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Finality and Habeas Corpus: Is the Rule that Res Judicata May Not Apply to Habeas Corpus or Motion to Vacate Still Viable

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FINALITY AND HABEAS CORPUS: IS THE RULE THAT RES JUDICATA MAY NOT APPLY TO HABEAS CORPUS OR MOTION TO VACATE STILL VIABLE?

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I. INTRODUCTION

Mr. Justice Frankfurter wrote of habeas corpus:

> It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world . . . .
>
> . . . But the writ has potentialities for evil as well as for good. Abuse of the writ may undermine the orderly administration of justice and therefore weaken the forces of authority that are essential for civilization.[1]

This delicate balance between preservation of those elements of the writ deemed essential to safeguard personal freedom and elimination of those abuses of the writ threatening the orderly administration of justice and necessary authority has neither been easy to discover nor to maintain. It has been a problem nearly from the beginning of the conception of the writ as one to enhance personal liberty.[2] This search for some balance between use and abuse of the writ has been aggravated by the continuous flux in the function and use of the writ. Perhaps with good reason, stability has not been a hallmark of the writ, for the writ has been a major means of adjusting and adapting law enforcement to the changing notions of justice and due process.[3] As a result, today, no less than at any

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[1] Brown v. Allen, 344 U.S. 443, 512 (1953) (concurring opinion).

[2] *See* The Habeas Corpus Act of 1679, 31 Char. II, c. 2; R. SOKOL, FEDERAL HABEAS CORPUS, § B, at 12-14 (2d ed. 1969) [hereinafter cited as SOKOL].

[3] *See* Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ*—I, 18 Can. B. Rev. 10 (1940); Jenks, *The Story of Habeas Corpus*, 18 L.Q.

other time during its existence as a remedy to challenge unlawful detention, the writ of habeas corpus[4] and its statutory counterpart, 28 U.S.C. § 2255, motion to vacate sentence,[5] present procedural problems that threaten the orderly administration of justice. This paper will discuss those procedural problems arising from the use of the common law rule that res judicata may not apply to denials of the writ of habeas corpus.

The rule that res judicata may not apply to denials of the writ

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Rev. 64 (1902); Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451 (1966).

[4] Habeas corpus, in this general context, refers to common law habeas corpus as adopted in the United States Constitution, and its statutory grant to state prisoners in 1867. *See* Judiciary Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

[5] 28 U.S.C. § 2255 (1970) states:

> 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 re-sentence 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 a 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.

has been venerated for nearly 300 years.[6] The United States Supreme Court, having adopted this rule simply as a matter of common law precedent,[7] has, in more recent years, elevated the rule to a constitutional requirement by deeming it "inherent in the very role and function of the writ,"[8] and by implying that the would-be application of res judicata to denials of the writ would be a *suspension* prohibited by the Constitution.[9] Yet, retention of the common law rule, in a court system with a hierarchical structure unknown to the common law, has created enormous problems of judicial administration since the rule requires that no one court may make conclusive those issues of fact or law that are determined adversely to petitioners on habeas corpus or motion to vacate.[10]

While general principles of decision-making emphasize finality in the law in order to obtain stability and certainty,[11] the tradition of habeas corpus creates the possibility of litigation ad infini-

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[6] *See* Goddard, *A Note on Habeas Corpus*, 65 L.Q. Rev. 30, 32 (1949) [hereinafter cited as Goddard].

[7] *See* Salinger v. Loisel, 265 U.S. 224, 230 (1924).

[8] Sanders v. United States, 373 U.S. 1, 8 (1963); *cf.* Fay v. Noia, 372 U.S. 391, 406, 422-23 (1963).

[9] *See* Sanders v. United States, 373 U.S. 1, 11-12 & n.6 (1963); *cf.* Fay v. Noia, 372 U.S. 391, 406 (1963); and U.S. CONST. art. I, § 9.

When in 1948, 28 U.S.C. § 2255 (1970) (motion to vacate sentence) was adopted, with the avowed purpose of providing an expeditious remedy for correcting erroneous federal sentences without resort to habeas corpus, 28 U.S.C. § 2255 (1970) (Reviser's Note), the language appeared to deny federal prisoners access to habeas corpus. To preserve the statute's constitutionality, in the face of a challenge that it suspended the writ, *see* Hayman v. United States, 187 F.2d 456 (9th Cir. 1950), the Supreme Court interpreted the statute as not, in fact, suspending the writ. *See* United States v. Hayman, 342 U.S. 205 (1952). Section 2255 was considered a complete substitute for the constitutional right of habeas corpus, maintaining as broad a scope, procedurally and substantively, as that guaranteed by habeas corpus. *Id.* at 219; *accord*, Hill v. United States, 368 U.S. 424, 427 (1962). One prior procedure was that res judicata would not apply to denials of relief on habeas corpus, Salinger v. Loisel, 265 U.S. 224, 230 (1924); *accord*, Fay v. Noia, 372 U.S. 391, 422-23 (1963), thus requiring reconsideration of the same issues where raised on subsequent petitions. Since successive applications were always permissible both at common law and under federal habeas corpus prior to the enactment of § 2255, successive applications on motion to vacate were considered proper and, indeed, constitutionally required.

[10] However, where the ends of justice would not be served by a reconsideration of the issues, successive petitions may be barred. *See* Sanders v. United States, 373 U.S. 1, 15 (1963). See discussion of this discretionary bar, pp. 13-20 *infra*.

[11] *See* F. JAMES, JR., CIVIL PROCEDURE, § 11.1, at 517-18 (1965).

tum. Furthermore, as a consequence of the continuing expansion of the concept of due process, ever-increasing numbers of judgments become subject to the common law prohibition against the use of res judicata. But the more serious problem, directly related to maintenance of the common law rule, is the ability of the habeas or 2255 forum to overrule prior judgments of its own court of appeals,[12] and theoretically, the United States Supreme Court.[13]

These complications necessitate re-evaluation of the common law rule and its purported status as a constitutional requirement; nevertheless, the Supreme Court has avoided the issue, choosing, instead, to foreclose a limited number of collateral petitions by a variety of devices, while maintaining the language of the common law rule that res judicata may not apply.[14] It seems unlikely that such a course can realistically be maintained since substantial inroads have already been made against the common law rule by use of these devices, all of which impliedly challenge the apparent constitutional status of the rule. Foreclosure of collateral review has been permitted, *e.g.*, where a petitioner has deliberately failed to exhaust his appellate remedies;[15] where a petitioner has appealed, but has intentionally failed to raise all issues known to him;[16] where a petitioner has once litigated his claims collaterally

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[12] *See, e.g.*, Floyd v. United States, 365 F.2d 368, 379-80 (5th Cir. 1966).

[13] *See* Biggers v. Neil, 448 F.2d 91, 96-97 (6th Cir. 1971), *aff'd*, 409 U.S. 188 (1972) (as to four-to-four decisions of the Supreme Court on certiorari to the direct appeal for state prisoners). The validity of applying res judicata to actual adjudications by a majority of the Supreme Court, permitted under 28 U.S.C. § 2244(c) (1970), was not ruled upon since the Court held that § 2244(c) was inapplicable to the case before it, *i.e.*, to four-to-four decisions of the Supreme Court.

[14] Neil v. Biggers, 409 U.S. 188, 190-91 (1972).

[15] Kaufman v. United States, 394 U.S. 217, 220 & n.3 (1969) (dictum). This rule, sometimes referred to as the exhaustion doctrine, is misleading where federal prisoners are involved since exhaustion is not a jurisdictional prerequisite to collateral review for federal prisoners as it is for state prisoners. *Compare* 28 U.S.C. § 2254(b) (1970) (for state prisoners) *with* 28 U.S.C. § 2255 (1970) (for federal prisoners). Exhaustion is merely the expected course of action for a federal prisoner seeking to correct alleged constitutional errors. *See* Bowen v. Johnston, 306 U.S. 19 (1939). Exhaustion is enforced for federal prisoners only by the discretionary power of the district court judge to refuse to hear petitions where there has been no exhaustion of ordinary remedies.

[16] Fay v. Noia, 372 U.S. 391, 438 (1963) (dictum); *accord*, Kaufman v. United States, 394 U.S. 217, 227 & n.8 (1969) (dictum). The deliberate bypass rule incorporates both complete failure to appeal and appeal with failure to raise all issues known to petitioner at the time of appeal. This rule reinforces the general rule of exhaustion by permitting a discretionary bar to issues that were not raised

and, thereafter, seeks to litigate them on a subsequent petition;[17] where a federal petitioner has failed to raise an issue that was required to be raised by pre-trial motion pursuant to Federal Rule of Criminal Procedure 12 (b)(2);[18] and where a state petitioner has actually adjudicated his claims by certiorari to the criminal appeal in the United States Supreme Court and, thereafter, seeks to litigate them by habeas corpus in the district court.[19] Presumably, none of these rules has any force or effect beyond denial of the instant writ since petitioners barred by these rules are still procedurally free to return on a subsequent petition, raising the same or different claims, owing to the continued Supreme Court acceptance of the rule that res judicata may not apply to habeas[20] or 2255 judgments.[21]

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in the criminal appellate process where the § 2255 judge finds that the petitioner intended to avoid the normal appellate process.

[17] Sanders v. United States, 373 U.S. 1 (1963) (dictum). The successive petitions doctrine permits a discretionary bar to relitigation of issues collaterally in a second or successive petition where: (1) the same ground presented in the subsequent application was determined adversely to the applicant in a prior petition; (2) the prior determination was on the merits; and (3) the ends of justice would not be served by reaching the merits a second time. *Id.* at 15.

[18] Davis v. United States, 411 U.S. 233, 248 (1973). This express waiver rule has, apparently, very limited application, though the rationale used to support it must inevitably collide with the general tradition of liberality in collateral litigation, heretofore thought to be constitutionally required. Impliedly, the express waiver rule rejects the notion that application of res judicata to habeas litigation is unconstitutional, though the issue was ignored by the Supreme Court when adopting the waiver rule.

[19] 28 U.S.C. § 2244(c) (1970) states:

> In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of 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 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.

[20] Neil v. Biggers, 409 U.S. 188, 190 (1972); *accord*, Fay v. Noia, 372 U.S. 391, 422-23 (1963).

[21] Sanders v. United States, 373 U.S. 1, 8 (1963); *accord*, Kaufman v. United States, 394 U.S. 217, 228 (1969) (by implication).

In addition to these exceptions to the common law rule permitted by the Supreme Court, another set of exceptions has been devised by various lower federal courts to bar all issues raised by federal petitioners that have already been litigated in the federal criminal appellate process. Thus, absolute foreclosure of a first 2255 petition may result from application of one of the following formulae: that such litigation would be purposeless[22] or frivolous;[23] or that such litigation would permit the motion to vacate to function as a second criminal appeal to which petitioner is not entitled.[24] Foreclosure of a first 2255 petition brought after criminal appeal may also occur in some lower federal courts by exercise of discretion,[25] presumably on some similar ground as the Supreme Court rule permitting a discretionary bar to relitigation of successive petitions, *i.e.*, that such litigation would not serve the ends of justice,[26] or that *weight* may be given to the prior determination.[27]

Barring the writ by the doctrine of res judicata has no historical support. And the common law rule, even as modified by the Supreme Court, is contrary to such a bar. Nevertheless, the preclusionary rules devised by the lower federal courts go well beyond the limited Supreme Court modifications. In effect, these various rules permit res judicata to operate sub silentio with respect to issues actually litigated in the federal criminal appellate process. Not

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[22] Blackwell v. United States, 429 F.2d 514 (5th Cir. 1970).

[23] Fuentes v. United States, 455 F.2d 910, 911 (5th Cir. 1972); Smith v. United States, 420 F.2d 690 (5th Cir. 1970).

[24] *See* Craig v. United States, 376 F.2d 1009, 1010-11 (8th Cir. 1967); United States v. Marchese, 341 F.2d 782, 789 (9th Cir. 1965) (dictum); Medrano v. United States, 315 F.2d 361, 362 (9th Cir. 1963); Franono v. United States, 303 F.2d 470, 472 (8th Cir. 1962); United States v. Thompson, 261 F.2d 809, 810 (2d Cir. 1958).

[25] Bearden v. United States, 403 F.2d 782, 784 (5th Cir. 1968), *cert. denied*, 393 U.S. 1111 (1969), where the court recognized that res judicata was inapplicable, but then stated:

> That is not to say, however, that every defendant who has been unsuccessful on appeal can compel a re-trial of the same issues in a collateral proceeding, since the courts in post-conviction relief applications may exercise a sound judicial discretion to decline to re-try issues fully and finally litigated . . . .

Accord, Blackwell v. United States, 429 F.2d 514 (5th Cir. 1970).

[26] *Compare* Baca v. United States, 383 F.2d 154, 156 (10th Cir. 1967), *cert. denied*, 390 U.S. 929 (1968), *with* Sanders v. United States, 373 U.S. 1, 15 (1963).

[27] Salinger v. Loisel, 265 U.S. 224, 231 (1924) where the Court stated, "[a]mong the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, . . . and (b) a prior refusal to discharge on a like application."

only do these rules challenge the validity of the common law rule, but also, they challenge the supposed function to be served by collateral review for federal prisoners. If issues heard in the federal criminal appellate process may be barred from the civil collateral process, *i.e.*, motion to vacate, then federal criminal appeal has displaced the traditional function of collateral review for federal prisoners, raising the ultimate question: what ought motion to vacate be for?

Strict application of the common law rule creates a certain embarrassing chaos within the federal courts, permitting district court judges to review the judgments of their own courts of appeals. Moreover, the statute of 1948[28] requires federal petitioners to return to the same forum on collateral review in which they were sentenced[29] (which is often the one in which they were tried and convicted),[30] creating a feeling among district court judges that they are duplicating their own trial work on collateral review and are therefore wasting time.[31]

These conceptual difficulties are absent when federal judges deal with state prisoners' petitions. While there is duplication of work already done by state court judges, it is not a duplication of effort for the federal judge, at least not on the first habeas petition. Furthermore, a federal judge may view the state court ruling on federal constitutional questions of law inferior, particularly when bolstered by the supremacy clause. Therefore, he may have little compunction for overruling a state supreme court's interpretation of the constitutional issues raised by a defendant. When, however, the same questions are raised by federal prisoners, first in the criminal process at trial and on direct appeal, and then in the civil process by motion to vacate, a federal hierarchical crisis occurs. Dare a district court judge on collateral attack overrule a decision rendered on the criminal appeal that was adverse to the defendant? Is not the ruling on appeal of some force and effect, even if

[28] 28 U.S.C. § 2255 (1970). See note 5 *supra*.

