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FEDERAL HABEAS CORPUS: LIMITATIONS ON SUCCESSIVE APPLICATIONS FROM THE SAME PRISONER

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It is well established that principles of res judicata are inapplicable to federal habeas corpus proceedings.[1] Justification for the refusal to apply that doctrine relates to the function the writ of habeas corpus[2] is designed to perform: "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."[3] The Supreme Court, however, has created an alternative method of achieving some degree of finality in cases involving successive federal habeas applications by the same prisoner. Numerous lower federal court decisions utilizing the guidelines announced in *Sanders v. United States*[4] demonstrate that essentially the same result is being achieved as would be the case under application of principles of res judicata.[5]

The impact of federal habeas corpus litigation on the alleged need for finality in the criminal process has been a source of controversy for many years.[6] Despite continuing criticism during the past two

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1. *See, e.g.*, Sanders v. United States, 373 U.S. 1 (1963); Fay v. Noia, 372 U.S. 391 (1963); Accardi v. Shaughnessy, 347 U.S. 260 (1954); Waley v. Johnston, 316 U.S. 101 (1942); Wong Doo v. United States, 265 U.S. 239 (1924); Salinger v. Loisel, 265 U.S. 224 (1924).

2. Habeas corpus will be used throughout this Article to refer to proceedings initiated by state prisoners under 28 U.S.C. § 2241 (1970), as well as to motions to vacate sentences filed by federal prisoners under 28 U.S.C. § 2255 (1970). The two remedies are identical in most respects. *See* notes 8 & 38 *infra*.

3. Sanders v. United States, 373 U.S. 1, 8 (1963). Acknowledging that the common law refusal to apply principles of res judicata to habeas proceedings may have been based on the fact that habeas judgments were not appealable, the Court found it necessary to justify its holding on this more fundamental ground. *See also* Fay v. Noia, 372 U.S. 391, 423 (1963) ("[T]he familiar principle that *res judicata* is inapplicable in habeas proceedings . . . is really but an instance of the larger principle that void judgments may be collaterally impeached.").

4. 373 U.S. 1 (1963).

5. *E.g.*, United States v. Lee, 446 F.2d 350 (9th Cir. 1971); Johnson v. Maryland, 283 F. Supp. 929 (D. Md. 1968), *rev'd on other grounds sub nom.* Johnson v. Copinger, 420 F.2d 395 (4th Cir. 1969).

6. *Compare* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963), *with* Freund, *Remarks*, in *Symposium: Habeas Corpus–Proposals for Reform*, 9 UTAH L. REV. 18, 27 (1964). Federal habeas applica-

decades, a majority of the Supreme Court has stood firm in providing a mechanism for redetermination in federal court of questions of fact or law involving all claims of infringement of constitutional rights in criminal proceedings.[7] When, however, a prisoner has once been afforded the opportunity to assert his claims in a federal forum by use of habeas corpus, the filing of further applications for relief adds a new dimension to the controversy. The problem, which has two aspects, may be stated as follows: Once a prisoner has made application for habeas relief and has received an adverse decision on the merits of his claim, under what circumstances, if any, should he be permitted thereafter to present either the identical claim or an additional claim not raised in the first application? Each aspect of the problem implicates a fundamental question concerning the administration of criminal justice. First, to what extent does our system of justice require a procedure whereby fact relitigation is possible whenever inadequacy or incompleteness of a prior determination can be shown? Second, at what point do the necessities of judicial economy demanding assertion of all claims in a single action outweigh the desirability of permitting a full and fair federal collateral determination of all constitutional claims?

It is instructive, after a decade, to examine the impact of *Sanders* on the treatment of successive federal habeas corpus applications. Following a brief discussion of that case and of provisions of the Judicial Code which bear upon the question of successive habeas applications, attention will be afforded the tendency of some lower courts to interpret

tions increased from 584 in 1949 to 12,088 in 1971. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT, Table 16 (1971).

7. In Brown v. Allen, 344 U.S. 443 (1953), the Court emphasized that all federal constitutional questions are cognizable in federal habeas corpus proceedings brought by state prisoners. The right of federal prisoners to raise *all* federal constitutional questions in section 2255 proceedings, which theretofore had been in some doubt, seemingly was settled by Kaufman v. United States, 394 U.S. 217 (1969). The controversy concerning issues cognizable in section 2255 proceedings, however, has not subsided, even among members of the Court. In Schneckloth v. Bustamonte, 93 S. Ct. 2041 (1973), Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Rehnquist, assailed the holdings of the Court permitting prisoners to attack collaterally questions relating to use of evidence allegedly obtained in violation of the fourth amendment. *Id.* at 2059 (concurring opinion). Justice Powell would confine the scope of federal habeas inquiry in such cases to whether the prisoner was provided a fair opportunity to raise the question in state proceedings. Expressing a fundamental disagreement with the Court's past decisions, he cited *Sanders* as an example of cases which have tended to "depreciate the importance of the finality of prior judgments in criminal cases." *Id.* at 2062-63.

Sanders without regard to the fundamental nature and purpose of federal habeas corpus, namely, a procedure designed to assure a full and fair federal determination of the legality of restraints on personal liberty. In the context of habeas applications presenting additional claims not raised in a prior application, it will be suggested that the guidelines announced in *Sanders* be modified to give full recognition to the role of counsel in most habeas proceedings, to the factors which motivate prisoners seeking habeas relief, and to the nature and function of the concept of waiver as applied in cases involving successive habeas applications. The discussion will proceed on the assumption that the principles involved are equally applicable to habeas applications filed by state prisoners and to section 2255 motions filed by federal prisoners.[8]

The Sanders Decision

In *Sanders*, successive motions under section 2255 were denied without a hearing. A federal district judge based his first ruling on the ground that no underlying facts were asserted in the motion to support its conclusory allegations, noting in addition that the allegations were conclusively refuted by facts in the files and records of the case.[9] The petitioner did not appeal but eight months later filed a second motion alleging specific facts not contained in the earlier motion.[10] The district court denied the second motion on the ground that the movant offered no reason for his failure to include this matter in his initial motion.[11] The Court of Appeals for the Ninth Circuit affirmed the denial of the second motion,[12] noting that the applicant knew of the facts alleged therein at the time the earlier motion was filed. It was held that the district court had acted within its discretion in refusing relief without a hearing because of the movant's inability to justify the failure to assert the necessary facts in his previous motion.[13]

8. In considering successive motions filed by a federal prisoner under 28 U.S.C. § 2255 (1970), the *Sanders* Court held that the principles governing successive applications for relief, whether from state or federal prisoners, are the same. 373 U.S. at 14-15.

