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The Federal Habeas Corpus Act and the Recent Amendments to the Act Limiting Its Use And Abuse By State Prisoners

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I. INTRODUCTION

This article will discuss the use of federal habeas corpus by state prisoners in light of the recent amendments to the Federal Habeas Corpus Act.[1] Since the Supreme Court's decision in *Brown v. Allen*[2] the federal courts have considered that the purpose of federal habeas corpus is to redetermine the merits of constitutional issues previously decided by the state courts in criminal convictions. This is usually accomplished by holding an evidentiary hearing and making new findings of fact if the federal judge considers the state finding of fact to be inadequate. When a state prisoner can be released by a single federal judge after the prisoner has been convicted in the state courts and the conviction has been affirmed through the entire state court appellate system, tension is created between the federal and state judicial systems. In fact, many legal writers have taken the alternative positions that the state courts should simply withdraw from determining constitutional questions since the federal courts will ultimately relitigate these issues,[3] or that federal habeas corpus should

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1. 28 U.S.C. § 2244(b) (Supp. II, 1965-66), *amending* 28 U.S.C. § 2244 (1964); 28 U.S.C. § 2244(c) (Supp. II, 1965-66), *amending* 28 U.S.C. § 2244 (1964); 28 U.S.C. § 2254 (Supp. II, 1965-66), *amending* 28 U.S.C. § 2254 (1964) (the amended statutes are hereinafter cited without dates); *See* note, 45 TEX. L. REV. 592 (1967).

2. 344 U.S. 443 (1953). For the leading discussion of the impact of this case *see* Bator, *Finality in Criminal Law and Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1953).

3. *See* Note, *State Court Withdrawal From Habeas Corpus*, 114 U. PA. REV. 1081, 1095 (1966):

> Through state court withdrawal smacks of an ostrich-like philosophy, it would mean that a state judge was not reversed—simply because he never ruled upon the question. The result—federal court issuance of the writ—would be identical in either case, but state judges would not feel the sting of reversal of *their* denials of

be abolished.[4] Recent Supreme Court decisions increasing the availability of habeas corpus to state prisoners have increased the tensions between the judicial systems,[5] and the conflict was at a critical stage when the Federal Habeas Corpus Act was amended. These amendments are an attempt to ease the tension between the judicial systems by limiting the abuse of federal habeas corpus by state prisoners and encouraging the states to adopt adequate fact finding procedures.[6]

These amendments should affect the practice of every member of the bar. The attorneys who do not practice criminal law will still be called upon to be appointed counsel for indigent prisoners. For the legal scholars, although habeas corpus may be the oldest of the writs little is known of its origin[7] and the extent of the writ has yet to be determined.[8] As a practical matter, a knowledge of the law regarding habeas corpus is essential in many types of civil litgation[9] and it is a powerful legal weapon which should be stocked in the arsenal of every lawyer.[10]

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the writ, especially if the federal court had based its determination upon allegations which had not been presented to the state court in the original state proceedings.

4. Desmond, *Federal Habeas Corpus Review of State Convictions—Proposals for Reform*, 9 UTAH L. REV. 18, 44 (1964): "We are faced with an intolerable condition, and it is no answer to it to say that some judges are more sensitive than others."

5. For a discussion of these decisions see: Note, *Constitutional Law—Criminal Law—Habeas Sorpus—The 1963 Trilogy*, 42 N.C. L. REV. 352 (1964); Note, *Burden of Habeas Corpus Petitions from State Prisoners*, 52 VA. L. REV. 486 (1966); Wilson, *Federal Habeas Corpus and the State Court Criminal Defendant*, 19 VAND. L. REV. 741 (1966); Note, *State Criminal Procedure and Federal Habeas Corpus*, 80 HARV. L. REV. 422 (1966). The scope of these decisions is set forth in notes 53-67 and text, at p. 417, *infra.*

6. S. REP. No. 1797, 89th Cong., 2d Sess. 1 (1966); This legislation is the culmination of a long history of efforts by both sides of the dispute. *See* Brennan, *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945, 957 (1964):

> Rather than as an unwarranted federal encroachment upon state domains, the federal habeas corpus jurisdiction should be taken by the states as an opportunity to fashion state remedies as good or better for the disposition of the federal claims of state prisoners.

See also Carter, *The Use of Federal Habeas Corpus by State Prisoners*, 23 WASH. & LEE L. REV. 23, 35 (1966):

> Is it not high time that more emphasis was placed on the prompt and effective administration of criminal justice, rather than undue emphasis on constitutional procedural rights?
>
> [I]t is now the duty of the bar to become interested and active in bringing about the correction of a procedural process that is materially contributing to that frustration of justice by causing protracted and undue delay through an *unnecessary dual system of appeals*, and to do so promptly. (Emphasis added.)