[29] *Id.*

[30] *See* Hoffa v. United States, 471 F.2d 391 (6th Cir. 1973); Eaton v. United States, 458 F.2d 704 (7th Cir. 1972); Gravenmier v. United States, 469 F.2d 66 (9th Cir. 1972); Odom v. United States, 455 F.2d 159 (9th Cir. 1972); Saros v. Richardson, 435 F.2d 821 (9th Cir. 1971); Morrison v. United States, 432 F.2d 1227 (5th Cir. 1970); Wagner v. United States, 418 F.2d 618 (9th Cir. 1969).

[31] *See* Blackwell v. United States, 429 F.2d 514 (5th Cir. 1970).

it is not permitted the effect of merger and bar or collateral estoppel?[32]

Nothing has been written concerning the validity of the argument that the common law rule is constitutionally required, based on either the premise that the rule is inherent in the writ or the premise that application of res judicata would unconstitutionally suspend the writ.[33] More significant, the Supreme Court has applied the common law rule for nearly 200 years,[34] dogmatically asserting its necessity without ever examining, more than superficially, its origin, or rationale, if any, behind its use, or whether the constitutional mandate against suspension of the writ was realistically intended to permit no procedural limitations to litigation ad infinitum. Moreover, the Supreme Court has never considered whether the rules used by the lower federal courts to bar issues from collateral review solely because they have already been litigated on the criminal appeal are valid and consistent with the common law rule.

Maintenance of both rules seems ludicrous since they are diametrically opposed and spawn opposite results. Either the common law rule is to be maintained with all its obvious consequences, including the possibility of lower courts overruling on collateral review the previous judgments made by appellate courts in the criminal process, or the rules against duplicative litigation are to be maintained, barring collateral review to all constitutional and jurisdictional issues that either have been heard on appeal or could have been heard, permitting some form of res judicata or collateral estoppel to apply. Such a rule would thereby permit federal criminal appeal or certiorari to the criminal appeal to obviate the 2255 process[35] except for issues not raised in the criminal process where failure to raise them was not intentional[36] and express waiver of those issues is not otherwise found.[37]

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[32] An analogous problem occurs where state prisoners have first sought certiorari in the United States Supreme Court to their criminal appeals from the state courts, and have then brought petitions for habeas corpus in the United States district court. Congress has, however, provided for this problem by amendment. 28 U.S.C. § 2244(c) (1970). See note 19 *supra*.

[33] This latter argument has been suggested, but not evaluated. *See* SOKOL, *supra* note 2, at 159.

[34] *See* Sanders v. United States, 373 U.S. 1, 7-8 (1963) and cases cited therein.

[35] This would be in conformity with 28 U.S.C. § 2244(c) (1970), note 19 *supra*, which permits such a bar for state petitioners.

[36] Kaufman v. United States, 194 U.S. 217 (1969).

[37] Davis v. United States, 411 U.S. 233 (1973).

To evaluate better the viability of the common law rule, several historical developments within the law of habeas corpus should briefly be mentioned. The development, adoption, and modifications of the common law rule must be emphasized, paying particular attention to the changing notions supporting the validity of this rule. Since the argument that the common law rule is constitutionally required is of recent origin, the soundness of this proposition must also be tested. And finally, if the common law rule is not constitutionally required, consideration must be given to the advisability of retaining it in the face of the serious administrative problems its retention creates.

II. THE COMMON LAW RULE

A. Historical Background

1. *England*

The origin of the common law rule and its rationale are uncertain. All the English cases usually cited as precedent for the rule[38] have simply recognized the existence of the rule and applied it, giving no reason for the procedure.

Prior to the Habeas Corpus Act of 1679,[39] there seems to be no authority for the common law rule;[40] from this, one eminent English scholar, Lord Goddard, concludes that the practice did not exist before then.[41] This conclusion is supported by the fact that prior to 1679, King's Bench was the only court from which habeas corpus as an independent cause of action could issue.[42] Thus:

> The practice of going from court to court . . . seems to have arisen solely as a consequence of . . . [the Habeas Corpus] Act which conferred the power of issuing the writ on the Chancellor and on any of the judges or barons, and obliged them to do so.[43]

Certainly, concurrent, original jurisdiction was necessary in order

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[38] Cox v. Hakes, 15 App. Cas. 506, 527-28 (1890); *Ex parte* Partington, 153 Eng. Rep. 284, 285 (Ex. 1845); Burdett v. Abbot, 104 Eng. Rep. 501, 535 (K.B. 1811); King v. Suddis, 102 Eng. Rep. 119, 122 (K.B. 1801).

[39] 31 Char. II, c. 2.

[40] See Goddard, *supra* note 6, at 32.

[41] *Id.*

[42] *Id.* The courts of Common Pleas and Exchequer could issue writs of habeas corpus in conjunction with the writ of privilege. See 3 W. BLACKSTONE, COMMENTARIES, in CASES ON THE DEVELOPMENT OF LEGAL INSTITUTIONS 261 (1965).

[43] Goddard, *supra* note 6, at 33.

for the practice to exist, but it was not the determinative condition since the common law courts had concurrent, original jurisdiction over other causes of action as well, without the accompanying common law rule.[44] Much speculation on what that condition might have been has been proffered, most of which Goddard rejects. The argument of Lord Bramwell in *Cox v. Hakes*,[45] *e.g.*, that the practice probably arose because each court, while exercising primary jurisdiction over the writ, would not necessarily have known of the former applications in the other courts, is rejected by Goddard since the respondent would certainly have known of the prior actions and could easily have pleaded res judicata.[46] Goddard also rejects the notion of "any particular tenderness of the law in favour of liberty"[47] since the very reason that Parliament intervened and passed the Habeas Corpus Act was because of the reluctance to grant the writ by the Stuart Courts, which delayed and evaded their obligation to do so whenever possible.[48] Finally, he rejects Holdsworth's suggestion that the right to hearings de novo was a happenstance result of the Act of 1679,[49] saying that this does not explain *why* the judgment rendered on the first petition was not considered conclusive.[50]

Goddard finally concludes that the practice rested on a technical rule of procedure, which existed until procedural reforms were effected during the reign of Queen Victoria.[51] Prior to those reforms, the only method of challenging a decision of one of the common law courts was by writ of error, which writ did not issue for denials of the prerogative writs since they were not considered judgments in the technical sense. There was, therefore, no procedure by which to challenge a denial of the writ of habeas corpus except by the right to a hearing de novo in another court having concurrent and original jurisdiction to issue the writ.[52]

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[44] *See* Sayles, *The Court of King's Bench in Law and History*, in CASES ON THE DEVELOPMENT OF LEGAL INSTITUTIONS 147-50 (1965); Sayles, *Select Cases in the Court of King's Bench, Edward II*, in CASES ON THE DEVELOPMENT OF LEGAL INSTITUTIONS 150-53 (1965).

[45] 15 App. Cas. 506, 527 (1890).

[46] Goddard, *supra* note 6, at 33.

[47] *Id.* at 34.

[48] *Id.*

[49] *Id.*, *citing* 9 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 112 (1903).

[50] Goddard, *supra* note 6, at 34.

[51] *Id.*

[52] *Id.* at 34-36. *Accord*, Gordon, *The Unruly Writ of Habeas Corpus*, 26 Modern L. Rev. 520, 523 (1963).

After procedural reforms had been effected, and the courts of the common law had been merged into one High Court of Justice, the common law rule, from the English point of view, no longer made sense.[53] Thus, in 1960, the rule was rejected.[54] The writ now issues from only one court;[55] each habeas applicant is entitled to receive only one judgment on the merits of his petition unless "fresh evidence" is, thereafter, adduced.[56]

2. *United States*

Chief Justice Marshall declared that "resort may unquestionably be had to the common law"[57] to determine the meaning and extent of habeas corpus.[58] Thus, on the strength of its tradition alone, the common law rule was adopted into the American legal system.[59]

In 1924, the common law rule was challenged. In a well-reasoned opinion, the Court of Appeals for the Sixth Circuit examined the rule and its merits and concluded that it no longer served any valid purpose.[60] The Supreme Court, while affirming the result in *Wong Doo v. United States*,[61] reprimanded the lower court for

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[53] *See* Administration of Justice Act of 1960, 8 & 9 Eliz. 2, c. 65, § 14(2) in 40 HALSBURY'S STATUTES OF ENGLAND 207, 222-23 (2d ed. 1961), Notes.

[54] *Id.* The Notes indicate that:

> It was thought at one time that in case of refusal of habeas corpus by one court or judge application might be made to another court or judge even though the grounds urged were exactly the same; *see* 11 Halsbury's Laws (3d ed.) 38, 39; and *cf.* the Habeas Corpus Act, 1679 (c.2), s. 2 vol. 6, p. 86. Recently, however, it was decided (at least so far as criminal applications made in term time were concerned) that this was no longer the case, and that, since the merger of the old common law courts and the Court of Chancery in one High Court of Justice in 1873, an applicant had no right to go from division to division or from judge to judge. (*Re Hastings* (No. 2), [1958] 3 All E.R. 625; *Re Hastings* (No. 3), [1959] ch. 368; [1959] I All E.R. 698; on appeal, [1959] 3 All E.R. 221, C.A.).

Canada has also rejected the common law rule. *See* Can. Rev. Stat. c. 51, § 719(3) (1970), *amending* Can. Rev. Stat. c. 51, § 691 (1970). The language follows closely that of the English statute.

[55] *See* 11 HALSBURY'S LAWS OF ENGLAND 38 (3rd ed. 1955).

[56] Administration of Justice Act of 1960, 8 & 9 Eliz. 2, c. 65, § 14(2); *accord*, Can. Rev. Stat. c. 51, § 719(3) (1970), *amending*, Can. Rev. Stat. c. 51, § 691 (1970).

[57] *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93-94 (1807).

[58] *Id.*

[59] *See* Salinger v. Loisel, 265 U.S. 224, 230 (1924).

[60] *See* Wong Sun v. United States, 293 F. 273 (6th Cir. 1923), *aff'd sub. nom.* Wong Doo v. United States, 265 U.S. 239 (1924) (on a different ground).

[61] 265 U.S. 239 (1924).

having applied res judicata, citing *Salinger v. Loisel*,[62] a case decided on the same day as *Wong Doo*. In *Salinger*, the Supreme Court had stated that:

> At common law the doctrine of *res judicata* did not extend to a decision on *habeas corpus* refusing to discharge the prisoner . . . . [T]his Court has conformed to [this rule] and thereby sanctioned it . . . . We regard the rule as well established in this jurisdiction.[63]

In 1963, the rule, as applied to the statutory remedy of motion to vacate, was impliedly challenged in *United States v. Sanders*,[64] when the District Court for the Northern District of California refused to entertain a second petition pursuant to § 2255, saying:

> As there is no reason given, or apparent to this Court, why petitioner could not, and should not, have raised the issue of mental incompetency at the time of his first motion, the Court will refuse, in the exercise of its statutory discretion, to entertain the present petition.[65]

The Court of Appeals affirmed.[66]

The Supreme Court reversed,[67] holding that the District Court should have entertained the second petition, basing its decision on the relitigation requirement imposed by the common law rule.[68] This time, however, the Court asserted a new and stronger ground for the rule than that given in *Salinger*. With an omniscience typical of the Court in 1963, the Supreme Court made certain that which no one could have known before: the common law rule was constitutionally required. Rejecting the rationale in *Salinger* that the rule "derive[d] from the fact that at common law habeas corpus judgments were not appealable,"[69] the Court asserted that:

> [The rule's] roots would seem to go deeper. Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If "government . . . [is] always [to] be accountable to the

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[62] 265 U.S. 224 (1924).
[63] *Id.* at 230.
[64] Unreported opinion, *quoted in* Sanders v. United States, 373 U.S. 1, 6 (1963).
[65] 373 U.S. at 6.
[66] 297 F.2d 735 (9th Cir. 1961).
[67] Sanders v. United States, 373 U.S. 1 (1963).
[68] *Id.* at 7.
[69] *Id.* at 8.

judiciary for a man's imprisonment," *Fay v. Noia, supra*, at 402, access to the courts on habeas must not be thus impeded.[70]

The Court then concluded that "[t]he inapplicability of *res judicata* . . . is inherent in the very role and function of the writ."[71] Furthermore, the Court suggested that "serious constitutional questions"[72] with regard to suspension of the writ would arise were the newer statutory remedies for collateral review "construed to derogate from the traditional liberality of the writ of habeas corpus . . . ."[73]

B. Supreme Court Modifications of the Traditional Use of the Common Law Rule

The traditional use of the common law rule that res judicata may not apply to denials[74] of habeas corpus must be considered separately since the rule is found in other contexts as well, compounding the administrative problems of the federal courts. These other contexts will be discussed shortly.

While application of res judicata to denials of relief by habeas corpus is still considered impermissible, the common law rule has proved so impracticable that the Supreme Court has found it necessary to provide some principles of finality, though they fall short of any automatic bar. In fact, those cases that most strongly support the common law rule have also provided the major modifications of that rule. Two distinct modifications are used, depending on whether the issue raised on a subsequent petition has actually been litigated previously, or whether the issue could or should have been litigated previously, but was not.

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 12.

[73] *Id.* at 11.

Noting that the literal language of § 2255 permits the 2255 forum to decline to reach the merits of a petition where the petitioner seeks "similar relief" for a second time, the Court insisted that this could not be taken literally since if § 2255 permitted application of res judicata, the statute would be unconstitutional. The Court then concluded by attacking any "substantial procedural hurdles" that would make § 2255 "less swift and imperative than federal habeas corpus" since such hurdles would create the "gravest constitutional doubts" about their validity. *Id.* at 14.

[74] A grant of relief on habeas corpus was traditionally res judicata. Goddard, *supra* note 6, at 31, 36; *see* Cox v. Hakes, 15 App. Cas. 506 (1890).

1. *Issues Actually Adjudicated on Prior Petitions*

The first holding by the Supreme Court that res judicata may not apply to denials of the writ of habeas corpus came in *Salinger v. Loisel*.[75] In that case, a warrant had been issued in South Dakota for the arrest of Salinger. He was found in Iowa where he posted bond, but failed thereafter to appear in South Dakota. He was subsequently arrested in New York for hearing on a warrant of removal to South Dakota. At that time, he applied for a writ of habeas corpus, challenging the legality of the warrant of removal. After hearing, the New York District Court dismissed the writ and issued the warrant of removal; the Second Circuit Court of Appeals affirmed that order.[76]

Salinger then posted a second bond for his appearance in South Dakota. Again, he failed to appear. Shortly thereafter, he surrendered to the marshal in New Orleans after which he applied for a second writ of habeas corpus, alleging the same ground as that determined adversely to him in New York. He was admitted to bail pending hearing on the writ, but was immediately re-arrested for failure to appear on the bond given in New York. Without waiting for the hearing on the second writ, Salinger applied for a third writ, the second in New Orleans, and was again admitted to bail pending hearing on that writ.

