THE FEDERAL APPROACH—SCOPE AND AVAILABILITY OF SECTION 2255

I. INTRODUCTION

Ohio recently adopted a new post-conviction remedy procedure[1] which it is hoped will cope with the vexatious habeas corpus problems now confronting many states as well as the federal judiciary. However, as with any post-conviction procedure, two conflicting interests exist. On the one hand, there is the need of fulfilling the societal goal of basic fair play in criminal matters. This demands an adequate opportunity for post-conviction review for those whose rights have been abused at trial. On the other hand, there is the necessity of filtering out the many unfounded claims upon which valuable time and effort is being lost. The frivolous habeas corpus petition can cause a secondary reaction to the immediate one of dismissal of the petition. Too many unfounded claims, clogging the dockets of the reviewing courts, can lead to a negative attitude toward post-conviction relief in general. This can then result in the drying up of available modes of relief to the abused as well as to the writ-abuser. The court is faced with a dilemma as practical as time, and as idealistic as the concept of justice. How the judge resolves the program has important ramifications in a society constitutionally pledged to due process.[2]

Now that the Ohio legislature has attempted to find a new solution to the problem, Ohio judges will be called upon to add substantive content to this new legislation. It may prove helpful to look at how

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[1] Ohio Rev. Code Ann. §§ 2953.21-.24 (Page Supp. 1965).

[2] Mr. Justice Schaefer, of the Supreme Court of Illinois, reached the heart of the matter when he admonished:

> It has been said of the habeas corpus cases that one who searches for a needle in a haystack is likely to conclude that the needle is not worth the effort. That emphasis distorts the picture. Even with the narrowest focus it is not a needle we are looking for in these stacks of paper, but the rights of a human being. And if the perspective is broadened, even the significance of that single human being diminishes, and we begin to catch a glimpse of the full picture. The aim which justifies the existence of habeas corpus is not fundamentally different from that which informs our criminal law in general, that it is better that a guilty man go free than an innocent one be punished. To the extent that the small number of meritorious petitions shows that the standards of due process are being honored in criminal trials we should be gratified; but the continuing availability of the federal remedy is in large part responsible for that result. What is involved, however, is not just the enforcement of defined standards. It is also the creative process of writing specific content into the highest of our ideals. So viewed, the burdensome task of sifting the meritorious from the worthless appears less futile, and there is less room for the emotions of federalism.

Schaefer, "Federalism and State Criminal Procedure," 70 Harv. L. Rev. 1, 25-26 (1956).

other jurisdictions have met the problem with legislation, and how that legislation has been interpreted. Analogy is not lacking. Since 1948 federal prisoners have had available the section 2255 motion as a post-conviction remedy.[3]

Much of the statutory language of the Ohio legislation and section 2255 is similar. Both provide that the remedy is available to a "prisoner in custody under sentence," that such motion can be made at any time, that the motion is to be directed to the sentencing court (as opposed to the court in whose jurisdiction the prisoner is incarcerated, which is the proper jurisdiction for habeas corpus relief), and that the court is "not required to entertain successive motions for similar relief on behalf of the same prisoner." Both allow the reviewing court to discharge the prisoner or correct the sentence through resentencing, and provide that the prisoner need not always be produced at the hearing on the motion.

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[3] 28 U.S.C. § 2255 (1965) reads as follows:

Section 2255:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

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

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

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

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

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

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

There are some marked differences between the statutes which must also be considered. Whereas the Ohio statute provides only one ground for relief, *i.e.*, "infringement of rights as to render the judgment void or voidable" under the state or federal constitutions, the federal motion allows the prisoner to test his conviction by raising not only constitutional questions but also questions relating to (1) the validity of the sentence in light of federal laws, (2) the excessiveness of the punishment, (3) the jurisdiction of the court to impose the sentence, and (4) whether the conviction is subject to "collateral attack." The Ohio statute makes the constitutional ground raisable in terms of the sentence being "void or voidable." Though both provide for a hearing unless the prisoner is not entitled to relief, in federal court the motion and files and records must *conclusively* show that the prisoner is not so entitled to relief; whereas, in Ohio, the records need not be conclusive.[4]

Though the Ohio statute is not a duplication of the federal motion, there are sufficient similarities in the choice of certain sentences and phrases to make inquiry into judicial interpretation of the federal motion by federal courts quite helpful to the Ohio judge. To the extent the legislation is similar, the Ohio judge may very well deem the legislators' choice of wordage as approval of prior federal construction.[5]

Turning, then, to the federal courts' judicial construction of section 2255, two main questions are dealt with in the following discussion: first, the scope of the federal motion, and second, the standing of the federal prisoner to raise his objections to his conviction.

II. Scope

A. *The Federal Context of Remedies*

The federal prisoner has many statutory avenues which allow him to present many types of questions concerning his conviction either to the trial court or to an appellate court.[6] Although some of these

[4] See Herman, "Symposium on Post-Conviction Remedies: Foreword and Afterword," 27 Ohio St. L.J. 237, 239 (1966).

[5] See, *e.g.*, New Amsterdam Cas. Co. v. Nadler, 115 Ohio St. 472, 476, 154 N.E. 736, 738 (1926), where the court said: "Where a statute is adopted from another state, which, previous to such adoption, had been construed by the court of that state, it is presumed to have been adopted with the construction so given it." See also James v. Appel, 192 U.S. 129, 135 (1904); Cathcart v. Robinson, 30 U.S. (5 Pet.) 264, 280 (1831); Steelworkers v. Doyle, 150 N.E.2d 334, 355 (Ohio C.P. 1958); 2 Sutherland, Statutes and Statutory Construction 551-55 (3d ed. 1943).