7. *See* Longsdorf, *Habeas Corpus—A Protean Writ and Remedy*, 8 F.R.D. 179 (1948).

8. *See* Comment, *Federal Habeas Corpus Jurisdiction—The Undeveloped Areas*, 41 WASH. L. REV. 327 (1966). This article discusses the use of federal habeas corpus in selective service classification and induction, alien deportation and exclusion, military commissions and court martials and, the American Indian Courts. *See also* Kutner, *"International" Due Process for Prisoners of War: The Need for a Special Tribunal of World Habeas Corpus*, 21 U. MIAMI L. REV. 721 (1967).

9. Habeas Corpus may be used for domestic relations, mental patients and quarantine due to health regulations. *See* Note, *Habeas Corpus and the Indigent Mental Patient in New York*, 35 FORD. L. REV. 531 (1967); Note, *Domestic Relations—Habeas Corpus Upheld as a Collateral Attack Upon a Child Custody Order* 36 U. DET. L.J. 348 (1959). *See generally* 39 C.J.S. *Habeas Corpus* §§ 41-50. (1944).

10. Bailey, *Federal Habeas Corpus—Old Writ, New Role: An Overhaul for State*

While it is not necessary to have a knowledge of every technical detail in habeas corpus proceedings, a basic understanding of the history and principles underlying the federal habeas corpus action is essential to use it effectively.

II. Historical Analysis

Habeas corpus means literally "you have the body."[11] The writ is directed to the person having custody of the "body" of the prisoner and commands the custodian to produce the "body" before the court so that the court may inquire into the legality of the "body's" detention.[12] Habeas corpus is a collateral proceeding and should be distinguished from direct proceedings such as appeal and certiorari.[13] It is a civil, not a criminal proceeding, and the guilt or innocence of the prisoner is not in issue.[14] The only issue before the court should be the legality of restraint.

Historically, the writ of habeas corpus is probably the most famous writ in the law and is often called the "Great Writ of Liberty." It had its origin in the common law of England, and the English colonists in America regarded it as one of their most valued rights.[15] The United States recognized it as inherited common law by article I section 9 of the Constitution, and Congress included it in the powers of the courts in the Judiciary Act of 1789, section 14.[16] In *Ex Parte Bollman,*[17] the Supreme Court recognized that the judicial power of the United States clearly comprehends habeas corpus. The original Federal Habeas Corpus Act of 1801 has been amended several times and is now 28 U.S.C. sections 2241-2255.[18]

Criminal Justice, 45 Bost. U. L. Rev. 161, 162 (1965). In this article, F. Lee Bailey tells of his use of habeas corpus to secure the release for Dr. Sam Sheppard. *See also* Sheppard v. Maxwell, 231 F. Supp. 37 (S.D. Ohio 1964).

11. Black's Law Dictionary 837, (4th ed. 1951).

12. This is the essence of habeas corpus. Another definition of the writ is found in Carter, *supra* Note 6, at 24:

> "It is directed to the person detaining another, commanding him to produce the body of the applicant at a certain time and place, with the cause of his detention, and submit to whatever order the court issuing the Writ shall direct."

13. *See generally* 39 C.J.S. *Habeas Corpus* § 13 (1944).

14. *See generally* 39 C.J.S. *Habeas Corpus* § 13 (1944).

15. *See* Carter, *The Use of Federal Habeas Corpus by State Prisoners*, 23 Wash. & Lee L. Rev. 23, 24 (1966).

16. Longsdorf, *Habeas Corpus—A Protean Writ and Remedy*, 8 F.R.D. 179, 180 (1948). This article contains an interesting point in stating that the writ of habeas corpus was first used to put people into prison and later became a method for getting people out of prison:

> The early writers tell us meagerly of the appropriate procedures and somewhat less than generously of the changes which occurred in the method, objects, and reach of the various writs. Mr. Jenks says: "This perhaps is the most embarrassing discovery, the more one studies the ancient writs of habeas corpus (for there were many varieties of the article) the more clear grows the conviction that, whatever may have been its ultimate use, the writ of habeas corpus was originally intended not to get people out of prison, *but to put them in it.*"

17. 8 U.S. (4 Cranch) 74 (1807).