All these prior proceedings were produced in evidence at the hearing in New Orleans after which the district judge discharged both writs, remanding Salinger to the marshal's custody. Salinger appealed and asked for a supersedeas to stay execution of the warrant of removal pending determination on appeal. The supersedeas was granted; however, the marshal took Salinger into custody, intending to execute the warrant. Salinger then applied for a fourth writ of habeas corpus, the third in New Orleans, alleging the same grounds as alleged in the first three, and additionally, alleging that his detention under the warrant of removal was in contravention of the supersedeas. After a hearing on the fourth writ, the district court discharged the writ. The Fifth Circuit Court of Appeals affirmed the discharge.[77]

On certiorari in the Supreme Court, respondent argued that

[75] 265 U.S. 224 (1924).

[76] *Ex parte* Salinger, 288 F. 752 (2d Cir. 1923).

[77] Salinger v. United States, 295 F. 498 (5th Cir. 1923), *aff'd in part, rev'd in part*, 265 U.S. 224 (1924).

the determination in the Second Circuit Court of Appeals was res judicata. The Supreme Court held that res judicata was inapplicable to denials of relief on habeas corpus solely on the basis of precedent, though the Supreme Court noted that it had never announced an "express decision on the point."[78]

Nonetheless, the Court was willing to permit discharge of the fourth writ on the basis of the prior decisions on the merits saying:

> [I]t does not follow that a refusal to discharge on one application is without bearing or weight when a later application is being considered . . . .
>
> . . . Among the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy . . . and (b) a prior refusal to discharge on a like application.[79]

The facts in *Salinger* were, admittedly, absurd. Some principle of finality should have been announced as, indeed, one was. What is difficult to understand is the Supreme Court's reasoning in refusing to apply the doctrine of res judicata. No holding had ever been announced in the Supreme Court that the doctrine of res judicata could not apply. At best, it was only assumed to be the rule,[80] or was dictum,[81] or was asserted in dissenting opinion.[82]

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[78] Salinger v. Loisel, 265 U.S. 224, 230 (1924).

[79] *Id.* at 230-31.

[80] *Compare* Carter v. Roberts, 177 U.S. 496 (1900) *with* Carter v. McClaughry, 183 U.S. 365 (1902), where the same issue, double jeopardy, was heard and ruled upon twice in the United States Supreme Court without any mention of res judicata or the common law rule.

[81] *See* Frank v. Mangum, 237 U.S. 309, 333-34 (1915), where the Supreme Court recognized the general principle of finality, saying:

> It is not easy to see why appellant is not, upon general principles, bound by [the Supreme Court of Georgia's] decision. It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties . . . . The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction.

The Court in *Frank* avoided the issue by asserting that it was not necessary to invoke the doctrine of res judicata for purposes of the case, not because of any common law rule, but because of the "impropriety of limiting . . . the authority of the courts of the United States in investigating an alleged violation by a State of . . . due process of law . . ." *Id.* at 334.

[82] *See In re* Kaine, 55 U.S. (14 How.) 103, 147 (1852) (Nelson, J., dissenting opinion).

Thus, precedent was not so strong that the Court should have felt obligated to honor it. More striking, however, the Court recognized the oft assumed rationale for the rule, that it existed because there was no right of appeal from a denial of habeas corpus at common law. The Court stated:

> In early times, when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number. But when a right to an appellate review was given, the reason for that practice ceased, and the practice came to be materially changed . . . .[83]

Since the rationale for the inapplicability of res judicata no longer existed, and since no holding that the common law rule was to be honored in the federal courts had ever been announced, it is most peculiar that the Court did not permit application of res judicata. The only hint given for the decision is the Court's statement that "the rules . . . here . . . outlined will accord to the writ of *habeas corpus* its recognized status as a privileged writ of freedom, and yet make against an abusive use of it."[84] This is not an adequate explanation since no argument suggested that the writ would have lost its privileged status as a writ of freedom were res judicata to have applied to Salinger's bid for his fourth writ.

Since the adoption of § 2255, the Supreme Court has reconfirmed the *Salinger* rule and made it applicable to denials of relief on 2255 petitions. In *Sanders v. United States*,[85] the Supreme Court said:

> Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.[86]

The major weakness of this discretionary rule is the implied assumption that discretion will always be exercised to give *weight* to the prior decision, and that the district judge will decline to relitigate issues determined adversely to petitioner by the court of

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[83] Salinger v. Loisel, 265 U.S. 224, 230-31 (1924).

[84] *Id.* at 232.

[85] 373 U.S. 1 (1963).

[86] *Id.* at 25.

appeals. However, since a district judge is "permitted, [but] not compelled"[87] to refuse to relitigate issues determined adversely to petitioner on a prior petition, the district judge may equally choose to rehear and redetermine issues actually adjudicated previously. Thus, the discretionary rule does not resolve the problem suggested in the introduction, that the habeas or 2255 judge has, by virtue of the common law rule, the power to review prior decisions of his own court of appeals and to overrule those decisions. If this conclusion is countered by the argument that it would be an abuse of discretion to rehear the same issues of law on the same facts as those presented to the court of appeals, then the discretionary rule becomes indistinguishable from res judicata or collateral estoppel since it would always be impermissible to relitigate the same issues on the same facts as those heard by the court of appeals.

The exercise of discretion to relitigate may result in the comic tragedy exemplified by *United States ex rel. Schnitzler v. Follette*.[88] In that case, the District Court had originally granted a writ of habeas corpus (to a state petitioner),[89] which judgment had then been reversed by the Second Circuit Court of Appeals.[90] Thereafter, petitioner applied for a second writ in the District Court, alleging the same facts and arguing that the decision of the Court of Appeals had been erroneous.[91] Assuming the applicability of the common law rule, the lower court had power to rehear and to rule contrary to the Court of Appeals. And that was precisely what the District Court did.[92] The State appealed; the Court of Appeals held on two grounds that the District Court was not entitled to grant relief on the second petition.[93] Both grounds were weak. First, the Court of Appeals held that under the *gsanders* rule the District Court could have refused to entertain the second petition;[94] but, second, the court held that "in light of [its] prior decision . . . the district court was required not to entertain the application."[95] This rationale was asserted in the face of a concession that res judicata was inapplicable. The court stated:

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[87] *Id.* at 12.

[88] 406 F.2d 319 (2d Cir. 1969), *cert. denied*, 395 U.S. 926 (1969).

[89] 267 F. Supp. 337 (S.D.N.Y. 1967), *rev'd* 379 F.2d 846 (2d Cir. 1967).

[90] 379 F.2d 846 (2d Cir. 1967).

[91] 290 F. Supp. 359 (S.D.N.Y. 1968), *rev'd* 406 F.2d 319 (2d Cir. 1969).

[92] *Id.*

[93] 406 F.2d 319 (2d Cir. 1969).

[94] *Id.* at 321.

[95] *Id.*

> While res judicata does not apply to successive applications Judge Croake was bound to follow our prior decision, rendered upon factual and legal background identical to that before the district court, under the common principle of stare decisis. In this case, as in all others, the district court is required to follow a binding precedent of a superior court, and it abused its discretion in declining to do so.[96]

This rationale merely begs the question by assuming that the former judgment was binding on the lower court.[97] Moreover, the Court of Appeals was incorrect in its application of stare decisis to this case. Since the parties and the issues of law and fact in the second petition were exactly the same as those in the first petition, the doctrine of stare decisis was inapplicable.[98] Finally, the Court of Appeals was attempting, by substitution of doctrines, to obtain the same enfect as that obtainable by res judicata, the application of which was admittedly impermissible. Therefore, it hardly mattered which label was given to the bar; the bar should have been equally impermissible.

2. *Issues That Could or Should have been Adjudicated on Prior Petitions*

On the same day that *Salinger* was decided, the Supreme Court denied a second petition in *Wong Doo v. United States*,[99] relying on the *Salinger* argument that while res judicata is inapplicable to habeas corpus, weight may be given to prior refusals of relief. Thus, while the Supreme Court reprimanded the lower court for having applied the "inflexible doctrine of res judicata,"[100] it reached the same result as the lower court by finding that the petitioner had placed the claim of the second petition in issue on the first petition; had had ample opportunity to offer his proofs on the first petition with regard to that claim; and had intentionally abandoned the claim on the first petition.[101] Therefore, petitioner

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[96] *Id.* at 322.

[97] This was precisely the issue to be determined, *i.e.*, whether a prior refusal of relief by the Second Circuit Court of Appeals could bind the district court, requiring the district judge to refuse to grant relief on a subsequent similar petition. The *Sanders* rule does not make such a provision.

[98] Stare decisis merely asserts that, in the future, questions of law between parties not bound to the present case will be decided the same as the present case if the facts are substantially the same. *See* R. MOORE, STARE DECISIS 7-8 (1958).

[99] 265 U.S. 239 (1924).

[100] *Id.* at 241.

[101] *Id.*

was presumed to be lacking "good faith"[102] and to be making "an abusive use of the writ of habeas corpus";[103] for these reasons, the petition was barred, and the judgment below affirmed.

This rule was refined in *Price v. Johnston*,[104] where the Court distinguished the facts of *gwong Doo*, saying that the record had been clear in *Wong Doo* that the proofs were available; whereas, in *Price*, though petitioner had had prior knowledge of the issue that was belatedly raised on his fourth petition, it was not clear from the record whether he had had access to his proofs before his fourth petition; thus, he was entitled to demonstrate that he had not abused the writ by offering some good reason for his failure to litigate the issue previously.[105]

Finally, in *Sanders v. United States*,[106] the Supreme Court applied the *Salinger* rule to 2255 petitions, but limited the use of discretion to deny subsequent petitions to those issues that have actually been adjudicated previously.[107] Therefore, no *weight* may be given to the denial of a prior petition unless the issues raised in the subsequent petition are the same as those adjudicated in the prior petition.

None of these cases required maintenance of the common law rule in order to achieve their results. Once the Court had determined in *Wong Doo* that petitioner was not entitled to litigate the specific issue raised on the second petition, there was no good reason why that decision should not have been res judicata. Moreover, the Court need only have determined that petitioner's claim *could or should* have been brought previously and was therefore barred. This is, in effect, precisely what the Court determined. The Court simply went one step further, reasoning that petitioner's failure to litigate an issue, which he *really* could have litigated, created a presumption of bad faith that barred him from litigating his claim. In *Price*, the Court ruled that the presumption could be

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[102] *Id.*

[103] *Id.*

[104] 334 U.S. 266 (1948).

[105] *Id.* at 291. *Salinger* was held inapplicable because the issue in *Price* had not actually been litigated on any prior petition. This distinction was a new one since the Court in *Wong Doo* relied on *Salinger*, arguing that *weight* could be given to the prior refusal of relief despite the fact that the issue had never actually been litigated.

[106] 373 U.S. 1 (1963).

[107] *Id.* at 9.

overcome by petitioner's demonstration of some good cause for the failure to litigate timely an issue known to him. Yet, these cases turn upon a simple interpretation of whether the issues *really* could have been litigated previously. In *Price* and *Sanders*, the Court need only have found that petitioners' proofs were not available on the prior petitions and were, therefore, not precluded by res judicata. Had the proofs been available, there is no reason why the Court could not have liberally construed the meaning of "could or should have brought" in order to avoid barring the writ if injustice would otherwise have been the result.[108]

These cases conclude the case law development of the common law rule as traditionally understood. While little rationale remains for the traditional use of the common law rule, it has been argued that the ill effects created by retention of the rule are limited, or at least controllable, by use of the successive petitions doctrine as set forth in *Sanders v. United States*.[109] The (V Schnitzler case, however, offers demonstrative proof of the ineffectiveness of the successive petitions doctrine.

More important, the successive petitions doctrine was not designed to control the problem of duplicative litigation brought through the courts by use of the variety of remedial devices currently available to petitioners, *e.g.*, pre-trial motions, post-trial motions, criminal appeal, writ of certiorari and habeas corpus or motion to vacate sentence. All these remedies are potentially available to petitioners, none precluding the use of another.[110] Given this variety of remedies, should not one mode of review be permitted to preclude the use of another, especially where petitioners seek to litigate issues by a second mode of review after they have already had those claims adjudicated by a different mode of review? Logically, should not petitioners be limited to one mode of review where that mode was sufficient to examine the issues fully?

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[108] Petitioner should not be barred, *e.g.*, from raising claims belatedly where there is a showing that the claim was not raised due to incompetency of counsel; *see* Barnes v. Florida, 402 F.2d 63 (5th Cir. 1968), *cert. denied*, 396 U.S. 969 (1969); Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967); or that rights were waived due to counsel's conflict of interests. *See* Whitaker v. Warden, 362 F.2d 838 (4th Cir. 1966).

[109] 373 U.S. 1 (1963); *see* SOKOL, *supra* note 2, § 21.5 at 159.

[110] There is a trend toward permitting one form of review to preclude another, see discussion of certiorari, pp. 33-46 *infra*; and also permitting the failure to exercise one form of review to preclude the exercise of another. See discussion of pretrial motions, pp. 39-49 *infra*.

C. Extention of the Common Law Rule to Denials of Relief on Certiorari to the Criminal Appeal and Its Subsequent Statutory Modification

It should be recalled that at common law there was neither appe/l from the criminal judgment,[111] nor appeal from the denial of relief on habeas corpus.[112] The common law rule provided a means of reviewing the denial of relief on habeas corpus in the absence of appellate review, and habeas corpus itself provided a means of reviewing the criminal judgment. Habeas corpus was, nonetheless, a limited review, *i.e.*, the only issue reviewable on habeas corpus was the jurisdiction of the criminal court to try the case; all other issues were necessarily final. And this initial review by habeas corpus was not governed by the common law rule; rather, it was governed by the rule that void judgments may be impeached.[113] In contrast, the common law rule was intended only to permit review of the denial of the writ itself. However, a slight misstatement of the rule by American courts has led to misapplication and extension of the common law rule. Misstated, the rule asserts that res judicata may not apply to habeas corpus.[114] This misstatement leads to the inevitable conclusion that no issue cognizable on habeas corpus can be determined with finality prior to

[111] 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 125-26 (2d ed. 1914). Prior to 1705, the writ of error issued in criminal cases only as a matter of royal grace. In Regina v. Paty, 91 Eng. Rep. 431 (K.B. 1705), the court held that the crown could not deny the writ in misdemeanor cases. However, even where the writ issued as a matter of right, the procedure was so cumbersome and the bases of review were so limited that the writ was of little practical advantage and was subsequently abolished in 1907. In the United States, the Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, permitted appeal from federal capital cases to the Supreme Court by writ of error, but limited the review to jurisdictional questions; the Act of Mar. 3, 1891, ch. 517, § 2, 26 Stat. 828, created circuit courts of appeal, and granted the right of direct appeal from federal district courts to the circuit courts on writ of error.

