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Post-Conviction Relief for Federal Prisoners A Survey and a Suggestion Under 28 U. S. C. § 2255:

By

GERALD F. UELMEN*

In answer to the complaints of numerous federal judges that they were being engulfed by a flood of habeas corpus petitions,¹ Congress in 1948 enacted a complete revision of the habeas corpus provisions of the Judicial Code. Part of this revision was title 28, section 2255, of the United States Code which "restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis."² Adopted upon the recommendation of the Judicial Conference of the United States, its declared purpose was to provide "an expeditious remedy for correcting erroneous sentences without resort to habeas corpus."³ The ensuing eighteen years have seen no diminution in the concern of federal judges with the burden habeas corpus, and now, section 2255 petitions impose upon them.⁴ The purpose of this article will be to suggest that this burden is largely self-imposed, and could be substantially reduced by a procedure whereby assistance of counsel is available in the preparation and drafting of petitions for post-conviction relief. In reviewing the procedural and tactical ramifications of section 2255, reference will frequently be made to a recent survey of petitions for relief under this section in the District of Columbia.⁵ Two justifications are offered for reliance upon the

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¹ See, e.g., Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313 (1948); Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1949).

² Reviser's Note, 28 U.S.C.A. § 2255 (1959).

³ *Ibid.*

⁴ See, e.g., Symposium, *Habeas Corpus and Post Conviction Review*, 33 F.R.D. 363 (1963); Oliver, *Post Conviction Applications Viewed by a Federal Judge*, 39 F.R.D. 281 (1966).

⁵ Under the direction of Miss Sylvia Bacon, then Assistant U.S. Attorney for the District of Columbia, all 1962 criminal cases in the District were surveyed, to compile statistics as to post-conviction relief subsequently sought. With her gracious permission, some preliminary findings will be incorporated herein. This unpublished report will hereinafter be cited *D.C. Survey*.

statistics of one judicial circuit: (1) no similar survey has been undertaken elsewhere, and (2) because of its general criminal jurisdiction, the D.C. Circuit surpasses all others in the number of section 2255 petitions filed.⁶

I. HABEAS CORPUS AND SECTION 2255

Although the terms of section 2255 render an application under its provisions a prerequisite to application for a writ of habeas corpus unless the remedy under section 2255 is "inadequate or ineffective,"⁷ in actual practice section 2255 is the exclusive remedy available to federal prisoners, since the circumstances in which section 2255 would be held "inadequate or ineffective" are extremely rare.⁸ This "replacement" of habeas corpus was attacked soon after its enactment as a violation of the constitutional mandate that "the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or invasion the public Safety may require it."⁹ In *United States v. Hayman*,¹⁰ the Supreme Court dealt with this contention. After tracing the legislative history of section 2255, the Court concluded that:

the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.¹¹

⁶ Out of 1,093 cases docketed in the District of Columbia District Court in 1962, motions to vacate under § 2255 were filed in 35. In five cases, two motions were filed, thus making a total of 40 motions, of which four were granted. *D.C. Survey*. Informal reports indicate the following breakdown of § 2255 motions for thirteen other districts, for the same year:

N.D. Cal. _____	11	S.D. Ill. _____	7	W.D. Mich. _____	1
N.D. Ga. _____	7	S.D. Ind. _____	5	N.D. Ohio _____	4
N.D. Ill. _____	18	D. Kan. _____	17	S.D. Ohio _____	0
E.D. Ill. _____	4	E.D. Mich. _____	3	M.D. Pa. _____	0
				W.D. Wash. _____	0

Smith, *Title 28, Section 2255 of the United States Code—Motion to Vacate, Set Aside or Correct Sentence: Effective or Ineffective Aid to a Federal Prisoner?*, 40 NOTRE DAME LAW. 171, 183 n. 52 (1965).

⁷ 28 U.S.C. § 2255 (1958).

⁸ Since § 2255 was enacted, only three reported decisions have allowed habeas corpus petitions on behalf of federal prisoners. *Mugavero v. Swope*, 86 F. Supp. 45 (N.D. Cal. 1949); *Stidham v. Swope*, 82 F. Supp. 931 (N.D. Cal. 1949); *St. Clair v. Hiatt*, 83 F. Supp. 585 (N.D. Ga. 1949).

