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Title 28, Section 2255 of the United States Code--Motion to Vacate, Set Aside or Correct Sentence: Effective or Ineffective Aid to a Federal Prisoner

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TITLE 28, SECTION 2255 OF THE UNITED STATES CODE—
MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE:
EFFECTIVE OR INEFFECTIVE AID TO A FEDERAL PRISONER? t

George P. Smith, II*

With the revision of the Judicial Code in 1948, and more particularly the enactment of Section 2255, Congress sought to give prisoners—held in custody under sentence of any federal court—a right to move the sentencing court either to vacate, set aside or correct a sentence which was subject to collateral attack. t Since the motion is to be made before one seeks a petition

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t The author wishes to express his grateful appreciation to Professor Lester B. Orfield of the Indiana University School of Law for his valuable suggestions and criticisms of the original draft of this article.

* B.S. 1961, J.D. 1964, Indiana University. Teaching Associate, Indiana University School of Law.


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.

A motion for such relief may be made at any time.

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

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

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

An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

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. (June 25, 1948, c. 646, § 1, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105).

Revisory committee note.—This section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis. It provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus. It has the approval of the Judicial Conference of the United States. Its principal provisions were incorporated in H.R. 4233, 79th Congress. H.R. Rep. No. 308, 80th Congress.

The 1949 amendment, in the first paragraph of the section, substituted the words, "court established by Act of Congress" for "Court of the United States." c. 139, § 114, 63 Stat. 105.
for writ of habeas corpus, it thereby serves to restrict the very issuance of the petition. The moving party must clearly show that the motion itself is "inadequate or ineffective" before any action will be taken on a habeas corpus petition. A labyrinth of technical problems, however, still confronts a prisoner who seeks to apply this section and consequently gain his freedom. Foremost among these problems confronting not only the prisoner, but the court as well, is the central question of when a prisoner may seek to exercise the right given to him under the section. Inextricably related to this, is the further mixed consideration of whether such a prisoner should be allowed to proceed with the aid of counsel and in forma pauperis, even though he has not exhausted his state remedies and is no longer in custody and also is barred from direct action by the rule of res adjudicata. Broadly generalized, and at times inconsistent, judicial policies in this particular area of appellate jurisdiction also impede the efficient pursuit and administration of the motion and cause unnecessary litigation. The logic of the words of the section, while it should yield to the logic of realities, oftentimes does not.\(^2\)

The four major ways in which progress can be made in overcoming many of the obstacles arising as a result of the section's administration may be listed as: widespread adoption of Rule 23 and the accompanying forms recently promulgated by the United States District Court for the Northern District of Illinois, which are easily understood by the moving party and enable the court in turn to ascertain quickly if a proper cause under the section is warranted; more extensive use of the discovery techniques authorized under the Federal Rules of Civil Procedure, with particular emphasis on utilization of the pre-trial conference; the passage and acceptance of the new proposed revisions to the Federal Rules of Criminal Procedure, which would in fact allow the court to perform a type of investigatory function before accepting a plea of guilty; and a basic re-evaluation of all the pitfalls of the section by the federal courts.

The aim of this article, then, will be to assay the above problem area and consider the validity and purpose of the remedies offered. But, before doing this, it is most important to consider the historical beginnings of the writs of habeas corpus and error coram nobis, for these two writs laid the groundwork upon which Section 2255 was built.

I. **THE HISTORICAL EVOLUTION OF SECTION 2255**

Despite the fact that habeas corpus, "the great common law writ of liberty,"\(^3\) is thought by some legal historians to have originally been used not to get people out of prison but rather to put them in it,\(^4\) its exact origin remains obscure and unsettled.\(^5\) Nevertheless, it is generally conceded that most of the

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\(^3\) Ex parte Kelly, 123 N.J. Eq. 489, 198 Atl. 203, 207 (1938); Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313 (1948).


very early writs of habeas corpus had but a single purpose—namely, to bring or "deliver up" a desired party before a court of law.\(^6\) Definite progress was made by Parliament in defining with specificity the formalistic limits of the writ when it passed the famous Habeas Corpus Act of 1679.\(^7\) But, exactly when the writ ceased being but a mere command "to deliver" and instead became a command "to deliver with cause" no one can rightly say. This transformation is, however, taken to be the most significant step in the historical growth and development of habeas corpus as the very bulwark of individual liberty.\(^8\)

Since the United States Constitution did not grant to the federal courts the authority to issue the writ of habeas corpus, the requisite jurisdiction could only be conferred upon the courts by Congress.\(^9\) With the Judiciary Act of 1789, the lower federal courts were given the necessary power to issue the writ.\(^10\) In 1867, Congress sought to effect a change in the English common law rule by extending the protection of the writ to "all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty


It is interesting to note that as early as 48 Ed. III, traces of the writ of habeas corpus may be found.

See Cohen, Habeas Corpus Cum Causa—The Emergence of the Modern Writ, 18 Can. B. Rev. 11 (1940); Collings, Habeas Corpus for Convicts—Constitutional Right or Legislative Grace? 40 Calif. L. Rev. 335 (1952); Longsdorf, Habeas Corpus—A Protean Writ and Remedy, 10 Ohio St. L. J. 301 (1949); Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171 (1949); and United States v. Hayman, 342 U.S. 205 (1952), for detailed considerations of the historical background of habeas corpus.


The King's courts used this writ for several centuries as an offensive weapon in their continuous battle to ensure permanent control of the lower courts. It is generally thought that not until the reign of Henry VII, however, was the original underlying purpose of the writ of habeas corpus fulfilled when it was first used against the Crown in an attempt to restrain arbitrary imprisonments which the Crown was making in alarming numbers. 2 Hallam, History of the Middle Ages 310 (2d ed. 1862).

By the middle of the fifteenth century, the Writ of Privilege was held to be co-extensive with the Writ of Habeas Corpus. Thus, the clergy, members of Parliament, ministers of the King, as well as the superior court officers, were the chief groups that availed themselves of the writ's protection. 2 Coke, Institutes 3, 4, 150, 212; 4 Coke, Institutes 24, 25, 363.

7 The Act codified the common law and stated that a criminal who was convicted by a court of competent jurisdiction could not obtain a review of his conviction by using the writ of habeas corpus because if the sentencing court had general criminal jurisdiction, this was in itself conclusive proof of the legality of confinement. The Act went still further and provided an absolute guarantee for the use of proper legal processes in reviewing the application for the writ when and if made by the petitioner. Yet, the Act did not provide for a review of the fairness of the application. Instead, it applied only when one was imprisoned on a criminal charge. United States v. Hayman, 342 U.S. 205 (1952); Jenks, The Story of Habeas Corpus, 18 L.Q. Rev. 64 (1902).

Stephen, History of the Criminal Law in England 243 (1883) noted that the Act of 1679 was "as ill drawn as it is celebrated."

8 Cohen, Habeas Corpus Cum Causa—The Emergence of the Modern Writ, 18 Can. B. Rev. 11 (1940).

9 Ex parte Bollman, 4 U.S. 75 (1807); Collings, Habeas Corpus for Convicts—Constitutional Right or Legislative Grace? 40 Calif. L. Rev. 335, 347-48 (1952).

10 The Judiciary Act of 1789 expressly provided: "[A]ll the before mentioned courts of the United States, shall have power to issue writs . . . of habeas corpus . . . and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law. . . ."
or law of the United States." Adequate provision was further made for inquiry into the facts surrounding a petitioner's detention. By 1915, the courts had held that where a petitioner alleged he was convicted by virtue of an unconstitutional statute or even a city ordinance, and was convicted twice for the same offense, they would proceed to examine the complete record. If need be, they would even look beyond the record. This would be done, however, only where the additional evidence would not tend to contradict the record itself.