[112] Goddard, *supra* note 6.

[113] At common law, the habeas forum could not examine a conviction for any purpose other than to verify that the committing court had valid jurisdiction. *See Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202-03 (1830) where Chief Justice Marshall wrote: "The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. . . .

. . . An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject matter, although it should be erroneous."

[114] *See* Neil v. Biggers, 409 U.S. 188, 190 (1972) where the Court states that "*res judicata* [is] inapplicable"; and Fay v. Noia, 372 U.S. 391, 423 (1963) where the Court states that "*res judicata* is inapplicable in habeas proceedings."

the habeas process; thus, a two-tiered process is required: the habeas process becomes automatic, no longer extraordinary, but routine.

Given the misstatement, certiorari to the criminal appeal presents three problems for the habeas or 2255 forum: (1) the meaning to be given a denial of certiorari; (2) the meaning to be given a grant of certiorari with a judgment rendered by an evenly divided court; and (3) the meaning to be given an actual adjudication of petitioner's claims by a majority of the Supreme Court on certiorari to the criminal appeal. In discussing these problems, one further issue should be considered: whether the meaning given to any of the above three situations should vary, depending on whether petitioner is a state or a federal prisoner.

1. *Denial of Certiorari*

The law is settled that denial of certiorari cannot be taken to mean that the Supreme Court has expressed an opinion on the merits of the petition.[115] But what does denial of certiorari say about the opinion of the lower court that is left undisturbed by the denial? It certainly is not to be deemed "approval of the decision."[116] This is so because denial may rest on a variety of factors, in particular, that the decision, whether right or wrong, does not present "questions of sufficient gravity"[117] for determination on certiorari.

Where the federal constitutional claims of a state petitioner have never been considered by a federal court, the state criminal appellate decision is given no finality.[118] This conclusion rested, in *Brown v. Allen*,[119] not on the common law rule, but on the statute of 1867 and the supremacy clause.[120] However, in *Fay v. Noia*,[121] the

[115] Brown v. Allen, 344 U.S. 443, 492, 497 (1953); Sunal v. Large, 332 U.S. 174, 181 (1947).

[116] Brown v. Allen, 344 U.S. 443, 496 (1953).

[117] *Id.* at 491.

[118] *Id.* at 500. This argument is subject to the caveats of the deliberate bypass and adequate state ground rules. For a discussion of these two limitations on the right to seek a review by habeas corpus, *see* SOKOL, *supra* note 2, at 159-71.

[119] 344 U.S. 443 (1953).

[120] *Id.* at 500; *see Ex parte* Royall, 117 U.S. 241, 248-50 (1886). The issues presented to the district court in *Brown* on habeas corpus had been the same issues as those presented to the United States Supreme Court on certiorari to the criminal appeal, which petition had been denied. The habeas forum, in dismissing the petition, had said:

Supreme Court held that denial of relief in the state court could be given no finality due to the "familiar principle that *res judicata* is inapplicable in habeas proceedings,"[122] citing the "classic English practice"[123] in support of that principle. This is a clear misstatement and misapplication of the classic English practice upon which the Supreme Court claimed to rely.

If the *Brown* rationale alone is relied upon for refusal to grant finality to state criminal judgments, then denial of certiorari to a federal prisoner's petition ought to be distinguishable in one of several respects: either the federal prisoner's right to collateral review arises pursuant to Article I, Section 9, of the United States Constitution, with its attendant common law rule, and the law with regard to state prisoners is therefore inapposite;[124] or the right

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> While action of the Virginia courts and the denial of certiorari by the Supreme Court were not binding on the principle of res judicata, they were matters entitled to respectful consideration . . . and in the absence of some most unusual situation, they were sufficient reason for [the] court to deny a further writ of habeas corpus.

Brown v. Crawford, 98 F. Supp. 866, 868 (E.D.N.C. 1951).

All the justices but Mr. Justice Jackson, who concurred in the result, were agreed that denial of certiorari was not res judicata, barring the issues on a subsequent habeas corpus petition. But they disagreed on the rationale for that rule. The minority stated: "In fields other than habeas corpus with its unique opportunity for repetitious litigation . . . the denial would make the issues *res judicata*." Brown v. Allen, *supra* at 456. However, the minority would have permitted *weight* to be given a denial of certiorari, on a sufficiently developed record, thus, applying the *Salinger* rule for successive petitions to a first petition raising claims fully considered on certiorari to the criminal appeal. *Id.* at 457. This position was rejected by the majority who asserted:

> If we were to sanction a rule directing the District Courts to give any effect to a denial of certiorari, let alone the effect of *res judicata* which is the practical result of the position of the Fourth Circuit, we would be ignoring actualities recognized ever since certiorari jurisdiction was conferred upon this Court more than sixty years ago.
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> . . . The governing consideration was authority in the Court to decline to review decisions which, right or wrong, do not present questions of sufficient gravity.

Id. at 491. Mr. Justice Jackson, who would have permitted res judicata to apply, noted in his concurring opinion that "[i]t is sometimes said that *res judicata* has no application whatever in habeas corpus cases and surely it does not apply with all of its conventional severity." *Id.* at 543.

[121] 372 U.S. 391 (1963).

[122] *Id.* at 423.

[123] *Id.* at 422-23 & n.32.

[124] *See* Thornton v. United States, 368 F.2d 822, 831 (D.C. Cir. 1966) (dissenting opinion), *cited with approval in* Kaufman v. United States, 394 U.S. 217, 230-31 (1969).

to relitigate under the *Brown* rationale rests on the right to have one's day in a federal forum on federal constitutional claims, and the federal prisoner has, by definition, already had his claims adjudicated in a federal forum;[125] or, in any event, the common law rule is inapplicable to denials of relief on certiorari, but for the *Brown* rationale all criminal judgments would be binding, and since *Brown* applies only to state criminal judgments, the judgment of a federal court of appeals ought to stand with finality in the face of a denial of certiorari, binding the district court to the appellate court ruling as a matter of law of the circuit until the Supreme Court ultimately approves or disapproves the rule of law. A similar point with respect to this last argument was made by Mr. Justice Jackson when he wrote in *Brown*:

> The fatal sentence that in real life writes *finis* to many causes cannot in legal theory be a complete blank. I can see order in the confusion as to its meaning only by distinguishing its significance under the doctrine of *stare decisis*, from its effect under the doctrine of *res judicata*. I agree that, as *stare decisis*, denial of certiorari should be given no significance whatever. It creates no precedent and approves no statement of principle entitled to weight in any other case. But, for the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the doctrine of *res judicata* . . . .[126]

The majority opinion in *Brown* had held that denial of certiorari could not be interpreted to mean that the issue was foreclosed on habeas corpus by res judicata since "denial of certiorari cannot be interpreted as an 'expression of opinion on the merits.' "[127] leaves confused the distinction, made by Mr. Justice Jackson, between stare decisis and res judicata. But the opinion, as expressed by Mr. Justice Frankfurter, made clear that the decision not to apply res judicata to state criminal judgments rested on the supremacy clause and not on the common law rule. The Court reasoned that:

> Insofar as this jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights

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[125] In *Kaufman*, this argument was rejected by the majority. 394 U.S. at 228.

[126] Brown v. Allen, 344 U.S. 443, 543 (1953) (concurring opinion). Mr. Justice Jackson believed, however, that both state and federal criminal judgments should be res judicata in the face of a denial of certiorari. *Id.*

[127] *Id.* at 497.

> guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law.[128]

Leaving, for the moment, the question of whether the doctrine of res judicata would be the correct principle of finality to apply, it seems clear that some principle of finality, at least in the instance of federal appellate court rulings, should apply. Were the *Fay* rationale for refusal to grant finality to criminal judgments valid, it would be equally applicable to federal criminal judgments; as a result, it would become possible for the 2255 forum to review and overrule prior federal criminal appellate court judgments. Were the *Brown* rationale to apply, federal criminal judgments would become distinguishable from state criminal judgments: denial of certiorari to a state petitioner would give no finality to the state judgment and should not preclude a subsequent habeas corpus petition; whereas, denial of certiorari to a federal petitioner should permit the judgment of the court of appeals to stand, precluding a subsequent 2255 petition that challenged issues already litigated in the criminal appellate process. Unfortunately, this confusion in the rationale for the rule denying finality to criminal judgments in the face of a denial of certiorari has never been clarified by the Supreme Court.[129]

2. *Four-to-four Decisions of the Supreme Court on Certiorari to the Criminal Appeal*

In 1966, Congress amended the statutory remedy of habeas corpus for state prisoners[130] with the intention of providing "a qualified application of the doctrine of res judicata."[131] According to that provision, where a state prisoner seeks relief for an alleged denial of a federal constitutional right by application for the writ of certiorari to the United States Supreme Court, any actual adjudication rendered by the Court shall be "conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right . . . ."[132]

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[128] *Id.* at 510.

[129] *See* Neil v. Biggers, 409 U.S. 188 (1972).

[130] *See* 28 U.S.C. § 2244(c) (1970), *supra* note 19.

[131] 3 U.S. CODE CONG. & AD. NEWS 3663, 3664 (1966) *quoting* S. REP. No. 1797, 89th Cong., 2d Sess. (1966); *cf.* Neil v. Biggers, 409 U.S. 188, 191 & n.1 (1972).

[132] 28 U.S.C. § 2244(c) (1970), *supra* note 19. Had this circumstance been clearly governed by the *Brown* rationale, there would have been no need for this

In *Neil v. Biggers*,[133] the Supreme Court held that a four-to-four decision of the Supreme Court on certiorari to the criminal appeal is not an "actual adjudication" on the merits of the issues considered and, therefore, does not fall within the purview of the statute.[134] Thus, four-to-four decisions, like denial of certiorari, are not entitled to any res judicata effect. Again, the Supreme Court referred to the common principle that res judicata may not apply to habeas proceedings, but failed to indicate whether the rationale for the rule rested on *Brown* or on *Fay*. Impliedly, however, the inapplicability of res judicata to habeas corpus rested on the *Brown* rationale since the Court indicated that were there an actual adjudication of the merits on certiorari, the state prisoner would have had the federal adjudication to which he was entitled and would be precluded from seeking relitigation of the issues on habeas corpus. If the decision does, in fact, rest on *Brown*, then where federal prisoners are involved, a split decision, like a denial of certiorari, should permit the criminal judgment of the court of appeals to stand as law of the circuit, binding the district court on any subsequent motion to vacate on those issues previously adjudicated.[135]

3. *Actual Adjudication on Certiorari to the Criminal Appeal*

If the Supreme Court considers § 2244(c) constitutional,[136] *i.e.*, not violative of the common law rule, then § 2244(c) is consistent with the *Brown* rationale, but not that of *Fay*: habeas corpus for state prisoners is only necessary in order to provide uniformity in interpretation of federal law; uniformity may equally be achieved by adjudication on certiorari or on habeas corpus in the federal system; therefore, one adjudication in the federal system, either by certiorari or by habeas corpus, is sufficient. Thus, all issues of fact and law that have been *actually* adjudicated on certiorari may be

statute since actual adjudication on certiorari would have been the *day* in a federal forum to which a state petitioner was entitled, foreclosing a subsequent review of the same issues on habeas corpus.

[133] 409 U.S. 188 (1972).

[134] *Id.* at 192.

[135] This argument, distinguishing state from federal prisoners, runs counter, however, to the Supreme Court's position in *Kaufman* that the two collateral remedies for state and federal prisoners are "exactly commensurate." 394 U.S. 217, 222 (1969); *accord*, Hill v. United States, 368 U.S. 424, 427 (1962).

[136] *See* Neil v. Biggers, 409 U.S. 188 (1972) (dictum) (by implication).

given finality, precluding a subsequent habeas petition raising the same claims.[137]

If the common law rule is considered inapplicable in this instance, then one of several conclusions may follow. Assuming the constitutionality of § 2244(c), this statute establishes a distinction between habeas corpus for state prisoners and motion to vacate for federal prisoners: the right to habeas corpus for state prisoners arises from the statute of 1867 pursuant to the supremacy clause and is therefore unattended by the common law rule. This conclusion rejects the Supreme Court position espoused in *Kaufman* and *Sanders* that the statutory remedies for state and federal prisoners are "exactly commensurate."[138] Moreover, this conclusion rejects the rationale for the inapplicability of res judicata, espoused in *Fay*.

On the other hand, if the Supreme Court continues to maintain that the statutory remedies for state and federal prisoners are exactly commensurate, then even though there is no comparable provision in § 2255 for federal prisoners to that in § 2244(c) for state prisoners, a similar limitation on federal prisoners' petitions should follow. It should be noted, however, that the argument that these remedies are commensurate does not need to be maintained in order to reach this result. One only need argue that the common law rule is equally inapplicable to denials of relief on certiorari whether the adjudication concerns a state or a federal prisoner. If this latter position is taken, then certiorari, as a post-criminal judgment remedy, is permitted to displace the traditional civil collateral remedy provided by habeas corpus and motion to vacate sentence, at least with respect to issues actually adjudicated. This should not be an astounding result, however, since the right of review by certiorari did not exist for criminal judgments at the time the traditional role of habeas corpus was being developed.

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[137] The language of § 2244(c) implies that redevelopment of the facts on habeas corpus, permitted under Townsend v. Sain, 372 U.S. 293 (1963), would be limited since the statute permits factual reconsideration only where "the applicant . . . shall plead and the court shall find the existence of a . . . controlling fact which did not appear in the record . . . in the Supreme Court and . . . the applicant . . . could not have caused such fact to appear . . . by the exercise of reasonable diligence." 28 U.S.C. § 2244(c) (1970). Clearly, the discretion of a federal district judge, under *Townsend* to relitigate facts would be precluded.

[138] Kaufman v. United States, 394 U.S. 217, 222 (1969); *accord*, Sanders v. United States, 373 U.S. 1, 13 (1963).

Certainly, direct review should be coordinated with habeas corpus and motion to vacate to avoid judicial confusion.