⁹ U.S. Consr. art. I, § 9, cl. 2.

¹⁰ 342 U.S. 205 (1952).

¹¹ *Id.* at 219.

Under the writ of habeas corpus, application had to be made to a judge within the district in which the prisoner was being held.¹² This led to a grossly disproportionate number of petitions to the judges in districts in which federal prisons were located.¹³ To correct this imbalance, it was required that petitions under section 2255 be directed to "the court which imposed the sentence."¹⁴ Thus, the essential difference between the writ of habeas corpus and section 2255 is in the forum authorized to grant relief.

II. PROCEDURE UNDER SECTION 2255

Relief under section 2255 is available only to prisoners "in custody under sentence of a court established by Act of Congress."¹⁵ The requirement that the prisoner be "in custody" has been held to exclude those who have not yet begun to serve the sentence which they are attacking,¹⁶ as well as those who have already served their term but are seeking to invalidate it to prevent its use as a prior conviction under recidivist statutes.¹⁷ This construction is consistent with the requirement that habeas corpus petitioners be entitled to immediate release.¹⁸ The limitation to sentences of a court established by Act of Congress excludes all state prisoners, as well as those under the jurisdiction of courts-martial,¹⁹ the District of Columbia Court of General Sessions,²⁰ and the District of Columbia Juvenile Court.²¹

Upon receipt of the petition, three courses are open to the District Court: (1) it can immediately deny the petition; (2) it can decide the petition on the merits from files and records on the case; or (3) it can order a hearing to decide the case.²²

¹² *Ahrens v. Clark*, 335 U.S. 188 (1948).

¹³ For the six years preceding enactment of § 2255, 63% of federal habeas corpus petitions were directed to five districts: N.D. Cal. (Alcatraz); N.D. Ga. (Atlanta); Kansas (Leavenworth); W.D. Wash. (McNeil); W.D. Mo. (Springfield Medical Center). *United States v. Hayman*, 342 U.S. 205, 214 n.18 (1952).

¹⁴ 28 U.S.C. § 2255 (1958).

¹⁵ *Ibid.*

¹⁶ *Heflin v. United States*, 358 U.S. 415, 418 (1959).

¹⁷ Relief is still made available to those in this position by a writ of error coram nobis. *Morgan v. United States*, 346 U.S. 502 (1954). *But cf.* *Pollard v. United States*, 352 U.S. 354 (1957).

¹⁸ *Parker v. Ellis*, 362 U.S. 574 (1960); *McNally v. Hill*, 293 U.S. 131 (1934).

¹⁹ *Massey v. Humphrey* 85 F. Supp. 534 (M.D. Pa. 1949).

²⁰ *Ingols v. District of Columbia*, 103 A.2d 879 (D.C. Mun. App. 1954).

²¹ *Burke v. United States*, 103 A.2d 347 (D.C. Mun. App. 1954).

²² See generally Note, *Processing a Motion Attacking Sentence Under Section 2255 of the Judicial Code*, 111 U. Pa. L. Rev. 788 (1963).

Authority for the denial of a section 2255 petition without a hearing is found in the statute itself, which states:

Unless 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 thereon²³

Thus, if the petition itself does not state facts upon which relief could be granted, the court can summarily reject the petition. In *Mitchell v. United States*,²⁴ the reasons for such rejections were succinctly stated by Judge Prettyman for the court:

This conclusion rests upon a simple elementary basis. If such a movant proved all the facts he alleges, he would get no relief; the conclusion flows as readily from the face of the allegations as from their proof Under such circumstances a hearing would be useless, an inexcusable waste of time, energy and money, because even if the movant proved what he alleged, he would not be entitled to relief.²⁵

Even if the petition does allege facts upon which relief could be granted, the court can look to the records of the case, which may show that the allegations of fact are unfounded. The ready availability of trial records to refute spurious claims was indeed one of the reasons for requiring section 2255 petitioners to apply to the court which sentenced them.²⁶

If the petition presents issues of fact which require the court to look beyond the record, however, it must order a hearing. Thus, where a prisoner alleged that his guilty plea was induced by promises of a United States Attorney, the Supreme Court recently reversed a District Court's denial of a hearing, stating:

The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the Government's response, related primarily to

²³ 28 U.S.C. § 2255 (1958).

