or sustaining a demurrer is by appeal. State *ex rel* Cook v. Wickens, 222 Ind. 383, 53 N.E.2d 630 (1944).

6. Two months later Cook filed a similar petition in the United States District Court for the Northern District of Indiana. This also was denied.

In Indiana a petition for a writ of habeas corpus may not be filed in any court other than the one in which the petitioner was convicted. IND. STAT. ANN. § 3-1918 (Burns Repl. 1946); State *ex rel.* Barnes v. Howard, 224 Ind. 107, 65 N.E.2d 55 (1945); State *ex rel.* Cook v. Howard, 223 Ind. 694, 64 N.E.2d 25 (1945); State *ex rel.* Kinkel v. LaPorte Circuit Court, 209 Ind. 682, 200 N.E.2d 614 (1935). A later statute has been construed to require also that only the courts of the county of incarceration have jurisdiction to entertain the petition. IND. STAT. ANN. § 3-1905 (Burns Repl. 1946); State *ex rel.* Moore v. Carlin, 226 Ind. 437, 81 N.E.2d 670 (1948). Thus habeas corpus is available in Indiana only to those who are incarcerated in the county where they were convicted. This situation has been recognized by the Seventh Circuit which has upheld the decisions of the United States District Court for the Northern District of Indiana finding that state remedies had been exhausted where there had been no resort to habeas corpus. Williams v. Dowd, 153 F.2d 328 (7th Cir. 1946); Potter v. Dowd, 146 F.2d 244 (7th Cir. 1944). These statutes, as they have been interpreted, appear not only to directly contravene ART. 1, § 25 of the INDIANA CONSTITUTION, which prohibits the suspension of the writ, but also to violate the equal protection clause of the Fourteenth Amendment since only those petitioners who were convicted in LaPorte county and are incarcerated there in the Indiana State Prison can avail themselves of the writ under the now existing law.

The inadequacy of habeas corpus in Indiana has resulted in an enlargement of the scope of coram nobis. This development has deemphasized the defects of the habeas corpus statutes by decreasing the necessity of resorting to that remedy.

For a preceding discussion of exhaustion of state remedies in Indiana, see Note, 22 IND. L.J. 189 (1947).

7. State *ex rel.* Cook v. Howard, 223 Ind. 694, 64 N.E.2d 25 (1945).

8. Cook v. Howard, 327 U.S. 808 (1946).

9. "If appellant has been denied the privilege of appealing his case, by the warden and employees of the prison where he is serving, until the time allowed by statute for an appeal has expired, that fact would not nullify the judgment lawfully rendered against him by the Jennings Circuit Court. It would merely extend the time for appeal during the period of such disability." State *ex rel.* Cook v. Howard, 223 Ind. 694, 699, 64 N.E.2d 25, 27 (1945).

10. It appears that the Indiana Supreme Court failed to squarely meet petitioner's principal contention in this application. Whereas he relied on the allegation that his constitutional rights were violated by the action of state authorities who suppressed his appeal documents, the court turned down his application with the observation that there was no irregularity in the failure of his trial counsel to prosecute the appeal.

Cook sought certiorari to the United States Supreme Court without avail.[11] A petition for rehearing, which reemphasized the fact that his right to appeal had been defeated by prison authorities, was likewise denied.[12]

On November 13, 1947, Cook filed his petition for writ of habeas corpus in the United States District Court for the Northern District of Indiana.[13] The State's motion to dismiss was granted on June 24 of the following year.[14] Allowance of an amended petition followed[15] and this time respondent's motion to dismiss was denied. On February 17, 1949, a hearing was held, and the District Court's decision, rendered on February 28, ordered petitioner's discharge from custody.[16] When confronted with the amended petition, the District Court decided that its objection to Cook's prior petition—his failure to demonstrate the probability of prosecuting a successful appeal—was not a valid consideration in determining whether the petition should be granted.