Summary

Since the common law rule does not assert that res judicata may not apply to denials of relief on certiorari, the rationale in *Fay* must be rejected if there is to be sound judicial administration of the criminal justice system. Moreover, there is no valid reason why these two statutory remedies for state and federal prisoners should be commensurate in all respects. Habeas corpus for state prisoners involves the relationship of different legal institutions from those regulated by motion to vacate. Thus, different administrative problems and considerations should be involved in creating procedural limitations for these two remedies.[139] To conclude that these remedies are exactly commensurate would require relitigation of issues for both state and federal prisoners where there has been a denial of certiorari or a grant of certiorari with a decision rendered by an evenly divide court. This requirement would permit federal district courts to relitigate issues actually adjudicated in the criminal process by federal courts of appeals. Avoidance of this problem requires rejection, to some degree, of the philosophy expressed in *Kaufman* that the purpose of habeas corpus is not simply to provide a federal forum on federal constitutional claims, but to provide an independent review of the criminal process in order to insure the integrity of that process.[140] The Court in *Neil v. Biggers* rejects this philosophy, with respect to state petitioners, when it says that one hearing in a federal forum is all that the state petitioner is entitled to have.[141] Ultimately, the right of a federal petitioner to have his claims reviewed may be reduced to the right of one independent review. Since Congress has provided for more than one means of review for federal petitioners to insure the integrity of the trial process, one adequate review, either by criminal appeal or by writ of certiorari, may ultimately be permitted to preclude a duplicate review by motion to vacate.

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[139] *See generally*, Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-finding Responsibility*, 75 Yale L.J. 895 (1966), for a discussion of administrative problems unique to habeas corpus for state petitioners.

[140] 394 U.S. at 226.

[141] 409 U.S. at 191.

D. Extension of the Common Law Rule as Modified by *Sanders v. United States* to Denials of Relief on Federal Criminal Appeal

Misstatement of the common law rule has also led to the conclusion that res judicata may not apply to denials of relief on federal[142] criminal appeal. For the moment, the problems related to issues that could or should have been adjudicated in the criminal process, but were not, are left aside. The sole concern here is the power of the 2255 forum to relitigate issues already ruled upon adversely to the petitioner in the criminal appellate process.

Section 2255 provides for discretion to refuse to relitigate issues already heard on a prior collateral petition,[143] but the statute is silent with respect to relitigation of issues already heard in the criminal appellate process,[144] at least, there is no clear statutory provision that permits finality prior to the collateral process by "actual adjudication" on either the criminal appeal or certiorari to the criminal appeal.

The circuits are split on whether res judicata may apply to issues actually adjudicated on criminal appeal, barring them from consideration on motion to vacate. Several cases indicate that res judicata, in its strictest form, may not apply;[145] however, there are

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[142] Again, a distinction should be made between state and federal prisoners' petitions. State criminal appellate judgments may not bar relitigation of federal constitutional issues in the federal habeas process because there is a right to federal adjudication of those claims, premised on the supremacy clause.

[143] "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." 28 U.S.C. § 2255 (1970). This was considered, in *Sanders*, to be the equivalent of § 2244 for state prisoners, *i.e.*, the statutory adoption of the *Salinger* rule.

[144] Section 2255 reads in part that "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing . . . [to] determine the issues . . . ." 28 U.S.C. § 2255 (1970).

Arguably, where the appellate record indicates that an actual adjudication of the issue raised by motion to vacate has already been made, the 2255 forum may conclude that petitioner is entitled to no relief, *i.e.*, res judicata. However, this interpretation would be inconsistent with the interpretation given by the Supreme Court to another subsection of 2255, which states that "[a] motion for such relief may be made at any time." *Id.* In Heflin v. United States, 358 U.S. 415, 420 (1959), five justices concurred that: "This latter provision simply means that, as in habeas corpus, there is . . . no *res judicata* . . . ."

[145] Houston v. United States, 419 F.2d 30 (5th Cir. 1969); Bearden v. United States, 403 F.2d 782 (5th Cir. 1968), *cert. denied*, 393 U.S. 1111 (1969); Floyd v. United States, 365 F.2d 368, 379 (5th Cir. 1966).

a number of decisions to the contrary.[146] Among those courts that assume the common law rule is applicable to denials of relief on criminal appeal, most find some device to avoid complying with the rule.[147]

While the Supreme Court has never ruled on the validity of permitting actual adjudication on criminal appeal to operate as a bar to relitigation on motion to vacate, a significant dictum of the Supreme Court indicates that the common law rule as modified by *Sanders v. United States* does govern this situation.[148] In *Kaufman v. United States*, the Supreme Court stated that it "perceive[d] no differences between the situations of state and federal prisoners which should make [fact-finding] less subject to scrutiny by a § 2255 court."[149] In a footnote to this observation, the Court went on to say that:

> Where a trial or appellate court has determined the federal prisoner's claim, discretion may in a proper case be exercised against the grant of a § 2255 hearing. Section 2255 provides for hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief . . . ." In *Sanders v. United States*, . . . we announced standards governing the determination whether a hearing should be ordered in the case of a successive motion under § 2255. Similarly, where the trial or appellate court has had a "say" on a federal prisoner's claim, it may be open to the § 2255 court to determine that on the basis of the motion, files, and records, "the prisoner is entitled to no relief."[150]

Thus, the ambiguous subsection of § 2255, which states that petitioner is entitled to a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," is given the same meaning as the subsection permitting a discretionary bar to relitigation on successive motions.[151] Again, the meaning of "abuse of discretion" becomes prob-

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[146] United States v. Barillas, 291 F.2d 743 (2d Cir. 1961), asserts that res judicata is inapplicable except as to issues actually adjudicated. *Accord*, Fiano v. United States, 291 F.2d 113 (9th Cir. 1961); D'Ercole v. United States, 361 F.2d 211, 212 n.1 (2d Cir. 1966).

[147] Blackwell v. United States, 429 F.2d 514, 516 (5th Cir. 1970); Houston v. United States, 419 F.2d 30, 32 (5th Cir. 1969); Bearden v. United States, 403 F.2d 782 (5th Cir. 1968).

[148] *See* Kaufman v. United States, 394 U.S. 217 (1969).

[149] *Id.* at 227.

[150] *Id.* at 227 n.8.

[151] "The sentencing court shall not be required to entertain a second or succes-

lematic. If it is always an abuse of discretion to relitigate the same issues of law on the same facts as those considered by the appellate court on the criminal appeal,[152] then the statute is simply construed to permit, euphemistically, the application of res judicata or collateral estoppel. Such an interpretation would change substantially the notion of the purpose of habeas corpus, *i.e.*, that the collateral civil process exists to insure the integrity of the criminal process[153] since it would permit review by criminal appeal to preclude an independent collateral review.

Furthermore, such an interpretation makes the initial provision of § 2255 unclear. That provision states, in pertinent part, that:

> 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 . . . may move the court . . . to vacate . . . the sentence.[154]

When may a prisoner "move the court . . . to vacate . . . the sentence"? In attempting to answer this question, it should be remembered that while there is no jurisdictional prerequisite under § 2255 requiring federal petitioners to exhaust appellate remedies prior to seeking collateral relief, it is the expected course of action;[155] to ensure this course, district courts are empowered to refuse to litigate issues collaterally that were intentionally not raised at the criminal trial or on direct appeal.[156] As a result, a petitioner is *forced* to appeal all issues known to him in order to preserve them for collateral review.[157] But, once he has sought direct review, he may equally be precluded, by exercise of discretion

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sive motion for similar relief . . . ." 28 U.S.C. § 2255 (1970).

[152] It was apparently not considered an abuse of discretion to do so in Salinger v. Loisel, 265 U.S. 224 (1924).

[153] Kaufman v. United States, 394 U.S. 217, 229 (1969). The Supreme Court stated in *Kaufman* that the history of the writ "refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, [the validity of the incarceration]." *Id.* at 223-24.

[154] 28 U.S.C. § 2255 (1970).

[155] *See* Bowen v. Johnston, 306 U.S. 19 (1939). 28 U.S.C. § 2254(b) (1970) requires exhaustion of state remedies for state prisoners prior to seeking habeas corpus in the federal courts. *Id.* Section 2255 has no comparable provision.

[156] Kaufman v. United States, 394 U.S. 217, 227 n.8 (1969) (dictum).

[157] *Id.*

or some other rule, from collaterally attacking those claims that were litigated on the criminal appeal.[158] Thus, § 2255 becomes inaccessible to federal prisoners except in a very limited number of circumstances, *e.g.*, where there is newly discovered evidence; where incompetency of counsel is alleged; or where the 2255 forum finds no deliberate bypass of the appellate process for issues not previously litigated.

While the Supreme Court has been unable to see any significant differences between the remedies for state and federal prisoners, this distinction—that actual adjudication on criminal appeal may bar relief collaterally for federal prisoners, implied in the *Kaunman* footnote—demands a concession that § 2255 is a unique remedy. Unlike common law habeas corpus (or the statutory habeas corpus for state prisoners), which operates as a check by one independent court system upon another and inferior court system, § 2255 operates as a self-review, an examination by the 2255 forum of its own previous conduct during the criminal proceeding.[159] More important, the 2255 forum is an inferior court in the federal court hierarchy. Thus, while any deference shown by a federal district court towards a state court is based merely on comity[160] and not on lack of power, the deference of a lower federal court to a higher federal court, to which it is considered bound on prior rulings of law, may be a limitation of power in the instance of entertaining a motion to vacate on issues already heard by an appellate court, preventing the lower court from ruling contrary to its superior.

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[158] *Id.*

[159] This presents problems of its own with regard to the level of objectivity that can be achieved by self-review. One special feature of the motion to vacate requires that the court hearing the motion be the same court that sentenced petitioner. 28 U.S.C. § 2255 (1970). The word "court" has often been construed to mean "judge." *See* Burris v. United States, 430 F.2d 399, 402 (7th Cir. 1970), *cert. denied*, 401 U.S. 921 (1971) (and cases cited therein). The sentencing judge is very often the same judge who tried and convicted petitioner. Thus, the independence of the collateral civil process, which was a traditional aspect of habeas corpus, is jeopardized. The requirement to relitigate and redetermine the facts under the *Townsend* standards, *e.g.*, where the facts are not supported by the record; or where the facts have not been adequately developed; or where there is an appearance of lack of a full and fair fact hearing, is weakened by permitting the same judge to evaluate the fairness or completeness of his own trial work.

[160] *Ex parte* Royall, 117 U.S. 241, 252 (1886); Fay v. Noia, 372 U.S. 391, 422 (1963), where the Court asserts that state adjudications bear no more weight before a federal court than does a foreign judgment and that a state court simply cannot have the last say on federal constitutional claims. *Id.*

This may seem obvious, but it has not proved obvious in practice, given the assumed applicability of the common law rule.

Because many lower federal courts express the opinion that the common law rule is applicable to denials of relief on criminal appeal (with respect to issues cognizable on motion to vacate), these district and appellate courts have been hard put to avoid the ridiculous circumstance of arguing among themselves as to which court may finally grant or deny relief to a petitioner. Recall the similar circumstance concerning successive petitions in the *Schnitzler* case.[161] Of course, the use of stare decisis, in substitution for res judicata, to avoid hierarchical chaos, is unique.[162] There are, however, several commonly recurring rules that are used to bar relitigation under similar circumstances.

The most common formula used is the *McCann-Sunal* rule[163] that "habeas corpus will not be allowed to do service for an appeal."[164] This phrase as used by the Supreme Court has meant that habeas corpus could not be used in lieu of the normal appellate process to raise claims of trial error that are cognizable only by criminal appeal.[165] Moreover, use of this rule as a substitute for res judicata to bar constitutional issues that could or should have been raised on the criminal appeal, but were not, has been condemned by the Supreme Court.[166] The validity of its use as a substitute for

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[161] 406 F.2d 319 (2d Cir. 1969). See discussion pp. 17-18 *supra*.

[162] Another unique device is the application of the doctrine of law of the case. In Fiano v. United States, 291 F.2d 113 (9th Cir. 1961), the court acknowledged that were the indictment so defective as to be void, which the petitioner had alleged, the issue of sufficiency of the indictment could be heard on motion to vacate. Nonetheless, the court asserted that the issue had been "unsuccessfully raised . . . on [petitioner's] appeal, and . . . [was] now res adjudicata and the law of the case." *Id.* at 114.

[163] *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942); Sunal v. Large, 332 U.S. 174 (1947). Neither case involved issues that were ruled upon on direct appeal in the normal criminal appellate process; rather, they involved, respectively, application for the writ while the criminal appeal was pending and waiver of criminal appeal altogether. The Supreme Court has never considered the use of this rule to preclude a subsequent collateral review following exhaustion of criminal appellate remedies. Therefore, any use of this rule to bar issues that were appealed, instead of waived, is an extension of and a misapplication of the rule.

[164] Sunal v. Large, 332 U.S. 174, 178 (1947).

[165] Kaufman v. United States, 394 U.S. 217, 223 n.7 (1969). *But cf.* Davis v. United States, 417 U.S. 333 (1974), where the Court held that an issue of trial error, which was preserved by raising it on appeal, may be brought by habeas or motion to vacate where there has been an intervening change of law affecting that issue.

[166] *See* Kaufman v. United States, 394 U.S. 217, 223 (1969).

res judicata to bar constitutional issues actually litigated on the criminal appeal has not yet been considered by the Supreme Court. But such use avoids the very end that habeas corpus, as traditionally understood, seeks to achieve: opportunity for a civil review, independent of the criminal process, in order to insure the integrity of the criminal process.[167]

A second method by which lower federal courts bar collateral review of the criminal process is to exercise discretion to bar the petition,[168] or to apply the *Sanders* rule.[169] Exercise of discretion, likewise, changes significantly the traditional structure of the writ of habeas corpus, for traditionally, where one alleged good cause for issuance of the writ, it had to be issued.[170] No discretion was

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[167] In Townsend v. Sain, 372 U.S. 293, 311-12 (1963), the Supreme Court distinguished the habeas function from the appellate function, saying:

> The whole history of the writ . . . refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest allegations . . . . The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew.

This distinction was reiterated in Kaufman v. United States, 394 U.S. 217, 223-24 (1969), in connection with the power of 2255 courts.

[168] *See* Blackwell v. United States, 429 F.2d 514 (5th Cir. 1970); Bearden v. United States, 403 F.2d 782, 784 (5th Cir. 1968); *cert. denied*, 393 U.S. 1111 (1969); Baca v. United States, 383 F.2d 154, 156 (10th Cir. 1967); United States v. Marchese, 341 F.2d 782 (9th Cir. 1965); United States v. Thompson, 261 F.2d 809 (2d Cir. 1958).

[169] *See* Baca v. United States, 383 F.2d 154, 156 (10th Cir. 1967).