²⁴ 259 F.2d 787 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958).

²⁵ *Id.* at 794.

²⁶ Parker, *supra* note 1, at 175.

purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection.²⁷

If the court does determine that a hearing is necessary, it can hold it without requiring the presence of the prisoner.²⁸ This frequently criticized²⁹ provision narrows the traditional habeas corpus requirement that "the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained,"³⁰ and the Supreme Court, although consistently recognizing the discretion of the trial judge not to require the petitioner's production, has imposed an affirmative duty to order the presence of the prisoner in some circumstances.

Whether the prisoner should be produced depends upon the issues raised by the particular case. Where, as here, there are substantial issues of fact as to events in which the prisoner participated, the trial court should require his production for a hearing.³¹

Despite these warnings, the District of Columbia survey revealed that most petitions were disposed of without a hearing.³² Since denial without a hearing seldom brings the prisoner's legal offensive to an end,³³ it may be well to keep in mind the conclusion of Senior Circuit Judge Walter L. Pope of the Ninth Circuit Court of Appeals:

[I]nsisting upon a finding of the facts in every appropriate case is the way most likely to bring frivolous applications to a sudden end.³⁴

²⁷ *Machibroda v. United States*, 368 U.S. 487, 494-95 (1962).

²⁸ 28 U.S.C. § 2255 (1958).

²⁹ See, e.g., Note, 59, *YALE L. J.* 1183, 1187 n.19 (1950).

³⁰ 28 U.S.C. § 2243 (1958).

³¹ *United States v. Hayman* 342 U.S. 205, 223 (1952).

³² Out of the 40 motions filed, hearings were granted in only 11 cases. *D.C. Survey*.

³³ Out of the 36 motions denied, appeals were taken in seven cases. *D.C. Survey*.

³⁴ Pope, *Suggestions for Lessening the Burden of Frivolous Applications*, 33 F.R.D. 409, 419 (1963).

Once a finding of facts is made, whether with or without a hearing, the motion is either granted or denied. The grant of a motion does not necessarily mean the release of the prisoner. Although being entitled to release is a jurisdictional requirement, section 2255 expressly authorizes resentencing,³⁵ a new trial, or merely correction of the sentence.³⁶ The statute also allows appeals to be taken from the order entered on the motion "as from a final judgment on application for a writ of habeas corpus."³⁷ Thus the Criminal Appeals Act³⁸ has no application, and the Government can appeal from the grant of the motion.³⁹

III. GROUNDS RECOGNIZED: A SUBSTITUTE FOR APPEAL?

A motion for relief under section 2255 "may be made at any time."⁴⁰ As a result, the criticism most frequently leveled at the increasing resort to this device is its unsettling effect upon the stability of judicial determinations.

To permit a convicted person to wait months, or even years as is frequently the case, after the actors have gone and recollections cannot be refreshed, and then to secure review consideration of alleged errors open upon the normal process of appeal, is to damage, if not destroy, an essential element in the rule of law, the element of accurate impartiality.⁴¹

For this reason, it has frequently been stated that a motion under section 2255 cannot be used as a substitute for appeal.⁴² Nevertheless, the four grounds available for relief, as set forth in section 2255, are grounds which could have been raised on appeal: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose such sentence; (3) the sentence was in excess of the maximum

³⁵ *Dillane v. United States*, 350 F.2d 732 (D.C. Cir. 1965).

³⁶ 28 U.S.C. § 2255 (1958). See *Andrews v. United States*, 373 U.S. 334 (1963).

³⁷ 28 U.S.C. § 2255 (1958).

³⁸ 18 U.S.C. § 3731 (1958).

³⁹ *Andrews v. United States*, 373 U.S. 334 (1963).

