NOTES

FEDERAL PROCEDURE: PROPOSED SOLUTIONS TO THE PROBLEM OF PROLIFERATION OF PETITIONS FOR THE WRIT OF HABEAS CORPUS AND 28 U.S.C. § 2255 PROCEEDINGS IN THE FEDERAL COURTS

I. INTRODUCTION

The proliferation of applications for writs of habeas corpus and motions for relief pursuant to the provisions of Title 28 U.S.C. § 2255, a substitute proceeding for federal prisoners, has created a serious problem in the federal courts. The purpose of this note is to suggest possible solutions to the problem.

The classic remedy for a person who alleges that he is illegally detained is to petition a court of competent jurisdiction for a writ of habeas corpus. On issuance of the writ the custodian is ordered to produce the body before the court. Following a determination of the question of illegal detention the custodian is directed to release or recommit the prisoner or a new trial may be ordered.[1]

The origin of the writ of habeas corpus is lost in history.[2] The writ, however, was firmly recognized as a part of the common law of England[3] and the United States Constitution guarantees that the privilege of resort to the writ shall not be suspended unless rebellion, invasion or public safety so requires.[4] Within the United States, jurisdiction to issue the writ was conferred upon the federal courts by the Judiciary Act of 1789 which provided that the writ could issue from a federal court only where the prisoner was in federal custody.[5] Following the adoption of the Fourteenth Amendment, Congress extended jurisdiction to the federal courts to grant the writ[6] "in all cases where any person may be restrained of his or her

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1 See generally WRIGHT, FEDERAL COURTS 177-186 (1963).

2 Longsdorf, *Habeas Corpus A Protean Writ and Remedy*, 8 F.R.D. 179 (1949); WRIGHT, *op. cit. supra* note 1 at 178. However, Glass, *Historical Aspects of Habeas Corpus*, 9 ST. JOHN'S REV. 55 (1935), argues that the origins of the writ may be found in Roman law.

3 Glass, *supra* note 2 at 57.

4 U.S. CONST. art I § 9.

5 Twardowski, *Habeas Corpus*, 9 VILL. L. REV. 168 (1963).

6 "In 1867, Congress was anticipating resistance to its Reconstruction measures and planning the implementation of the post-war constitutional Amendments. Debated and enacted at the very peak of the Radical Republicans' power, . . . the measure that became the Act of 1867 seems plainly to have been designed to furnish a method additional to and independent of direct Supreme Court review of state court decisions for the vindication of the new constitutional guarantees. . . . [A] remedy almost in the nature of a *removal* from the state to the federal courts of the state prisoners' constitutional contentions seems to have been envisaged." Fay v. Noia, 372 U.S. 391, 415 (1963).

liberty in violation of the constitution or of any treaty or law of the United States."[7] The substantive scope of the writ has not changed since 1867.[8] It was at first held that the writ would issue only when the *state* court lacked jurisdiction. Subsequently, however, the writ was held to issue when the *state* court convicted the prisoner in violation of his constitutional rights.[9] The writ's marked effect on the development of the common law and its use in modern times amply justify its designation as the "Great Writ."[10] Its protection is a major limit on arbitrary government and its existence is a hallmark of a free people.

II. COMPARISON OF THE WRIT OF HABEAS CORPUS AND TITLE 28 U.S.C. § 2255 PROCEEDINGS

Today the habeas corpus provisions governing the federal courts are contained in 28 U.S.C. §§ 2241-54. In 1948, for the prisoner "in custody under sentence of a court established by Act of Congress," 28 U.S.C. § 2255 provided a substitute remedy. Basically there are only three differences between § 2255 and habeas corpus proceedings: (1) under § 2255 the prisoner need not be called before the bench if it can be disposed of on the record while the very nature of the writ of habeas corpus requires a production of the body;[11] (2) under § 2255 the petition is filed in the jurisdiction wherein the sentence was passed while under habeas corpus the petition is filed at the place of incarceration; and (3) § 2255 was designed to supersede the basic habeas corpus remedy to the extent that it was an adequate vehicle to protect the rights previously protected by habeas corpus. Section 2255 provides that a federal prisoner shall not be given relief by a writ of habeas corpus unless it first appears that he has made a motion under § 2255 or that it appears that § 2255 provides an inadequate remedy.[12]

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[7] WRIGHT, *op. cit. supra* note 1 at 178. The appendix to Fay v. Noia, 372 U.S. at 441-43, contains the Judiciary Act of 1867 verbatim.

[8] WRIGHT, *op. cit. supra* note 1 at 178.

[9] Twardowski, *supra* note 5 at 169.

[10] *Ex parte* Bollman, 8 U.S. 75, 95 (1807); Fay v. Noia, 372 U.S. at 399.

[11] 28 U.S.C. § 2243 (1948); WITKIN, CALIFORNIA CRIMINAL PROCEDURE, 788 (1963). "An essential element of the remedy by habeas corpus is the power to compel the production of the body of the prisoner before the judge. It is this very feature which . . . give[s] the name to the writ. And while in certain cases courts have proceeded, generally by agreement of those concerned, without the actual production of the prisoner, this has always been because such production would be inconvenient, and the case was so shaped that the court was assured that its order would be effective in the absence of the prisoner." Nebraska Children's Home Soc. v. State, 57 Neb. 765, 767, 78 N.W. 267, 269 (1899).

[12] 28 U.S.C. § 2255 (1948): "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."