18. See Longsdorf, *The Federal Habeas Corpus Acts Original and Amended*, 13 F.R.D. 407 (1953).

III. UNDERSTANDING FEDERAL HABEAS CORPUS

The key words to understanding federal habeas corpus are custody, constitutional rights, exhaustion of state remedies and evidentiary hearing. The prisoner must be held in custody in violation of his constitutional rights[19] and show an exhaustion of state remedies[20] by proving that he has presented his claims throughout the state court system in order to qualify for a hearing on his petition.[21] If the only issue before the court is a question of law and the state court findings of fact were adequate, the court may grant or deny the petition without an evidentiary hearing. If, however, it finds that the state courts did not make an adequate finding of fact, the federal court may hold an evidentiary hearing and make new findings of fact.[22]

A. *The Custody Requirement*

"Custody" should be thought of in terms of seeking immediate release from present custody.[23] Four situations should be distinguished when speaking of the custody requirement in federal habeas corpus. First, when a prisoner is unconditionally released from prison his petition is said to be moot.[24] Second, when a prisoner is released from one custody to another his petition against his former custodian is also said to be moot.[25] Third, when a prisoner is serving concurrent sentences his petition attacking only one sentence will be dismissed since the granting of the petition will not result in his immediate release;[26] the same reasoning

19. 28 U.S.C. § 2241(c)(3):

(c) The writ of habeas corpus shall not extend to a prisoner unless—
(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . .

28 U.S.C. § 2254(a):

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States.

20. 28 U.S.C. § 2254(b):

(b) 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, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

21. 28 U.S.C. § 2254(c):

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented.

22. 28 U.S.C. § 2254(d) set forth in note 88, *infra*.

23. McNally v. Hill, 293 U.S. 131 (1934).

24. Parker v. Ellis, 362 U.S. 574 (1960); Morrison v. Heritage, 324 F.2d 698 (5th Cir. 1963).

25. Heflin v. United States, 358 U.S. 415 (1959); Wainwright v. Phillips, 360 F.2d 617 (5th Cir. 1966).

26. McNally v. Hill, 293 U.S. 131 (1934); *See* Note, *Habeas Corpus and the Prematurity Rule*, 66 COLUM. L. REV. 1164 (1966); Note, *The Uncertain Rules of Timeliness in Petitions for the Writ of Habeas Corpus*. 11 VIL. L. REV. 589 (1966).

applies when a prisoner is serving consecutive sentences and only attacks the sentence he is serving. Fourth, when the prisoner is serving consecutive sentences and attacks the one to be served in the future the petition is said to be premature.[27]

Usually, if the prisoner fits into one of the four categories the federal court will apply *McNally v. Hill*[28] and summarily dismiss his petition. Some writers have argued that the custody requirement has been weakened by the Supreme Court's reversal of the fourth circuit by holding in *Jones v. Cunningham*[29] that a prisoner on parole was sufficiently in custody to justify granting habeas corpus. Since its reversal, the fourth circuit has not followed *McNally* but it appears to be a voice crying in the wilderness since *McNally* is still followed in most circuits.[30]

B. *Violation of Constitutional Rights*

"Constitutional rights" should be thought of in those exact terms. The prisoner must allege some deprivation of his rights arising under the federal constitution.[31] This is necessary for the federal court to have jurisdiction to hear the petition. Without getting into the difficulties of defining "arising under"[32] the constitution, certain basic principles may be set forth.

If the prisoner asserts a direct deprivation, for example, denial of right to counsel under the sixth amendment, there is no problem. A more difficult area is the fourteenth amendment due process clause since this requires "state action." For example, the use of perjured testimony in a state trial will not be sufficient unless the prosecution "knowingly used" perjured testimony.[33] The state action requirement is satisfied by the action of the state prosecutor in knowingly using the perjured testimony.

Several common misconceptions should be clarified in relation to constitutional claims. When a prisoner has been transferred from the

27. *Id.*

28. *Id.*

29. 371 U.S. 236 (1963); *See* Note, *The Custody Requirement for Habeas Corpus Relief in the Federal Courts*, 51 CAL. L. REV. 228 (1963).

30. A caveat is issued to the reader. The Supreme Court has granted certiorari to review this question as of the time this article goes to the printer. Peyton v. Rowe, 383 F.2d 790 (4th Cir. 1967), *cert. granted*, 36 U.S.L.W. 3286 (U.S. Jan. 15, 1968) (No. 802) *See generally* Comment, *Viability of McNally v. Hill in the Modern Context*, 65 MICH. L. REV. 172 (1966).

31. 28 U.S.C. § 2241(c)(3) and 28 U.S.C. § 2254(a) are set out in note 19 *supra*.

32. The question must be one "arising under" the constitution to give the federal court jurisdiction. The term "arising under" has not been satisfactorily defined at the present time. *See generally* Cohen, *The Broken Compass: The Requirement That A Case Arise "Directly" Under Federal Law*. 115 U. PA. L. REV. 890 (1967).