⁴⁰ 28 U.S.C. § 2255 (1958).

⁴¹ *Mitchell v. United States*, 259 F.2d 787, 791 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

⁴² *Ibid.* *Baker v. United States*, 334 F.2d 444 (8th Cir. 1964); *Desmond v. United States*, 333 F.2d 378 (1st Cir. 1964); *Carrillo v. United States*, 332 F.2d 202 (10th Cir. 1964).

authorized by law; (4) the sentence is otherwise subject to collateral attack. While this excludes errors in the course of the trial which are not of constitutional dimension,⁴³ the continuing expansion of the requirements of due process is constantly increasing the arsenal of constitutional grounds available for collateral attack.⁴⁴ Perhaps the reason these errors are not raised on appeal lies in defects in the availability of appeals to indigents.⁴⁵ Increased accessibility of appellate review would certainly alleviate some of the burden of section 2255 motions, since issues raised and decided on appeal could not be raised again in subsequent collateral proceedings,⁴⁶ but this approach to the problem may merely shift the burden, rather than dissipate it.

Although a section 2255 motion is not a substitute for appeal, its use to make an appeal available after expiration of the statutory time for filing a notice of appeal was suggested in the recent case of *Dillane v. United States*.⁴⁷ In affirming the denial of a petition for leave to appeal *in forma pauperis* because untimely, the court noted that the failure of appointed counsel to advise the defendant of his right to appeal⁴⁸ would be cognizable under section 2255 as ineffective assistance of counsel:

If the court should find the facts to be as alleged, it should, by the expedient of vacating and resentencing, restore appellant to the status of one on whom sentence

⁴³ *Moss v. United States*, 263 F.2d 615 (5th Cir. 1959); *Mitchell v. United States*, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958); *Stephenson v. United States*, 257 F.2d 175 (6th Cir. 1958). It is interesting to note, however, that such errors are among the grounds most frequently raised in motions to vacate under § 2255. *Smith*, *supra* note 6, at 183 n.52.

⁴⁴ The Supreme Court has effectively foreclosed collateral attacks based upon many of its most significant recent cases, however, by holding these cases have no retroactive application to prior trials. In so holding, the specter of collateral hearings on cases long since tried was a factor given great weight. *Johnson v. New Jersey*, 384 U.S. 719, 730 (1966); *Tehann v. Shott*, 382 U.S. 406, 418-19 (1966); *Linkletter v. Walker*, 381 U.S. 618, 637-38 (1965). Compare *Amsterdam, Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378 (1964).

⁴⁵ See Note, 51 CALIF. L. REV. 970, 974-76 (1963). In only nine of the thirty-five cases in which § 2255 relief was sought in 1962 District of Columbia criminal cases had there been prior recourse to appellate courts. *D.C. Survey*.

⁴⁶ *Gebhart v. Hunter*, 184 F.2d 644 (10th Cir. 1950); *Owens v. United States*, 174 F.2d 469 (5th Cir. 1949).

⁴⁷ 350 F.2d 732 (D.C. Cir. 1965).

⁴⁸ Under the recently amended Rule 32(a)(2), Federal Rules of Criminal Procedure, all defendants must be advised of their right to appeal by the sentencing judge. Thus, it is unlikely the *Dillane* situation will recur.

has just been imposed and who has 10 days in which to institute a direct appeal.⁴⁹

IV. SUCCESSIVE MOTIONS

Recognizing the judicial complaint that many prisoners made a hobby of preparing and sending a habeas corpus petition every time the Supreme Court handed down a new decision,⁵⁰ section 2255 included a provision that "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."⁵¹ Immediately after its enactment, this provision was criticized as narrowing the availability of habeas corpus.⁵² That this is not the case was made clear by the Supreme Court in *Sanders v. United States*.⁵³ There, the petitioner had filed two motions under section 2255. The first, merely stating conclusions, was summarily denied. The second presented the same claims, but with sufficient factual allegations. It was also denied, relying upon the "similar relief" clause of section 2255. The Supreme Court reversed, interpreting the "similar relief" clause to be the equivalent of section 2244 of the Judicial Code,⁵⁴ which limits the discretion of the judge to dismiss subsequent habeas corpus petitions to situations where no new grounds are presented. The Court then circumscribed the domain of res judicata in collateral proceedings by broadly defining what grounds are "new":

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

⁴⁹ 350 F.2d at 733.