The impetus for the passage of § 2255 was that the courts in locales which housed federal prisons were being deluged by a constant stream of habeas petitions. In many cases the evidence necessary for the required hearings was almost inaccessible to the court. Thus § 2255 provided a remedy similar to habeas corpus. As was pointed out by the United States Supreme Court in the leading case of *United States v. Hayman*,[13] § 2255 was passed at the insistence of the Judicial Conference to meet the practical difficulties that had arisen in the administration of the habeas corpus jurisdiction of the federal courts. It was not intended to impinge upon a prisoner's right of collateral attack upon the conviction. Rather, the purpose was to minimize the difficulties encountered in habeas corpus hearings by providing the same rights in a more convenient forum.[14]

III. PROLIFERATION

The problem of proliferation of the writ of habeas corpus may be divided into three categories: (A) the increase of the number of writs filed because of the expansion of many portions of the Bill of Rights to apply to the states through the Due Process Clause of the Fourteenth Amendment; (B) the increase of the number of writs filed because of the change in procedural rules which were in the past used as a method to avoid hearing habeas petitions; and (C) the large number of successive writs which are filed by a single prisoner due to the fact that the doctrine of res judicata does not apply to habeas proceedings.

A. Expanded Substantive Basis for Allowance of the Writ

The general approach which the Supreme Court of the United States has taken with respect to the substantive content of the Due Process Clause of the Fourteenth Amendment was stated by Justice Moody in *Twining v. New Jersey*.[15]

> [I]t is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law. Few phrases of the law are so elusive of exact apprehension as this. Doubtless the difficulties of ascertaining its connotation have been increased in American jurisprudence, where it has been embodied in constitutions and put to new uses as a limit on legislative power. This court has always declined to

[13] 342 U.S. 205 (1952).
[14] Sanders v. United States, 373 U.S. 1 (1963); United States v. Morgan, 346 U.S. 502 (1954); Heflin v. United States, 358 U.S. 415 (1959); Martin v. United States; 273 F.2d 775 (10 Cir. 1960).
[15] 211 U.S. 78, 99-100 (1908).

> give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise.

Although this approach has been forcefully attacked by minority members of the Court, it is still today the governing approach for a determination of what is meant by due process of law.[16] The lack of precision engendered by this approach is evident from the holding in *Twining*. It was there held that the Fifth Amendment privilege against self-incrimination was not such a fundamental right as to be incorporated into the phrase, "due process." This holding was overruled in 1964 by *Malloy v. Hogan*.[17] The Supreme Court in 1963 once more broadened the scope of due process by holding the right to counsel in all felony cases, as guaranteed by the Sixth Amendment, applicable to the states.[18] In 1961 the federal exclusionary rule pertaining to the use of illegally seized evidence was held, in *Mapp v. Ohio*,[19] to apply to the states.

There is also considerable question whether these holdings are to be applied retroactively so as to allow a prisoner who was convicted in violation of these rights prior to the decisions mentioned above, to collaterally attack the convictions by means of a writ of habeas corpus. As the question was stated by one federal district court judge: "Until the Supreme Court itself clarifies the point, it is impossible for any other court or judge to be certain whether and to what extent the Supreme Court intended the decision in *Mapp v. Ohio* to be retrospective."[20] Nevertheless, whether applied retroactively or not, there are now more numerous grounds for a successful habeas corpus action available to the state prisoners. The number of writs cannot but increase as a result of these holdings.[21]

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16 Justices Black and Douglas have been in the forefront in criticizing this approach contending that Due Process in the Fourteenth Amendment was a total incorporation of the first eight Amendments. The highwater mark of this view was Adamson v. California, 332 U.S. 46 (1947), where four dissenting justices accepted the Black-Douglas approach.

17 378 U.S. 1 (1964).

18 Gideon v. Wainwright, 372 U.S. 335 (1963).

19 367 U.S. 643 (1961).

20 Hall v. Warden, 201 F. Supp. 639, 643 (D. Md. 1962). This case was overruled by the Circuit Court of Appeals in Hall v. Warden, 313 F.2d 483 (4th Cir. 1963) but the Circuit Court stated that they agreed with the quoted statement. Since there has been no Supreme Court decision as of January 1965, the question is still open.

21 Pope, *Suggestions for Lessening the Burden of Frivolous Applications*, 33 F.R.D. 363, 414 (1963). See generally FORKOSCH, CONSTITUTIONAL LAW 409-436 (1963).

B. Dissolution of Procedural Rules

Title 28 U.S.C. § 2254 provides:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, . . ."

Prior to 1963 this statute had been given conflicting interpretation by the lower federal courts. One line of cases had held that the failure of the applicant to exhaust all the state remedies available (*i.e.*, the state post conviction appellate proceedings and the exhaustion of all available state proceedings for the hearing of the federal question when petitioner brings the writ of habeas corpus) was jurisdictional and that such failure precluded a federal court from hearing the application.[22] The better reasoned cases indicated that the federal courts still maintained the power to hear the habeas petition but that in the interest of federalism they should defer a hearing until the state court had an opportunity to hear the question unless an extreme factual situation was presented.[23] In 1963, *Fay v. Noia*[24] presented the question once more to the Supreme Court. The Court concluded that the requirements of § 2254 were not jurisdictional. It was further held that the habeas petitioner had only to exhaust the remedies which were available to him at the time of the habeas application unless there could be gleaned from the state record a waiver of the right of resort to habeas. The facts of the case demonstrate the problem clearly. The petitioner, with two other defendants, had been convicted of second degree murder. The only evidence against all three was their confessions. It was contended that these confessions were obtained by coercion. The two co-defendants appealed and their convictions were reversed. They were never retried and at the time the petition came to the Supreme Court they were still free. Petitioner had declined to appeal after the conviction because of the risk of being convicted of first degree murder at a new trial, with a possible resultant death sentence. The court concluded that this type of Russian roulette could not in any sense of the word be considered a waiver (a knowing relinquishment of a right) of the right to resort to habeas.