On February 7, 1950, the Seventh Circuit affirmed the decision.[17] In its opinion the court traced in detail the state remedies petitioner had pursued in his effort to secure recognition of his constitutional rights. Denial by the Indiana Supreme Court of the petition for a delayed appeal was emphasized. If this can be construed as a recognition by the Seventh Circuit that the delayed appeal is an available remedy in Indiana when state action has defeated a petitioner's attempts to secure timely review, it seems highly probable that such an appeal will hereafter be considered as an "established" state remedy under these circumstances.[18]

Thus, as a precautionary measure the petitioner who has been denied the right to appeal by action of state officers in Indiana, in contravention of the equal protection clause, must go through an additional step before seeking his discharge on writ of habeas corpus in the federal district court. Failure to proceed in this manner will subject him to the risk of being denied relief on

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11. Cook v. Indiana, 330 U.S. 841 (1947).

12. Cook v. Indiana, 331 U.S. 863 (1947).

13. Transcript of Record, pp. 4, 5, 6, and 7, United States *ex rel.* Cook v. Dowd, Warden, 180 F.2d 212 (7th Cir. 1950).

14. Transcript of Record, pp. 10 and 11, United States *ex rel.* Cook v. Dowd, Warden, 180 F.2d 212 (7th Cir. 1950).

15. Transcript of Record, p. 18, United States *ex rel.* Cook v. Dowd, Warden, 180 F.2d 212 (7th Cir. 1950).

16. The court delayed entry of the formal order of discharge until March 10, 1949.

17. United States *ex rel.* Cook v. Dowd, Warden, 180 F.2d 212 (7th Cir. 1950).

18. This conclusion is strengthened by several recent Indiana Supreme Court decisions stating that the highest court of Indiana will entertain a petition for a delayed appeal in cases where state action has interfered with the timely perfection of an appeal or the application for a new trial. Sweet v. State, 226 Ind. 566, 81 N.E.2d 697 (1948); State *ex rel.* Walker v. Youngblood, 225 Ind. 375, 75 N.E.2d 417 (1947); State *ex rel.* Barnes v. Howard, 224 Ind. 107, 65 N.E.2d 55 (1945); State *ex rel.* Cook v. Howard, 223 Ind. 694, 64 N.E.2d 25 (1945). In addition to the Indiana Supreme Court's inherent powers to hear a late appeal it has also a direct statutory grant of power for this purpose. IND. STAT. ANN. § 9-3305 (Burns Repl. 1946).

the ground that an adequate state remedy is still available. Balanced against the increased complexity of state remedies, however, is the possibility that by means of the delayed appeal the Indiana Supreme Court may succeed in sidestepping technical procedural obstacles to its correction of errors occurring in the state judicial process which have resulted in denial of constitutional rights. The delayed appeal might possibly be extended even beyond its present limits and afforded to petitioners who have failed to perfect their appeals within the allowed period for reasons *other than state interference* where there is a contention that fundamental rights have been violated. This view, expressed by the dissenting opinion in *Johns* v. *State,*[19] places the proper emphasis on the responsibility of the state judiciary for insuring compliance with federal constitutional guarantees in criminal proceedings in state courts.

The *equal protection of the laws* aspect of the *Cook* case may prove to be of considerable significance in the future delineation of the scope of this clause of the Fourteenth Amendment. The Court of Appeals held (a) that the petitioner's constitutional right to equal protection of the laws was invaded by the action of state authorities subsequent to his conviction; and (b) that this denial rendered his detention illegal, thereby entitling him to his freedom. The validity of the petitioner's contention—that where the right to appeal is guaranteed by state law, state action preventing exercise of this right constitutes a denial of equal protection which invalidates incarceration—was acknowledged. The Seventh Circuit relied almost solely on *Cochran* v. *Kansas,*[20] apparently giving little independent consideration to the novelty of their conclusions.

Both propositions, it is true, gained at least nominal recognition from the United States Supreme Court in the *Cochran* case in 1941. The facts there were almost identical to those in the *Cook* case, except that in the former it had not been previously established, as in the latter, that an attempt to appeal actually had been obstructed. Cochran made the same two arguments presently under discussion, the validity of which the *respondent conceded.*[21] This concession was due to the fortuitous circumstance that the

19. 89 N.E.2d 281 (1949). In this case Johns failed to file a transcript of the record in the office of the clerk within the time fixed by rule 2-40 of the supreme court rules. Dismissal was based on the ground that the court was without jurisdiction because the appeal had not been perfected within the required time. The dissent noted, however, that ". . . this court in recent years has in many instances properly refused to permit rules to become the instrument of oppression. Where an accused has been deprived of his constitutional rights, negligence of counsel cannot be permitted to prejudice such rights . . . where . . . life or liberty are involved. This court has the power and it should be its duty to waive any given rule where . . . an accused has been deprived of his constitutional rights . . . under the Fourteenth Amendment. . . ." 89 N.E.2d 281, 286 (1949). The well-reasoned dissent took the position that since the question presented by Johns involved his constitutional rights, a delayed appeal should have been allowed despite the fact that failure to prosecute a timely appeal was in no way attributable to state action.