⁵⁰ Concern with successive petitions may be exaggerated. Of the forty motions filed under § 2255 in 1962 D.C. cases, only 5 were filed by prisoners who had made prior motions. *D.C. Survey*.

⁵¹ 28 U.S.C. § 2255 (1958).

⁵² See Note, 59 *YALE L. J.* 1183, 1188 n.24 (1950).

⁵³ 373 U.S. 1 (1963), 62 *MICH. L. REV.* 903 (1964).

⁵⁴ 28 U.S.C. § 2244 (1958):

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

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.⁵⁵

In limiting the circumstances under which successive applications can be denied, however, the Court went beyond the denial of prior applications, to the other ground most frequently asserted by the courts in dismissing successive applications: abuse of remedy. Although it was generally recognized that abuse of remedy would be grounds for outright denial of a section 2255 petition, the lower courts were divided as to how abuse of remedy was to be established. Illustrative of this disagreement was the 1959 decision of *Smith v. United States*.⁵⁶ After denial of a section 2255 motion alleging ineffective assistance of counsel, Smith filed a second motion alleging mental incompetency to stand trial, which the District Court Judge refused to consider. Sitting en banc, the United States Court of Appeals for the District of Columbia was unable to muster a majority on the question of how abuse should be established. Judge Fahy, joined by Judges Edgerton, Bazelon and Washington, maintained that abuse was a defensive plea.⁵⁷ He cited weighty authority, for in a habeas corpus case the Supreme Court had held:

[I]f the Government chooses not to deny the allegation or to question its sufficiency and desires instead to claim that the prisoner has abused the writ of habeas corpus, it rests with the Government to make that claim with clarity and particularity in its return to the order to show cause.⁵⁸

Judge Danaher, joined by Judge Burger, placed the burden of justifying his failure to raise the second ground in the first motion upon the prisoner, but said that Smith's justification was readily apparent from the mental status alleged in his second motion.⁵⁹ Judges Miller⁶⁰ and Bastian,⁶¹ in separate dissents, found no justification, saying the burden was on the petitioner and had not been met.

⁵⁵ 373 U.S. 1, 15 (1963).

⁵⁶ 270 F.2d 921 (D.C. Cir. 1959) (en banc).

⁵⁷ *Id.* at 926-27.

⁵⁸ *Price v. Johnston*, 334 U.S. 266, 292 (1948).

⁵⁹ 270 F.2d at 928.

⁶⁰ *Id.* at 935.

⁶¹ *Id.* at 936-38.

The controversy was laid to rest by the *Sanders* Court with the simple statement that "full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ or motion remedy; and this the Government has the burden of pleading."⁶²

V. RULE 35: CONFLUENCE OR CONFLICT?

The post-conviction relief most frequently sought in federal courts⁶³ is a reduction or correction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure.⁶⁴ Thus, any discussion of the "burdens" of post-conviction proceedings under Section 2255 must take cognizance of the far more burdensome Rule 35 proceedings.

While most Rule 35 petitions are simply emotion-laden pleas for a reduction of sentence, the provision for correction of an "illegal" sentence at any time raises issues quite similar to Section 2255 proceedings. The purpose of this provision of Rule 35, and the ways in which it differs from Section 2255, were set forth at some length in *Duggins v. United States*⁶⁵ by Judge Shackelford Miller, Jr., of the Sixth Circuit:

This rule became effective March 21, 1946, more than two years prior to the enactment of Sec. 2255, Title 28, U.S. Code on June 25, 1948. It was a codification of existing law and was intended to remove any doubt, created by the ruling in *United States v. Mayer*, 235 U.S. 55, 67, about

⁶² *Sanders v. United States*, 373 U.S. 1, 17 (1963).