[170] All the great prerogative writs of the common law were considered discretionary in the sense that there was no absolute right to their issuance, but that a strong showing of entitlement was required. Nevertheless, in the law of habeas corpus, once such a showing was made, there was no discretion to refuse the writ. Blackstone wrote:

> [I]f a probable ground be shewn, that the party is imprisoned without just cause, and therefore hath a right to be delivered, the writ of *habeas corpus* is then a writ of right, which "may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by the command of the king, the privy council, or any other."

3 W. BLACKSTONE, COMMENTARIES, in SOKOL, *supra* note 2, at 323.

permitted.[171] In order to apply a discretionary bar, in conformity with the writ's tradition, the court must first determine that no good cause exists for the writ's issuance. This determination requires definition of the term "good cause." If the ambiguous subsection to § 2255—that a hearing must be granted "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief"—is construed to include a ruling adverse to petitioner on the criminal appeal, then of course the writ can be barred, not on the basis of res judicata, but on the basis of no allegation of good cause for its issuance. But this would simply be a subterfuge for res judicata. More properly, "good cause" means an alleged violation of constitutional rights or lack of jurisdiction. Accordingly, the district court must determine whether to hear a petition that asserts good cause even in the face of an adverse ruling on that issue on criminal appeal. This use of discretion does not resolve the problem of lower courts hearing and overruling judgments of higher courts; it merely gives the lower court an opportunity to avoid the administrative problems involved.

A third method by which lower federal courts bar a first collateral review of issues heard on the criminal appeal is to label the collateral review derogatorily as "purposeless duplication"[172] or as "frivolous."[173] Frivolousness usually implies that the case is so lacking in substance that it should be dismissed.[174] However, when asserted as a bar to a first motion to vacate after the criminal appeal, the term seems to be equated with the mere fact that petitioner has already litigated the same issue in the criminal appellate process.[175] Again, if this fact alone triggers the bar, then it is nothing more than subterfuge for res judicata.

None of the foregoing rules, with the exception of the discretionary rule, conforms to the supposedly correct rule that res judi-

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[171] *Id. See also* Jenks, *The Story of Habeas Corpus*, 18 L.Q. Rev. 64, 74-76 (1902).

[172] Blackwell v. United States, 429 F.2d 514, 516 (5th Cir. 1970).

[173] Fuentes v. United States, 455 F.2d 910, 911 (5th Cir. 1972); Smith v. United States, 420 F.2d 690 (5th Cir. 1970); Dirring v. United States, 370 F.2d 862, 864 (1st Cir. 1967); Lipscomb v. United States, 312 F.2d 891, 892 (8th Cir. 1963).

[174] Blair v. California, 340 F.2d 741, 742 (9th Cir. 1965).

[175] *See, e.g.*, Dirring v. United States, 370 F.2d 862, 864 (1st Cir. 1967), where the First Circuit Court of Appeals asserted that: "Indeed, an appeal from the denial of a § 2255 motion which attempts to raise again questions which had been previously determined may be dismissed as frivolous."

cata may not apply to habeas corpus, except that each avoids using the term "res judicata." Use of these rules indicates that a problem of orderly court administration does exist and that the common law rule performs unsatisfactorily in this situation. Moreover, these rules present a serious problem of their own: they are applied inconsistently and arbitrarily. Most exemplary of this inconsistency and consequent arbitrariness is the Court of Appeals for the Fifth Circuit.

The Fifth Circuit Court of Appeals presents a kaleidoscopic line of cases, indicating an open split among the panels as to whether the common law rule is to be applied strictly or not. Until 1961, the court had espoused the *McCann-Sunal* rule,[176] both in context[177] and out.[178] Suddenly, in 1961, the court swung to the common law rule, holding that issues previously determined either on direct appeal or on motion to vacate could be relitigated since res judicata was inapplicable.[179]

In 1965, the court reverted to its former rule that motions presenting no issues other than those already considered on direct appeal are not reviewable a second time.[180] Likewise, in 1966, the court dismissed an issue, though cognizable under § 2255, because it had already been reviewed in the normal appellate process.[181] More recently, in *Floyd v. United States*,[182] the court turned again to the common law rule with all its obvious consequences:

> Remembering always that principles of res judicata, as such, are not a part of habeas-like post-conviction remedies, so that an earlier ruling does not foreclose reconsideration or even a change of result, the Constitution does not require . . . another evidentiary hearing . . . on facts already fully developed . . . .[183]

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[176] See Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942); Sunal v. Large, 332 U.S. 174, 178 (1947), where the court asserted that "habeas corpus will not be allowed to do service for an appeal."

[177] *See* Larson v. United States, 275 F.2d 673 (5th Cir. 1960), which applied the *McCann-Sunal* rule to bar trial errors from collateral review.

[178] *See* Smith v. United States, 265 F.2d 14 (5th Cir. 1959), which applied the *McCann-Sunal* rule to bar constitutional issues from collateral review.

[179] Birchfield v. United States, 296 F.2d 120 (5th Cir. 1961).

[180] Del Genio v. United States, 352 F.2d 304 (5th Cir. 1965).

[181] Grene v. United States, 360 F.2d 585 (5th Cir. 1966).

[182] 365 F.2d 368 (5th Cir. 1966).

[183] *Id.* at 379.

This rule was reconfirmed by a different panel,[184] which relied on the Supreme Court dictum in *Heflin v. United States*[185] where five justices concurred that:

> The words which Congress has used are not ambiguous. Section 2255 provides further that: . . . "A motion for *such relief* may be made at any time." This latter provision simply means that, as in habeas corpus, there is no statute of limitations, no *res judicata*, and that the doctrine of laches is inapplicable.[186]

Nevertheless, the Fifth Circuit Court of Appeals provided a limiting provision of "judicial discretion,"[187] permitting the 2255 forum to determine whether to relitigate.

One year later, in *Houston v. United States*,[188] the court backpedaled to state that "the principles of res judicata do not automatically apply to § 2255 motions . . . [but] there is likewise no requirement that hearings be held on issues already laid to rest,"[189] citing the *Floyd* case.[190]

This fitful volley has resumed in the most recent cases of the Fifth Circuit Court of Appeals where the court has held that issues alleged collaterally that have been previously determined on direct appeal are precluded from reconsideration as "purposeless duplication"[191] and as "frivolous."[192]

Use of these rules is not consistent with the common law rule as modified by *Sanders* and as applied by the Supreme Court. Therefore, assuming the common law rule is applicable to denials of relief on criminal appeal, application of these rules of preclusion, with the exception of the discretionary rule, is impermissible. Yet, the very existence of these preclusionary rules demonstrates that

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[184] *See* Bearden v. United States, 403 F.2d 782 (5th Cir. 1968).

[185] 358 U.S. 415, 420 (1959).

[186] *Id.* at 420.

[187] Bearden v. United States, 403 F.2d 782, 784 (5th Cir. 1968).

[188] 419 F.2d 30 (5th Cir. 1969).

[189] *Id.* at 32. This is simply a non sequitur.

[190] The court's reliance on the language of *Floyd* to support its proposition is unwarranted. The crux of the confusion is (1) whether a prior full scale hearing that fully developed the facts permits foreclosure of a second hearing to develop the same facts, or (2) whether the ruling of law on the facts developed at the prior hearing permits foreclosure of a reconsideration of the prior ruling of law. *Floyd* seems to say the former; *Houston*, the latter.

[191] Blackwell v. United States, 429 F.2d 514, 516 (5th Cir. 1970).

[192] Fuentes v. United States, 455 F.2d 910, 911 (5th Cir. 1972).

the lower federal courts have had to wrestle with the problem asserted in the introduction, *i.e.*, that extension of the common law rule to denials of relief on criminal appeal would permit lower federal courts to ignore or to overrule prior decisions of higher federal courts with a consequent chaos within the federal courts and the creation of an enormous number of inconclusive criminal judgments.

The questions raised by these cases, and the preclusionary rules asserted in them, ultimately concern the legitimate functions of the criminal appeal and motion to vacate, and the scope of the 2255 forum's power to relitigate issues that have been ruled upon by a higher court in the federal criminal process. Does motion to vacate really serve as a second appeal as some of these courts suggest, or does it serve a distinct and independent function: to insure the integrity of the federal criminal process? If it is serving an independent function, is the district court empowered to insure the integrity of the appellate court? Does the district court, by virtue of its 2255 jurisdiction and the common law rule, have power to overrule its superior court?

As can be seen from these cases, there is a need for the Supreme Court or Congress to provide some clear rule to resolve the confusion of whether the common law rule applies to denials of relief on criminal appeal or some other rule foreclosing relitigation of those issues ruled upon in the criminal appellate process. Furthermore, there is a need to clarify the *Sanders* rule, which was created for successive petitions. The Supreme Court should determine whether this rule is applicable to successive petitions where there has been an intervening appeal ruling on the issues raised subsequently, and whether it is applicable to collateral review of issues heard on the criminal appeal, as suggested by the *Kaufman* footnote. If it is applicable, then the district court has, within its discretion, power to overrule its own court of appeals. And the right of respondent to appeal, which thereby permits the court of appeals to reverse the district court, is no practical solution to the lower court's ability to rule contrary to its own court of appeals. This simply permits a wasteful and time-consuming power struggle.

E. Extension of the Common Law Rule as Modified by *Sanders* and *Fay* to Issues That Could or Should Have Been Adjudicated in the Federal Criminal Process, But Were Not; and Its Subsequent Limitation

1. *The Right to a Plenary Hearing*

Section 2255 provides that "[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 . . . may move the court . . . to vacate . . . the sentence."[193] Though this language seems clear, the circuit courts had been split over the question of whether all constitutional issues could be challenged by motion to vacate,[194] necessitating a review by the Supreme Court to resolve the issue. In *Kaufman*[195] the Supreme Court held that an issue of illegal search and seizure may not be barred on motion to vacate[196] since the statutory remedy is intended to be as broad as habeas corpus[197] and since the statute of 1867, which expanded the issues cognizable on habeas corpus to include constitutional claims,[198] is applicable to both state and federal prisoners.[199] However, the Court recognized that circumstances may exist that would permit the 2255 forum, under equitable principles, to refuse to litigate issues, otherwise cognizable on motion to vacate, that were not raised timely in the criminal process.[200]

The concern, in this section, is with those conditions that may entitle a court to bar issues collaterally (where the criminal judgment was entered by a court of competent jurisdiction)[201] on the

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[193] 28 U.S.C. § 2255 (1970). See note 5, *supra*.

[194] *See, e.g.*, cases cited in Kaufman v. United States, 394 U.S. 217, 220 n.3, 221 n.4 (1969).

[195] 394 U.S. 217 (1969).

[196] *Id.* at 231.

[197] *Id.* at 221-22.

[198] *Id.* at 221.

[199] *Id.* This argument was not necessary since 28 U.S.C. § 2255 (1970) provides specifically that federal prisoners may bring constitutional claims by motion to vacate.

[200] Kaufman v. United States, 394 U.S. 217, 220 n.3, 227 n.8 (1969).

[201] Formerly, the writ of habeas corpus issued only for the purpose of inquiring into the jurisdictional authority of a court (or other governmental agency) to order a person detained. The writ would not issue against a detention ordered by a court of competent jurisdiction. *See Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202-03 (1830). Any judgment entered or commitment ordered had to be more than erroneous or improper; it had to be null and void in order for the writ to issue. *Id.* at 203.

This concept of nullity is essential to any consideration of barring issues, otherwise cognizable on habeas corpus, simply because they could have been challenged in the criminal process, but were not. Since lack of subject matter jurisdiction always makes a judgment void and subject to challenge, *see* F. JAMES, JR., *supra* note 1, § 11.6 at 534-40, it is not crucial that this issue be raised in the criminal

basis that an orderly challenge was not made at the appropriate time in the criminal process to the issues raised collaterally. The problems suggested here, concerning finality, are not whether relitigation is necessary, but whether one adequate litigation has, in fact, been afforded; and whether the courts should be obligated to provide an alternate means of litigation where the ordinary means available to petitioner was not exercised;[202] or whether the courts may be permitted to refuse the alternate means; and if so, upon what principle or principles of finality.

a. The Common Law Rule

The common law rule has been used by the Supreme Court as justification for litigation of issues collaterally that were not raised timely in the state criminal process. As previously indicated, the Supreme Court misstated and therefore misapplied the common law rule in this situation.[203] In *Fay v. Noia*,[204] the Supreme Court held that the federal district court's habeas jurisdiction is not limited by the failure of a state court defendant to seek direct review in the state courts on an alleged violation of the fourteenth amendment.[205] Any weight to be given state adjudications is based on comity and not on any doctrinal bar such as res judicata.[206]

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process in order to preserve it for a subsequent collateral attack. Bowen v. Johnston, 306 U.S. 19 (1939). The argument of nullity runs aground, however, where the subject matter competency of the habeas forum is expanded to include issues other than jurisdiction. The Supreme Court has already abandoned the attempt to determine which challenges, other than lack of subject matter jurisdiction, may make a judgment null and void. *See* Waley v. Johnston, 316 U.S. 101 (1942); Johnson v. Zerbst, 304 U.S. 458 (1938). *See also Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1055-62 (1970), for a discussion of these cases. Rather, the Court has conceded that deprevation of constitutional rights, by courts of competent jurisdiction, may be challenged by habeas corpus. *See* Kaufman v. United States, 394 U.S. 217, 222 (1969); Fay v. Noia, 372 U.S. 391, 409 (1963).

[202] Since most constitutional issues may conceivably be raised at one or more stages of the criminal process prior to any application for collateral review, it becomes legitimate to require petitioners to preserve these constitutional issues by asserting them at every possible opportunity. To administer this requirement effectively, however, the courts must necessarily be thrown back into the quagmire of determining which issues other than subject matter jurisdiction may render a judgment void, or if not void, then so lacking in due process that failure to raise the claim in the criminal process should not bar that claim collaterally.

[203] See discussion pp. 21-22, *supra*.

[204] 372 U.S. 391 (1963).

[205] *Id.* at 429-30.

[206] *Id.* at 420.