20. 316 U.S. 255 (1941).

21. *Id.* at 257.

Kansas attorney general chose to base his objection to petitioner's discharge on the contention that there actually had been no state action obstructing the attempts to appeal. Thus it is evident that this concept—suppression by state authorities of the right to appeal, where guaranteed by state law, is a denial of equal protection—gained its first federal judicial recognition without challenge.[22] Moreover, the Supreme Court's acceptance of Cochran's argument that the denial of equal protection subsequent to a lawful conviction rendered his detention illegal and entitled him to his release was based *only* on an extremely liberal interpretation of the law of Kansas.[23] Consequently the Supreme Court's recognition of these two arguments in 1941 was at best indirect.[24]

The equal protection clause has long occupied a subordinant role as a device to protect individual rights against state usurpation.[25] It has been used by the courts chiefly as a basis for appraising legislative classification;[26] and it is mainly in this context that it has been utilized to protect the rights of defendants in state criminal proceedings.[27] In view of this background

22. "The state properly concedes that if the alleged facts pertaining to suppression of Cochran's appeal were 'disclosed as being true before the supreme court of Kansas, there would be no question but that there was a violation of the equal protection clause of the Fourteenth Amendment.' And in Kansas, habeas corpus is recognized as affording a remedy for a person held in prison in violation of a right guaranteed by the Federal Constitution." *Id.* at 257-258. This is the Court's only allusion to equal protection in the *Cochran* case.

23. The *Cochran* case reached the Supreme Court on certiorari to the Supreme Court of Kansas to review a denial of habeas corpus. Therefore, the law of Kansas governed as to that state remedy. *Re* Jarvis, 66 Kan. 329, 71 Pac. 576 (1903), was cited to support the United States Supreme Court's interpretation of applicable Kansas law. That case appears to hold only that an unconstitutional law is a nullity and that a conviction under it is not merely erroneous but void and subject to collateral attack in a habeas corpus proceeding.

24. There are numerous cases which indicate that due process of law may not comprehend the right to appeal. *See, e.g.,* Carter v. Illinois, 329 U.S. 173, 175, 176 (1946); District of Columbia v. Clawans, 300 U.S. 617, 627 (1937); Kohl v. Lehlback, 160 U.S. 293, 297 (1895); Andrews v. Swartz, 156 U.S. 272, 275 (1895); McKane v. Durston, 153 U.S. 684, 688 (1893); Casebeer v. Hudspeth, 114 F.2d 789, 790 (10th Cir. 1940); De Maurez v. Swope, 104 F.2d 758, 759 (9th Cir. 1939). It seems probable that counsel resorted to the equal protection argument in the *Cochran* case only because, in view of these precedents, he preferred to attempt to induce the Court to extend the scope of the equal protection clause in support of his contention that his client's constitutional rights were invaded. This is strongly suggested by Petitioner's Brief, p. 24, Cochran v. Kansas, 316 U.S. 255 (1941), in which counsel alludes to the cases supporting the proposition that due process does not include the right to appeal, and then attempts to support the validity of the equal protection argument while recognizing that it has never been previously invoked in these circumstances.

25. "A construction of the equal protection clause which would find a violation of federal rights in every departure by state officers from state law is not to be favored." Snowden v. Hughes, 321 U.S. 1, 11, 12 (1944).