⁶³ In 1962 D.C. cases, 329 such motions were filed. The great bulk of these were in the form of a letter to the sentencing judge. Although only nineteen of these motions were granted, appeals were taken from denials in only two cases. Many of the motions were successive: 57 prisoners accounted for a total of 156 petitions, some filing as many as six or seven. *D.C. Survey*.

⁶⁴ FED. R. CRIM. P. 35:

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. (As amended Feb. 28, 1966, eff. July 1, 1966).

⁶⁵ 240 F.2d 479 (6th Cir. 1957).

the jurisdiction of the District Court to correct an illegal sentence after the expiration of the term at which it was entered. . . . Prior to the adoption of the Rules of Criminal Procedure certain problems were involved in the ending of a term of court and the start of another. It was the purpose of Rules 45 (c), 33, 34, 35 and 36 to meet these problems. It was not their purpose to meet the problems involved in habeas corpus proceedings or a collateral attack upon a judgment. Rule 35 presupposes a conviction and affords a procedure for bringing an improper sentence under it into conformity with the law. . . . Sec. 2255, Title 28, U.S. Code, on the other hand, covers the broader field of collateral attack upon the validity of a judgment of conviction by reason of matters dehors the record. . . . Being a procedural substitute for a habeas corpus proceeding, the right to relief under § 2255 is limited by the express terms of the statute to situations where the prisoner is attacking the judgment under which he is in custody and, if successful, would be entitled to be released. Such limitations do not apply for a proceeding under Rule 35, Rules of Criminal Procedure.⁶⁶

Although they differ in purpose, there is at least one area of confluence between Rule 35 and Section 2255. Among the grounds available for collateral attack under Section 2255 is the excess of sentence over the maximum authorized by law. This would clearly render a sentence "illegal" within the meaning of Rule 35.⁶⁷ Thus, where consecutive or concurrent sentences for multiple counts of an indictment are attacked on the ground that the counts arose from the same transaction, it might be appropriate to seek relief under *either* Rule 35 or Section 2255.⁶⁸ Where relief is only available under Rule 35 because the prisoner is not entitled to immediate release, the courts have shown no reluctance to construe a motion labeled as one under Section 2255 as a Rule 35 motion.⁶⁹ Con-

⁶⁶ *Id.* at 483-84.

⁶⁷ 4 BARRON, FEDERAL PRACTICE AND PROCEDURE § 2301 (Rules Ed. 1951); 8 MOORE, FEDERAL PRACTICE—CIPES, CRIMINAL RULES § 35.04 (1966).

⁶⁸ *Wilson v. United States*, 310 F.2d 879 (10th Cir. 1962); *Smith v. United States*, 287 F.2d 270 (9th Cir.), *cert. denied*, 366 U.S. 946 (1961).

⁶⁹ *Heflin v. United States*, 358 U.S. 415 (1959); *Bayless v. United States*, 288 F.2d 794 (9th Cir.), *cert. denied*, 366 U.S. 971 (1961); *Duggins v. United States*, 240 F.2d 479 (6th Cir. 1957).

versely, the courts are also quite willing to treat a Rule 35 motion as one under Section 2255 where necessary.⁷⁰ Therefore, for the most part it would appear to make little difference what label is attached to the motion. However, One significant distinction should be noted. The government has no right to appeal from the grant of a Rule 35 motion;⁷¹ it can appeal from the grant of a Section 2255 motion.⁷²

Thus far, the Supreme Court has been unwilling to expand the meaning of "illegal sentence" in Rule 35 beyond the narrow confines established in the 5-4 decision of *Hill v. United States*:

But, as the Rule's language and history make clear, the narrow function of Rule 35 is to permit correction at any time of an illegal *sentence*, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence. The sentence in this case was not illegal. The punishment meted out was not in excess of that prescribed by the relevant statutes, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect.⁷³

The specific error of which the Supreme Court refused to take cognizance in *Hill*, the denial of the right to allocation at the time of sentence, can now be reached under Rule 35 by virtue of the 1966 amendment allowing the court to correct "a sentence imposed in an illegal manner."⁷⁴ In any case, unless the error is such that it cannot be raised by collateral attack, the *Hill* limitation of Rule 35 is without consequence in light of alternative remedies.⁷⁵

⁷⁰ *Andrews v. United States*, 373 U.S. 334 (1963); *Moss v. United States*, 263 F.2d 615 (6th Cir. 1959); *United States v. Rader*, 185 F. Supp. 224 (1960), *aff'd*, 288 F.2d 452 (8th Cir.), *cert. denied*, 368 U.S. 851 (1961). *But see* *Johnson v. United States*, 334 F.2d 880, 883 (6th Cir. 1964), *cert. denied* 380 U.S. 935 (1965).