With the case of *Walker v. Johnson*, the Court openly promoted an uncontrolled use of writs of habeas corpus by federal prisoners. Essentially, the decision was that when a federal court undertakes the process of determining whether to issue the writ, it must consider all allegations set out in the petitioner's brief as true. This presumption of truth was to be made regardless of how the allegations might "tax credulity" except to the extent that, in the judgment of the court, they conflicted with the records before it. Not until 1948, with the passage of Section 2255 of the Judicial Code, was a concerted effort made to curb the flagrant abuse of habeas corpus writs.

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As early as 1830 in the case of *Ex parte Watkins*, 28 U.S. 193, 202, Mr. Chief Justice Marshall said:

> This writ is, as has been said, in the nature of a writ of error, which brings up the body of the prisoner, with the cause of commitment. The court can undoubtedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction . . . is not that judgment in itself sufficient cause? Can the court, upon this writ, look beyond the judgment, and re-examine the charges on which it was rendered? A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case.


In 1873, the Supreme Court read into the Act of 1789 the procedural change in the Act of 1867, and accordingly used certiorari to bring before it the record of a trial court in habeas corpus proceedings which involved a petitioner under sentence. Collings, *supra* note 5, at 352; *Ex parte Lange*, 85 U.S. 163 (1873).


14 312 U.S. 275 (1941).

15 See 33 *F.R.D.* 363, 409 (1963) for a symposium entitled, "Applications for Writs of Habeas Corpus and Post Convictions Review of Sentences in the United States Courts"; Sofaer, *Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N.Y.U.L.R. 78 (1964); Desmond, *Federal and State Habeas Corpus: How to Make Two Parallel Judicial Lines Meet*, 49 A.B.A. 1166 (1963); Comment, *Exhaustion of State Remedies Before Bringing Federal Habeas Corpus: A Reappraisal of U.S. Code Section 2254*, 45 Neb. L. Rev. 120 (1964). In *Use and Abuse of the Writ of Habeas Corpus*, 7 *F.R.D.* 313, 1948, Judge L. E. Goodman points out the prominent problems which the Northern District of California had with the Alcatraz penitentiary inmates abusing their right to petition for habeas corpus before passage of Section 2255. The Judge notes that prison officials, instead of discouraging the flow of groundless petitions, actually encouraged the prisoners to keep themselves "occupied" by harassing the courts with countless writs of habeas corpus. The "penitentiary racket" was justified on the grounds that by keeping the prison inmates "occupied," they were less apt to devote themselves to more mischievous pursuits.

Mr. Justice Jackson, in his dissent in *Price v. Johnston*, 334 U.S. 266, 296-97 (1948) correctly assessed the area when he said:

> Confinement is neither enjoyable nor profitable. And it is safe to assume that it neither gives rise to new scruples nor magnifies old ones which would handicap petitioner's preparation of one habeas corpus application after another. . . . The number of times the government must retry the case depends only on the prisoner's ingenuity, industry and imagination.

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Section 2255 of the Judicial Code allows the federal courts to disregard a petition for writ of habeas corpus unless the motion to vacate procedure under the section is "inadequate or ineffective" to test the validity of the petitioner's allegations can run the gamut of all those perpetuated in the pages of the United States Reports.

Habeas Corpus Cases and Motions to Vacate Sentence [2255]
Filed in 86 United States District Courts,
Fiscal Years 1941 to 1959.**

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**Annual Report, Director of the Administrative Office of the United States Courts, September 1959, p. II-34.

At present, the following objections may be raised through a writ of habeas corpus by a federal prisoner in his efforts to attack a conviction:
1. That the Court lacked jurisdiction of the offense.
2. That the Court lacked jurisdiction of the person of the defendant.
3. That the statute pursuant to which the defendant was prosecuted is unconstitutional.
4. That the indictment attempted to charge an offense unknown to or not cognizable under any Act of Congress. This consideration is to be distinguished from the question whether the allegations of the indictment are sufficient.
5. In the event a defendant was prosecuted by information, that he was entitled to prosecution by indictment.
6. If defendant was tried without a jury, that he was entitled to a trial by jury and had not waived that right.
7. That he was not accorded the right of counsel under the Sixth Amendment and had not waived that right. Included in this objection may be an assertion that the defendant had not been apprised of his rights and was not aware that the court would appoint counsel for him if he was indigent and unable to retain counsel.
8. That he had been induced to plead guilty either by misrepresentation, or by threats or coercion exercised either by the prosecuting attorney, or by the arresting officers.
9. That he was mentally incompetent, either by reason of insanity or by virtue of the fact that he was under the influence of drugs, when he pleaded guilty or during the trial.
10. That he had been convicted on the basis of perjured evidence. There seems to be some difference of opinion by the authorities on the question whether this objection is available only if the prosecuting authorities were aware of the perjury but nevertheless deliberately introduced the false testimony.
11. That the trial court was under the domination of a mob or influenced by the threat of imminent mob violence, with the result that the trial was but a sham and a mockery.
12. That generally the proceedings at the trial were so grossly lacking in
confine them. Since most petitions for habeas corpus are brought before the motion to vacate or set aside is ever heard, they are summarily dismissed and the prisoner is directed to first seek relief by motion. Many of the courts, in

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The current or majority view, as set forth in Rubenstein v. United States, 227 F.2d 638 (10th Cir. 1955), cert. denied, 350 U.S. 993 (1956), and United States ex rel. Lequillou v. Davis, 212 F.2d 681 (3d Cir. 1954), is that Section 2255 is a substitute for the writ of habeas corpus and normally superseded it. Thus, this section, so some authorities hold, is the
MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE

fact, are exercising wide judicial discretion in deciding whether to issue a writ of habeas corpus by giving controlling weight to a prior refusal to grant the writ even though res adjudicata is not a ground for refusing habeas corpus.\textsuperscript{18}

All things considered, a prisoner would stand a far better chance of obtaining the desired relief from the courts if he pursued the writ of habeas corpus alone, rather than being encumbered with the motion under Section 2255. This is so primarily because the courts, being required to issue the writ "forthwith" and the hearings being commenced within five days, are enabled to far surpass the long, drawn-out and, at times, arduous requirements of the motion to vacate procedure and thus render justice in a speedy and efficient manner.\textsuperscript{19}

\textsuperscript{18} Exclusive remedy for federal prisoners where the issues controverted are those which normally have been within the reach of habeas corpus. It would appear, then, that Section 2255 is not normally the one exclusive remedy but is always the exclusive remedy for federal prisoners who claim the right to be released because of a jurisdictional or constitutional trial defect. See \textit{Note, Section 2255 of the Judicial Code: The Threatened Demise of Habeas Corpus}, 59 \textit{Yale L.J.} 1183 (1950); \textit{Note, Procedural Substitute for Habeas Corpus: A Critical Analysis and Comparison}, 34 \textit{St. John's L. Rev.} 81, 91 (1959); \textit{Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners}, 76 \textit{Harv. L. Rev.} 441 (1963).

\textsuperscript{19} In Barrett v. Hunter, 180 F.2d 510, 514-15 (10th Cir. 1950), \textit{cert. denied}, 340 U.S. 897 (1950), however, the Court held that it did not have unlimited discretion to refuse to entertain a second motion to vacate under Section 2255. Instead, it stated that the motion to vacate should be so disposed of "... in the exercise of sound judicial discretion, guided and controlled by a consideration of whatever has a rational bearing on the propriety of the relief sought. ..." Yet, "if the second or successive motion sets up new or dissimilar grounds for relief which are within the purview of the grounds enumerated in the third paragraph of 2255, and the motion and the records and files in the case do not conclusively show that the prisoner is entitled to no relief, the court will ordinarily entertain such second or successive motion." Generally, this rule is followed. \textit{Annot., 20 A.L.R. 2d 976, 996 (1951)}.