26. Tussman and tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 346 (1949).

27. The following cases hold criminal statutes unconstitutional denials of equal protection because the classification was unreasonable: Skinner v. Oklahoma, 316 U.S. 535 (1941); McFarland v. American Sugar Co., 241 U.S. 79 (1915); People v. Fitzgerald, 14 Cal. App.2d 180, 58 P.2d 718 (1936); Dowd, Warden v. Stuckey, 222 Ind. 100, 51

it is admittedly somewhat surprising to see the clause used to prevent discrimination by the states in the administration of their criminal procedures. Nevertheless, the conclusion seems inescapable that if equal protection dictates that state legislation must operate equally upon those in like circumstances,[28] it should also command that in the administration of this legislation the state must not discriminate between those similarly situated. In no area does this conclusion have greater validity than in that of determining and meting out criminal penalties. Of course petitioner was not the only one whose right to appeal was suppressed by the Indiana prison authorities. This denial affected all inmates who lacked funds to hire counsel or friends on the outside to file their appeal papers for them. But surely it can not be contended, in answer to the proposed application of this new found device to prevent state discrimination, that the fact petitioner was incarcerated and unable to hire counsel is a reasonable basis for classification. This aspect of the Circuit Court's decision was explicitly adopted by the Supreme Court.[29]

It is with the second phase of the opinion of the lower court that the Supreme Court took issue:[30]

> There remains the question of the disposition to be made of this case. Fortunately, we are not confronted with the dilemma envisaged by the State of having to choose between ordering an absolute discharge of the prisoner and denying him all relief. The District Court has power in a habeas corpus proceeding to "dispose of the matter as law and justice require." 28 U. S. C. § 2243. The Fourteenth Amendment precludes Indiana from keeping respondent imprisoned if it persists in depriving him of the type of appeal generally afforded those convicted of crime. On the other hand, justice does not require Indiana to discharge respondent if such an appeal is granted and reveals a trial record free from error. Now that this Court has determined the federal constitutional question, Indiana may find it possible to provide the appellate review to which respondent is entitled.

N.E. 2d 947 (1943); Carson v. Baldwin, 236 Mo. 984, 144 S.W.2d 134 (1940); State v. Gregori, 318 Mo. 998, 25 S.W.2d 747 (1928); People v. Simmons, 130 Misc. Rep. 821, 226 N.Y.S. 397 (1927); Head v. State, 147 Tex. Crim. Rep. 594, 183 S.W.2d 570 (1944); Acme Finance Co. v. Huse, 192 Wash. 96, 73 P.2d 341 (1937). *But cf.* Hale v. Commonwealth of Ky., 303 U.S. 613 (1938), where the Supreme Court held that racial discrimination in the selection of grand jurors is prohibited by the equal protection clause; U.S. *ex rel.* Foley v. Ragen, 52 F. Supp. 265 (N.D. Ill. 1943), where the court held that change in length of petitioner's sentence by successor to parole board denied equal protection; Blocker v. State, 112 Tex. Crim. Rep. 275, 16 S.W.2d 253 (1929), where prosecutor's statement to jury that decedent slapped Negro defendant to keep him in his place and that jury "need not be told what to do" held to violate equal protection. It will be noted that in these cases in which equal protection was invoked for reasons other than unreasonable legislative classification either racial discrimination or unreasonableness of classification by an administrative body was involved.

28. Skinner v. Oklahoma, 316 U.S. 535 (1941); Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32 (1927).

29. Dowd v. U.S. *ex rel.* Cook, 71 Sup. Ct. 262 (U.S. 1951).

30. *Id.* at 264.

The Supreme Court's reluctance to sanction an unconditional discharge where the deprivation of constitutional rights occurred *subsequent* to conviction, was probably motivated to a large extent by its unwillingness to turn loose upon society a man convicted of murder whose conviction has never been repudiated.[31] But the decision has the practical effect of an order to the state to manufacture an adequate remedy *or else*. The Court made this disposition of the case with full awareness of the lower court's finding that *state remedies had been completely exhausted.* Although couched in non-mandatory langnage, it appears to be an unwarranted federal intervention in a matter heretofore peculiarly within the realm of state powers. Moreover, it is difficult to justify the Court's casual assumption that a denial of equal protection can be "cured" in this manner after an interval of seventeen years during which the victim of the state's dereliction has been incarcerated.

The most inacceptable aspect of this decision is that while it recognized that events subsequent to conviction may amount to denial of equal protection, it proceeds to seriously impair the efficacy of this constitutional guarantee by supplying a totally inadequate remedy. The states are merely put on notice that they may continue to deny equal protection to those convicted of crime subject only to the slight inconvenience of according the safeguards they should have provided in the beginning if and when the denial is challenged.