33. Price v. Johnson, 334 U.S. 266 (1948); Hysler v. Florida, 315 U.S. 411 (1942); Napue v. Illinois, 360 U.S. 264 (1959); King v. Wainwright, 368 F.2d 57 (5th Cir. 1966). For a critical analysis of the Florida position See Note, *Perjured testimony: Flordia's Substantive Window*, 13 U. FLA. L. REV. 358 (1960).

custody of one to another he may not raise the issue of whether either of the custodians waived jurisdiction over him.[34] When a voluntary plea of guilty is entered the prisoner waives all objections such as a coerced confession.[35] Further, the constitutional right must be one that existed at the time the act complained of occurred or else be a constitutional right to which the Supreme Court has given retroactive application.[36]

C. *Exhaustion of State Remedies*

"Exhaustion of state remedies" should be thought of in terms of complete exhaustion. The prisoner must show that he has litigated his claim of a deprivation of a constitutional right through every possible state court or his petition will be dismissed as premature. When both the federal and state doors are open, the prisoner must try the state door first.[37]

The principle is generally justified in terms of "comity" and is not a jurisdictional requirement for the federal courts. As a matter of practical efficiency, state courts are better able to deal with issues concerning state procedures and practices. It eases the burden on federal courts since the state appellate system may reverse the trial court or the prisoner will be satisfied that his constitutional claim is not meritorious. Finally, both the development of state law in accordance with federal standards and the release by state courts of their own prisoners eases the tension between state and federal judicial systems.[38]

34. Opheim v. Willingham, 364 F.2d 989,(10th Cir. 1966); Finley v. United States, 266 F.2d 29, (5th Cir. 1959), *cert. denied*, 361 U.S. 870, (1959); United States v. Williams, 203 F. Supp. 123 (S.D. Tex. 1962) *aff'd* 311 F.2d 68 (5th Cir. 1962).

35. Busby v. Holman, 356 F.2d 75 (5th Cir. 1966). This area is one in which the state court judges have a "golden opportunity to protect their judgments from habeas corpus attack. Federal Criminal Procedure Rule II provides in pertinent part that the federal courts shall not accept a guilty plea "without first determining that the plea is made voluntarily with understanding of the charge." Extensive questioning is not required under the rules as seen by Smith v. United States, 378 F.2d 296, 299 (5th Cir. 1967) in which the following was held sufficient: "The Court: Then are you making this, are you entering this plea and are you saying again today that you are guilty voluntarily and of your own free will?"

If the state trial judge questions the defendant before accepting a guilty plea, their verdict will be immune to attack by federal habeas corpus. *See* Scarlett, *Habeas Corpus*, 18 MERCER L. REV. 354, 363 (1967). *See also* Meador, *The Impact of Federal Habeas Corpus on State Trial Procedures* 52 VA. L. REV. 286 (1966).

36. The recent trend in the Supreme Court decisions is away from retroactive application. In Johnson v. New Jersey, 384 U.S. 719 (1966) the Court held Miranda v. Arizona, 384 U.S. 436 (1966) applicable only to *trials* after the decision. In Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967) the Court refused retroactive application to the right to counsel in police line-ups. *See also* Tehan v. Shott, 382 U.S. 406 (1966) (comment by prosecutor on failure of a defendant to testify not retroactive); Linkletter v. Walker, 381 U.S. 618 (1965) (Mapp, decision not retroactive). *See generally* Meador, *Habeas Corpus and the "Retroactivity" Illusion*, 50 VA. L. REV. 1115 (1964); Note, *Evidence—Confession Safeguards of Escobedo and Miranda Are Not Retroactive*, 18 SYRACUSE L. REV. 117 (1966).

37. Reitz, *Federal Habeas Corpus: Impact of An Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1364 (1961).

38. *See* Comment, *Habeas Corpus — Effect of Supreme Court Change in Law on Exhaustion of State Remedies Requisite to Federal Habeas Corpus*, 113 U. PA. L. REV. 1303 (1965).

The prisoner, of course, need not journey through the state courts if his journey would be futile. The purpose of the principle is to exhaust state remedies and not to exhaust state prisoners.[39] If the scope of the state remedy is so narrow as to be inadequate and the possibility of state relief so uncertain as to make the state remedy futile, or if the remedy is foreclosed by state law, the prisoner need not exhaust his state remedies.[40]

D. *Evidentiary Hearings*

"Evidentiary hearing" should be thought of in terms of a possible hearing. Many states have adopted post-conviction proceedings with adequate fact finding procedures that should eliminate the need for a hearing in the federal courts[41] or the only issue raised by the petition may be a question of law which can be decided without a hearing.

If the petition raises a federal question or alleges facts, which if true, would entitle the prisoner to release, a prima facie case is made. The federal judge will then issue an order for the state custodian to show cause why the writ should not be granted. The state is then required to file a response which the judge considers in conjunction with the petition. He must then decide, on the basis of the pleadings and records submitted, whether to hold an evidentiary hearing.[42] Although many states have adequate fact finding procedures and follow them, some federal judges still insist on holding evidentiary hearings.[43]

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39. *United States v. La Vallee*, 306 F.2d 199, 203 (2nd Cir. 1962).