So, while it has been declared that res adjudicata is pertinent to Section 2255 proceedings, the reasons for dismissing a second or successive motion have generally been the same as those justifying a dismissal of successive habeas corpus applications. \textit{Lipscomb v. United States}, 265 U.S. 239 (1924); \textit{Salinger v. Loisel}, 265 U.S. 224 (1924).

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It would thus appear that, if a second motion is based upon the same legal and factual grounds as the first, a court is entirely free to dismiss it. \textit{Ray v. United States}, 295 F.2d 416 (10th Cir. 1961), per curiam, \textit{cert. denied}, 369 U.S. 875 (1962); in \textit{Sanders v. United States}, 373 U.S. 1 (1963), the high court reiterated its position in this area by declaring that a judge was only permitted — not compelled in any way whatsoever — to decline to entertain successive applications on which hearings could properly be denied on the basis that the grounds asserted were previously heard. The judge was only to act as such if he were satisfied that justice would not be met by reconsidering the merits.

Some courts have held that the judicial discretion to dismiss extends to any successive motion regardless of whether it presents new grounds, either factual, legal, or both, since the prisoner is seeking the same relief — namely, vacation of his sentence. \textit{Note, 111 U. Pa. L. Rev.} 788, 802 (1963). But, where a second motion presents new grounds, yet is not entertained, the question then arises whether the remedy is "inadequate or ineffective." \textit{Orfield, New Trial in Federal Criminal Cases}, 2 \textit{Vill. L. Rev.} 293, 358 (1957).

It is well to remember that 28 U.S.C. § 2255, passed in 1948, unequivocally states that a writ of habeas corpus will not issue unless an applicant shall have first of all exhausted all the remedies available to him under the law of his state.

The Circuit Court of Appeals for the Seventh Circuit speaking in \textit{Potter v. Dowd}, 146 F.2d 244 (1944) held that the writ of habeas corpus should be granted even though the petition on the first appeal was denied on the ground of res adjudicata. But this split decision on the court apparently reversed its prior stand requiring exhaustion of state habeas corpus procedure. \textit{Note, Procedural Due Process in Criminal Cases}, 47 \textit{Mich. L. Rev.} 71, 79 (1948); \textit{Marino v. Ragen}, 332 U.S. 561, 563-64 (1947), is in accord on basic principles.

In \textit{Townsend v. Sain}, 372 U.S. 293, 312-13 (1963), Chief Justice Warren held that:
Coram Nobis

The common law writ of error coram nobis issued from the Chancery Court to the Court of the King's Bench after judgment in that court, ordering the judges then assembled to examine the official record for error of fact.20 Since the remedy naturally tended to threaten, if not indeed loosen, the absolute finality of the Court's decision, the writ developed quite slowly.21

While the federal courts recognized at an early date the propriety and

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"Where the facts are in dispute, the federal court on habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a 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." Going on to particularize the situation, Justice Warren noted: "...[W]e hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: (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."


21 Note, The Writ of Error Coram Nobis, 37 Harv. L. Rev. 744 (1924). The correction of mere clerical errors, coveture, death, and the appearance of an infant or an insane person without an attorney or guardian, were the common historical grounds for the issuance of coram nobis. This writ was available not only in civil cases, but in criminal cases as well, and could be brought any time after judgment. King v. Jones, 2 Ld. Raym. 1525, 92 K.B. 489 (1727); Meggott v. Broughton, Cro. Eliz. 106, 78 K.B. 364 (1568); Dawkes v. Payton, St. 216, 218, 82 K.B. 657 (1650).


At common law, the writs of error coram nobis were severely limited in scope and were allowed to bring to the attention of the court errors of fact affecting the validity and regularity of the proceedings, but which were not in issue at the trial, and which if known at the time, would have prevented the judgment. Orfield, Criminal Procedure from Arrest to Appeal 501 (1947).

Modernly, the writ of error coram nobis may be thought of as a writ applied for at subsequent terms of the same court and before the same judge who gave the original judgment. The writ in substance, then, petitions the court to revoke the judgment for errors of fact not apparent on the record not negligently withheld from the court by the applicant. Orfield, The Writ of Error Coram Nobis in Civil Practice, 20 Va. L. Rev. 423 (1934).


In the federal courts, coram nobis has been used— as has habeas corpus— primarily to attack convictions in violation of either jurisdictional or constitutional guarantees. Note, Federal Courts— Common Law Coram Nobis Not Superseded by Enactment of New Motion Procedure for Vacating Convictions, 66 Harv. L. Rev. 1137 (1953).
usefulness of coram nobis in civil cases, subsequent recognition of the writ's value in criminal cases was delayed. 22

Due to the Revisor's note to Section 2255 of the Judicial Code which stated that the section "restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis," 23 it was commonly thought that Section 2255 was in fact a substitute for the ancient writ of error coram nobis. 24 But, in the 1954 Supreme Court decision of United States v. Morgan, 25 it was held that Section 2255 did not in fact preclude use of the writ of coram nobis in the federal courts. 26

To reiterate, Section 2255 was passed not with the idea of enlarging the class of remedies already available to attack a conviction, but rather to provide that a proper attack upon an original conviction be made in the sentencing


The first case holding that coram nobis was available in criminal cases was United States v. Steese, 144 F.2d 439 (3d Cir. 1944). Six Circuits had either actually ruled or strongly indicated, by 1948, that criminal defendants could effectively avail themselves of the writ of common law coram nobis. Allen v. United States, 162 F.2d 193 (6th Cir. 1947); Roberts v. United States, 158 F.2d 150 (4th Cir. 1946); Garrison v. United States, 154 F.2d 106 (5th Cir. 1946); United States v. Steese, 144 F.2d 439 (3d Cir. 1944); Tinkoff v. United States, 129 F.2d 21, 23 (7th Cir. 1942); Robinson v. Johnston, 118 F.2d 998, 1000 (9th Cir. 1941). Note, Writ of Error Coram Nobis Allowed in Federal Court to Attack State Prisoner's Prior Federal Conviction, 53 Colum. L. Rev. 737 (1953).

It would seem that the willingness of the courts to recognize the writ of error coram nobis in the criminal process was in large response to several Supreme Court decisions that greatly enlarged the grounds on which an imprisoned defendant could attack the constitutional basis of his detention. Carter v. Illinois, 329 U.S. 173 (1946); Betts v. Brady, 316 U.S. 455 (1942); Powell v. Alabama, 287 U.S. 45 (1932).

23 See supra note 1.


One of the most important results of the Morgan case, supra note 25, is that even after a prisoner completes his term of confinement, he may still have the means of obtaining judicial relief from an invalid conviction. Accord, United States v. Roth, 283 F.2d 765 (2nd Cir. 1960).

The current Indiana position on the writ of error coram nobis is most interesting. The Supreme Court of the State held, in Barker v. State, 191 N.E. 2d 9 (Ind. 1963), that the equitable doctrine of "laches" would prevent the writ from issuing. The court went on to note that only one petition for error coram nobis could be presented to a court. Burns Ind. Ann. Stat. § 9-3302; Etheridge v. State, 240 Ind. 384, 164 N.E. 2d 642 (1960); 17 I.L.E. Judgments, § 380, (Burns 1956 Rep.).