9. *See* 373 U.S. at 5.

10. The petitioner's first claim for relief included an allegation that the sentencing court had "allowed the Appellant to be intimidated and coerced into intering [sic] a plea without Counsel, and any knowledge of the charges lodged against the Appellant." *Id.* In his second application, the petitioner alleged that at the time of his trial and sentence, he was mentally incompetent as a result of narcotics administered to him while awaiting trial. *Id.*

11. *Id.* at 6.

12. Sanders v. United States, 297 F.2d 735 (9th Cir. 1961), *rev'd*, 373 U.S. 1 (1963).

13. 297 F.2d at 736-37.

The Supreme Court premised its review of the case upon the inapplicability of principles of res judicata to habeas corpus proceedings and to section 2255 motions to vacate sentence, apparently viewing the question as one of constitutional significance. In examining the then statutory language relating to successive applications for relief, the Court noted that congressional attempts to alter established principles concerning the inapplicability of the doctrine would raise "serious constitutional questions." [14] Although reversing the denial of the second motion in the case before it, the Court nevertheless ruled that under certain conditions a federal district judge may, within his discretion, refuse to entertain on the merits successive habeas applications.

According to the guidelines enunciated by the Court, a federal district court may give controlling weight to the denial of a previous application for habeas relief and thus refuse to entertain a second application on the merits upon determining, first, that the same ground had been presented in a prior application, second, that the prior determination adverse to the applicant was on the merits, and, third, that the ends of justice would not be served by reaching the merits of the new application.[15] It was noted that the "same ground" requirement refers to "a sufficient legal basis for granting relief." [16] Allegations raising the same "ground" include those proved by different factual allegations as well as those supported by different legal arguments.[17] Uncertainty

14. 373 U.S. at 11-12. The basis of this position is U.S. CONST. art. I, § 9, cl. 2, which provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The Court, on numerous occasions, has taken the position that even though the Constitution does not define the nature of the writ, it implicitly authorizes, if not compels, the federal courts to accord the writ its full common law meaning. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 406 (1963). Several Justices, including Mr. Justice Harlan in his dissent in *Sanders*, have taken issue with this interpretation of the Constitution. *See* notes 26-27 *infra* & accompanying text. *Compare* Chaffee, *The Most Important Human Right in the Constitution*, 32 B.U.L. REV. 143, 146 (1953), *with* Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 344-45 (1952).

15. 373 U.S. at 15.

16. *Id.* at 16.

17. *Id.* As an example of a claim constituting the same ground for relief, the Court suggested an allegation that a confession was involuntary because of psychological coercion followed by an allegation that the confession was obtained by the use of a physical coercion.

Although the Court's definition of "same grounds" may be sufficient for most cases, potential difficulties are apparent from its application in *Sanders*. It would not be unreasonable to argue that an allegation that the prisoner had been "intimidated and coerced" into entering a guilty plea without counsel is simply a generalized statement of a more

as to whether a subsequent application raises a different ground for relief is to "be resolved in favor of the applicant." [18] Concerning the question whether the prior application was adjudicated "on the merits," the Court stated that if that application raised factual issues, an adjudication "on the merits" must have entailed an evidentiary hearing, unless the files and records "conclusively resolved" the issues adversely to the applicant.[19]

The opinion was notably vague regarding the factors to be considered in determining whether the "ends of justice" would be served by a refusal to redetermine a claim for relief. It was indicated, however, that if factual issues are involved, an additional evidentiary hearing should be granted if the prior hearing was not "full and fair" within the criteria established in *Townsend v. Sain*.[20] On the other hand, if purely legal questions are involved, an additional hearing may be granted upon the showing of an intervening change in the law or "some other justification" for having failed to raise the argument in the prior application.[21] It was emphasized that the applicant carries the burden of showing that the ends of justice would be served by reaching the merits of the new application.[22]

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specific allegation that the prisoner was mentally incompetent at the time of trial and sentence as a result of narcotics administered to him while in jail pending trial. The Court, however, treated the allegation in the second application as raising an entirely new ground for relief; thus, the scope of inquiry on remand was limited to the question of whether the prisoner had abused the writ. *Id.* at 21.

18. *Id.* at 16.

19. *Id.* *See* Villarreal v. United States, 461 F.2d 765 (9th Cir. 1972); Wallace v. United States, 457 F.2d 547 (9th Cir. 1972); Anderson v. Page, 454 F.2d 432 (10th Cir. 1972).

20. 372 U.S. 293, 312-18 (1963). *See* notes 70-81 *infra* & accompanying text.

21. 373 U.S. at 17. Most of the lower court decisions since *Sanders* have involved successive applications raising questions of fact. *But see* Brooks v. United States, 457 F.2d 970 (9th Cir. 1972); United States *ex rel.* Townsend v. Twomey, 452 F.2d 350 (7th Cir.), *cert. denied*, 409 U.S. 854 (1972). Because of the current Supreme Court position with respect to the retroactivity of its decisions (*see* Desist v. United States, 394 U.S. 244 (1969)), the question of intervening changes in the law has seldom been argued. Mr. Justice Harlan, dissenting in *Desist*, criticized the majority opinion for its failure to deal with the "quite different factors" which should govern the application of retroactivity in habeas corpus cases. *Id.* at 256-69. *See generally* Haddad, *"Retroactivity Should Be Rethought": A Call for the End of the Linkletter Doctrine*, 60 J. CRIM. L.C. & P.S. 417 (1969); Kitch, *The Supreme Court's Code of Criminal Procedure: 1968-1969 Edition*, 1969 SUP. CT. REV. 155, 183-202; Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law, The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56 (1965); Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719 (1966).