The idea that a deprivation of equal protection subsequent to lawful conviction renders the commitment void and entitles petitioner to release on habeas corpus is not revolutionary. It apparently falls within the broad langnage of several decisions expressing the view that any violation of constitutional rights will be remedied in this manner.[32] Also analogous to this proposition rejected by the Court are two recent cases in the federal courts which have held that subjecting a convict to cruel and unusual punishment violated *due process of law* and that such violation, although *subsequent* to a lawful conviction, justifies petitioner's discharge from custody.[33]

Cook was entitled to the timely review of alleged errors in the trial court which is afforded under Indiana law to all those convicted of crime.[34] Action of state authorities deprived him of this right in derogation of the

31. In Brief for Petitioner, p. 17, Dowd, Warden v. U.S. *ex rel.* Cook, 180 F.2d 212 (7th Cir. 1950), the state forcefully presented this argument to the court.

32. *See* Frank v. Mangum, 237 U.S. 309, 331, 332 (1914); Grahm v. Squier, 132 F.2d 681, 683 (9th Cir. 1942); Filer v. Steel, 228 Fed. 242, 245 (W.D. Pa. 1915).

33. *Application of* Middlebrooks, 88 F. Supp. 943 (E.D. Cal. 1950); Johnson v. Dye, 175 F.2d 250 (3d Cir. 1949), *rev'd on other grounds,* 338 U.S. 864 (1950). Also, in Boykin v. Huff, 121 F.2d 865 (D.C. Cir. 1941), petitioner claimed that his constitutional rights had been violated by action of state authorities subsequent to conviction. The court, while remanding the case to the state court, commented that if the consequences of the state's mistake could not have been remedied in any other way, petitioner's claim to freedom would have been entitled to serious consideration.

34. IND. STAT. ANN. § 9-2301 (Burns Repl. 1942).

equal protection clause. It is well established that denial of constitutional rights in the course of proceedings *before* conviction deprives the court of jurisdiction and invalidates petitioner's detention.[35] It is unthinkable that invasions of constitutional guarantees should remain unredressed merely because they occur *subsequent* to conviction. Before a petitioner can be heard in habeas corpus proceedings in the federal courts, he must have thoroughly exhausted his state remedies,[36] unless there has been a determination by the federal court that the state remedies are unavailable or inadequate under the particular circumstances.[37] Thus it is evident that the refusal of a federal court to exercise its discretion[38] to discharge a petitioner so situated would leave him without a practical remedy[39] for the invasion of his constitutional rights short of federal interference with matters of state procedure.

Two possible rationales have been suggested for the proposed result that the denial of equal protection after conviction renders detention illegal and enables petitioner to invoke the writ of habeas corpus:[40] (a) the denial of constitutional rights after conviction relates back to deprive the trial court of jurisdiction ab initio; (b) judgment of conviction is not regarded as constitutionally final until the time for appeal has passed, and unconstitutional interference with timely appeal prevents the conviction from ever becoming valid. However, it would seem to be unnecessary to resort to any such fictional rationale to support discharge on habeas corpus in the federal courts where state remedies have been exhausted, as in the *Cook* case. Where constitutional rights have been infringed *at any stage in the state judicial process* and the state affords no possibility of redress, these facts alone should justify the vindication of petitioner's rights by the only adequate means available to the federal courts.[41]

If it is essential that the Court adopt a different approach in this area where petitioner claims that state action denying him recourse to a state criminal procedure violates equal protection than in those habeas corpus cases based on an infringement of the more fundamental guarantees constituting due process of law, surely a solution more acceptable than that adopted by the

35. Bowen v. Johnson, 306 U.S. 19 (1938); Dorsey v. Gill, 148 F.2d 857 (D.C. Cir. 1945); Price v. Johnson, 125 F.2d 806 (9th Cir. 1942); Minnec v. Hudspeth, 123 F.2d 444 (10th Cir. 1941).

36. Darr v. Burford, 339 U.S. 200 (1950); *Ex parte* Hawk, 321 U.S. 114 (1944).

37. Wade v. Mayo, 334 U.S. 672 (1947).

38. 62 STAT. 964, 28 U.S.C. § 2241 (1948), as amended, 63 STAT. 105 (1949): "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . . (c) The writ of habeas corpus shall not extend to a prisoner unless. . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States."