40. Whippler v. Balkcom, 342 F.2d 388, 391 (5th Cir. 1965). The court noted that the Georgia remedies were indeed narrow:

> Habeas corpus in Georgia is a door that not every constitutionally deprived prisoner can open. The magic words are "deprivation of counsel." The applicant who cannot say them may not pass.

41. Florida has adopted Crminal Procedure Rule One which is patterned after 28 U.S.C. § 2255, the federal fact finding procedure. Tolar v. State, 196 So.2d 1 (Fla. 4th Dist. 1967). Other states have used different methods. *See* Note, *Federal Habeas Corpus: Its Uncertain Effects on Illinois Law*, 59 N.W. U.L. REV. 696 (1964): Note, *A Comparative Analysis of the Ohio Postconviction Determination of Constitutional Rights Act.* 17 W. RES. L. REV. 1367 (1966); Note, *Habeas Corpus and the 1966 Post Conviction Hearing Act: Major Pennsylvania Remedies in Criminal Cases*, 39 TEMP. L.Q. 188 (1966); Note, *Federalism and Federal Habeas Corpus—What Impact on Georgia Criminal Law and Procedure?*, 16 MERCER L. REV. 281 (1964); Note, *Constitutional Law—Habeas Corpus—New Post-Conviction Hearing Act*, 44 N.C.L. REV. 153 (1965); *Federal Habeas Corpus Confronts the Colorado Courts: Catalyst or Cataclysm?*, 39 U. COLO. L. REV. 83 (1966); Note, *State Post-Conviction Remedies and Federal Habeas Corpus*, 40 N.Y.U.L. REV. 154 (1965).

42. *See* Note, *Federal Habeas Corpus For State Prisoners: The Isolation Principle*, 39 N.Y.U.L. REV. 78, 104 (1964).

43. The attitude of some federal judges is probably explained by language like that found in Wright, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 897 (1966):

> Federal district courts, in the exercise of their habeas corpus jurisdiction, have been called upon to perform *significant* institutional functions. They have virtually become the *Supreme Court's delegates* or masters, *providing full and complete records* to make Supreme Court review more meaningful. (emphasis added).

See generally Post Conviction Applications Viewed by a Federal Judge, 39 F.R.D. 281 (1965); Note, *Symposium on Post-Conviction Remedies: Foreward and Afterward* 27 OHIO S.L.J. 237 (1966).

E. *The Right to Counsel*

Once inside the federal "door" the prisoner, if indigent, may seek the payment of costs and the appointment of counsel. It is well settled that the prisoner is entitled to payment of fees and a transcript[44] but it is equally well settled that the appointment of counsel is discretionary with the court.[45] Some writers had predicted that the Supreme Court would extend the right to appointment of counsel to habeas corpus proceedings during its recent term;[46] but the court, instead, reaffirmed its position that the right to counsel is limited to first appeal from conviction.[47]

The absence of an absolute right to appointed counsel is not as severe a handicap as it may seem. The petitions for habeas corpus may be filed on standardized forms in which the prisoners merely fill in the appropriate blank spaces.[48] From this standard petition the federal judge is able to determine if there is any merit to the prisoner's claim or if he has exhausted his state remedies. He then may exercise his discretion and appoint counsel.

IV. THE CAUSES OF TENSION BETWEEN JUDICIAL SYSTEMS

Armed with an understanding of the history and basic principles underlying federal habeas corpus, we must next explore the causes of the tension between federal and state judicial systems and see if the recent amendments to the Federal Habeas Corpus Act can alleviate these tensions. The main causes of the tension are the disputed Federal Habeas Corpus Act of 1867, the recent decisions expanding the scope of federal habeas corpus and the flood of habeas corpus petitions that have deluged the courts since these decisions.

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44. Entsminger v. Iowa, 386 U.S. 748 (1967); Lane v. Brown, 372 U.S. 477 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Griffin v. Illinois, 357 U.S. 12 (1956).

45. Sanders v. United States, 373 U.S. 1 (1963); Fleming LaClair v. United States, 374 F.2d 486 (7th Cir. 1967); Fleming v. United States, 367 F.2d 555 (5th Cir. 1966); Tolar v. State, 196 So.2d 1 (Fla. 4th Dist. 1967).

46. *See* Note, *Adequate Appellate Review For Indigents: A Judicial Blend of Adequate Transcript and Effective Counsel* 52 IOWA L. REV. 902, (1967).

47. Douglas v. California, 372 U.S. 353, 387 (1963). The *Douglas* court carefully limited the right:

> [W]here the merits of *the one and only appeal* an indigent has as of right are decided without the benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.