⁷¹ *Andrews v. United States*, *supra* note 70.

⁷² *Ibid.* *United States v. Hayman*, 342 U.S. 205, 209 n.4 (1952).

⁷³ 368 U.S. 424, 430, *reh. den.* 369 U.S. 808 (1962).

⁷⁴ FED. R. CRIM. P. 35 (as amended Feb. 28, 1966, eff. July 1, 1966). See Advisory Committee's Note.

⁷⁵ Even if the prisoner is not entitled to immediate release, collateral attack is available by writ of error coram nobis. *United States v. Morgan*, 346 U.S. 502 (1954). *But see* *Johnson v. United States*, 334 F.2d 880, 883 (6th Cir. 1964), *cert. denied*, 380 U.S. 935 (1965).

VI. THE RIGHT TO COUNSEL: A SUGGESTED APPROACH

It is generally held that the appointment of counsel in a Section 2255 proceeding rests in the proper exercise of the court's discretion.⁷⁶ Since a petition for collateral relief is considered a separate civil action, the sixth amendment guaranty of assistance of counsel is not applicable.

The need for counsel is most acute during a hearing, and it appears most courts appoint counsel to assist a prisoner during the course of a hearing,⁷⁷ and one court, in a much publicized decision, granted an appointed attorney compensation for his services in representing an indigent in Section 2255 proceedings.⁷⁸ Mere presence of counsel at the hearing, however, does little to assist the court in meeting the burden of petitions for post-conviction relief. Only by offering the assistance of counsel in the *preparation* of petitions will their proliferation be reduced.⁷⁹ The problem faced by the judge is not in the conduct of the hearing itself, but in making an informed determination as to whether a hearing is necessary. As suggested by the Committee on Habeas Corpus of the Judicial Conference of the United States:

Congress now has before it bills to provide proper legal assistance for indigent defendants charged with Federal offenses and we strongly recommend passage of such legislation. We think it would promote orderly procedure if the legislation also provided appropriate legal assistance for inmates of Federal penal institutions in the preparation

⁷⁶ *Ellis v. United States*, 313 F.2d 848 (7th Cir. 1963); *Dillon v. United States*, 307 F.2d 445 (9th Cir.), *cert. den.* 372 U.S. 909 (1962); *United States v. Wilkins*, 281 F.2d 707 (2d Cir. 1960); *Anderson v. Heinze*, 258 F.2d 479 (9th Cir.), *cert. denied*, 358 U.S. 889 (1958). See Note, *Right to Counsel in Federal Collateral Attack Proceedings: Section 2255*, 30 U. CHI. L. REV. 583 (1963).

⁷⁷ Cases cited *supra* note 76; *Desmond v. United States*, 333 F.2d 378 (1st Cir. 1964); *Pike v. United States*, 330 F.2d 53, (5th Cir. 1964); *Milani v. United States*, 319 F.2d 441 (7th Cir. 1963); *Campbell v. United States*, 318 F.2d 874 (7th Cir. 1964). *But see* *Tubbs v. United States*, 249 F.2d 37 (10th Cir.), *cert. denied*, 355 U.S. 935 (1957).

⁷⁸ *Dillon v. United States*, 230 F. Supp. 487 (D. Ore. 1964); 53 GEO. L. J. 498 (1965).