Noia then went on to discard another procedural restriction. *Prior* to *Noia*, *Darr v. Buford*[25] had enunciated the rule that in order to

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22 Fouquette v. Bernard, 198 F.2d 860 (9th Cir. 1952); Hawk v. Jones, 160 F.2d 807 (8th Cir. 1947).

23 Brown v. Allen, 344 U.S. 443 (1953); Duffy v. Wells, 201 F.2d 503 (9th Cir. 1952); Marshall v. Snyder, 160 F.2d 351 (2nd Cir. 1947).

24 372 U.S. 391 (1963).

25 339 U.S. 200 (1950).

exhaust the state remedies that a petition for writ of certiorari must be filed in the Supreme Court of the United States after approval of the conviction in the highest state court. Although the petitioner had complied with this requirement in *Noia*, the court undertook to abolish this requirement, noting in the process that the wisdom of the rule had always been considered doubtful. Thus *Noia* granted to state prisoners the right of resort to federal courts with habeas petitions in every case where the petitioner had both exhausted his then available state remedies and an intentional refusal to use the state post conviction procedure could not clearly be gleaned from the record. Habeas became, in reality then, a post-conviction appeal without time limitation.

C. Applicability of Res Judicata

Today considerable abuse prevails in the use of the writ and proceedings pursuant thereto due to the fact that res judicata does not apply to habeas corpus and § 2255 proceedings.[26] If res judicata was held to apply, then a petitioner who had presented a prior petition on which judgment was rendered concerning the alleged unconstitutional detention by a court of competent jurisdiction would be barred from again relitigating the issues arising out of the same cause of action which had been or might have been litigated at the first hearing.[27] The federal courts have held, however, that in order to insure the prisoner his constitutional rights res judicata does not apply. State courts are in accord, absent modifying legislation, but because of the abuse resulting from such a rule there is a strong movement for its abandonment.[28] Prior to 1924 there had been no express holding by the Supreme Court on the question of the applicability of res judicata, although there were decisions which indicated inapplicability to be the rule.[29] In 1924, the Supreme Court, in *Salinger v. Loisel*,[30] stated that res judicata did not apply to habeas corpus. The reason for the inapplicability of the doctrine is

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[26] Sanders v. United States, 373 U.S. 1, 11 (a § 2255 proceeding); Fay v. Noia, 372 U.S. 391, 423 (a habeas corpus proceeding).

[27] RESTATEMENT, JUDGMENTS § 63 (1942). Note that if this section were to apply to a writ of habeas corpus then there would be raised the additional problem of determining whether the illegal detention as a whole or the particular defect alleged in the petition amounts to the cause of action. If the cause of action was held to be the illegal detention then the petitioner would be precluded from bringing any more petitions for his detention. If the cause of action was considered merely the thing alleged in the application then the petitioner would have the right to subsequent petitions provided they were based on facts different from those alleged in the prior petition.

[28] Rosenfeld, *The Application of Res Judicata to Habeas Corpus, Section 7.3(b) of the Proposed N.Y. Civil Practice Law*, 46 CORNELL L.Q. 483 (1961).

[29] Carter v. McClaughry, 183 U.S. 365, 378 (1902); *Ex parte* Spencer, 228 U.S. 652, 658 (1913).

[30] 265 U.S. 224 (1924).

perhaps best stated by the Supreme Court in the recent case of *Sanders v. United States*.[31]

> Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If 'government . . . [is] always [to] be accountable to the judiciary for man's imprisonment,' access to the courts on habeas must not be thus impeded. The inapplicability of *res judicata* to habeas, then, is inherent in the very rule and function of the writ.

Because res judicata does not apply to habeas corpus, Congress decided it was necessary to provide some means of limiting the number of petitions. This limitation is set forth in Title 28 U.S.C. § 2244 which provides:

> No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any state, if it appears that the legality of such detention has been determined by a judge or court of the United States or a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

A similar provision is found in 28 U.S.C. § 2255 which provides:

> "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

The Supreme Court of the United States was called upon in the *Sanders* case to determine whether the above quoted portion of § 2255 made the doctrine of res judicata applicable to § 2255 petitions. It was argued that the "similar relief" provisions of the § 2255 provision would allow the summary dismissal of a second or successive petition. The court held this not to be the case, and construed the section to be substantially the same as §2244 under which res judicata was held not to apply to habeas petitions.[32]

The wording of these sections, not being mandatory, allow broad discretion on the part of the judge in determining whether the petition is successive, and if so, whether it will further the ends of justice to hear the application. This broadness insures that a prisoner will not be deprived of his constitutional rights, even if he has had a hearing on the same grounds if he substantially (the record not showing otherwise) alleges new material facts. Thus, what is created is a statutory hybrid form of estoppel preventing relitigation

[31] 373 U.S. 1, 8.
[32] *Id.* at 12-15.

of the exact issue previously tried unless the ends of justice will be served thereby.