While Stephenson v. State, 205 Ind. 141, 186 N.E. 293 (1933), pointed out the rule that in criminal cases the writ of error coram nobis will not lie where there are other adequate remedies such as motion to vacate judgment, new trial, or appeal available to the petitioner, and the subsequent case of Caram v. State, 208 Ind. 297, 196 N.E. 78 (1935), went on to hold that the trial court had absolute discretion to hold a hearing to rule on the merits of issuing the writ without calling the prisoner forth, Rule 2-40 of the Indiana Supreme Court would drastically change the whole picture in this area. The first paragraph of the new rule states: "Hereafter, no court shall have jurisdiction to entertain any action for a writ of error coram nobis in any criminal case, but the remedy heretofore granted in such a proceeding shall hereafter be obtained solely through a motion for a new trial in the case out of which the cause therefore is alleged to have originated. Each ground shall be separately specified in the motion for a new trial and any ground or error not so specified shall be considered waived...." Res Gestae 7, 8 (Sept. 1963).

See Note, Habeas Corpus and Coram Nobis in Indiana, 26 Ind. L. J. 529 (1951).
court and not in some other court through use of the writ of habeas corpus.\footnote{27} Resort to habeas corpus is thus allowed only when the remedy by motion is "inadequate or ineffective."\footnote{28}

While the form of the attack is direct, the grounds for initiating the action to vacate or set aside are limited to matters which may only be raised by a collateral attack.\footnote{29} Hence, the central design of the section — to relieve the federal district courts where federal prisons are located of the heavy burden of passing on unrestricted habeas corpus applications — is sought to be effectuated.\footnote{30}

II. Section 2255: Effective or Ineffective Aid to a Federal Prisoner?

When relief is denied under the motion to vacate or set aside, this does not necessarily imply that the motion itself is inadequate or ineffective. In \textit{Jones v. Squier},\footnote{31} both the motion to vacate and the petition for writ of habeas corpus had been passed on and subsequently denied. On appeal from the denial of the writ, the court held that it was not conclusively shown that the motion provided by Section 2255 was inadequate or ineffective to test the legality of the prisoner's detention. The court further noted that at the time of the Constitution's adoption, the writ was limited to examination of the face of the record solely for determining proper jurisdiction. Just as Congress had later proceeded to enact remedies "in addition" to those previously available and thereby to expand the writ, so Congress could later restrict the use of the writ by Section 2255 without violating a prisoner's constitutional rights.\footnote{32} With the case of


\footnote{28} \textit{Birch v. United States, 173 F.2d 316 (4th Cir. 1949) (per curiam), cert. denied, 337 U.S. 944 (1949); United States v. Myers, 84 F. Supp. 766 (D.D.C. 1949), aff'd, 181 F.2d 802 (D.C. Cir. 1950)}.

\footnote{29} \textit{Kreuter v. United States, 201 F.2d 33 (10th Cir. 1953)}.

The motion embodied in § 2255 is used, then, not to review the proceedings of the trial as would be done upon appeal or writ of error. Instead, it is used only to test their validity when judged upon the face of the record or by principles of constitutional law. \textit{Hurst v. United States, 177 F.2d 894 (10th Cir. 1949); Kinney v. United States, 177 F.2d 895 (10th Cir. 1949)}.

\footnote{30} \textit{United States v. Hayman, 342 U.S. 205 (1952); Orfield, \textit{New Trial in Federal Criminal Cases, 2 Vill. L. Rev. 293, 357 (1957)}; See supra note 1}.

Even though § 2255 was not intended to restrict the prisoner's right of collateral attack, the following changes, to recapitulate, have nonetheless resulted:

1. The petitioner must now make his motion to the sentencing court rather than applying to the district court of confinement.
2. Petitioner's presence is no longer required at the hearing.
3. Res judicata is now apparently applicable to successive motions.
4. Petitioner is assured of a "prompt" hearing rather than having a definite time guarantee placed on the hearing.
5. Petitioner's right to proceed by habeas corpus is abolished under the section unless the motion encompassed thereunder is "inadequate or ineffective."


In \textit{Pelly v. United States, 214 F.2d 597 (7th Cir. 1954)}, the purpose of Section 2255 was listed as merely a means of giving a prisoner a proper method for a direct attack on his sentence in the court where he was tried and sentenced. A motion to vacate sentence is, after all, but an independent civil action. \textit{Schiebelhut v. United States, 318 F.2d 785 (6th Cir. 1963)}.

\footnote{31} 195 F.2d 179 (9th Cir. 1952).

Close v. United States, the court stated that it was no more unreasonable for Congress to require exhaustion of remedies by the Section 2255 motion before resort to habeas corpus than it was to require a petitioner to exhaust his state remedies before seeking federal habeas corpus. The word "exhaust" is a most unfortunate one — particularly since Section 2255 does not speak of an exhaustion of remedies. The court's main function is but to determine whether the remedy is "inadequate or ineffective," with the problem of remedy exhaustion, as such, being relatively unimportant.

In United States v. Bradford, and in United States v. Lavelle, it was stated that after a federal prison sentence is completed by the moving party, the federal courts have no power and jurisdiction to vacate the sentence. This is so merely because the party, once he completes his sentence, is no longer "in custody" of the federal authorities. The Court, speaking in Pollard v. United States, however, held that a proceeding brought under Section 2255 was not rendered moot by the expiration of the term of the sentence. The fact that the petitioner was, at the time of the hearing, unconditionally at large had no bear-

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33 198 F.2d 144 (4th Cir. 1952), cert. denied, 344 U.S. 879 (1952).
Since habeas corpus is not a "writ of course" but rather a "writ of right" when reasonable cause is shown for its issuance, one district court has held that it is not in violation of the Constitution to limit the right of the sentencing court unless the remedy there proves inadequate or ineffective. Barrett v. Hunter, 180 F.2d 510 (10th Cir. 1950), cert. denied, 340 U.S. 897 (1950).
The Constitutional validity of § 2255 has been generally upheld by the courts. United States v. Anselmi, 207 F.2d 312 (3d Cir. 1953); Close v. United States, 198 F.2d 144 (4th Cir. 1952), cert. denied, 344 U.S. 879 (1952); Barrett v. Hunter, 180 F.2d 510 (10th Cir. 1950), cert. denied, 340 U.S. 897 (1950); Martin v. Hiatt, 174 F.2d 350 (5th Cir. 1949).

35 194 F.2d 197 (2d Cir. 1952).
36 194 F.2d 202 (2d Cir. 1952).
37 United States v. Forlano, 319 F.2d 617 (2d Cir. 1963), held that application for writ of error coram nobis was the proper manner of attacking the constitutionality of a conviction where the sentence had been completely served.

Even though it is specifically stated in § 2255 that the motion to vacate "may be made at any time," no hard and fast rules have been formulated in determining whether to entertain or refuse a motion on the basis of its application within appropriate time limits. The courts have declined to make rigid rules of procedure in deciding if the motion is timely. See United States v. Ray, 183 F. Supp. 769 (D. Md. 1960), where eighteen years was too long a period to have waited; United States v. Witherspoon, 167 F. Supp. 297 (D. Md. 1958), where a delay of eight years was fatal; and Keto v. United States, 189 F.2d 247 (8th Cir. 1951), where only three and one-half years was held too late.
ing on the granting of a motion pursuant to the section. Nevertheless, it was held in *Heflin v. United States*\(^\text{39}\) that the “in custody” requirement of Section 2255 was comparable to that of habeas corpus. As such, a petitioner serving the first of three consecutive sentences was without standing to raise the question of the legality of the third sentence which he had not yet begun to serve. It was not until 1960, and the case of *Parker v. Ellis*,\(^\text{40}\) that the rule laid down in the *Pollard* case was conclusively held to be inapplicable to Section 2255 proceedings. Relief under the section was unavailable to any party not in custody.\(^\text{41}\)

If the petitioner’s motion to vacate, as well as the records and the files of his case, conclusively show that he is not entitled to relief, a hearing to rule on the motion is unnecessary.\(^\text{42}\) The cases on this point have, for the most part, followed the clear statutory directive of the section in not according a petitioner the right to a hearing when his motion is clearly without merit.\(^\text{43}\) In fact, in *Risken v. United States*,\(^\text{44}\) the court stated that no hearing on a motion to vacate was required when the only question raised was one of law. But, in *United States v. Diggs*,\(^\text{45}\) *Guy v. United States*,\(^\text{46}\) and *Porter v. United States*,\(^\text{47}\) because of the seriousness of the situation in each case, the courts involved felt that exception to the above rule was warranted and a hearing was ordered.\(^\text{48}\)

\(^\text{40}\) 362 U.S. 574 (1960).

