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AN OPEN LETTER TO THE ATTORNEY GENERAL OF ILLINOIS

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MR. ATTORNEY GENERAL, through your "confession of error" in the case of Tony Marino, you have focused public attention upon the efforts of Illinois convicts to secure hearing of their charges of violations of constitutional rights. There is no question as to the duty of the state to provide some procedure by which such charges may be considered on their merits.¹ But in the *Marino* case three justices of the United States Supreme Court have labeled the Illinois practice as a "merry-go-round," a "procedural labyrinth made up entirely of blind alleys."²

In recent months this situation has been sharply criticized in the press, in neighboring states as well as in Illinois. I suggest, Mr. Attorney General, that you can no longer afford to postpone a review of the part that your office has played in the operation of this merry-go-round. Specifically I urge you to study the inconsistent positions which your staff has taken in the various state and federal courts.

In 1945 I charged that you apparently consider it proper to meet the contentions of petitioners in various courts by whatever arguments can be urged with any plausibility and that you feel no responsibility for the consistency of these arguments or for the development of an orderly pro-

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¹ "A State must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process. . . . Questions of fundamental justice protected by the Due Process Clause may be raised . . . de hors the record." *Carter v. Illinois*, 329 U.S. 173, 175 (1946).

² *Marino v. Ragen*, December 22, 1947, 16 U.S.L. Week 4067, concurring opinion by Rutledge, J., with whom Douglas and Murphy, JJ., joined.

cedure by which prisoners may present their claims of unfair trial.³ I think this charge is still justified.

I suggest that you begin the review of your record with the *Marino* case itself. In the "confession of error" submitted by you to the United States Supreme Court, you admitted (on the merits) that the decision quashing the writ of habeas corpus violated the rule that "due process of law in a capital criminal case requires the appointment of counsel by a trial court where it appears that the accused is ignorant of trial procedure and incapable of understanding the English language before the court can accept a plea of guilty." On the question of remedy, you inserted in your confession of error a footnote "in order to keep Illinois' position constant and consistent" before the United States Supreme Court. In this footnote you stated: "We deem *habeas corpus* to be clearly appropriate under the Illinois law in this case." You explained the case as one where the facts relied upon "although not a matter of record at the trial were nevertheless known to the trial court," and you asserted that in such a situation "we have always conceded" that "*habeas corpus* may be available in proper cases."

But was it not misleading, Mr. Attorney General, to say that you have always made this concession when in this very case you signed a return stating "that if the relator has any recourse it is by the statutory remedy of a motion in the nature of a writ of error *coram nobis*"? In this return, furthermore, you made no reference to the requirements of the federal constitution, but urged upon the court that "it is well settled that in Illinois no duty is imposed upon the court to appoint legal counsel for an accused unless he states upon oath his inability to procure legal assistance."

In your "confession" you had the temerity to say, "The Attorney General can see no reasons in this record why the Circuit Court of Winnebago County should have denied the petitioner relief." One reason may have been that Judge Dusher took seriously the reasons for dismissal which you urged in your return.

As you review your record I urge you not to omit the case of Lee Van Woods. When the United States Supreme Court granted his petition to review denials of habeas corpus, you induced the Supreme Court to dismiss the cases by arguing that habeas corpus was not the appropriate remedy under the state law.⁴ You argued: "It is . . . a classical case, a

³ *White v. Ragen*, 324 U.S. 760 (1945), Reply brief for petitioners, 9-10.

⁴ *Woods v. Nierstheimer*, 328 U.S. 211 (1946).

case *par excellence*, for relief by statutory *coram nobis*.”⁵ You made no reference to the fact that Woods had tried *coram nobis* and had been denied a hearing on his allegations. Furthermore, when he attempted to appeal to the Illinois Supreme Court this denial of *coram nobis*, you opposed review by filing an answer asserting that *coram nobis* was not an appropriate remedy.⁶

In your published reports in recent years you have written concerning the burden of thousands of petitions filed by prisoners in various courts. In reviewing your record, I urge you to study the extent to which you are responsible for the volume of petitions. Many of these petitions are filed only because of the arguments which you make in the federal courts as to the steps which must be taken to “exhaust state remedies” before a federal district court may entertain a petition for habeas corpus. When arguing in the federal courts, you have habitually insisted that many steps be taken in the state courts, steps which you then contend are not appropriate remedies when you are arguing in the state courts.

For example, in the *Foley* case you induced the federal Circuit Court of Appeals to reverse an order discharging the prisoner on habeas corpus, arguing that review was available in the state Supreme Court by writ of error.⁷ You made this argument although it was obvious that the matters relied upon could not be reviewed on writ of error since they were not matters of record.

You thus insist on the suing out of groundless writs of error in the Supreme Court of Illinois. You do this although the Illinois court has expressed its resentment at being made “a way station through which the case must pass on its journey to some *nisi prius* court.”⁸ (Perhaps it gave you amusement that the court in this opinion, instead of criticizing your tactics which made the useless writ of error necessary, branded the tactics of counsel for the prisoner as “improper and insincere” and refused to modify this language on petition for rehearing.)

Not only do you thus unwarrantedly waste the time of the state Supreme Court but you cause the docket of the United States Supreme Court to be swollen with petitions for writs of certiorari to review denials of habeas corpus in Illinois courts. After persuading the court in the

⁵ *Ibid.*, Brief for respondent, 9.

⁶ *Woods v. People*, Supreme Court of Illinois, September term 1946, Answer to petition for leave to appeal.

⁷ *United States ex rel. Foley v. Ragen*, 143 F. 2d 774 (C.C.A. 7th, 1944), Brief and argument for appellant, 9-10.

⁸ *People v. Peters*, 396 Ill. 345, 348, 71 N.E. 2d 703, 704 (1947).

White and *Woods* cases that such denials were to be understood as based upon state remedial law and thus as involving no federal question, you continue to argue in the lower federal courts that such petitions for certiorari must still be addressed to the Supreme Court as a step in "exhausting state remedies."

These examples, Mr. Attorney General, should convince you that a large part of the responsibility for the "Illinois merry-go-round" rests squarely upon you. Perhaps it is too late for you to repair the damage. Three justices of the United States Supreme Court have volunteered the opinion that prisoners may now apply to the federal courts in the first instance, without trying the state remedies at all;⁹ nor is the silence of the other justices inconsistent with this position. Further litigation will be necessary before we know whether the People of Illinois have been convicted or merely indicted. If you plan to defend the state practice you must certainly first "confess error" and put your official house in order.

⁹ *Marino v. Ragen*, 16 U.S.L. Week 4067, 4070 (1947).