The strict doctrine of res judicata being inapplicable, a commonly encountered problem is abuse of the writ by persons confined in penal institutions. Such prisoners have been known to submit petition after petition, apparently solely to relieve the boredom of prison life.[33] The Court of Appeals for the District of Columbia noted the problem in *Dorsey v. Gill*:[34]

> [P]etitions for the writ are used not only as they should be to protect unfortunate persons against miscarriage of justice, but also as a device for harassing court, custodial and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1939 and April 1944, presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions, a third 24, a fourth 20. One hundred nineteen persons have presented 597 petitions—an average of 5.

Another example is found in the records of petitions filed in the Northern District of California. During the period from 1937 to 1947, 180 Alcatraz inmates filed 368 petitions, 117 inmates filing one petition each, the remaining 251 petitions being filed by 63 prisoners.[35] The effect of this practice is to needlessly crowd the dockets of the federal district courts.[36] It should also be noted that the majority of these petitions are in *forma pauperis* and in many cases virtually unintelligible.

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[33] Carter, *Pre-trial Suggestions for Section 2255 Cases Under 28 United States Code*, 32 F.R.D. 391 (1963).

[34] 148 F.2d 857, 862 (D.D.C. 1945), *Cert. denied* 375 U.S. 890 (1945).

[35] Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313 (1947). Alcatraz habeas corpus petitions filed from January 1, 1937 to June 15, 1947:

Numbers of Petitioners	Number of Petitions filed by each	Numbers of Petitions filed
1	16	16
1	15	15
1	14	14
1	9	9
2	7	14
5	6	30
9	5	45
6	4	24
10	3	30
27	2	54
117	1	117

[36] Judge Pope, of the 9th Circuit, when speaking of habeas corpus and § 2255 petitions states: "These petitions furnish the prime example of this sort of thing. [Frivolous appeals] In my own experience I have considered the necessity of dealing with the vast majority of these applications which are plainly frivolous, the most irritating and the most disagreeable task which I have been called upon to perform as a judge." Pope, *supra* note 21, at 409.

IV. Proliferation Totally Accentuated: The Final Blow

Prior to 1963, although numerous writs were filed in the district courts because of the developments described in part three of this note, the problem was not acute because the judges could, in memorandum decisions, dismiss the applications.[37] This procedure was severely curtailed by two late cases, *Townsend v. Sain*[38] and *Sanders vs. United States.*[39]

A prisoner incarcerated in a state prison could always allege such was done in violation of his constitutional rights and collaterally attack his conviction by a writ of habeas corpus in the federal courts after he had exhausted his state remedies. Since res judicata did not apply the federal district court was always at liberty to try the factual issues anew. The decisive question being when did the situation require a factual hearing. Justice Frankfurther, in a concurring opinion in *Brown v. Allen*,[40] undertook to provide guidelines which were regarded as authoritative for 10 years.[41] It was stated that there need be no evidentiary hearing at the district court unless there appeared to be some "vital flaw" in the process of ascertaining the facts in the state court. This guideline proved too elusive for consistent application by the district courts.[42]

In 1963, the question was again posed to itself by the Supreme Court in *Townsend v. Sain*. Because of the difficulties which had occurred after *Brown* in exercising the federal habeas corpus juris-

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37 See Brown v. Allen, 344 U.S. 443. A fine example of the procedure is Simpson v. Teets, 239 F.2d 890, 894 (9th Cir. 1956), wherein the court stated: "How then may we account for the trial court's action? The recital in the order that the California court 'has fully and adequately considered all matters presented to it by petitioner' is just not so, for the petition was denied the same day it was filed. . . . This is not the only case in which hearings have been refused upon issues of fact presented by such petition, or by petition under Title 28 § 2255. . . . I cannot help but think that this situation has some relation to the appalling volume of such applications which continue to flood the federal courts. In many instances the petitions have an air of incredibility. It is apparent that even if they were required to be verified by oath, the pains of perjury would be no deterrent to the filing of such petitions. The available statistics demonstrate that such skepticism is justified. . . . In short, with but rare exceptions, the applications were without merit. The prisoner who makes such an application has nothing to lose and everything to gain. The prisoner under sentence of death may gain time; other prisoners, at the very least, may gain a trip to the federal courtroom. But the filing of contrived petitions will not be discouraged by too critical a construction of petitions with summary denials thereof." See Lorensen, *The New Scope of Federal Habeas Corpus For State Prisoners,* 65 W. Vir. L. Rev. 253 (1963), wherein the author alludes to the procedure prior to *Townsend* and *Sain* as one where the district courts sloughed off writs of habeas corpus in gross. The district courts were seemingly as anxious as state attorneys to avoid pressing the writ to its fullest scope. *Townsend* has now brought an abrupt ending to such procedure.

38 372 U.S. 293.

39 373 U.S. 1.

40 344 U.S. 443.