Even though the common law rule may be rejected as a valid reason for refusal to give finality to state criminal judgments, other valid policy reasons do exist for this refusal, such as the need to achieve uniformity of federal law,[207] or to correct inadequacies of state fact-finding procedures.[208] These reasons, necessarily, do not apply to federal criminal judgments. Nevertheless, with respect to motions to vacate for federal prisoners, the Supreme Court has considered the holdings in *Fay* to be applicable[209] so that "failure to take a direct appeal from conviction does not deprive a federal post-conviction court of power to adjudicate the merits of constitutional claims . . . ."[210]

In *Kaufman*, the Supreme Court applied the common law rule sub silentio, quoting from *Fay* that "conventional notions of finality . . . cannot be permitted to defeat the . . . policy that federal constitutional rights . . . shall not be denied without . . . opportunity for plenary federal judicial review."[211] Likewise, the common law rule was impliedly extended by analogy from the successive petitions doctrine, espoused in *Sanders*. The Court, quoting from *Sanders*, continued that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."[212] The Court concluded that "the interest in finality" is plainly the same "with regard to both federal and state prisoners."[213]

All these assertions have already been criticized. Nevertheless, there are valid reasons for refusal to grant finality to federal criminal judgments, and instead, to require the 2255 forum to litigate claims not previously litigated.

b. Manifest Federal Policy

One reason is the claimed "manifest federal policy"[214] against denying constitutional rights without "the fullest opportunity for plenary federal judicial review."[215] The Supreme Court has, until

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[207] Brown v. Allen, 344 U.S. 443 (1953).
[208] Townsend v. Sain, 372 U.S. 293 (1963).
[209] Kaufman v. United States, 394 U.S. 217, 220 n.3, 228 (1969).
[210] *Id.* at 220 n.3.
[211] *Id.* at 228.
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*

recently, taken the position that "full protection of . . . constitutional rights"[216] requires more than an opportunity to be heard in a federal forum; full protection requires "full and fair consideration of constitutional claims."[217] Under this policy, habeas or 2255 review may not be denied solely on the ground that the issue should have been raised in the criminal trial or on appeal, but was not.

c. An Independent Cause of Action

Traditionally, habeas corpus was considered to be a different cause of action from the criminal action that resulted in the prior judgment.[218] Thus, it has been said that habeas corpus is a civil remedy "sued out by one arrested for crime . . . [and] brought . . . to assert the civil right of personal liberty . . . ."[219] The writ was therefore not considered to be a continuing proceeding in the criminal prosecution, but an independent civil proceeding.[220] Further, "the judicial proceeding under [habeas corpus was] not to inquire into the criminal act which [was] complained of, but into the right to liberty notwithstanding the act."[221]

In *Fay*, the Supreme Court's lack of power to grant relief on direct review by certiorari, due to an adequate and independent state law ground, was neither a logical nor a legal bar to the lower federal court's power to grant relief by habeas corpus.[222] This result was based, in part, upon the "independent" nature of the collateral remedy.[223] The Court reasoned by analogy that "Noia's failure to appeal [would not] have precluded him from bringing an action under the Civil Rights Act . . . ."[224] Similarly, since habeas corpus is an independent remedy, it is irrelevant to its exercise that certain bars exist within the criminal system to any challenges attempted within that system.[225] The inapplicability of the adequate state ground rule to habeas corpus was also based upon the

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[216] *Id.*

[217] *Id.*

[218] SOKOL, *supra* note 2, § 2.

[219] Kurtz v. Moffit, 115 U.S. 487, 494 (1885).

[220] Riddle v. Dyche, 262 U.S. 333, 335-36 (1923).

[221] *Ex parte* Tong, 108 U.S. 556, 559 (1883). *See also* Eagles v. United States *ex rel.* Samuels, 329 U.S. 304, 315 (1946).

[222] 372 U.S. at 429-30.

[223] *Id.* at 422.

[224] *Id.* at 428.

[225] *Id.* at 426.

distinction drawn between the appellate process and the habeas process,[226] and the fact that "the adequate state-ground rule is a function of the limitations of appellate review" only.[227]

The Supreme Court has treated both habeas corpus and motion to vacate as independent civil remedies to test the validity of the criminal trial process.[228] If this analysis is to be maintained for purposes of applying some doctrinal bar to collateral litigation, then res judicata would not apply to issues that could or should have been litigated in the criminal process, but were not, even though the common law rule is not applicable, since res judicata does not apply to different causes of action.[229] The proper principle of finality would be collateral estoppel, which would only bar issues actually litigated previously.[230]

On the other hand, while one may argue that the causes of action are technically different, and even that the cause of action for habeas corpus or motion to vacate does not arise until there has been a judgment rendered wrongfully in the prior cause of action, the issues and arguments of both causes of action often overlap. Indeed, the functions to be served by pre-trial motions, post-trial motions, criminal appeal, and habeas corpus or motion to vacate often overlap. Thus, where a petitioner could easily have pursued those issues and theories in the first cause of action, should he not

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[226] *Id.* at 429-30.

[227] *Id.* at 429.

[228] Townsend v. Sain, 372 U.S. 293, 311-12 (1963) (habeas corpus); Kaufman v. United States, 394 U.S. 217, 223-26 (1969) (motion to vacate).

[229] F. JAMES, JR., *supra* note 11, § 11.18 at 575. Analysis of § 2255 proceedings is difficult because § 2255 is a hybrid of remedies. It combines the common law writ of error coram nobis or the statutory motion to vacate judgment with the common law writ of habeas corpus. The former two remedies were traditionally considered to be direct attacks on the criminal judgment, or a continuation of the original criminal proceeding in the same sense as direct appeal is a continuation of the original proceeding; whereas, habeas corpus was traditionally viewed as an independent civil proceeding that challenged the validity of the incarceration, irrespective of the first cause of action that established guilt for a criminal act.

If § 2255 is considered to be more nearly analogous to the writ of error coram nobis or motion to vacate, and thus, to permit res judicata to apply to motions to vacate under § 2255, though that doctrine would not be applicable to habeas corpus as an independent cause of action, then the Court has come full circle to the problems raised in United States v. Hayman, 342 U.S. 205 (1952). If the statutory motion to vacate narrows the scope of petitioner's remedies, which he had prior to the adoption of 28 U.S.C. § 2255 (1970), then the statute presents serious constitutional problems with regard to suspension of the writ of habeas corpus.

[230] F. JAMES, JR., *supra* note 11, at 575-76.

be compelled to do so? This requirement is most logical, but it does not resolve the problem under consideration here; it creates the problem. If petitioner is required to pursue his claims as soon as they arise and as soon as a mechanism is available by which to raise them, and yet he fails to do so, should he then be precluded from pursuing those issues later? This is most difficult to answer, especially when the issue of finality must be weighed against the prospect of loss of life or liberty. In fact, this was the consideration given for requiring relitigation of successive similar petitions in *Sanders*.[231] The distinguishing point to be made, however, is that it is less essential to relitigate the same claims than it is to litigate an essential claim for the first time. Discretion to bar litigation of new claims, where no plenary hearing has ever been afforded to the issues raised untimely, should be exercised more sparingly than the exercise of such a bar to issues already once adjudicated. Moreover, collateral litigation of a claim never before litigated does not pose the administrative problems suggested earlier with regard to lower courts reviewing actual adjudications of their superior courts. The only major policy breached by such belated litigation is that against petitioners splitting their causes of action, which constitutes harassment of the courts and causes undue delay. This breach may be avoided, however, by application of equitable principles to bar those persons found to be intentionally splitting their claims, harassing the courts, and causing undue delays.[232]

d. The Statutory Language

Section 2255 provides that "[a] motion [to vacate] may be made at any time."[233] This provision has been interpreted to mean that, as in habeas corpus, res judicata has no application.[234]

Arguably, the common law rule has been codified and must govern motions to vacate even if it is otherwise not constitutionally required and even though its application no longer makes sense. However, if res judicata is inapplicable to issues litigated collaterally that were not litigated in the criminal process because these two proceedings constitute different causes of action, then the foregoing interpretation of the statute can only be taken to apply

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[231] 373 U.S. at 8.

[232] For other arguments, see Cleary, *Res Judicata Reexamined*, 57 Yale L.J. 339 (1948).

[233] *See* 28 U.S.C. § 2255 (1970). See *supra* note 5.

[234] *See* Heflin v. United States, 358 U.S. 415, 420 (1959).

to successive similar petitions, *i.e.*, to the same cause of action sued on more than once, and not to an issue raised for the first time in a collateral proceeding. It may thus be concluded that the statute is silent with respect to a first motion to vacate brought after the criminal process and that had Congress intended to bar or limit such issues, it would have said so, as it did with respect to successive petitions,[235] when it codified the *Salinger* rule.[236]

2. *Limitations on Plenary Hearing*

a. Equitable Principles

Though there is a tradition of liberality of relitigation in the law of habeas corpus, there are some limitations on that liberality. One limitation has been to bar claims by application of equitable principles.[237] Thus, petitioners have not been permitted to abuse the orderly procedures provided them for correction of constitutional violations.[238] As mentioned before, one may be barred by a finding of petitioner's "lack of good faith,"[239] or "abuse of the remedy,"[240] or "deliberate by-pass"[241] of the normal methods of correcting constitutional errors in the criminal process. Each of these represents the imposition of an equitable concept to bar collateral litigation.

b. Express Waiver

More recently, the Supreme Court has applied an express waiver provision, contained in the Federal Rules of Criminal Procedure, to bar collateral review. In *Davis v. United States*,[242] petitioner attempted, on motion to vacate, to challenge for the first time the grand jury array, from which the grand jury that indicted him was selected, on the ground of racial discrimination in its

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[235] 28 U.S.C. § 2255 (1970) provides, in part, that "[t]he sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

[236] This statutory provision was construed to be a codification of the *Salinger* rule. *See* Sanders v. United States, 373 U.S. 1, 12 (1963).

[237] Kaufman v. United States, 394 U.S. 217, 220 n.3 (1969); Fay v. Noia, 372 U.S. 391, 438-40 (1963).

[238] Bowen v. Johnston, 306 U.S. 19 (1939) (dictum).

[239] Wong Doo v. United States, 265 U.S. 239, 241 (1924).

[240] *Id.*

[241] Kaufman v. United States, 394 U.S. 217, 220 n.3, 227 n.8 (1969); Fay v. Noia, 372 U.S. 391, 438 (1963).

[242] 411 U.S. 233 (1973).

composition,[243] though this specific issue was required to be raised by pre-trial motion pursuant to Federal Rule 12(b)(2).[244] Rule 12(b)(2) provides that "defenses and objections based on defects in the institution of the prosecution or in the indictment or information . . . may be raised only by motion before trial . . . . Failure to present any such defense or objection . . . constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver."

Davis, unaided by counsel, alleged that he had neither waived nor abandoned his right to challenge the array.[245] The district judge dismissed the petition on the basis of the waiver provision in rule 12(b)(2) and on a finding that no cause was shown for avoidance of the waiver,[246] though petitioner was given no opportunity to offer any proof in support of the allegation that he had not waived the issue.[247]

The Court of Appeals affirmed.[248]

In the Supreme Court, petitioner argued that his case was controlled by *Kaufman* and *Sanders* and that he could not be precluded from raising the issue unless he had "deliberately bypassed" the criminal process or had "understandingly and knowingly" waived the claim.[249]

The Supreme Court affirmed the dismissal of the petition,[250] distinguishing *Kaufman* on two grounds: (1) that petitioner in *Kaufman* had timely raised the issue of illegal search and seizure at trial, but had then failed to raise the issue on appeal; whereas, petitioner in *Davis* had never raised the issue of jury discrimination prior to the collateral process;[251] and (2) that *Kaufman* involved an interpretation of § 2255 in the absence of an express waiver requirement in the statute or the applicable rule of criminal procedure, 41(e); whereas, *Davis* involved application of an express

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[243] *Id.* at 235.

[244] *Id.* at 236.

[245] *Id.* at 257 (Marshall, J., dissenting opinion).

[246] *Id.* at 235-6.

[247] *Id.* at 235.

[248] Davis v. United States, 455 F.2d 919 (5th Cir. 1972), *aff'd* 411 U.S. 233 (1973).

[249] 411 U.S. at 236.

[250] *Id.* at 245.

[251] *Id.* at 239-40.

waiver provision set forth in 12(b)(2).[252] The minority suggested that these were not valid distinctions.[253]

Is there any essential difference between failure to raise an issue on appeal that may not bar collateral review, and failure to raise an issue at trial or pre-trial that may bar collateral review? This depends on the rationale given for the difference. *Kaufman* is limited by this distinction to the holding that issues not raised on criminal appeal may not be barred in the 2255 process because the common law rule does not permit such a bar; because there is a manifest federal policy that there be a federal plenary hearing on federal constitutional claims; and because "adequate protection of constitutional rights . . . requires the continuing availability of a mechanism for relief."[254] None of these reasons was expressly rejected as rationale for the permissive litigation policy, espoused in *Kaufman*. Why are they not equally applicable to the *Davis* case? Can it be that the common law rule, or a manifest federal policy, or the independence of the collateral remedy, requires federal review of constitutional claims in the one case, but not in the other, merely on the distinction that the process of criminal review was aborted at a different stage in each case? Apparently so.

Does it really matter that *Kaufman* dealt with illegal search and seizure and the requirement of pre-trial challenge under rule 41(e), which has no express waiver provision, and that *Davis* dealt with challenge to the array and the requirement of pre-trial challenge under rule 12(b)(2), which does have an express waiver provision? The minority opinion urged that rule 41(e) also has an express waiver provision, developed by case law, and that no essential difference exists, for purposes of a bar, between an express waiver provision contained in a rule and one developed by case law.[255]

Even if there are valid distinctions between *Kaufman* and *Davis*, the Supreme Court's refusal to alter the district court's findings in *Davis* raises a more disturbing point. The 2255 forum

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[252] *Id.* at 240.

[253] *Id.* at 248-50 (Marshall, J., dissenting opinion).

[254] Kaufman v. United States, 394 U.S. 217, 226 (1969).

[255] The majority avoided this issue by noting that the waiver provision of rule 41(e) was not considered by the Court in *Kaufman* since petitioner had objected timely to the introduction of evidence in the criminal trial, and simply failed to renew the issue on appeal. *Id.* at 239-40.

was simply permitted to presume, from a record that was not concerned with the issue belatedly raised, that petitioner was not prejudiced by the violation of his constitutional right, and that he had no valid excuse for failure to raise the claim timely.[256] The e findings were irrebuttable since petitioner was not entitled to offer proof to the contrary. This irrebuttable presumption is simply subterfuge for res judicata.

What was wrong with the standard of deliberate bypass, or why would the Supreme Court in *Davis* not permit the presumption of waiver to be rebutted? The answer lies in the political reality of a Court reconstituted from the time of the decisions in *Fay, Townsend, Sanders,* and *Kaufman.* This Court's philosophical attitude toward habeas corpus has been expounded in the recent decision of *Schneckloth v. Bustamonte,*[257] where Mr. Justice Powell, concurring, and with whom the Chief Justice and Mr. Justice Rhenquist joined, concurring, stated:

> Recent decisions . . . have tended to depreciate the importance of finality of prior judgments in criminal cases. [Citing *Kaufman, Sanders* and *Fay.*] This trend may be a justifiable evolution of the use of habeas corpus where one in state custody raises a constitutional claim bearing on his innocence. But the justification . . . is measurably less apparent in the typical Fourth Amendment claim asserted on collateral attack. In this latter case, a convicted defendant is most often asking society to redetermine a matter with no bearing at all on the basic justice of his incarceration.[258]

Likewise, in *Davis,* a challenge to the grand jury array was viewed as having no bearing on the justice of petitioner's incarceration.[259] Both of these cases imply that one must allege innocence to be entitled to challenge the incarceration.[260] The right to challenge detention based upon one's innocence substantially changes the concept of habeas corpus. Moreover, if carried further, this argument supports the notion that if one is clearly guilty, there is no need for a fair trial or any trial at all, or if entitled to this, but

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[256] *Id.* at 237-38.