Since only the court which imposed the sentence has jurisdiction to hear the motion provided for under § 2255, there is no discretionary power to transfer the place of hearing. It must be the place of trial even though the possibility of prisoner “joy rides” from penitentiary to court still persist. Baker v. United States, 287 F.2d 5 (9th Cir. 1961). Hence, in Martin v. United States, 248 F.2d 554 (8th Cir. 1957), where the defendant was paroled from a Florida court—the very same court which later suspended his parole—he was refused the right to make a motion to vacate in a Minnesota court. The result could well follow that where a moving party is convicted and confined under the jurisdiction of the same court, which tried and sentenced him, this court, then, would be the proper court for the motion as well as for the petition for writ of habeas corpus. See Marchese v. United States, 304 F.2d 154 (9th Cir. 1962), appeal pending.

\(^\text{42}\) 28 U.S.C. § 2255. See *supra* note 1, para. 3.

\(^\text{43}\) United States v. Fleenor, 177 F.2d 482 (7th Cir. 1949); People v. Seidenberg, 221 N.Y.S. 2d 761 (1961); Pasley v. Overholser, 282 F.2d 494 (D.C. Cir. 1960); Simmons v. United States, 302 F.2d 71 (3d Cir. 1962); Thomas v. United States, 290 F.2d 696 (9th Cir. 1961); Sweptson v. United States, 289 F.2d 166 (8th Cir. 1961); Davis v. United States, 311 F.2d 495 (7th Cir. 1963).

\(^\text{44}\) 197 F.2d 599 (8th Cir. 1952).
\(^\text{45}\) 304 F.2d 929 (6th Cir. 1962).
\(^\text{46}\) 287 F.2d 393 (6th Cir. 1961).
\(^\text{47}\) 298 F.2d 461 (5th Cir. 1962).
\(^\text{48}\) In *Diggs*, the court held that the petition for correction of the lower court sentence was to be remanded to the District Court. This was decreed because the question of whether the plea of guilty was accepted in violation of Rule 11 of the Federal Rules of Criminal Procedure was not properly before the Court of Appeals and the basic contention itself was not of a frivolous nature.

The court, speaking in *Guy*, held that petitioner’s motion for vacation of sentence raised questions of fact only determinable by hearing in open court at which time petitioner could then be heard.

A hearing was ordered in *Porter* because the court felt that the defendant’s attorney
Relief under Section 2255 may generally be sought on the same grounds required for relief by writ of habeas corpus. Those grounds relied on most frequently for motions entertained under the Section have been stated as being: unjust deprivation of constitutional rights — especially right to counsel, errors in the conduct of the trial, and insufficiency of evidence to convict.

was in a duplicitous position owing to his commitments to other parties in defendant's trial. A moving party's presence will be ordered only where the court feels that it will be helpful in attempting to deduce the truth of the matter involved. McDonald v. United States, 282 F.2d 797 (9th Cir. 1960); Close v. United States, 198 F.2d 144 (4th Cir. 1952); Crowe v. United States, 175 F.2d 769 (4th Cir. 1949). Mr. Chief Justice Vinson set the guidelines which most of the courts follow in this particular area when he said:

The existence of power to produce the prisoner does not, of course, mean that he should be automatically produced in every Section 2255 proceeding. Whether the prisoner should be produced depends upon the issues raised by the particular case. Where, as here, there are substantial issues of fact as to events in which the prisoner participated, the trial court should require his production for a hearing.


Chief Judge William Steckler of the United States District Court for the Southern District of Indiana noted in a personal interview, October 2, 1963, that almost all motions to vacate, in his court, were disposed of by rulings made without a hearing in open court. The reasons for refusal of motions, when such are made, are set out in a complete memorandum and signed by the Judge. The Judge further noted that that particular procedure had been most effective.

Quite a number of jurisdictions have held that a denial of a motion to vacate, made only upon the record without notice of hearing to the petitioner, is improper and error on the court's part. Thomas v. United States, 217 F.2d 494 (6th Cir. 1954); Slack v. United States, 196 F.2d 493 (6th Cir. 1952); United States v. Pisciotta, 199 F.2d 603 (2d Cir. 1952); Howard v. United States, 186 F.2d 778 (6th Cir. 1951); United States v. Von Willer, 181 F.2d 774 (7th Cir. 1950). Nonetheless, it appears that the need for notice, like that of a hearing on the motion itself, will turn largely on the court's determination of the validity and merit of the moving party's claim for relief as gleaned from the motion, the records, and the files. Bowman, Processing a Motion Attacking Sentence Under Section 2255 of the Judicial Code, 111 U. Pa. L. Rev. 788, 802 (1963). This is true, even though the Supreme Court, in Hayman, said, "Respondent, denied an opportunity to be heard, has lost something indispensable, how can considering the entire showing," 342 U.S. 221 (1952); Snyder v. Massachusetts, 291 U.S. 97, 116 (1934); U.S. v. Myers, 84 F. Supp. 766, 767 (D.D.C. 1949), aff'd, 181 F.2d 802 (D.C. Cir. 1950), cert. denied, 336 U.S. 912 (1950).

Such grounds have held that a denial of a motion to vacate, made only upon the record without notice of hearing to the petitioner, is improper and error on the court's part. Thomas v. United States, 217 F.2d 494 (6th Cir. 1954); Slack v. United States, 196 F.2d 493 (6th Cir. 1952); United States v. Pisciotta, 199 F.2d 603 (2d Cir. 1952); Howard v. United States, 186 F.2d 778 (6th Cir. 1951); United States v. Von Willer, 181 F.2d 774 (7th Cir. 1950). Nonetheless, it appears that the need for notice, like that of a hearing on the motion itself, will turn largely on the court's determination of the validity and merit of the moving party's claim for relief as gleaned from the motion, the records, and the files. Bowman, Processing a Motion Attacking Sentence Under Section 2255 of the Judicial Code, 111 U. Pa. L. Rev. 788, 802 (1963). This is true, even though the Supreme Court, in Hayman, said, "Respondent, denied an opportunity to be heard, has lost something indispensable, how can considering the entire showing," 342 U.S. 221 (1952); Snyder v. Massachusetts, 291 U.S. 97, 116 (1934); U.S. v. Myers, 84 F. Supp. 766, 767 (D.D.C. 1949), aff'd, 181 F.2d 802 (D.C. Cir. 1950), cert. denied, 336 U.S. 912 (1950).


51 Ibid.

52 Lipscomb v. United States, 298 F.2d 9, 11 (8th Cir. 1962); Link v. United States, 295 F.2d 260 (8th Cir. 1961); Curry v. United States, 292 F.2d 576 (10th Cir. 1961); Shobe v. United States, 220 F.2d 929 (8th Cir. 1955).