The *Douglas* holding was re-affirmed in Anders v. California, 386 U.S. 738 (1967). The hope for right to appointed counsel in habeas corpus proceedings was apparently laid to rest in Long v. District of Iowa, 385. U.S. 192 (1966). In a per curiam decision, the court reaffirmed its 1963 position in *Lane v. Brown* that there is a right to transcript in habeas corpus appeals. The court indicated in footnote two of the opinion that it will continue to treat right to transcript and right to counsel as separate issues.

48. Sample forms may be found in *Habeas Corpus and Post Conviction Review*, 33 F.R.D. 363 (1964). Some writers have taken the position that fellow inmates should prepare the petitions. *See* Note, *Habeas Corpus: Right of Prisoners to Assistance of "Jail House Lawyers"* 66 COLUM. L. REV. 1542 (1966); Note, *Prisoner Assistance on Federal Habeas Corpus Petitions*, 19 STAN. L. REV. 887 (1967). These articles seem moot in view of Johnson v. Avery, 382 F.2d 353 (6th Cir. 1967) which reversed the case noted.

A. *The Disputed Act of 1867*

The original Federal Habeas Corpus Act of 1801 has been amended several times.[49] One of the amendments was the Federal Habeas Corpus Act of 1867.[50] The Supreme Court has taken the position that an examination of legal history shows that this act authorized the federal review of state criminal convictions. The legal historians take the position that an examination of legal history shows to the contrary[51] and have accused the Court of "magisterial historiography." This dispute is critical, for if the legal historians are correct, the federal review of state criminal convictions is an unwarranted "power grab" by the federal courts. One historian has summed up the dispute in the following way:

> Few students of the law object to the Court's reshaping of old remedies to fit new and growing social problems so long as the the court moves within the interstitial area governed by what Karl Llewellyn called the law of "leeways." But the legal rules fashioned to cover such growth should be cloaked in reason, not garbed in a regal patchwork of history that, on close examination, proves as embarrassingly illusory as the Emperor's new clothes.[52]

B. *The Recent Supreme Court Decisions*

The Supreme Court made federal habeas corpus available to state prisoners in *Brown v. Allen*.[53] Since that decision, the availability of habeas corpus has been increased in two distinct ways.

The first way has been by gradually expanding the scope of due process, thereby increasing the number of grounds upon which violation of constitutional rights may be based. Since *Gideon v. Wainwright*,[54] in which the right to counsel was extended to state felony trials, the Supreme Court has decided *Escobedo v. Illinois*,[55] *Douglas v. California*,[56] *Gilbert*

49. See note 18, *supra*.

50. The text of this act is set out in Mayers, *The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965).

51. The Supreme Court's position is severely criticized in Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966).

52. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451, 472 (1966). This article by Professor Oaks has many quotes which typify the legal historians' reaction to the position taken by the Supreme Court. Some sample quotations are:

> Legal historians—even those cited in the opinion—hold a view that is at odds with the historical analysis in the *Fay* case. (*Id.* at 459)
>
> To support this assertion, the Court offered three authorities: an ambiguous dictum in a famous 1670 contempt case in Common Pleas, an obscure and unsupported statement in *Bacon's Abridgement*, and a bill introduced in the House of Commons in 1593 but never passed. (*Id.* at 461).

53. 344 U.S. 443 (1953).

54. 372 U.S. 335 (1963).

55. 378 U.S. 478 (1964).

56. 372 U.S. 353 (1963).

v. California,[57] *United States v. Wade*,[58] and *Miranda v. Arizona*,[59] which have vastly increased the scope of due process.[60]

The other way that the availability of federal habeas corpus has been increased is by the removal of procedural impediments in seeking the writ. This was accomplished by three decisions of the Supreme Court based on the disputed Act of 1867 that have become famous as the "1963 Trilogy."[61]

In *Fay v. Noia*[62] the Court held that the exhaustion of remedies doctrine was a rule of comity and not binding on the federal courts. The court expressly overruled *Darr v. Burford*[63] and held that the prisoner need not seek review by appeal or certiorari to the Supreme Court before filing a habeas corpus petition. The Court then held that the prisoner need not exhaust state remedies that are not available to the prisoner at the time he files his petition.

In *Sanders v. United States*,[64] the court removed the principle of res judiciata as an important consideration in federal habeas corpus applications.[65] Lastly, in *Townsend v. Sain*,[66] the Court increased the situations in which the federal courts must hold an evidentiary hearing in spite of tensions between federal and state judicial systems and crowded federal dockets.[67]

C. *The Flood of Petitions*

In 1953 the Supreme Court considered 541 habeas corpus petitions to be a "flood" of petitions.[68] By 1963 the number of petitions had increased to 1,692.[69] In 1964, the year following the "trilogy" decisions which increased the availability of habeas corpus, there was an eighty-five

57. 388 U.S. 263 (1967).