[257] 412 U.S. 218 (1973).

[258] *Id.* at 256 (concurring opinion).

[259] "The government's case against petitioner was, although largely circumstantial, a strong one." 411 U.S. at 244.

[260] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 256 (1973); *accord,* Kaufman v. United States, 394 U.S. 217, 232-36 (1969) (Black, J., dissenting opinion).

denied it, no writ of habeas corpus would issue since the lack of due process may be counter-balanced by petitioner's obvious guilt.

The final disturbing note with regard to *Davis* concerns the Supreme Court's lack of any concomitant vigor in enforcing the waiver exception for "cause shown" under rule 12(b)(2) as was demonstrated in enforcing the waiver provision itself. Does not a determination of the right to relief from the waiver require an investigation by the 2255 forum of whether good cause existed for the failure to raise the claim timely? Such an investigation should, minimally, require a hearing, permitting petitioner to present evidence tending to show good cause for the failure to raise the claim timely. It makes no sense to permit the district court to presume that good cause cannot be demonstrated. Moreover, it makes no sense to apply good cause as a standard to determine justification for failure to raise an issue timely, if lack of knowledge of the issue or lack of intent to waive the issue may not be considered good cause. "Good cause" has, then, no rational meaning.

Unfortunately, the Court chose to apply a principle of finality without discussing all the issues raised by the waiver, *i.e.*, the implied rejection of the common law rule; the implied rejection of a manifest federal policy against such foreclosure; and more important, the implied rejection of a concept with considerable tradition: the notion that habeas corpus and motion to vacate are independent remedies and, therefore, do not stand or fall on any contingencies of the criminal process, but rest upon equitable principles that may be interposed to deny relief.

F. Is the Common Law grule Constitutionally Required?

There are two premises, suggested by the Supreme Court, from which the conclusion that the common law rule is constitutionally required may be deduced: (1) that "[t]he inapplicability of *res judicata* to habeas [or 2255] . . . is inherent in the very role and function of the writ";[261] and (2) that the application of res judicata to the writ would raise "serious constitutional questions"[262] with regard to suspension of the writ.[263]

Notably, both these premises were suggested by a Supreme Court of the early 1960's, a Court that has been severely criticized

[261] Sanders v. United States, 373 U.S. 1, 8 (1963).
[262] *Id.* at 11-12.
[263] *Id.* at 13.

for creating legal history to suit its purposes.[264] Moreover, both premises, set forth in *Sanders*,[265] relied on *Fay*[266] the most seriously criticized opinion of the early 1960's for its weak historical analysis of the writ of habeas corpus. Equally, these two premises suffer from limited historical support.

The Supreme Court had never noticed, until *Sanders*, that the common law rule was inherent in the nature of the writ.[267] The Court in *Fay* did not rely on any inherent quality of the writ to support the common law rule. Rather, it relied on the assertion in *Brown v. Allen* that "[t]he State court cannot have the last say when it . . . may have misconceived a federal constitutional right."[268] The *Brown* rule was defended in *Fay* on the basis of the "classic English practice,"[269] which was a clear misstatement and misapplication of that practice.[270] Finally, the common law rule in *Fay* was considered to be "but an instance of the larger principle that void judgments may be . . . impeached."[271] Thus, in the short period of a month and a half from its decision in *Fay*, the Court in *Sanders* discovered the "deeper roots"[272] of the common law rule.

The premise that the common law rule is inherent in the writ was based upon no authority; rather, it derived from syllogistic argument. From the assertion in *Fay* that "government must always be accountable to the judiciary for a man's imprisonment,"[273] the Court in *Sanders* concluded that "access to the courts . . . must not be . . . impeded"[274] by res judicata. From this, the Court further concluded that "the inapplicability of *res judicata* to habeas [corpus] . . . is inherent in the very role and function of the writ."[275] The first conclusion drawn in *Sanders* is based on an in-

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[264] *See, e.g.*, Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. Chi. L. Rev. 31 (1965); Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451 (1966).

[265] 373 U.S. 1 (1963).

[266] 372 U.S. 391 (1963).

[267] A general intimation may be found in *Fay* that "full common law scope" should be accorded the writ and that refusal to do so might be construed as a suspension. But the Court refused to consider the issue. 372 U.S. at 406.

[268] *Id.* at 422; Brown v. Allen, 344 U.S. 443, 508 (1952) (concurring opinion).

[269] 372 U.S. at 422-23.

[270] See discussion pp. 21-22 *supra*.

[271] 372 U.S. at 423.

[272] 373 U.S. at 8.

[273] 372 U.S. at 402.

[274] 373 U.S. at 8.

[275] *Id.*

terpretive abuse of the word "always" as used in *Fay*. The assertion in *Fay* that "government must always be accountable" was based on the assumption that accountability could be demonstrated by a showing that the imprisonment "conform[ed] with the fundamental requirements of law;"[276] no logic compels the conclusion that a showing of accountability can never be accomplished. That one must always be accountable is not the equivalent of saying that one must make a continuous accounting. It is more sensible to interpret the phrase to mean that if one is called upon, at any particular time, to render an accounting, one be prepared to demonstrate the validity of the particular incarceration.

Finally, few characteristics can be said to be inherent in the writ of habeas corpus, for, of this writ, little has remained constant.[277] Not even the procedure that gave the writ its name is essential to effect the majority of challenges permitted by the writ today.[278] Certainly, the definition of what constitutes illegal detention has not remained constant.[279] Furthermore, the creators of both the writ and the common law rule, the English, have never considered the rule to be inherent in the writ. To them, it was simply an archaic procedure of uncertain origin and rationale, the function of which died when the English courts were reorganized.[280]

The second premise that either § 2244 or § 2255 might raise serious constitutional questions were they construed to derogate from the "traditional liberality"[281] of the writ of habeas corpus refers the reader to the brief historical analysis of the common law rule discussed earlier in *Sanders*,[282] and to *Fay*.[283] The Court in *Fay* asserted that "the Constitution invites, if it does not compel . . . a generous construction of the power of the federal courts to dispense the writ conformably with common law practice."[284] But this argument does not lead to the necessary conclusion that the common law rule is required by the mandate against suspension, as the

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[276] 372 U.S. at 402.

[277] *See* Cohen, *supra* note 3; Jenks, *supra* note 3.

[278] *See* U.S.C. § 2255 (1970). See note 5 *supra*.

[279] *Compare Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830) *with* Fay v. Noia, 372 U.S. 391 (1963) *and* Kaufman v. United States, 394 U.S. 217 (1969).

[280] See discussion pp. 9-11 *supra*.

[281] Sanders v. United States, 373 U.S. 1, 11-12 (1963).

[282] *Id.* at 7-8.

[283] 372 U.S. at 406.

[284] *Id.*

Court implied in *Sanders*. On the contrary, the mandate against suspension was clearly rooted in a different historical problem, and its resolution, from that of the common law rule. In England, the fear of arbitrary imprisonment by the king, compounded by the arbitrary suspension of habeas corpus or the dilatoriness of the executive in making returns on the writ, led to the passage of the Petition of Right in 1628 and the Habeas Corpus Act in 1679.[285] To ensure that any power of suspension would not fall into the hands of the executive, Parliament claimed for itself the limited powers of suspension.[286] Likewise, the major political battles and court litigation in the United States, concerning the suspension of habeas corpus, have revolved around the issue of *who* had the power of suspension, rather than the meaning of suspension itself.[287] There is no suggestion in these historical, constitutional controversies that application of the doctrine of res judicata would have been an unwarranted suspension of the writ, or, indeed, a suspension at all.

Finally, the origin and rationale of the common law rule are so tenuous that any expression, without citation of authority, either that the common law rule is inherent in the writ, or that application of res judicata would be an unconstitutional suspension of the writ, is dubious at best.

Of course, the Supreme Court is at liberty to construe the Constitution to include the common law rule, as a matter of constitutional development, without citation of authority. But the Court is then under some obligation to demonstrate the necessity of such a construction. The Court did suggest that the rule was necessitated because "life or liberty [was] at stake."[288] Yet, the Court did not explain why more than one accounting for any specific constitutional challenge to the incarceration should be required. If one determination of an issue cannot finally establish the legitimacy of the incarceration with respect to the issue challenged, then the incarcerated person cannot be presumed to be lawfully detained. He must either be presumed to be unlawfully detained or in limbo, somewhere between lawful and unlawful detention, while the courts sit to hear the continuous accountings rendered ad infinitum by their jailors.

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[285] SOKOL, *supra* note 2, at 3-15.

[286] *Id.* at 197.

[287] *Id.* at 196-204.

[288] Sanders v. United States, 373 U.S. 1, 8 (1963).

III. CONCLUSION

The rule that res judicata may not apply to denials of relief on habeas corpus is no longer viable. It serves no valid function since a denial of relief is now subject to review by right of appeal.[289] Moreover, relitigation of issues by the district court, already ruled upon by the court of appeals, creates administrative confusion. And there are ample exceptions to foreclosure of relitigation to dispel any fears of an unjust incarceration based simply on the technicality of res judicata.[290]

Issues that could or should have been litigated, but were not, should be barred by res judicata, assuming a liberal interpretation of *could or should have brought* to avoid any unjust results.

The rule that res judicata may not apply to habeas corpus at all is a misstatement of the common law rule that leads to the absurd result that no issues, relating to jurisdictional or constitutional claims may ever become final prior to the habeas process,

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[289] *See* 28 U.S.C. §§ 2253, 2255 (1970).

[290] The issue may be reconsidered, *e.g.*, where there is newly discovered evidence, Kaufman v. United States, 394 U.S. 217, 226-227 (1969) (motion to vacate); Townsend v. Sain, 372 U.S. 293, 317 (1963) (habeas corpus); FED. R. CIV. P. 60(b); F. JAMES, JR., *supra* note 11, §11.1; where there is an allegation of fraud or deceit, FED. R. CIV. P. 60(b); F. JAMES, JR., *supra* note 11, § 11.1; where the prosecution illegally suppressed evidence, Imbler v. Craven, 298 F. Supp. 795 (C.D. Cal. 1969), *aff'd*, *sub nom.* Imbler v. California, 424 F.2d 631 (9th Cir. 1970), *cert. denied*, 400 U.S. 865 (1970); where there is an allegation of incompetency of counsel, Hall v. Wainright, 441 F.2d 391 (5th Cir. 1971); Nelson v. Peyton, 415 F.2d 1154 (5th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970); Barnes v. Florida, 402 F.2d 63 (5th Cir. 1968); Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967); and Whitaker v. Warden, 362 F.2d 838 (4th Cir. 1966); where there has been a change in the law affecting petitioner's case, Davis v. United States, 417 U.S. 333 (1974); Sunal v. Large, 332 U.S. 174 (1947) (dictum); or where:

> (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.

Townsend v. Sain, *supra* at 313. All but category (3) have been held applicable to federal prisoners' petitions. Kaufman v. United States, *supra* at 226. Moreover, "[i]n all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge." Townsend v. Sain, *supra* at 318; Kaufman v. United States, *supra* at 227.

thereby, making the habeas process an automatic and required review. Its application to the criminal appeal or to certiorari to the criminal appeal would require a restatement of the rule, *i.e.*, that res judicata may not apply to denials of relief on criminal appeal or to denials of relief on certiorari to the criminal appeal.

For purposes of stating the proper bar and its limitations, a distinction must be made between state and federal prisoners. The law respecting state prisoners ought to conform to the theories developed pursuant to the statute of 1867 and the supremacy clause. This simply means that if res judicata or collateral estoppel is to be avoided, the avoidance mechanism should not be based on the common law rule, but on the necessity for uniformity of federal law or the necessity to protect state prisoners from inadequate fact-finding procedures. None of these arguments is applicable to federal prisoners. Thus, denials of relief on criminal appeal or certiorari to the criminal appeal for federal prisoners ought to be final, barring the district court from litigating issues actually decided by its superior courts.

Since the common law rule has been misapplied in the above situation, rejection of this rule's applicability will require reexamination of the proper relation of the criminal process to the habeas or 2255 process in order to determine the proper bar to relitigation. Both habeas corpus and motion to vacate have been considered separate causes of action from the preceding criminal processes. If this analysis is maintained, then res judicata does not become an available bar simply because the common law rule is held to be inapplicable. Rather, the proper bar would be collateral estoppel, *i.e.*, only issues actually adjudicated in the criminal process should be barred from the habeas or 2255 process. Again there are reasons to exclude this bar from state prisoners' petitions due to the supremacy clause, but no such limitation stands in the way of such a bar for federal prisoners. Certainly, the purpose of collateral review, like the purpose of criminal appeal, is to insure the integrity of the trial process; therefore, caution should be exercised in permitting collateral estoppel to apply to issues adjudicated at the criminal trial that have never been reviewed by any means subsequent to the criminal trial since the trial process would be virtually unreviewable and, thereby, free from any insurance of its integrity. More important, collateral review by the trial court, where the issues have never been reviewed by a superior court, does not create any administrative confusion or conflict of authority between

the district court and its superior court. The only issue is whether such litigation is abusive.

Under the above analysis, issues that could or should have been litigated previously, but were not, are not barred by the doctrine of collateral estoppel. They may, however, be controlled by equitable principles. Where there is no finding of bad faith or intentional bypass, the failure to litigate timely should not be penalized simply to protect the court from time-consuming litigation since such protection should be balanced against the potential loss of life or liberty to the petitioner. Here, the Supreme Court cases are anomolous: the right to seek collateral review has been granted more freely where issues have already been litigated once, but has been granted less generously where issues have not previously been litigated, thus, denying petitioners opportunity for a full and fair hearing on all matters that may have bearing on the validity of their incarceration . This anomoly is difficult to explain since motion to vacate serves no distinct function when the 2255 forum is called upon to review the same issues of law on the same facts as those considered in the appellate criminal process. Motion to vacate becomes distinctive when it is used to consider evidence or issues of law that may have merit, though they were not considered in the criminal process. Here, the traditional liberality of habeas corpus would seem to have its proper place.