41 Wright, *op. cit. supra* note 1 at 181.

42 *Id.* at 182.

diction, the Court ignored the judicially self-imposed rule that the only issue decided should be the particular question before them, and laid down broad general criteria for the district courts to follow in granting a habeas corpus evidentiary hearing to determine the substantive constitutional question involved. The Court held there must be such a hearing when:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.[43]

If there is a substantial allegation in the petition of an alleged constitutional violation which was not the subject of a full and adequate hearing in the state courts the federal district court must now hold evidentiary hearings to determine the question. These criteria make it clear that it is the duty of the federal judiciary to determine essentially whether the petitioner had a fair adjudication of his federal claim in the state courts. Such an adjudication includes the opportunity to be heard fully on the constitutional claim and to have the ultimate determination thereof supported by the record as a whole under the perseverance of constitutional principles. If the record of the state court proceeding fails to satisfy the federal court that the petitioner did in fact have such a hearing, he is entitled to an evidentiary hearing on his federal habeas claims in the federal courts.[44]

In *Sanders v. United States* the question as to when an evidentiary hearing would be required under § 2255 was presented. The court went off on a tack similar to *Townsend* and provided broad guidelines for the district courts to follow in granting evidentiary hearings under § 2255. Section 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or 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.

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[43] 372 U.S. at 313.

[44] Leonard, *Federal Habeas Corpus for State Prisoners*, 1 L. IN TRANS. Q. 1, 15 (1964).

> A motion for such relief may be made at any time.
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> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court *shall* cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. (Emphasis added)[45]

The Court held that the statute provided the grounds which determine when an evidentiary hearing was required. If there is a substantial allegation as to any of the grounds quoted in the first part of the statute the federal district court must grant an evidentiary hearing unless the "motion and the files and records" conclusively show that the petitioner is not entitled to relief.

Sanders also considered the question of successive petitions and the weight to be given prior adjudications on the question presented. The Court indicated:

> Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.[46]

Needless to say the provisions of *Townsend* and *Sanders* have produced a rash of evidentiary hearings in the federal district courts and now that these holdings are being combined with the expanded substantive base for habeas petitions the district courts are literally being swamped with petitions.[47] *How may the congestion caused by these rules be eased without violating the rights of those persons whose petitions have real merit and should be heard?*

V. SOLUTIONS

Since the problem has two aspects, that is, divided into (A) numerous original writs and (B) numerous successive writs by a single prisoner, the solution phase will suggest an approach to each area.

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[45] 28 U.S.C. § 2255 (1948).

[46] 373 U.S. 1 at 15.

[47] "There has been a tremendous increase in the number of petitions for habeas corpus filed in the federal courts in recent years, most of them unmeritorious, repetitious, or even frivolous, and this flood of petitions threatens to clog the wheels of these courts and to interfere with the efficient discharge of their work." Bodenheimer, *Symposium—Federal Habeas Corpus*, 9 UTAH L. REV. 38 (1964). See Gold, *Federal Habeas For State Prisoner—A New Look*, 25 OHIO ST. L.J. 60, 68 (1964); Desmond, *Federal Habeas Corpus Review of State Court Convictions—Proposals for Reform*, 9 UTAH L.R. 18 (1964).

A. Numerous Original Writs

The federal district courts are under no requirement to grant a mandatory evidentiary hearing where the record in the state hearing conclusively shows that the petitioner is entitled to no relief. As was statd in *Townsend*:

> Where the facts are in dispute, the federal court in habeas must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in the state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.[48]

As can be seen, if the state court reliably found on the issue the district court is under no duty to rehear the question. Generally where the state court does not give an adequate evidentiary hearing on the federal question it does so for one of two reasons: (1) The state procedure for hearing the federal question is not adequate[49] or (2) the natural and understandable reticence of state judges to reopen the question after the conviction and after the appellate pro-

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[48] 372 U.S. at 312.

[49] "Postconviction remedies in the state courts may not be available; they may be unduly narrow. Even if a postconviction remedy is available in the state courts through state habeas corpus or coram nobis and it is adequate to reach the kind of error which the Supreme Court regards as fundamentally constitutional, the record is frequently quite unclear." Freund, *Symposium—Federal Habeas Corpus*, 9 UTAH L. REV. 27 (1964). One procedure utilized to avoid hearing the federal question on its merits is the application of the doctrine of res judicata to a subsequent petition. As discussed previously the great weight of authority both in England and the United States refuses to apply res judicata to habeas petitions. Statutes modifying such a rule vary. Some apply the doctrine, while others deny it on the basis of a prior hearing; still others forbid subsequent application to judges of inferior jurisdictions after a previous application has been denied by a higher court. Rosenfeld, *supra* note 28 at 484.

Under California law the writ of habeas corpus will issue where any prisoner is "unlawfully imprisoned or restrained of his liberty." CAL. PEN. CODE § 1473. Generally it may be stated that the California writ may issue anytime a person is held in violation of his constitutional rights. WITKIN, CRIMINAL PROCEDURE 771 (1963). But the California courts have hedged the writ's issuance with procedural rules. (1) The petitioner must always seek the writ in a lower court first before an appellate court will issue the writ. (2) An appellate court will usually deny the writ where petitioner has failed to make a motion or otherwise raise his point in the trial court. (3) The writ may be denied where a remedy by appeal or otherwise was available and was not employed. (4) Also the problem of successive writs is handled by CAL. PEN. CODE § 1475 precluding the same court from issuing a writ which had done so previously whether or not the exact issue was raised. The petitioner must bring the petition in the next higher court. See generally WITKIN, *op. cit. supra* at 767-71. At any rate these procedural provisions allow the California judges ample opportunity to refuse to hear a federal question on the merits. See TEX. CRIM. PRO. § 135 (allowing state judge to refuse application if record shows it to be without merit); Cochran v. Kruger, 194 Pa. Super. 564, 169 A.2d 886 (1961); Moore v. Burnett, 109 S.E.2d 605 (Geo. 1959).