58. 388 U.S. 218, (1967).

59. 384 U.S. 436 (1966).

60. The situation has been improved by the Supreme Court not holding many of these cases retroactive in Stovall v. Denno, 386 U.S. 293 (1967). *Miranda* was held to apply only to *trials* after the decision in Johnson v. New Jersey, 384 U.S. 719 (1966). *See also*, Tehan v. Shott, 382 U.S. 406, (1965) and Linkletter v. Walker, 381 U.S. 618 (1964). See note 36 *supra*.

61. *See* Note, *Constitutional Law—Criminal Law—Habeas Corpus—The 1963 Trilogy*, 42 N.C.L. REV. 352 (1964) [hereinafter cited *Trilogy*]. See note 52 *supra* for a criticism of these cases.

62. 372 U.S. 391 (1963); *See* Note, *Federal Habeas Corpus—An Extended Remedy*, 18 SW. L.J. 475 (1964).

63. 339 U.S. 200 (1950).

64. 373 U.S. 1 (1963).

65. Thus the Court has completely removed res judicata as an important consideration in post-conviction collateral relief. This was done because "conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Trilogy*, *supra* note 61, at 370.

66. 372 U.S. 293 (1963).

67. *Trilogy*, *supra* note 61, at 373.

68. Brown v. Allen, 344 U.S. 443, 536 (1953).

69. SEN. REP. No. 1797, 89th Cong., 2d Session. 1 (1966). [hereinafter cited SEN. REP. 1797]. This report is set forth in 3 U.S. CODE CONG. & AD. NEWS 3663 (1966).

per cent increase in the number of petitions.[70] The expansion of the scope of due process of law in the ensuing years resulted in 6,356 petitions being filed between July 1, 1965 and June 30, 1966.[71] Since more than ninety-five percent of these petitions are totally without merit, the federal courts spent that year considering over 6,000 frivolous petitions.[72] This heavy burden on the federal courts is further complicated by the fact that it takes about two years to dispose of the non-frivolous petitions.[73]

The drafting of these petitions has become a game with prisoners. It offers relief from the boredom of an incarceration and, perhaps most alluring to the prisoner, a chance to get out of prison for a week or two at the state's expense to appear at an evidentiary hearing.[74] The saddest part of this game is that the prisoner who may have a valid constitutional claim has little chance for the federal court to evaluate it in sifting through the thousands of meritless petitions. As the Supreme Court noted in *Brown v. Allen*,[75] the federal courts' task is comparable to searching for a needle in a haystack:

> [T]his court has sanctioned progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own. Judged by our own disposition of habeas corpus matters, they have, as a class, become peculiarly undeserving. It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.[76]

V. THE RECENT AMENDMENTS TO THE FEDERAL HABEAS CORPUS ACT[77]

The purpose of Congress in amending the federal habeas corpus act was to expedite the handling of habeas corpus petitions by the federal district courts.[78] The courts had been burdened by their duty to consider successive petitions filed by prisoners due to the Supreme Court's decision in *Sanders v. United States*[79] which removed the doctrine of res judicata as an important consideration in habeas corpus proceedings and further burdened by their duty to hold evidentiary hearings due to the Supreme

70. SEN. REP. 1797.

71. SEN. REP. No. 170, 90th Cong., 1st Sess. 1 (1967). This report is set forth in 4 U.S. CODE CONG., & AD. NEWS 569, 576 (May 20, 1967).

72. SEN. REP. 1797.

73. *See* Carter, *The Use of Federal Habeas Corpus by State Prisoners*, 23 WASH. & LEE L. REV. 23, 33 (1966).

74. *See* Comment, *The Burden of Federal Habeas Corpus Petitions From State Prisoners*, 52 VA. L. REV. 486, 490 (1966).

75. 344 U.S. 443 (1953).

76. *Id.* at 536-537.

77. *See* Note, 45 TEX. L. REV. 592 (1967).

78. SEN. REP. 1797.

79. 373 U.S. 1 (1963).

Court's decision in *Townsend v. Sain*[80] that made evidentiary hearings mandatory when state post conviction remedies were inadequate.