⁷⁹ Such a procedure has been suggested to reduce the number of federal habeas corpus petitions from state prisoners. Meador, *Accommodating State Criminal Procedure and Federal Postconviction Review*, 50 A.B.A.J. 928, 931 (1964); Oliver, *Postconviction Applications Viewed by a Federal Judge*, 39 F.R.D. 281, 290 (1966).

of their § 2255 petitions. The effect of this would not be to increase the number of such proceedings, but to enable judges to determine more readily which petitions merit hearings and which do not. Under the present practice, frequently the judge feels constrained to order a hearing, fearing that there is no other way to ascertain the nature and merits of the case.⁶⁰

This approach is now being attempted in the Southern District of California, where, although an attorney is not appointed until the judge determines a hearing is necessary, he is encouraged to make full use of discovery devices to disclose all possible grounds for collateral attack.⁶¹ In this way:

The fullest review of the conviction possible is provided in the hope that the court will not again be required to entertain new section 2255 petitions from the same prisoner or that such petitions might be disposed of without requiring a hearing, presence of petitioner, or appointment of counsel.⁶²

Another approach is that adopted in the Northern District of Illinois, where it is required that petitions be submitted on forms supplied by the court, and designed to elicit all the information necessary for the court to make a determination of the necessity for a hearing.⁶³ The form is quite complicated, however;⁶⁴ it is difficult to conceive of how even the most skilled "jail-house lawyer" could properly complete it without the assistance of counsel, and such assistance at this stage has been denied.⁶⁵

⁶⁰ *Report of the Committee on Habeas Corpus, Judicial Conference of the United States*, 33 F.R.D. 367, 385 (1963). For a similar suggestion, see *Sanders v. United States*, 373 U.S. 1, 21 (1963). The subsequently enacted Criminal Justice Act of 1964, 18 U.S.C. § 3006A, makes no provision for appointment or compensation of attorneys representing indigents on collateral proceedings.

⁶¹ See Carter, *Pre-Trial Suggestions for Section 2255 Cases Under Title 28, United States Code*, 32 F.R.D. 391 (1963).

⁶² Note, *Right to Counsel in Criminal Post-Conviction Proceedings*, 51 CALIF. L. REV. 970, 983 (1963).

⁶³ See Report, *supra* note 80, at 382.

⁶⁴ The form used for § 2255 motions is reproduced at 33 F.R.D. 404.

⁶⁵ *Thomas v. United States*, 308 F.2d 369 (7th Cir. 1962).

VII. CONCLUSION

The problem of numerous petitions for post-conviction relief will probably be with us as long as jail houses are. As picturesquely stated by Justice Jackson:

Confinement is neither enjoyable nor profitable. And it is safe to assume that it neither gives rise to new scruples nor magnifies old ones which would handicap petitioner's preparation of one habeas corpus application after another. . . . The number of times the Government must retry the case depends only on the prisoner's ingenuity, industry and imagination. . . . The prisoner, of course, has nothing to lose in any event. Perjury has few terrors for a man already sentenced to 65 years' imprisonment for a crime of violence. Even such honor as exists among thieves is not too precious to be sacrificed for a chance at liberty. Consequently, his varying allegations can run the gamut of all those perpetuated in the pages of the United States Reports.⁸⁶

The creativity of the jail-house lawyer will not be stymied by summarily denying his petition, however. This article has suggested that the best approach to take is to appoint counsel and grant a hearing whenever in doubt, so that a determination can be made on the merits. Once such a determination is made, the matter can be disposed of with finality. The burden of which the judiciary complains may be largely self-imposed, as was suggested by Senior Circuit Judge Walter L. Pope:

Granted that processing all these applications is a burden; granted that too many of them are frivolous or fraudulent—yet finding, somewhere in that mass, the case of the prisoner whose claim is just is a task that is of the greatest importance. Is it too much to suggest that the burden is not too heavy—for, searching for and now and then finding the occasional just cause is, after all, but a part of our job.⁸⁷

⁸⁶ *Price v. Johnston*, 334 U.S. 266, 296-97 (1948) (Jackson, J., dissenting). See also Sloan, *The Jail House Lawyer versus Court and Counsel: Some Ideas for Self-Protection*, 1 WASHBURN L. J. 517 (1962).

⁸⁷ Pope, *supra* note 34, at 421.