ceedings have been exhausted,[50] in spite of the fact that state judiciaries look on the federal habeas corpus jurisdiction with a certain amount of animosity. There is an affront to state sensibilities when a single federal judge can order discharge of a prisoner whose conviction has been affirmed by all the appellate machinery of a given state.[51]

It would appear that the solution might come from the states themselves or from Congress. Congress could, under the Supremacy Clause of the constitution,[52] pass legislation which would require the state courts to give evidentiary factual hearings on constitutional questions to the same extent that the federal courts are required to do such under § 2255 and habeas petitions. But this proffered solution would in all likelihood be looked upon by the states as unjustified federal "interference." The animosity over the federal habeas corpus jurisdiction would remain, but such a solution would require a hearing and the creation of a record on which the federal district court could base its ruling on the habeas petition. It is submitted that such a solution would do little to overcome the natural reticence of state court judges to reopen such questions. Any such statute which is, so to speak, "crammed down the throats" of the states would seemingly not be applied by state judges in the spirit without which it could properly be expected to obtain the desired result. In spite of its undesirability this solution is likely to follow, unless the states solve the problem themselves.

The federal habeas jurisdiction would be unnecessary in the vast majority of cases if the state courts granted a full and fair evidentiary hearing on the federal questions posed by habeas petitions. In those states where legislation is not broad enough to allow habeas corpus or similar relief to the same extent as § 2255, statutes should be passed allowing such. In those states where the legislation is broad enough but because of judicially engrafted procedural rules,

[50] "[N]ot all the [state] courts are . . . manned by persons who really place a very high value on seeing that justice is done in each individual case. Some people who are persuaded of the high social value of timely and expeditious law administration are willing to allow a little human wastage to be involved in the process. This is a question of values. The American Constitution is not against law enforcement, but it has placed a higher value on being sure that the individual is fairly treated. . . . I think it fair to say that many judges—a great many of whom, incidentally, have been drawn to the bench after careers as prosecuting officers—have a somewhat different equation in their minds and may therefore not be quite so penetrating in their study of individual cases as they should be. Freund, *supra* note 49 at 33. United States *ex rel.* Walker v. La Vallee, 224 F. Supp. 661, 663 (N.D. N.Y. 1963), "The reluctance of New York trial and appellate courts to review old situations is apparently unchanged."

[51] Wright, *op. cit. supra* note 1 at 185; *Federal Habeas Corpus Treatments of State Fact Findings: A Suggested Approach*, 76 Harv. L. Rev. 1253. 1254 (1963).

[52] See generally 16 AM. JUR. §§ 50-58 (2 ed. 1964).

by which a case may be refused a hearing, or because of the state judges' reticence to hear the question, full hearings are not given, the court created procedural rules should be discarded and the reluctance of state judiciaries to grant evidentiary hearings dissipated. The state determination would in the vast mass of habeas litigation be the final determination because the federal judiciary has no great fondness for the duty imposed on them by Title 28, U.S.C. §§ 2241-55.[53] Also under 28 U.S.C. § 2254 the petitioner must exhaust his state remedies before filing his petition in the federal courts. The federal judge could then look at the record of the hearing in the state court and determine from it that the petitioner is conclusively not entitled to relief. Thus it would be encumbent on the state judiciaries to explain carefully what was done and what was considered.[54] This procedure would insure that justifiable state sensitivities would not be encroached and yet the merits of the contention would be tried and a determination made in such a manner so as not to deprive the prisoner of his fundamental privilege of resort to the courts. It would seem that this solution would dispel a great deal of the friction between the federal and state judiciaries. Normally the most sensitive state officials are those who are continually arguing for state's rights. This procedure would seek to uphold the jurisdictional prerogative of the state courts and yet maintain an ultimate federal check for that rare state proceeding which is fundamentally lawless.[55]

B. Numerous Successive Writs

Since the writ of habeas corpus is most often used by prisoners to challenge some constitutional aspect of the criminal case in which they were convicted, it is often erroneously assumed that the habeas corpus proceeding is criminal in nature, *i.e.*, part of the appellate procedure following the criminal conviction. The writ of habeas corpus is, however, available to free a person from illegal restraint

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[53] *Supra*, note 36.

[54] Freund, *supra* note 49, at 34.

[55] Judge Desmond of New York has proposed as a solution to the problem that Congress pass legislation taking the habeas corpus jurisdiction over state prisoners away from the federal district court with the one ultimate check being the Supreme Court of the United States through the certiorari power. Judge Desmond proposes that Congress then pass detailed legislation, under the Supremacy Clause of the Constitution, which would in detail provide when the state courts should hear due process claims. Desmond, *Federal and State Habeas Corpus: How Two Parallel Judicial Lines Meet*, 49 A.B.A. J. 1166 (1963). This solution seems unworkable because the Supreme Court could not effectively oversee the project with its certiorari power due to the sheer number of cases. This criticism assumes that there is a need for the federal courts to oversee the state courts, a point not conceded by Judge Desmond. Furthermore Judge Desmond's solution presupposes that Congress could provide a detailed "due process" standard. It is submitted that the constitutional elasticity of the phrase would make this impossible.

of any kind,[56] and is a collateral attack on the judgment, challenging the fairness of the procedure or the jurisdiction of the court.