Though by no means an exhaustive compilation, the following grounds are those which are frequently raised, and at the same time most frequently refused, by the courts in passing on the merits of motions to vacate under Section 2255:

(1) That defendant, at the time of the crime, was insane or mentally incompetent. Clayton v. United States, 302 F.2d 30 (8th Cir. 1962); Breton v. United States, 303 F.2d 557 (8th Cir. 1962); Brown v. United States, 186 F. Supp. 410 (E.D. Oregon 1960); Burdette v. Settle, 296 F.2d 687 (8th Cir. 1961); Carter v. United States, 283 F.2d 200 (D.C. Cir. 1960). See also, United States v. Hill, 312 F.2d 653 (6th Cir. 1963), and Sturrup v. United States, 218 F. Supp. 279 (E.D.N.C. 1963), where the court held that bald assertions of insanity — unsubstantiated by records — would carry no hearing merit.

In Anderson v. United States, 318 F.2d 815 (5th Cir. 1963), and Fisher v. United States, 317 F.2d 352 (4th Cir. 1963), the courts held, in essence, that a prisoner was entitled to a hearing on a motion to vacate sentence on the ground he was mentally incompetent at the time of his arraignment when the trial motion was accompanied by necessary papers showing a mental illness.

The early cases have generally held that a defendant's incompetency was only a defense and did not make the conviction a nullity. Hahn v. United States, 178 F.2d 11 (10th Cir. 1949); see also, United States v. Myers, 84 F.Supp. 766, 767 (D.D.C. 1949), aff'd, 181 F.2d 802 (D.C. Cir. 1950), cert. denied, 336 U.S. 912 (1950).
The Right to Counsel

In McCartney v. United States, the Seventh Circuit enunciated the majority rule regarding a petitioner's right to counsel when moving to vacate sentence under Section 2255. The court held that the rule ensuring a petitioner's

1949). Later, the courts took the view that such incompetency could make the complete trial void and thus, the defendant would have his remedy under Section 2255. Arnold v. United States, 271 F.2d 440 (4th Cir. 1959); Brown v. United States, 267 F.2d 42 (5th Cir. 1959); and Smith v. United States, 267 F.2d 210 (9th Cir. 1959). Yet, the present view seems to be that in light of Section 4244 of the Criminal Code — 63 Stat. 686, 18 U.S.C. § 4244 (1949) — the courts have reverted to their earlier position that a § 2255 motion would not lie under such circumstances; this applies even to cases where the issue of the defendant's competency was not raised at trial.

(2) That contrary to the defendant's instructions, his counsel neglected to appeal from the judgment of conviction. Glauser v. United States, 296 F.2d 855 (8th Cir. 1961); Link v. United States, 295 F.2d 259 (8th Cir. 1961); Dennis v. United States, 177 F.2d 195 (4th Cir. 1949).

(3) That the publicity preceding and during the trial was of a prejudicial nature. United States v. Rosenberg, 200 F.2d 666 (2nd Cir. 1952).

(4) That perjured testimony was knowingly used by the government — unless, that is, this allegation is supported by particulars showing the alleged perjury in detail, and the sources of the government's alleged knowledge. Perry v. United States, 209 F. Supp. 691 (W.D. Ark. 1962); Bram v. United States, 302 F.2d 58 (8th Cir. 1962); Elliott v. United States, 269 F.2d 135 (8th Cir. 1959); Myers v. United States, 191 F.2d 802 (D.C. Cir. 1950). But, where the conduct complained of took place outside the court room, the courts have reached a contrary conclusion on the basis that this is not a question where "the file and records of the case conclusively show that the prisoner is entitled to no relief." Machibroda v. United States, 368 U.S. 487 (1962).

(5) That the prosecutor used intemperate language in presenting his case to the jury. Adams v. United States, 222 F.2d 45 (D.C. Cir. 1955).

(6) That a motion which was properly made for a judgment of acquittal was erroneously denied by the court. Domenica v. United States, 292 F.2d 483 (1st Cir. 1961).

(7) That the defendant, although he pleaded guilty at trial, was in fact not guilty. United States v. Romane, 210 F. Supp. 900 (W.D. Pa. 1962); Harris v. United States, 268 F.2d 790 (8th Cir. 1961).


(9) That the indictment was insufficient and/or defective. Fiano v. United States, 291 F.2d 135 (8th Cir. 1960); Myers v. United States, 181 F.2d 268 (4th Cir. 1950). Yet, the present view seems to be that in light of Section 4244 of the Criminal Code — 63 Stat. 686, 18 U.S.C. § 4244 (1949) — the courts have reverted to their earlier position that a § 2255 motion would not lie under such circumstances; this applies even to cases where the issue of the defendant's competency was not raised at trial.

The basic question is not whether the indictment is vulnerable to attack by motion, but whether it is so fatally defective as to deprive the court of jurisdiction. Pulliam v. United States, 178 F.2d 777 (10th Cir. 1949). In Pulliam the court said: "It is only where the judgment was rendered without jurisdiction, the sentence was not authorized by law, or there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack that a motion to vacate will be under such section."

Id. at 778.

The sentence has been declared illegal where the information stated no federal offense against the defendant. Martyn v. United States, 176 F.2d 609 (8th Cir. 1949).

In United States v. Glass, 317 F.2d 200 (4th Cir. 1963), it was held that an indictment could not obtain a free transcript of trial merely for his examination in order to determine whether he wished to engage in litigation. But the District Court may and should furnish a transcript for purposes of instituting a collateral attack on a criminal proceeding when — and only when — the moving party has accordingly stated a proper ground for relief and a transcript is indispensable.

(10) That defendant was entrapped into committing the offense. United States v. Daniels, 191 F. Supp. 129 (E.D. Pa. 1961); Frazee v. United States, 235 F.2d 1 (9th Cir. 1956).

(11) That defendant's innocence may be conclusively shown by newly discovered evidence. United States ex rel. House v. Swope, 219 F.2d 538 (5th Cir. 1955).

(12) That a confession resulting from an illegal detention would not be considered unless, that is, this allegation is supported by particulars showing the alleged perjury in detail, and the sources of the government's alleged knowledge. Perry v. United States, 209 F. Supp. 691 (W.D. Ark. 1962); Bram v. United States, 302 F.2d 58 (8th Cir. 1962); Elliott v. United States, 269 F.2d 135 (8th Cir. 1959); Myers v. United States, 191 F.2d 802 (D.C. Cir. 1950). But, where the conduct complained of took place outside the court room, the courts have reached a contrary conclusion on the basis that this is not a question where "the file and records of the case conclusively show that the prisoner is entitled to no relief." Machibroda v. United States, 368 U.S. 487 (1962).

(13) That defendant was illegally arrested. United States v. Sturm, 180 F.2d 413 (7th Cir. 1950); cert. denied, 339 U.S. 966 (1950).

(14) That evidence introduced at trial was obtained as a result of an unlawful search and seizure in violation of the Fourth Amendment. Warren v. United States, 311 F.2d 673 (8th Cir. 1963); Thomas v. United States, 308 F.2d 369 (7th Cir. 1962); Alexander v.
right to counsel in all criminal prosecutions, laid down in Johnson v. Zerbst, was not applicable to parties seeking to have their sentences vacated and set aside in civil proceedings under the section. Since proceedings under Section 2255 are not part of the original criminal action, but merely independent collateral inquiries into the validity of the conviction, a request for counsel in such proceedings is addressed to the sound discretion of the court.

When one considers that right to counsel problems arise only in cases of indigent prisoners, the rigid pronouncement of the majority rule seems most unfair. 28 U.S.C. § 1915 (Supp. III, 1962) tempers the harshness of the rule, however, and allows the indigent party to petition the court for counsel under the in forma pauperis statute. Yet, if a judge finds that no substantial question is presented for review and/or that the motion is of a frivolous nature, he will deny the appeal in forma pauperis.