39. The state action of which petitioner is complaining may give rise to a civil cause of action. However, this remedy has consistently proven to be an inadequate protection against overreaching acts of state authorities.

40. Petitioner's Brief, p. 36 n. 37, Cochran v. Kansas, 316 U.S. 255 (1941).

41. Hawk v. Olson, 326 U.S. 271 (1945).

Supreme Court can be devised. Extension of the equal protection clause to inequality in the treatment of offenders after conviction is of slight significance when limited by the unsatisfactory remedy supplied by the Court. Admittedly it is altogether possible in the former situation that the conviction was a just one, despite the deviation from established procedure; and violation of a technical right by the state should not be permitted to result in petitioner's escape from just punishment.

Where the denial of constitutional rights is held to invalidate the conviction, a release on habeas corpus does not bar the state from initiating a new prosecution, this time complying with constitutional mandates.[42] A more desirable solution which might render absolute discharge a less drastic remedy would require the federal courts to pursue a course similar to that followed by the District Court for the Western District of Missouri in *Honaker v. Cox*.[43] There the court found that the sentence under which petitioner was serving was void because he had been insane when it was imposed, had not been represented by counsel, and had not intelligently and competently waived the right to counsel. However, the court also found that at the time of the habeas corpus hearing petitioner was sane and therefore the District Court for the Eastern District of Kentucky, in which petitioner had been sentenced, had jurisdiction to entertain a new prosecution against him under the original indictment. In pursuance of these findings the court ordered petitioner discharged, subject to the condition that he be held for a reasonable time to allow the authorities of the Eastern District of Kentucky to claim his custody for the purpose of initiating a new proceeding against him. A procedure such as this applied to situations where there is denial of equal protection by state action would prevent the petitioner from leaving the jurisdiction before the state could begin possible new proceedings, and would perhaps induce the federal courts to be more liberal in granting the remedy.[44] A similar disposition of the *Cook* case would have *actually* corrected the earlier denial of equal protection in so far as it is within the power of the judiciary to accomplish this end and at the same time would have protected the public interest in the punishment of criminal offenders.

42. Murphy v. Mass., 177 U.S. 155 (1900); Bryant v. U.S., 214 Fed. 51 (8th Cir. 1914).

43. 51 F. Supp. 829 (W.D. Mo. 1943).

44. 62 STAT. 965, 28 U.S.C. § 2243 (1948). "Issuance of writ [of habeas corpus]. . . . The court shall summarily hear and determine the facts, and dispose of the matter *as law and justice require.*" (Italics added.) This statute apparently authorized the federal courts to exercise a wide range of discretion in shaping the remedy to fit the particular circumstances in habeas corpus proceedings. It is not advocated that the discharge should be conditional in every case where petitioner requests his discharge on habeas corpus due to the violation of his right to equal protection. In instances where the denial of constitutional rights was quite a substantial one or where the petitioner has already served the major portion of his sentence, the analogy to the due process cases is much stronger and it is only proper that the discharge should be absolute.

It may be argued by analogy to the *Cook* case that in those areas where the state has established *substantial* criminal safeguards higher than the minimum requirements of due process,[45] the equal protection clause may be properly invoked to prevent the states from discriminating in the administration of such standards. True, this would extend the scope of equal protection considerably, but once the rationale underlying the Circuit Court's decision in the *Cook* case is accepted, it would be difficult to challenge such an extension.

The potential efficacy of the equal protection clause in this area is still largely a matter for speculation. However, it is highly probable that the courts will limit its application to those discriminations by the state which closely approximate the basic standards of justice comprising due process. Every deviation by state authorities from formal criminal procedures in the course of their judicial proceedings undoubtedly will not justify recourse to this constitutional guarantee.

If a state has fully complied with the existing requirements of federal due process, but has not afforded to the defendant all of the substantial rights to which he is entitled under the state constitution or laws, invoking the equal protection clause appears to be the only promising avenue of redress. The state action obviously cannot be effectively challenged on the grounds of due process without inducing the Supreme Court to expand that category of safeguards, a step which the Court has on numerous occasions indicated reluctance to take.[46] This fact indicates that in situations where there has been no direct holding by the Supreme Court that the action complained of either does or does not violate due process, but where it obviously fails to measure up to a state-established standard, the equal protection argument again may be more expedient.