22. 373 U.S. at 17. The significance of placing the burden of proof on the applicant is discussed in the text accompanying notes 77-78 *infra*.

The Court distinguished the problem of successive applications involving questions not previously raised by a prisoner. Noting that the habeas procedure might be abused if an applicant were permitted to assert a claim which could have been raised in a previous application, the Court stated that "if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, . . . he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground." [23] *Fay v. Noia*[24] and *Townsend v. Sain*[25] were cited as establishing the principles to govern the determination whether there has been a waiver.

In his dissent,[26] Mr. Justice Harlan, although agreeing with the majority that principles of res judicata are inapplicable in habeas proceedings, argued that some finality in criminal litigation must be achieved. Particularly concerned with the treatment of the application under consideration, Justice Harlan objected to the apparent affirmative tenor in which the majority opinion dealt with the question of successive applications. The fundamental difference between the two opinions, however, involved the issue whether a congressional attempt to modify previous Court decisions by limiting the right to file successive habeas applications would be an unconstitutional suspension of the writ.[27]

Statutory Limitations on Successive Applications

Congress on two occasions has attempted to deal with the problem of successive habeas applications. The 1948 amendments to the Judicial Code introduced a provision, codified in section 2244,[28] which addressed the question of successive habeas applications of state or federal prisoners alleging claims for relief previously determined ad-

23. 373 U.S. at 18.

24. 372 U.S. 391 (1963).

25. 372 U.S. 293 (1963).

26. 373 U.S. at 23-32.

27. *See* note 14 *supra* & accompanying text.

28. 28 U.S.C. § 2244 (1964), *as amended*, 28 U.S.C. § 2244(a) (1970). The original version of the section provided:

> 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.

versely to them. The statute provided that a successive application should be denied if no new grounds for relief were presented and if the ends of justice would not be served by an additional inquiry. It apparently did not purport to deal with the problem of successive habeas applications involving new grounds for relief.[29]

In construing the effect of this provision, the *Sanders* Court stressed the limitations on legislative power in this area.[30] Noting that Congress had specifically rejected a provision which would have injected the full measure of res judicata into habeas proceedings,[31] the Court construed the statute as simply codifying several previous Supreme Court decisions dealing with the problem.[32] In addition to stating that the 1948 amendments did not change the law as established by prior decisions with respect to questions previously determined adversely to the applicant, the Court asserted that the apparent absence of congressional action on the issue of successive applications alleging new grounds for relief left undisturbed the Court's previous decisions in cases involving questions of alleged abuse of the writ.[33]

Also enacted in 1948, section 2255 provides the procedures to be utilized in motions by federal prisoners to vacate sentences.[34] The portion of that section addressing successive applications[35] purports, on its face, to be much broader in coverage than section 2244.[36] In providing only that a court shall not be required to entertain successive applica-

29. In *Sanders*, the Court interpreted the statute as "addressed only to the problem of successive applications based on grounds previously heard and decided." 373 U.S. at 12. Mr. Justice Harlan, however, asserted that legislative history indicated that the "new ground" proscription referred to a ground that had not previously been "known." *Id.* at 27 (dissenting opinion).

30. *See* note 14 *supra* & accompanying text.

31. *See* S. REP. No. 1559, 80th Cong., 2d Sess. 9 (1947).

32. 373 U.S. at 11. *See* Salinger v. Loisel, 265 U.S. 224 (1924) (prior denial of writ may be given controlling weight and subsequent application dismissed if it alleges identical claim for relief and first denial followed a full hearing on the merits).

33. 373 U.S. at 12. *See* Price v. Johnston, 334 U.S. 266 (1948) (regardless of number of prior applications for relief, assertion of new grounds not previously heard is not per se abuse of remedy since petitioner might have been justifiably ignorant of facts or unaware of their legal significance); Wong Doo v. United States, 265 U.S. 239 (1924) (prior refusal to grant writ must be given controlling weight when, on subsequent application, same ground is raised as was raised in first application but upon which no proof was offered).

34. 28 U.S.C. § 2255 (1970).

35. The pertinent provision is as follows: "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." *Id.*

36. The Court in *Sanders* so noted. 373 U.S. at 12.

tions "for similar relief," section 2255 could be construed as covering cases involving grounds previously determined, as well as petitions alleging new grounds. Moreover, as noted in *Sanders*,[37] section 2255 could be interpreted as authorizing a court in its discretion to apply principles of res judicata to successive habeas corpus applications. The Court in *Sanders*, however, emphasized that despite the differences in language between sections 2255 and 2244, they are to be construed similarly and in a manner consistent with previous decisions of the Court.[38]

In its second venture into the area of successive habeas applications, and in apparent response to growing concern over the increasing number of such applications,[39] Congress in 1966 amended section 2244. The amendments added a provision, now codified in section 2244(b),[40] designed to deal with successive habeas applications from state prisoners. The Judicial Conference of the United States, which sponsored the

37. *Id.* at 13.

38. *Id.* at 14. The Court's questionable interpretation of section 2255 was apparently in response to practical as well as constitutional considerations. In United States v. Hayman, 342 U.S. 205 (1952), responding to an allegation that section 2255 was an unconstitutional suspension of the writ, the Court interpreted the section as affording the same rights as the traditional writ of habeas corpus. It was noted in *Sanders* that if section 2255 were interpreted as making the remedy "less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered . . . ." 373 U.S. at 14. As a practical justification for its interpretation, the Court observed that under the terms of section 2255, habeas corpus remains available to federal prisoners when the remedy given by that section proves "inadequate or ineffective." If res judicata were applied to section 2255 motions, the remedy would be "inadequate or ineffective," and the federal prisoner could resort to habeas corpus under section 2244. *Id.* at 14-15.