An attempt to curb this unlimited — yet for the most part conscientiously exercised — discretion of the court to reject a plea to move an appeal in forma pauperis, was made by the Supreme Court in Coppedge v. United States. If from the face of the papers he has filed, it is apparent that the applicant will present issues for review not clearly frivolous, the Court of Appeals should then grant leave to appeal... appoint counsel to represent the appellant and proceed to a consideration of the appeal on its merit... If, on the other hand, the claims made or the issues sought to be raised by the applicant are such that their substance cannot adequately be ascertained from the face of the defendant's application, the Court of Appeals must provide the would-be applicant both with the assistance of counsel and a record of sufficient completeness to enable him to attempt to make


The courts in Warren v. United States, 308 F.2d 369 (9th Cir. 1960), Pasley v. Overholser, 282 F.2d 494 (D.C. Cir. 1960), and Watson v. Devlin, 167 F. Supp. 638 (D.C. Mich. 1957), seemed to hold, in essence, that motions for leave to proceed under this section would be denied when it would be an obvious miscarriage of justice to burden proposed defendants with the cost of retaining counsel themselves and proceeding to defend a meritless, frivolous action not grounded on any causes which would allow sentence to be vacated according to § 2255.

a showing that the District Court's certificate of lack of "good
faith" is in error and that leave to proceed with the appeal . . .
should be allowed.⁵⁸

If the Coppedge case were expanded and applied to Section 2255 proceedings,
not only would the petitioner have the guaranteed opportunity to advance a
valid claim for relief, but the court would in turn have stronger standards to
guide it in ascertaining the merits of such a motion.⁵⁹

The basic underlying problem in this area seems to be whether the courts
should pursue, in an expedient manner, the administration of justice, or whether
they should overburden themselves with the countless and petty attempts by
recalcitrant prisoners to gain their freedom. Section 2255 collateral motions,
however, are just as important as the guarantees of fair trial which are expressly
provided by the Constitution. It would behoove the federal courts to recognize
this fact and accord the party under Section 2255 every possible consideration
in his valid attempts to gain the assistance of counsel and plead in forma
pauperis.

Recently, in Gideon v. Wainwright,⁶⁰ the Supreme Court held that the
Fourteenth Amendment to the Constitution required the states to follow the
federal rule, as set out in the Sixth Amendment, and thereby to appoint counsel
for defendants unable to employ legal assistance in their criminal prosecutions.⁶¹
This procedure was to be followed unless the right was completely, as well as
intelligently, waived by the defendant himself. Gideon was charged in a Florida
court with breaking and entering a poolroom with intent to commit a mis-
demeanor. The court of original jurisdiction refused to appoint counsel to
represent the defendant in the action because the laws of Florida only allowed
this where a defendant was charged with a capital offense. The Supreme Court
likened this case to the famous Betts v. Brady⁶² and stated that the doctrine
evolving from Betts should be overruled in favor of the liberal guarantee of
counsel as a fundamental right.⁶³ Mr. Justice Harlan, in a concurring opinion,
hastened to add that whether the rule of law so embodied in the instant case
regarding noncapital cases was to apply in all criminal cases, was not to be
decided at that time.⁶⁴

It would appear from Campbell v. United States,⁶⁵ as well as from Milani v.
United States,⁶⁶ that the Seventh Circuit has taken an about-face from its
earlier very definite pronouncement that the need for counsel by a party under
Section 2255 proceedings was to be determined in the court's exercise of judicial
discretion.⁶⁷ In fact, Campbell expressly overrules McCartney v. United States⁶⁸
in holding that a petitioner who seeks to have his sentence and judgment of

⁵⁸ Id. at 446.
⁵⁹ Note, Right to Counsel in Federal Collateral Attack Proceedings: Section 2255, 30 U.
⁶¹ Ibid.
⁶⁵ 318 F.2d 874 (7th Cir. 1963).
⁶⁶ 319 F.2d 441 (7th Cir. 1963).
⁶⁷ McCartney v. United States, 311 F.2d 475 (7th Cir. 1963).
⁶⁸ Ibid.
conviction vacated is entitled to court-appointed assistance of counsel when he is in such a position as to be unable to employ counsel himself.\textsuperscript{69}

III. PROPOSED SOLUTIONS

Delusive exactness is a constant source of fallacy found throughout the law.\textsuperscript{70} The very terms of Section 2255 were set forth, however, in very broad language. This was done in order to enable the courts to mold and adapt the law to the individual circumstances of each motion problem raised rather than to be tied to a statute that defied anything but a strict construction.

Much criticism of the section centers around the extended judicial discretion given to the sentencing court in reviewing the motion, and the fact that petitioners are not absolutely guaranteed the right to have counsel and be heard on their motion. The fact that only a "prompt hearing" is granted a party under the section, while under habeas corpus one is guaranteed a hearing within five days after the writ is returned, is another inadequacy of Section 2255 proceedings. Since a petitioner must make his motion to vacate or set aside conviction to the sentencing court where all the files, the records, and the witnesses are located, he is normally left to his own strained devices in obtaining counsel and preparing his case through the mails, rather than by direct interview. Further, it is claimed that the sentencing court can usually be expected to be less objective in passing on the motion than the district court of confinement would be under the same circumstances.\textsuperscript{71} While some of this criticism is justified, a large part of it is based on imagined fears rather than on conclusive evidence of injustice.

Seven proposed solutions to the administrative problems arising under Section 2255 may be made: (1) Repeal the section and assign more judges to the district court of confinement — thereby enabling the petitioner to escape the traumatic experience of working through the original sentencing court;\textsuperscript{72} (2) Have widespread state adoption of the Uniform Post Conviction Procedure Act and, consequently, escape the need for using Section 2255;\textsuperscript{73} (3) Have the

\textsuperscript{69} 318 F.2d 874 (7th Cir. 1963).

Both the Campbell and Milani cases have fallen in line with the very recent decision in Gideon v. Wainwright, 372 U.S. 335 (1963).

In a vigorous dissent in Campbell, Judge Knoch noted that the Gideon case did no more than make explicit something which had, by implication, been in previous Supreme Court decisions, namely, that in light of the particular circumstances of a case, denial of counsel would in fact amount to denial of due process. Justice Harlan in a concurring opinion in the Gideon case said, "Whether the rule should extend to all criminal cases need not now be decided." 372 U.S. 335, 351 (1963). Judge Knoch noted further that, "If the Seventh Circuit continues to follow this present case, it will have nullified the clear and unambiguous provisions of Section 2255 respecting study of the motion, files and records of the case to ascertain whether these conclusively show that the prisoner is entitled to no relief."

It would thus seem that if the lower federal courts follow the rule of necessity of counsel, as laid down in Gideon, the prior classification of a motion proceeding under § 2255 as an independent civil action would no longer be of any weight or value. See Schiebelhut v. United States, 318 F.2d 785 (6th Cir. 1963).

\textsuperscript{70} Truax v. Corrigan, 257 U.S. 312, 342 (1921) (Holmes, J., dissenting).


\textsuperscript{72} Id. at 97.

\textsuperscript{73} 1962 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS OF UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE at 291.

While this Act was approved and recommended by the American Bar Association meeting in Philadelphia, August 25, 1955, only Oregon and Maryland have adopted it.