The right-to-counsel situation is one to which this newly established federal device for enforcing non-discrimination by the states in the administration of their criminal procedures might well be successfully extended. It is firmly established in Indiana that the state must provide counsel for indigent defendants in all felony prosecutions unless the right to counsel is intelligently waived.[47] The federal standard of due process is less stringent. In *Betts v.*

45. The courts have frequently asserted that various state criminal safeguards are not guaranteed by the due process clause of the Fourteenth Amendment. *See, e.g.,* Adamson v. Cal., 332 U.S. 46 (1946) (exemption from self-incrimination); Betts v. Brady, 316 U.S. 455 (1941) (right to counsel in non-capital cases); Snyder v. Mass., 291 U.S. 97, 105 (1933) (right to trial by jury); Ocampo v. United States, 234 U.S. 91 (1913) (right to preliminary hearing); Hurtado v. California, 110 U.S. 516 (1883) (right to indictment by grand jury); People v. DeFore, 242 N.Y. 13, 150 N.E. 585 (1926) (right not to be convicted by evidence secured by illegal search and seizure).

46. *See, e.g.,* Adamson v. California, 332 U.S. 46 (1946); Betts v. Brady, 316 U.S. 455 (1941); Twining v. New Jersey, 211 U.S. 78 (1908); Hurtado v. California, 110 U.S. 516 (1883).

47. IND. CONST. ART. I, § 13. Suter v. State, 227 Ind. 648, 88 N.E.2d 386 (1949); Batchelor v. State, 189 Ind. 701, 125 N.E. 778 (1920). *But see* Schmittler v. State, 93 N.E.2d 184 (Ind. 1950). The right to counsel in Indiana is discussed in detail *supra* p. 234.

Brady[48] the Court held that the due process clause of the Fourteenth Amendment does *not* embody "an inexorable command that no trial for any offense or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." Under the rule of that decision due process is afforded to the defendant without supplying counsel for his defense when, in view of all the surrounding circumstances, the denial of counsel does not seriously prejudice his right to a fair hearing.[49] If a case should arise in which the state has fully complied with the federal standard as enunciated in the *Betts* case, yet has failed to comply with its own more rigorous standard, such a situation would provide an appropriate occasion to invoke the equal protection guarantee of the Fourteenth Amendment.[50] The previous extension of the clause to the analogous fact situation in the *Cook* case should prove to be a persuasive factor in inducing the courts to take this step.

The application of the equal protection clause to defects occurring prior to conviction, as in the right to counsel situation, would presumably not be rendered impotent by restrictions on the remedy available in the federal courts, since there can be no serious objection to invalidating a conviction *secured* by denying equality of treatment.

THE GERRYMANDER AND JUDICIAL ABSTENTION—AN IMPORTANT DISTINCTION BETWEEN POLITICAL QUESTIONS AND THE DISCRETIONARY POWER TO DENY EQUITABLE RELIEF

The right to effective participation in the selection of public officials is fundamental to a truly democratic system.[1] Historically, however, various political groups in the United States have succeeded in denying this right to certain elements of the population. This end has been attained chiefly

48. 316 U.S. 455 (1941).

49. *Id.* at 473.

50. Todd v. State, 226 Ind. 496, 81 N.E.2d 530 (1948), is just such a case according to the dissenting judges. See the dissenting opinions at 82 N.E.2d (1948) and 81 N.E.2d 784 (1948).

1. While this right is the foundation of our constitutional system it is qualified in certain respects. The states have the right to define who shall participate by the exercise of the franchise, U.S. CONST. ART. I, § 2, but their definition of the electorate must be in compliance with the Fourteenth and Fifteenth Amendments. Smith v. Allwright, 321 U.S. 649 (1944); Lane v. Wilson, 307 U.S. 268 (1939); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927). Thus, as stated in Wiley v. Sinkler, 179 U.S. 58, 62 (1900), "The right to vote for members of the Congress of the United States is not derived merely from the Constitution and laws of the State in which they are chosen, but has its foundation in the Constitution of the United States." And when the class who may vote has been defined by the state the members of the class must be treated equally in their exercise of the right. Smith v. Allwright, *supra*. Generally, see Note, *Negro Disenfranchisement—A Challenge to the Constitution*, 47 COL. L. REV. 76 (1947).