39. *See* S. REP. No. 1797, 89th Cong., 2d Sess. (1966).

40. 28 U.S.C. § 2244(b) (1970), *amending* 28 U.S.C. § 2244 (1964), provides:

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

The 1966 amendments also added a provision dealing with the effect of direct review by the Supreme Court of issues subsequently raised in habeas proceedings. 28 U.S.C. § 2244(c) (1970). Another provision addresses the burden and standard of proof in evidentiary hearings. *Id.* § 2254(d).

amendments, was candid in its statement that the intent of the new section 2244(b) was to introduce a "qualified application of the doctrine of res judicata" into habeas proceedings.[41]

One of several problems created by the 1966 amendments stems from the fact that the former version of section 2244, now codified in section 2244(a), remains available as a source of relief for persons in custody pursuant to a judgment of a court of the United States and for whom relief under section 2255 is "inadequate or ineffective." [42] Since section 2255 was left unchanged by the 1966 amendments, there are now three different statutory standards dealing with the problem of successive applications. Such a result is difficult to justify, particularly in light of the Supreme Court's determination in *Sanders* that constitutional problems would be posed by provision of different procedures for state and federal prisoners.[43]

Another difficulty resulting from the 1966 amendments involves the limitation of section 2244(b) to cases in which there has been an evidentiary hearing on the merits of the material factual issue. It was emphasized in *Sanders* that an issue could be considered adjudicated on the merits even though the determination was based solely upon the records and files of the case.[44] The section 2244(b) hearing requirement would appear inconsistent not only with this statement in *Sanders* but also with the congressional purpose underlying the 1966 amendments, that is, to limit the number of successive habeas applications.

Finally, a question is raised by the absence in section 2244(b) of the "ends of justice" element of the *Sanders* test.[45] The omission of this language is particularly significant in view of its retention in section 2244(a).[46] Legislative history of the amendments provides little insight into the reasons for the omission.[47] The "ends of justice" aspect of the *Sanders* test frequently is the most important factor to be considered by a court in determining whether to entertain a subsequent application based on an issue previously determined. Indeed, this re-

41. S. REP. No. 1797, 89th Cong., 2d Sess. (1966) (letter from Judge Orie L. Philips, chairman of the Habeas Corpus Committee of the Judicial Conference of the United States, to Sen. Joseph D. Tydings, Sept. 4, 1966).

42. 28 U.S.C. § 2255 (1970).

43. *See* note 38 *supra*.

44. 373 U.S. at 16.

45. *See* notes 20-22 *supra* & accompanying text.

46. 28 U.S.C. § 2244(a) (1970).

47. It has been suggested that the congressional purpose in excluding the phrase was to discourage its use without an express limitation. *See Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1152 (1970).

quirement is essentially a restatement of the fundamental purpose of habeas corpus. Perhaps in recognition of the deficiencies of section 2244(b), the lower federal courts uniformly have continued to follow the guidelines set forth in *Sanders*.[48]

Redetermination of Issues Previously Presented

Application of Sanders Guidelines

Strict adherence to the *Sanders* guidelines requires a federal district judge to determine initially whether a prior petition by the applicant alleging the same grounds for relief has been denied on the merits. Although there appears to be little difficulty in determining when the same grounds for relief have been asserted,[49] a question frequently presented is whether a prior dismissal without a hearing was based solely on deficient pleading of the issues and thus was not "on the merits";[50] as noted by the Court in *Sanders*, when factual issues are presented there can be no decision on the merits in the absence of an evidentiary hearing, unless the records and files "conclusively" resolve the issues adversely to the applicant.[51] The most difficulty with the *Sanders* guidelines, however, has been in applying the "ends of justice" aspect of that test.[52] The need for clarification of this element is well illustrated by the extraordinary case of Charles Townsend.

In *United States ex rel. Townsend v. Twomey*,[53] the Court of Appeals for the Seventh Circuit dealt with the apparent climax to a case which was described as reaching "Jarndycian proportions."[54] The state appealed from a judgment in the district court granting a writ of habeas corpus on the ground that a confession used in Townsend's trial was drug induced and, therefore, involuntary. In a previous habeas application, Townsend had raised the same issue, and, following an evidentiary hearing on the question, the district judge had held that the confession was voluntary and not drug induced. A retrial had been

48. *See, e.g.*, Boyden v. United States, 463 F.2d 229 (9th Cir. 1972), *cert. denied*, 410 U.S. 912 (1973). United States *ex rel.* Townsend v. Twomey, 452 F.2d 350 (7th Cir.), *cert. denied*, 409 U.S. 854 (1972).

49. *See* notes 16-18 *supra* & accompanying text.

50. *See* Cancino v. Craven, 467 F.2d 1243 (9th Cir. 1972); Villarreal v. United States, 461 F.2d 765 (9th Cir. 1972).

51. 373 U.S. at 16.

52. *See* notes 20-22 *supra* & accompanying text.

53. 452 F.2d 350 (7th Cir.), *cert. denied*, 409 U.S. 854 (1972).