Two new subsections were added to section 2244 of the act which impose severe limitations on successive petitions filed by state prisoners. The purpose of these new subsections is to add a qualified doctrine of res judicata to the act.[81] These new subsections are necessary because state prisoners have been filing petitions with allegations identical to those asserted in previous petitions or predicated on grounds obviously well known to them when they filed the preceding petition.[82]

New subsection 2244(b) provides that after a federal court holds a hearing on a habeas corpus petition it need not entertain a subsequent petition based on new grounds unless the court is satisfied that the prisoner did not deliberately withhold the new ground or otherwise abuse the writ.[83] One court has construed this amendment to mean that the prisoner must include all grounds that he can ascertain with "reasonable diligence" in his original habeas corpus petition.[84]

New subsection 2244(c) provides that when the prisoner has sought review of his conviction by direct appeal to the highest state court and thereafter seeks review in the Supreme Court by appeal or writ of certiorari, the finding of the Supreme Court is conclusive to all issues of law and fact actually adjudicated if the prisoner later files a habeas corpus petition. The adjudication by the Supreme Court will be conclusive in the habeas corpus proceedings except when the prisoner pleads and proves the existence of a material and controlling fact that did not appear in the record of the Supreme Court proceedings and which the prisoner could not have made appear in that record by the exercise of reasonable diligence.[85]

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80. 372 U.S. 293 (1963).

81. SEN. REP. 1797.

82. *Id.*

83. 28 U.S.C. § 2244 (b):
When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

84. Hill v. Nelson, 272 F. Supp. 790, 796 (N.D. Cal. 1967).

85. 28 U.S.C. §2244(c):
In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment by the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the

The result of new subsection 2244(c) is that after a state prisoner obtains initial review of his constitutional claim in the highest state court he must decide whether to seek further review by appeal or certiorari in the Supreme Court or file a habeas corpus petition in a federal district court. If the facts have been adequately developed in the state courts, the best method of review for the prisoner to use is by review in the Supreme Court. If the facts have not been adequately developed in the state courts his best method of review is by a habeas corpus proceeding in which the facts may be adequately developed.[86]

New subsections 2244(b) and 2244(c) provide state prisoners with an opportunity to have their constitutional claims fully heard by the federal courts. However, they may no longer have opportunity after opportunity *ad infinitum* as they have enjoyed in the past. The essence of these new subsections is that the prisoners may now only file one petition for habeas corpus. This change, limiting the filing of successive petitions, should be a great assistance to the federal courts in shouldering their burden of sifting through thousands of frivolous petitions in search of the few meritorious ones with a valid constitutional claim.

Section 2254 was amended to provide that state court records are presumptively correct in federal habeas corpus proceedings. This presumption of correctness will arise unless it is established that the state proceedings were inadequate or upon a review of the state court record the federal court concludes that it does not support the factual determination of the state court.[87]

Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

86. *See* Note, 45 TEX. L. REV. 592, 595 (1967).

87. 28 U.S.C. § 2254(d):

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

If the federal court decides to hold an evidentiary hearing and the presumption of correctness has not arisen, the prisoner has the burden of proving by convincing evidence that the factual determination by the state court was erroneous.[88] One court has held that the unrebutted testimony by a state prisoner in a federal court evidentiary hearing that his confession was obtained by violence does not meet his statutory burden of proof when the state court has made a prior determination that the confession was not obtained by violence.[89]

The purpose of amending section 2254 was to encourage the states to adopt adequate post conviction remedies.[90] If the prisoner has had an adequate hearing on his constitutional claim in a state court there is no necessity for the federal courts to hold additional hearings. This amendment, limiting the situations in which a federal court should hold evidentiary hearings, will be a great assistance to the federal courts in relieving their overcrowded dockets.

VI. CONCLUSION

The Supreme Court's decision in *Brown v. Allen*[91] created a Pandora's box out of the federal habeas corpus act. Its justification of the decision on the basis of legal history has been rejected by legal historians,[92] and the state judiciary has never accepted the release of duly convicted state prisoners by a single federal judge based on his opinion of facts developed in federal habeas corpus evidentiary hearings. The Supreme Court's decisions in the greatly criticized "trilogy" decisions which increased the availability of habeas corpus[93] and its decisions continually expanding the scope of due process of law,[94] created an intolerable situation which led to the amending of the federal habeas corpus act.[95]

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(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record . . .

88. 28 U.S.C. § 2254(d):

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, *the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.* (emphasis added).

89. Justus v. State of New Mexico, 378 F.2d 344 (10th Cir. 1967).

90. SEN. REP. 1797.

91. 344 U.S. 443 (1953).

92. *See* note 52 *supra.*

93. *See* note 61 *supra.*

94. *See* note 54 *supra.*

95. *See* note 4 *supra.*

The recent amendments offer a workable solution to the problems created between federal and state judicial systems by the federal review of state convictions. If the legal systems will follow the guidelines enumerated in the amendments both systems will benefit. The federal courts will be relieved of their burdens of successive petitions and evidentiary hearings and the state courts will be able to control the administration of their own criminal law. Most importantly, a state prisoner with a valid constitutional claim will have an opportunity to have it heard in a federal habeas corpus proceeding which is, in the final analysis, the real purpose of the federal habeas corpus act.