The four goals of the Uniform Act are: (1) To provide a complete statutory substi-
petitioning prisoner swear to the genuineness of his claims so embodied in his motion;74 (4) Employ discovery procedures authorized under the Federal Rules of Civil Procedure;75 (5) Revise the Federal Rules of Criminal Procedure;76 (6) Adopt Rule 23 and the accompanying forms as the United States District Court for the Northern District of Illinois has recently done;77 (7) Have the Federal District Court judges exercise more caution in deciding Section 2255 cases and, at the same time, familiarize themselves thoroughly with the “pitfalls” of the section’s administration.78

If Section 2255 were repealed, and even though additional judges were to be assigned to the district courts of confinement, it is fair to assume that the situation prior to the 1948 enactment of the section would be upon the courts once again. As more judges are added, petitions for habeas corpus are bound to increase fourfold, resulting in rank inefficiency in the administration of justice. While the Uniform Post Conviction Act, on the surface, looks like a proper solution to the problems, its provisions are too bold and assertive for states to grasp. This is apparent when one considers that only two states have adopted it since the Act was first approved in 1955.79 Even if a petitioner falsely swore to the validity of his motion to vacate and were prosecuted as a result thereof, this would have little deterring significance to him — especially if he were the average hardened criminal serving a life sentence. Any opportunity to gain freedom, no matter what the consequence might be for failure, commends itself to the criminal petitioner.

One of the most difficult problems in this whole area is the court-made rule that res adjudicata applies only when the precise point presented has been ruled upon in a prior Section 2255 hearing.80 This problem could be solved in large part if the discovery techniques under the Federal Rules of Civil Procedure were to be employed.81 There is really no concrete reason that the Rules could not be effectively applied, particularly since the prevailing view is that motions under Section 2255 are civil rather than criminal. If this viewpoint were to be adopted, the United States Attorney could easily determine, at the pre-trial hearing or conference, whether or not the petitioner’s contentions had any real basis with respect to each and every ground for which hearing is usually provided. In this way, the party would receive but one hearing, and for the various remedies relied on in the past to test the constitutionality of a conviction on any ground not previously adjudicated. Coram nobis and habeas corpus and their variations, therefore, are displaced by the Act; (2) To furnish as speedy a proceeding as is possible, compatible, that is, with orderly judicial processes; (3) To define clearly the scope of the remedy provided by the Act — thereby assuring the petitioner the full opportunity to test any charges he may have as regards lack of due process; (4) To bring to a definite conclusion any further testing after every reasonable opportunity to be heard is afforded the petitioner.

75 Carter, Pre-Trial Suggestions for Section 2255 Cases, 32 F.R.D. 391, 396 (1963).
76 Bowman, supra note 74.
77 Interview with Chief Judge William E. Steckler, The United States District Court, Southern District, Indianapolis, Indiana, October 2, 1963.
78 Ibid.
79 See supra note 73.
80 Carter, Pre-Trial Suggestions for Section 2255 Cases, 32 F.R.D. 391, 394 (1963).
81 Id. at 396.
the possibility of his ever raising other issues in subsequent motions would be foreclosed.

The proposed revisions to the Federal Rules of Criminal Procedure provide another direct means of alleviating problems within this area. Under the present rules, automatic denial of a hearing on the claim of a coerced guilty plea cannot be defended even if the trial court made a detailed attempt to comply with Federal Criminal Rule 11; but if the proposed amendment is adopted, this may no longer be true. The proposed revision greatly expands the requirements on guilty pleas by requiring the court, before accepting such a plea, to make "such inquiry as may satisfy it that the defendant in fact committed the crime." The court must, accordingly, address the defendant personally to determine that the plea is a voluntary one.

Two recent Supreme Court decisions have held that mere failure to comply with the formal requirements of Rule 32(a), allowing the defendant to make a statement in his own behalf before sentencing, was not grounds for relief under Section 2255. Chief Justice Warren and Justices Black, Douglas, and Brennan dissented in both cases, believing that this was in fact sufficient error to grant relief under Federal Rule 35. Following these two decisions, amendments have been proposed both to Rule 32, as well as to Rule 35 of the Federal Rules of Criminal Procedure. The change in Rule 32 would require the court to address the defendant personally and ask him if he wished to make a statement in his own behalf before sentence. Revised Rule 35, as proposed, would distinguish between an illegal sentence, which may be corrected at any time, and a sentence imposed in an illegal manner. Under the latter situation, sentence could be corrected within sixty days after final adjudication of the issues in the original trial.

Perhaps the greatest single achievement in this entire area of administration under Section 2255 has been the introduction and passage of Rule 23 and the accompanying forms by the United States District Court for the Northern District of Illinois. By filling out the detailed, yet simply-written and easily-understood forms, it readily appears on the face of the forms themselves whether the party has a proper cause under the section. Although the federal district courts in Indiana have not yet adopted this Illinois rule, general adoption of the rule would seem to be a step in the right direction in seeking to remedy

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84 Ibid.
87 Id. at 688.
88 Interview with Chief Judge William E. Steckler, The United States District Court, Southern District, Indianapolis, Indiana, October 2, 1963.
89 Ibid. An unpublished copy of this Rule and the accompanying forms were received October 11, 1963, through the courtesy of Chief Judge William E. Steckler, United States District Court, Southern District of Indiana, Judge Orie L. Phillips of the United States Court of Appeals, Tenth Circuit, and Mr. Joseph F. Spaniol, Jr., of the Administrative Office of the United States Courts. Since the receipt of this copy, the complete report has been published in 33 F.R.D. 365 (1963).
the problems which are encountered when one seeks to move under Section 2255.

Unquestionably, the simplest and most direct answer to the problems connected with Section 2255 would be a thorough familiarization on the part of Federal District judges with the “pitfalls” of all post conviction remedies, and particularly the motion-to-vacate proceedings. Coupled with this undertaking should be a basic re-evaluation of individual court methodology in the problem area, and a strong resolution to exercise the utmost caution in passing on such motions.  

IV. Conclusions

It would appear best to allow the federal courts to continue in their administration of Section 2255 of the Judicial Code since the slight inefficiencies to be detected under the section are small indeed compared with the magnitude of those experienced prior to 1948 with habeas corpus petitioners.

In the final analysis, a prisoner’s basic right to attack collaterally a conviction is, today, largely unimpaired. If the standards of judicial review set out in *Coppedge v. United States* were read into Section 2255, the major complaint as regards the right to counsel and the appeal in forma pauperis would be satisfactorily corrected. Notwithstanding the Seventh Circuit’s recent statement on the absolute need of counsel in Section 2255 proceedings, it would appear fairly certain that, as Justice Harlan noted in *Gideon v. Wainwright*, the basic right to counsel in *all criminal* cases has yet to be decided by the Supreme Court.

The words of Mr. Justice Cardozo aptly summarize the hopeful awareness which the legal scholar and practitioner must have when he considers the problem of Section 2255 and further realizes that it is but one element in the judicial process:

The judicial process is one of compromise, a compromise between paradoxes, between certainty and uncertainty, between the literalism that is the exaltation of the written word and the nihilism that is destructive of regularity and order.

90 *Ibid.* Chief Judge Steckler noted that as soon as he came to the bench, he undertook to thoroughly familiarize himself with all the “pitfalls” which he would later encounter with the post conviction remedies. Judge Steckler’s cautious approach, exercised as such to the point of being *over-cautious* in fact, has paid off handsomely since the Southern District in Indiana has not had an overflow of post conviction cases under section 2255. See *supra* note 17.

91 369 U.S. 446 (1962).
92 Campbell v. United States, 318 F.2d 874 (7th Cir. 1963); Milani v. United States, 319 F.2d 441 (7th Cir. 1963).
94 *Id.* at 351 (concurring).
95 COOK, A TREASURY OF LEGAL QUOTATIONS 49 (1961).