54. *Id.* at 351. The history of the litigation involving Charles Townsend is presented in Appendix A of the decision of the court of appeals. 452 F.2d at 363-64.

granted, nevertheless, because the "new evidence" developed at the evidentiary hearing concerned the circumstances surrounding the extraction of the confession and was deemed by the district judge relevant to the issue of the credibility of the confession. The Court of Appeals for the Seventh Circuit, however, had disagreed and reversed the district court's grant of a writ on Townsend's first application.[55] Moreover, even though Townsend had not cross-appealed the district court's finding that his confession was voluntary, the appellate court referred in passing to and expressed its agreement with that finding.[56]

Townsend subsequently filed a second habeas application. The same district judge, finding that the application had merit and that the "ends of justice would be served" by holding a second evidentiary hearing on the question of the voluntariness of Townsend's confession, concluded, contrary to his earlier decision, that the confession was drug induced and involuntary.[57] In granting the writ, the district judge stated that "new and additional evidence" had been presented and that there had been "advances and changes in the law" since the earlier application.[58] Again the court of appeals reversed the trial court's decision to grant a new evidentiary hearing.[59] Interpreting *Sanders* as requiring a showing of "different or new evidence" before a district judge could legitimately exercise his discretion to consider a second application,[60] the court held that the second application presented no such "new" evidence.[61]

The basic disagreement between the court of appeals and the district judge related to the significance of testimony given by an expert witness

55. United States *ex rel.* Townsend v. Ogilvie, 334 F.2d 837 (7th Cir. 1964), *cert. denied*, 379 U.S. 984 (1965).

56. 334 F.2d at 842.

57. United States *ex rel.* Townsend v. Twomey, 322 F. Supp. 158, 173-74 (N.D. Ill. 1971), *rev'd*, 452 F.2d 350 (7th Cir.), *cert. denied*, 409 U.S. 854 (1972). Townsend's second application also raised other claims for relief, including a challenge of the constitutionality of the death penalty and of exclusion from the trial of jurors who had conscientious or religious scruples against capital punishment. The district judge accepted both contentions as additional bases for granting the writ. 322 F. Supp. at 178-79.

58. 322 F. Supp. at 174.

59. 452 F.2d 350 (7th Cir.), *cert. denied*, 409 U.S. 854 (1972). The appellate court, however, did agree with the district court's finding that the jury selection procedure was unconstitutional under the Supreme Court's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968). This issue was held to present grounds for relief arising as a result of intervening changes in the law since the disposition of Townsend's first habeas petition. 452 F.2d at 363. *See* note 21 *supra* & accompanying text.

60. 452 F.2d at 355.

61. *Id.* at 356.

who had not testified either at the trial or the first evidentiary hearing. The appellate court noted that the testimony of this witness, concerning the effect of certain drugs given to Townsend prior to his confession, was similar to testimony given by a different expert at the first evidentiary hearing. In comparing the testimony of the two experts, the court noted that both witnesses had relied on the same underlying facts in forming their opinions and concluded that the testimony was similar in all material respects.[62] In addition, it was observed that the testimony offered at the second evidentiary hearing was the same as the witness would have given if called at the time of the trial or the first evidentiary hearing.[63] Since the only difference in evidence was the opinion of another expert witness on unchanged facts, it was held that no "new" matter was presented upon which a second evidentiary hearing could be justified.[64]

The court relied heavily upon the decision of the Court of Appeals for the Second Circuit in *United States ex rel. Schnitzler v. Follette*.[65] That court had reversed the granting of a writ on a prisoner's initial petition, holding that the district judge incorrectly determined, following an evidentiary hearing, that a search warrant which had led to seizure of certain incriminating evidence introduced at trial was issued on an insufficient showing of probable cause.[66] Alleging no new facts, the defendant had filed a second habeas application which merely requested the district court to apply what was conceded to be an unchanged constitutional standard to the same facts. The judge again sustained the applicant's claim and granted the writ.[67] In reversing this decision, the court of appeals held[68] that the trial judge had abused his discretion in entertaining the second habeas application, since, in the opinion of the appellate tribunal, his only basis for granting relief was the belief that his first decision was correct and should not have been reversed on appeal. The court found it unnecessary to apply the *Sanders* guidelines, holding that the question was merely one of the impact of stare decisis on a federal district judge.

62. *Id.* at 357.
63. *Id.*
64. *Id.*
65. 406 F.2d 319 (2d Cir.), *cert. denied*, 395 U.S. 926 (1969), *rev'g* 290 F. Supp. 359 (S.D.N.Y. 1968).
66. United States *ex rel.* Schnitzler v. Follette, 379 F.2d 846 (2d Cir.), *rev'g* 267 F. Supp. 337 (S.D.N.Y. 1967).
67. United States *ex rel.* Schnitzler v. Follette, 290 F. Supp. 359 (S.D.N.Y. 1968), *rev'd*, 406 F.2d 319 (2d Cir.), *cert. denied*, 395 U.S. 926 (1969).
68. 406 F.2d 319 (2d Cir.), *cert. denied*, 395 U.S. 926 (1969).

In his dissent in *United States ex rel. Townsend v. Twomey*,[69] Judge Kerner argued that *Schnitzler* was inapposite, since the *Townsend* court had not decided the question of the voluntariness of the prisoner's confession on the first appeal. In addition, Judge Kerner asserted that the *Sanders* test should not be interpreted as requiring "new" evidence before a district judge may entertain a second habeas application on the merits.

The Correct Focus of Inquiry Under Sanders

The history of the litigation in the case of Charles Townsend dramatically demonstrates the potential for misapplication of the *Sanders* guidelines. The difficulties encountered by the federal district judge in that case stem directly from the portion of the *Sanders* guidelines providing that grounds previously decided on the merits may be redetermined if the "ends of justice" so require.