A criminal proceeding is defined as:

> One instituted . . . for the purpose either of preventing the commission of a crime or for fixing the guilt of a crime already committed and *punishing the offender*; as distinguished from a 'civil' proceeding, which is for the redress of a private injury.[57] (Emphasis added.)

Under this definition, the official to whom the writ is directed is not the offender, and an action of habeas corpus is not one designed to punish such official. Rather, the purpose of the writ is to gain the freedom of a prisoner who is held in violation of his constitutional rights,[58] and is the remedy which the law gives for the enforcement of the civil right to personal liberty.[59] Therefore, although the petition for the writ of habeas corpus is used most often to gain release from a criminal conviction it is not part of the criminal proceeding. As early as 1883 the United States Supreme Court in *Ex parte Tom Tong*[60] declared:

> Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process. Such a proceeding on his part is, in our opinion, a civil proceeding, notwithstanding his object is, by means of it to get released from custody under a criminal prosecution.

This was the first of a long line of cases so to hold.[61]

It is submitted that since habeas corpus proceedings are civil in nature the Federal Rules of Civil Procedure apply and a thorough use of the Rules would alleviate a great portion of the problem

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56 Nebraska Children's Home Soc. v. State, 57 Neb. 765, 78 N.W. 267.
57 BLACK, LAW DICTIONARY (4th ed. 1951).
58 KINUANE, ANGLO AMERICAN LAW (2d ed. 1952).
59 Dancy v. Owens, 126 Okl. 138, 258 Pac. 879 (1927).
60 108 U.S. 556, 559 (1883).
61 Farnsworth v. Montana, 129 U.S. 104 (1889); Gross v. Burke, 146 U.S. 82 (1892); Estep v. United States, 251 F.2d 579 (5th Cir. 1938); Dancy v. Owens, 126 Okl. 138, 258 Pac. 879. One such holding is that habeas corpus proceedings being civil in nature carries with it no right to counsel as would a criminal proceeding. Graeber v. Schneckloth, 241 F.2d 710 (9th Cir. 1957); United States *ex. rel.* Sholter v. Claudy, 203 F.2d 805 (3rd Cir. 1953); Collins v. Heinze, 217 F.2d 62 (9th Cir. 1954) *cert. denied* 349 U.S. 940 (1955); Application of Atchley, 169 F. Supp. 313 (N.D. Cal. 1958). But see recent suggestion that denial of counsel in habeas petition would be a denial of due process. Gold, *supra* note 49 at 65.

created by a single prisoner filing successive petitions for writs of habeas corpus or motions pursuant to § 2255. The idea of using the Federal Rules of Civil Procedure in habeas corpus and § 2255 proceedings is not novel. The Rules, it is submitted, are merely not being utilized to their full extent.

In *Schiebelhut v. United States*,[62] the United States Attorney propounded interrogatories to the petitioner who refused to answer except in open court under guidance of counsel. The court stated:

> The appellant cannot raise the question as to whether the interrogatories were properly submitted. This court has previously ruled that Section 2255 Title 28, U.S.C., is a civil action and as such is subject to Rules 33 and 37 (d), Federal Rules of Civil Procedure.[63]

Similarly, in *Estep v. United States*,[64] the court applied Rule 45 of the Federal Rules of Civil Procedure to a § 2255 petition, holding that there was no limit on the number of witnesses that could be subpoenaed to appear at the proceeding. Also, in *Bowdidge v. Lehman*,[65] the court held that the summary dismissal of a § 2255 petition was governed by Rule 56 of the Federal Rules of Civil Procedure.[66] It is therefore submitted that the Federal Rules of Civil Procedure govern habeas and § 2255 proceedings.

The only case found which is not in accord with this view is *Sullivan v. United States*[67] wherein the court stated:

> Just because some decisions referred to Sec. 2255 as a civil proceeding does not prevent further inquiry. To us the loose use of the phrase civil proceeding is an excellent illustration of the extent to which uncritical use of words bedevils the law. If this really was a civil proceeding we would suppose that all of the civil rules would be applicable including the rules encompassing the government's formal pre-trials, and the right to a jury, *ad infinitum.*

This conclusion is clearly in error. Proceedings to enforce civil rights are civil proceedings and proceedings for the punishment of crimes are criminal proceedings. The fact that the remedy is extraordinary is immaterial to the classification.[68] The court in the *Sullivan* case was concerned with "flagrant abuses" of § 2255 as evidenced by the frivolous petitions inspired by "jailhouse lawyers." These

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62 318 F.2d 785 (6th Cir. 1963), *cert. denied*, 361 U.S. 973 (1960).
63 *Id.* at 786.
64 251 F.2d 579 (5th Cir. 1958).
65 252 F.2d 366 (6th Cir. 1959).
66 28 U.S.C. Rule 56(b) (1948): "A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any parts thereof."
67 198 F. Supp. 624 (S.D.N.Y. 1961).
68 Dancy v. Owens, 127 Okl. 138, 258 Pac. 879; *Ex parte* Tom Tong, 108 U.S. 556.

abuses are the ones which may be most readily controlled by the appropriate use of the Federal Rules of Civil Procedure. However, the court overlooked the possibility of limiting these abuses through the use of the Rules. Furthermore the Rules themselves provide that they are applicable in habeas corpus appeals and to habeas hearings to the extent not elsewhere covered in the United States Code.[69] An examination of Title 28 U.S.C. §§ 2241 through 2255 reveals that the only code section dealing substantially with civil discovery procedures is § 2246. The section provides:

> On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

Cases interpreting § 2246 generally have been liberal and hold that the granting or refusal to grant motions to allow the taking of depositions or the serving of interrogatories is entirely discretionary with the court.[70]

In *Hunter vs. Thomas*[71] it was contended that Rule 81 (a) (2)[72] excluded the use of the Federal Rules of Civil Procedure in habeas corpus proceedings. The court held the Rules applicable to the extent not superseded by the United States Code and that there were no procedural provisions in the Code with respect to a new trial in habeas corpus proceedings, and since habeas corpus was a civil proceeding the provisions of Rule 59 therefore governed motions for a new trial. Thus the court concluded that the Federal Rules of Civil Procedure applied to habeas corpus proceedings in situations other than on appeal.

With the Rules applicable,[73] the solution to the problem of successive petitions would be to insure that each and every point which

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[69] 28 U.S.C. Rule 81. (a) (2) (1948): "In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and as heretofore conformed to the practice in actions at law or suits in equity; . . . *habeas corpus*. . . . The requirements of Title 28 U.S.C., Section 2253, relating to certification of probable cause in certain appeals in habeas corpus cases remain in force. (Emphasis added.)

[70] Chessman v. Teets, 239 F.2d 205 (9th Cir. 1956), vacated on other grounds in 354 U.S. 156; Loper v. Ellis, 263 F.2d 211 (5th Cir. 1959). *Cf* Sullivan v. United States, 198 F. Supp. 624 (1961).

[71] 173 F.2d 810 (10th Cir. 1949).

[72] *Supra*, note 69.

[73] An apparent application of rule 8 (a) can be seen in the case of ManGaoang v. Boyd, 186 F.2d 191 (9th Cir. 1950), wherein the court held that undenied allegations in a petition for habeas corpus are taken as true. *Accord* United States *ex rel.* Tillery v. Cavell, 294 F.2d 12 (3rd Cir. 1961), where the court applied Rule 60 (a) of the Federal Rules of Civil Procedure to the correction of a transcription error on appeal.

might constitute grounds for relief under either a habeas corpus or § 2255 petition is ruled upon in the first hearing. Through the use of depositions, requests for admission, interrogatories, affidavits and pre-trial, this solution is attainable. When an original petition is filed with the federal district court, the United States Attorney should determine by interrogatories or depositions, if the petition has any basis for relief with respect to each and every ground for which a hearing is required. This determination should be made in each and every case, whether or not the grounds are raised by the petitioner. A pre-trial hearing should be held and through the use of the discovery devices of the Rules a pre-trial order should be made containing all the actual contentions of the petitioner and listing as issues all grounds which through the discovery devices were ascertained to be possible grounds for relief under habeas corpus. The court should conduct a full hearing on these issues making findings of fact on all the issues raised, and on those issues where no proof is offered making findings of fact pursuant to rule 52 of the Federal Rules of Civil Procedure. Rule 52 provides:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58.

Under the provisions of Rule 56 the depositions, interrogatories, pre-trial order and findings could all be entered in a motion for summary judgment in case of a subsequent petition. This procedure would thus save the time and expense of a second full hearing, for no federal judge need entertain an application for a writ of habeas corpus if the legality of such detention has been fully determined and the judge is satisfied that the ends of justice will not be subverted by a refusal to have a hearing on the question.[74] The Supreme Court of the United States in the *Sanders* case apparently alludes to the possibility.

> The imaginative handling of a prisoner's first motion would in general do much to anticipate and avoid the problem of a hearing on a second or successive motion. The judge is not required to

[74] "Judge James Carter of the Southern District of California has put into effect a pre-trial rule operable as to Section 2255 applications. When the Judge determines that a hearing is necessary he appoints a lawyer for the prisoner and sends out a pre-trial notice listing all of the reasonable available grounds for collateral attack. A pre-trial hearing is held and on the basis of the hearing detailed findings of fact are made, finding pro or con on the issues presented and on which proof was offered and foreclosing further inquiry as to those on which no proof was offered. The utility of this approach is that it gives full use to pre-trial discovery methods including interrogatories addressed to the prisoner and requests for admission." Breintenstein, *Remarks on Recent Post Conviction Decisions*, 33 F.R.D. 363, 444 (1963). See also 32 F.R.D. 398 for the pre-trial stipulation and order; 32 F.R.D. 402 for Findings of Fact, Conclusions of law and judgment.

> limit his decision on the first motion to the grounds narrowly alleged. . . . He is free to adopt any appropriate means for inquiry into the legality of the prisoner's detention in order to ascertain all possible grounds upon which the prisoner might claim to be entitled to relief.[75]

V. CONCLUSION

In this day of literate prisoners there has, perhaps, been found within the doctrine of habeas corpus the seeds of its own destruction. If some methods cannot be found to curb the abuses to which the writ of habeas corpus has been put, corrective legislation might well follow, so restrictive as to nullify the writ's primary purpose which is to keep government accountable to the judiciary for man's imprisonment. The proposed solutions to the problems here presented would work in a manner so as not to deprive any person of his fundamental right to habeas corpus. They would also dispose of habeas and § 2255 petitions in the sound discretion of the court, and consequently would save the time and expense of another full evidentiary hearing in the federal courts.

David Pitkin
Ray Shollenbarger

[75] 373 U.S. 1, 22.