Although not purporting to limit the circumstances which would require a redetermination of factual issues, the *Sanders* Court specifically tied the meaning of the "ends of justice" clause to situations in which, according to the criteria enunciated in *Townsend v. Sain*,[70] the first hearing on the merits of the claim was not "full and fair."[71] There is indeed sound justification for applying the principles of *Townsend v. Sain* to cases involving successive habeas applications which raise issues previously resolved on the merits. The underlying purpose of a federal habeas corpus proceeding is not merely to provide an additional forum in which a prisoner may assert that his constitutional rights have been denied; rather, it is to ensure a continuing mechanism for determinations that such rights have been afforded.[72] In this light, the question presented to a federal court when a prisoner files a second application should be framed in terms not of whether a fact relitigation is necessary but of whether there has been an adequate federal adjudication.[73]

These principles are well illustrated in the context of an *initial* section 2255 motion requesting a redetermination of a factual issue which was considered by a federal trial judge. In such case, the prisoner clearly has had an opportunity to assert his constitutional claim in a federal forum;

69. 452 F.2d 350, 364-69 (7th Cir.), *cert. denied*, 409 U.S. 854 (1972).
70. 372 U.S. 293 (1963).
71. 373 U.S. at 16-17.
72. *See* Kaufman v. United States, 394 U.S. 217, 226 (1969).
73. *See* Thornton v. United States, 368 F.2d 822, 831 (D.C. Cir. 1966) (Wright, J., dissenting).

consequently, the justification may seem less than compelling for permitting a collateral redetermination of facts previously found adversely to the applicant.[74] It is clear, however, that section 2255 motions are not per se improper in cases where the same issue has been presented at trial. The decision to hold an evidentiary hearing on an initial section 2255 motion where the federal trial judge has had a "say" on the question should be determined in accordance with the criteria outlined in *Townsend v. Sain*,[75] since the issue is identical to that presented by a state prisoner on his first habeas application,[76] that is, whether there has been a full and fair hearing on contested factual issues.

In all probability, the Court in *Sanders* intended that a subsequent habeas application be examined in the same manner as an initial habeas petition by a state prisoner or section 2255 motion by a federal prisoner. There is, however, one difficulty concerning the equating by the *Sanders* Court of the *Townsend v. Sain* "full and fair" hearing criteria with its own requirement that the district judge make a finding whether the "ends of justice" would be served by entertaining an additional application. The placing on the applicant of the burden of showing that the ends of justice would be served by a redetermination[77] introduces an element not present in *Townsend v. Sain*, since nothing in that decision

74. Permitting federal courts to redetermine questions of law and fact previously determined by state courts has been partially justified on the theory that due to the differences in institutional setting within which federal judges operate, there is a substantial interest in having a federal forum adjudicate federal constitutional claims of state prisoners. *See Developments in the Law–Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970).

75. 372 U.S. 293 (1963). The *Townsend* Court held that in reviewing state court proceedings a federal habeas court should order an evidentiary hearing if:

> (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.

Id. at 313. It has been observed that "[o]f these, only the duty of the federal habeas court to scrutinize 'the fact-finding procedure' . . . [of the trial court] does not apply in the case of a federal prisoner; federal fact-finding procedures are by hypothesis adequate to assure the integrity of the underlying constitutional rights." Kaufman v. United States, 394 U.S. 217, 227 (1969).

76. Kaufman v. United States, 394 U.S. 217, 227-28 (1969).

77. 373 U.S. at 17.

indicates that the applicant must assume the burden of proving that the state hearing was not full and fair.[78]

It is now possible to return to the case of Charles Townsend to examine the misapplication of the *Sanders* guidelines. The federal district judge, after noting that the application raised a factual issue previously decided adversely to the applicant, should have determined whether there had been a full and fair hearing on the question. Since under *Townsend v. Sain* the existence of newly discovered evidence is only one factor entering into this determination,[79] the court of appeals clearly was incorrect in holding that there must be some "new" evidence before a district judge can order a second evidentiary hearing. In addition, the definition of "newly discovered evidence" in *Townsend v. Sain* is much broader than that traditionally used by courts in ruling on motions to grant a new trial, including therein any evidence which is crucial to an adequate consideration of a constitutional claim and which, for some reason other than inexcusable neglect, could not have been introduced at a prior evidentiary hearing.[80] Assuming that the testimony of the second expert witness was additional evidence crucial to an adequate determination of Townsend's constitutional claim, both the district judge and the court of appeals should have explored further why such testimony was not produced at trial or at the first evidentiary hearing, rather than merely determining that the testimony was available at the time of trial and the first evidentiary hearing.[81] It is submitted that these failures to apply the principles of *Townsend v. Sain* to the "ends of justice" requirement of *Sanders* evidence a misapplication of the *Sanders* guidelines and a disregard of the fundamental nature and purpose of federal habeas corpus.

Abuse of the Writ in the Presentation of New Claims

A second aspect of the *Sanders* decision which has proved troublesome concerns successive applications involving questions of fact or law not raised in an earlier habeas application. The factors which permit a federal district judge, within his discretion, to refuse to entertain successive habeas applications alleging new grounds for relief are grounded in equit-

78. *See Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1124 (1970).

79. *See* note 75 *supra*.

80. 372 U.S. at 317.

81. *See* notes 62-63 *supra* & accompanying text.

able considerations,[82] even though the writ itself is considered a legal remedy.[83]

The *Sanders* Court very carefully framed the inquiry in this situation in terms of potential for abuse of the writ.[84] It was emphasized that the mere existence of a prior application for habeas relief in which a claim was not raised does not of itself justify a refusal to entertain a subsequent application.[85] Consistent with this view, the burden of raising the question of abuse of the remedy was placed upon the government.[86] In explaining this procedural allocation, the Court noted that since most habeas applications are prepared without the aid of counsel, it would be unfair to require the applicant to negative this issue in his pleadings.[87]

Moving from procedural to substantive considerations, the Court stated that an abuse of the writ may be found only where there has been a "deliberate" withholding of a claim under circumstances amounting to waiver.[88] Such circumstances do not exist, however, if the claim was not presented because of justifiable ignorance of certain facts or their legal significance.[89] In making such a determination, it would appear that in many cases the district judge will have to hold an evidentiary hearing to obtain information not present in the records or files of the case. Moreover, from a practical point of view, it may be impossible for a court to determine whether a prisoner was justifiably ignorant of certain facts or their legal significance.

Concerning what constitutes a waiver, the *Sanders* Court stated merely that this determination should be made in accordance with the standards announced in *Fay v. Noia*.[90] Unfortunately, there are several factors relevant to the question of whether a prisoner has abused the writ which the Court considered in a perfunctory manner or not at all. For example, although it was recognized that most habeas applications are prepared without the assistance of counsel,[91] more emphasis should have been given to the role (or lack thereof) of counsel in the preparation of habeas applications. Even those district courts which have attempted to simplify

82. Sanders v. United States, 373 U.S. 1, 17 (1963).
83. *See* R. SOKOL, FEDERAL HABEAS CORPUS 33 (2d ed. 1969).
84. 373 U.S. at 17-18.
85. *Id.* at 17.
86. *Id.* at 10-11, *citing* Price v. Johnston, 334 U.S. 266 (1948).
87. 373 U.S. at 11.
88. *Id.* at 18. *See* note 23 *supra* & accompanying text.
89. 373 U.S. at 10.
90. 372 U.S. 391 (1963).
91. 373 U.S. at 11.

the pleading process through the use of forms[92] or other devices designed to elicit information from habeas applicants so that all claims for relief are presented jointly[93] have not been effective in obviating the need for counsel. Developing and presenting facts contained in the record and elsewhere in a manner which fully identifies the nature and significance of constitutional claims requires some understanding of the intricacies of criminal procedure. The possibility that some claims for relief will not be presented due to ignorance is inherent in the process when counsel has not participated. It also seems inappropriate to place the district judge in the position, suggested by the *Sanders* Court,[94] of attempting to formulate the exact nature of legal claims contained in the often unorganized allegations of the prisoner.

Another factor which the Court in *Sanders* failed to consider is the motivation of a prisoner in seeking collateral relief. In cases where a state court refuses on procedural grounds to entertain a prisoner's claim for relief on the merits, *Fay v. Noia* establishes the right of the prisoner to present his constitutional claims to a federal court, unless the court determines that the petitioner "knowingly" or "deliberately" waived this right.[95] It is submitted that such a "waiver" concept fails to take into account the fact that seldom, if ever, will a prisoner intentionally withhold a constitutional claim in a habeas application. In *Harris v. Brewer*,[96] Judge Lay commented on the motivations of prisoners seeking to assert constitutional claims:

> It seems virtually inconceivable that a prisoner who seeks his liberty will not allege every *known* basis which might support his release. This is undoubtedly why so many frivolous grounds are alleged in post-conviction petitions since the prisoner, unschooled in the

92. *See Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1177 (1970). *See also* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Rules Governing Habeas Corpus Proceedings for the United States District Courts, Rule 9, *reproduced in* 93 S. Ct. (Adv. Sh.) No. 16 (1973) [hereinafter cited as Proposed Rules].

93. In United States v. Lee, 446 F.2d 350 (9th Cir. 1971), the district court, by local rule, had employed a procedure designed to put applicants on notice that all claims for relief must be asserted jointly. Under the rule, applicants were warned that all claims not submitted would be deemed "wilfully omitted," and, if presented at a later time, they would not be "accepted or considered" by the court. *Id.* at 351 n.1. *See also* Proposed Rules, *supra* note 92, Rule 9.

94. 373 U.S. at 22-23 (["The judge] is free to adopt any appropriate means for inquiry into the legality of the prisoner's detention . . . .").

95. 372 U.S. at 438-39.

96. 434 F.2d 166 (8th Cir. 1970).

> law, seeks his freedom on every ground he can imagine. It is in the prisoner's self-interest to allege all constitutional infirmities, not because of procedural forfeiture, but because of continued imprisonment. Judicial anathema will never surpass a prisoner's unending quest for relief as an effective limitation on fragmented consideration of his claims.[97]

It is most unfortunate that the *Sanders* Court found the standards of waiver enunciated in *Fay* to be appropriate guiding principles in habeas proceedings for determining when a prisoner has, by his own actions, waived the right to assert his constitutional claims. Holding that a federal district court may deny a writ of habeas corpus where there has been a deliberate bypass of "the orderly procedure of the state courts," [98] the *Fay* Court equated deliberate bypass with the familiar concept of waiver of constitutional rights in other settings: "An intentional relinquishment or abandonment of a known right or privilege." [99] The circumstances in which waiver most often takes place in the context of state trial proceedings, however, bears little relation to the context of successive habeas applications alleging new grounds for relief.

In the context in which it was considered in *Fay*, waiver often involves questions of trial strategy designed to secure some anticipated benefit[100] and in which counsel has participated.[101] As noted in *Fay*, the abuse of state procedures also is a significant factor which the federal habeas judge must take into account in determining the question of waiver.[102] These considerations, however, simply are not relevant in the context of successive federal habeas proceedings. Since in most cases the prisoner does not have the aid of counsel in deciding to bring or preparing the first habeas application, it cannot be maintained that counsel advised him to withhold a claim which can be asserted in a subsequent application. The only "benefits" which a prisoner might possibly gain from fragmenting his claim are in hedging against the possibility that his first

97. *Id.* at 169.

98. 372 U.S. at 438.

99. *Id.* at 439. This concept of waiver was first set forth in Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

100. *See* White, *Federal Habeas Corpus: The Impact of the Failure to Assert a Constitutional Claim at Trial*, 58 VA. L. REV. 67 (1972).

101. *Cf.* Henry v. Mississippi, 379 U.S. 443 (1965). In this case involving the right to raise a claim on direct review, the Court held that the decision of counsel to waive his client's rights could be binding even though the attorney did not first consult with his client.

102. 372 U.S. at 439.

attempt may come before an unsympathetic federal judge or in gaining psychological satisfaction from a belief that his numerous complaints are disrupting the administration of justice.[103] The rationale for the first possibility breaks down if it is accepted, as Judge Lay has noted,[104] that above all else, the prisoner wants his freedom as quickly as possible. With respect to the possibility that the process may be used by vindictive prisoners to harass the system, successive applications which can be found on the basis of records and files of the case to be patently frivolous in nature or clearly without merit may be summarily dismissed without the expenditure of significant judicial resources.[105]

The result is that application of the concept of waiver to successive federal habeas corpus applications serves no substantial interest except judicial economy, a value which, it is submitted, is insignificant in comparison to the interests of an individual who possibly is being detained unlawfully. The motivations for waiver by a prisoner are simply nonexistent. Moreover, even when the habeas applicant has been represented by counsel and advised not to present a claim in the first habeas application, no substantial federal interest is served by refusing to entertain a subsequent application. The factors which would motivate counsel in habeas proceedings not to raise a particular constitutional claim are based entirely on his opinion concerning the merits of the claim.[106] Unlike the situation in a case at trial, no possible benefit, from the point of view of the prisoner, is to be derived from failing to raise a constitutional issue. Thus, assuming that the claim does in fact raise an issue justifying a hearing on the merits, it is inconsistent with the fundamental philosophy of habeas corpus to hold the prisoner to a waiver. In short, questions concerning the proper allocation of decisionmaking between counsel and client should not be considered in habeas proceedings when the issue simply involves the decision to assert a claim for relief.[107]

103. It also has been suggested that many applications for relief are filed to obtain a short release from prison to testify. *See Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1154 (1970). This factor is of dubious validity in the case of federal prisoners, since a federal district judge, even after ordering an evidentiary hearing, is not required to bring the prisoner before the court. 28 U.S.C. § 2255 (1970). The procedure for state prisoners, however, does require the court, when ordering an evidentiary hearing on questions of fact, to issue an order that the prisoner be brought to court. 28 U.S.C. § 2243 (1970).

104. *See* text accompanying note 97 *supra*.

105. *See* text accompanying note 19 *supra*.

106. *Cf.* McCartney v. United States, 343 F.2d 471 (9th Cir. 1965). *But see* Murch v. Mottram, 409 U.S. 41 (1972) (per curiam).

107. Professor White argues that courts should decide which party is most likely

The question of waiver of the right to assert an additional constitutional claim in successive habeas applications involves considerations wholly different from those involved when the issue on the successive application is whether the failure to present relevant evidence on the particular claim was due to inexcusable neglect. When the question is the right to relitigate an issue previously determined adversely to the applicant based upon "new" evidence within the meaning of *Townsend v. Sain*, holding the applicant to a waiver of his right to present such additional evidence because of inexcusable neglect is consistent with the fundamental nature and purpose of the writ. Once the legal grounds for relief have been formulated, if questions of fact are involved, counsel normally is appointed to represent the applicant. Since the prisoner's counsel must then make strategic decisions concerning the presentation of evidence, he acts in essentially the same capacity as a trial attorney. There is thus ample justification to view the question of waiver of the right to present additional evidence on questions previously determined in habeas proceedings in the same manner that the question of waiver would be considered in an initial habeas proceeding. As Professor Bator has pointed out with respect to the propriety of even an initial federal evidentiary hearing, consideration must be given to the fruitlessness of a search for "ultimate truth." [108]

Although there is a possibility that the writ may be abused if a prisoner is not limited in his right to present "new" or "different" evidence to support previously litigated claims, this is not the case with the assertion of new constitutional claims for relief. Even assuming that a prisoner is capable of continually raising wholly new claims for relief, the ability of a federal district judge to identify from the files and records of the case the frivolous nature of any claim should be an adequate check on possible abuse of the system.[109]

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to render an intelligent decision and then allocate as between the defendant and his attorney the responsibility of deciding whether to assert a claim at trial. White, *Federal Habeas Corpus: The Impact of the Failure to Assert a Constitutional Claim at Trial*, 58 VA. L. REV. 67, 98 (1972). When the question relates to the ends to be achieved rather than the means to those ends, the defendant's judgment should be required, and waiver in such case should be made in open court after the judge has explained the consequences. *Id.* at 74-76. A similar approach to waiver in the case of successive habeas applications could be employed.

108. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963).

109. The Judicial Conference of the United States has submitted a preliminary draft of proposed rules governing habeas corpus and section 2255 proceedings in the district courts. Proposed Rules, *supra* note 92. Proposed Rule 9(b), for each type of

Conclusion

The question of the propriety of permitting prisoners to file successive applications for federal habeas relief is only one of the many problems not adequately resolved by the current system of federal habeas corpus. Since, however, the whole scope of criticism of the existing system can be used to support curtailment of the right to file successive habeas applications, the practice may be the most vulnerable to attempts to change the system. Nevertheless, arguments that concepts of fairness are satisfied when there has been one opportunity to present constitutional claims in a federal forum or that the judiciary cannot withstand the strain of successive habeas applications from the same prisoner ignore the fundamental purpose of the writ to guarantee a prisoner a full and fair hearing on all constitutional claims.

To maintain the vitality of the writ, the Supreme Court should reemphasize that the controlling focus of inquiry when a successive application involves an issue previously determined on the merits is whether a full and fair hearing has been afforded in accordance with the standards of *Townsend v. Sain*. In addition, in developing new guidelines with respect to successive applications involving grounds for relief not previously determined, the Court should consider the prevailing practice of uncounseled preparation of habeas applications, the motivation of those seeking habeas relief, and principles of fairness distinguishing waiver in the context of successive habeas applications from waiver of state procedural rules.

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proceeding, addresses the problem of successive applications for relief and permits dismissal of second or successive petitions when no new ground for relief is alleged or, if new or different grounds are alleged, when the court finds that the failure previously to assert such grounds was "not excusable." Even though the Advisory Committee Notes indicate that the proposed rules are not intended to change existing standards, the propriety of introducing language different from that used in *Sanders* and in section 2244(b) should be seriously questioned.