[6] The battery of federal remedies includes:

(1) Appeal of the conviction to question errors at trial under Fed. R. Crim. P. 37(a).

(2) Motion under Fed. R. Crim. P. 32(d) in the sentencing court to withdraw

procedures have definitely limited functions and have been interpreted so as not to be expandable beyond their statutory language or common-law scope,[7] an air of liberality generally prevails in the federal courts concerning the procedural aspects of the post-conviction remedies. The various remedies have been allowed to be interchanged for one another when the federal prisoner has a substantial claim but has used the wrong procedure for correcting the abuse. For example, even though rule 34 is held to its strict statutory language,[8] direct appeal has been liberally administered to the degree that it has been

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guilty plea or plea of *nolo contendere* after judgment of conviction to prevent manifest injustice. Fed. R. Crim. P. 32(d) states: "A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

(3) Motion under Fed. R. Crim. P. 33 for new trial within five days after verdict on grounds other than newly discovered evidence, for which the period is two years.

(4) Motion under Fed. R. Crim. P. 34 in arrest of judgment within five days on the grounds that the indictment or information does not charge an offense or that the court was without jurisdiction of the offense charged.

(5) Motion under Fed. R. Crim. P. 35 to correct an illegal sentence, which may be made at any time; or reduce the sentence, which must be made within sixty days.

(6) Petition for writ of habeas corpus in the jurisdiction of incarceration to test the legality of detention when § 2255 proves inadequate.

(7) Petition for a writ of error coram nobis to correct errors of fact. See United States v. Morgan, 346 U.S. 502 (1954).

(8) Motion under § 2255 in the sentencing court.

[7] See Duggins v. United States, 240 F.2d 479 (6th Cir. 1957), which held that the purpose of rules 45(c), 33, 34, 35, 36 was to meet the problems of jurisdiction of federal courts to correct an illegal sentence after expiration of the term at which it was entered. The court said at 483: "It was not their [the rules'] purpose to meet the problems involved in habeas corpus proceedings or a collateral attack upon a judgment."

[8] In United States v. Zisblatt, 172 F.2d 740 (2d Cir. 1949), Judge Learned Hand said at 741-42:

> Rule 34 is explicit as to the grounds upon which a motion in arrest of judgment will lie: (1) The indictment must fail to "charge an offense," or (2) the court must be "without jurisdiction of the offense charged." . . . the appellee is right in saying that at common-law a motion in arrest of judgment raised no objections which did not appear "upon the face of the record." . . . . The "face of the record" includes nothing more than the judgment roll . . . . For this reason it was held before the Rules that upon appeal any ruling whose validity depended upon the evidence taken at the trial, was not reviewable by motion in arrest; and the Rules have made no change. The Criminal Appeals Act spoke to the law, as it then was; it used the phrase, "motion in arrest of judgment," as it had come down from the past. . . .

[Footnotes omitted.] See also United States v. Bradford, 194 F.2d 197 (2d Cir.), *cert. denied*, 343 U.S. 979 (1952), *cert. denied*, 347 U.S. 945 (1954) (limiting rule 34 to the "record").

held to be a matter of right,[9] with full opportunity given to the indigent.[10] But narrower or broader construction of each federal remedy itself is not as crucial as is the determination of the prisoner's rights within the context of the total battery of remedies available. Where relief could have been denied on the grounds that the prisoner proceeded under the wrong remedy, the federal courts have instead heeded the Supreme Court's directive in *United States v. Morgan*:[11] "In behalf of the unfortunates, federal courts should act in doing justice if the record makes plain a right to relief."[12] Thus a motion under section 2255 may be treated as a petition for writ of error coram nobis;[13] a "Motion for Dismissal of Sentence and Reversal of Verdict" which had been denied below as a section 2255 motion may be treated as a motion for a new trial on the ground of newly discovered evidence under rule 33 and a hearing granted;[14] a motion under section 2255 may be treated as a motion under rule 35 when that would be the proper remedy;[15] and when the rules are of no avail because of their

[9] Coppedge v. United States, 369 U.S. 438 (1962). The Court said at 441-42:

> Present federal law has made an appeal from a District Court's judgment of conviction in a criminal case, what is, in effect, a matter of right [citing 28 U.S.C. § 1291 (1965), and Fed. R. Civ. P. 37(a)]. That is, a defendant has a right to have his conviction reviewed by a Court of Appeals, and need not petition that court for an exercise of its discretion to allow him to bring the case before the court. The only requirements a defendant must meet for perfecting his appeal are those expressed as time limitations within which various procedural steps must be completed. First, a timely notice of appeal must be filed in the District Court to confer jurisdiction upon the Court of Appeals over the case.

[10] *Id.* at 444-45. The Court said:

> The sole statutory language by which the District Court is guided in passing upon the application provides "an appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." 28 U.S.C. § 1915(a). . . . What meaning should be placed on the "good faith" of which the statute speaks? In the context of a criminal appeal, we do not believe it can be read to require a District Court to determine whether the would-be appellant seeks further review of his case in *subjective* good faith. . . . We hold, instead, that "good faith" in this context must be judged by an *objective* standard. We consider a defendant's good faith in this type of case demonstrated when he seeks appellate review of any issue not frivolous.

[11] 346 U.S. 502 (1954).

[12] *Id.* at 505.

[13] *Ibid.*

[14] Mitchell v. United States, 368 U.S. 439 (1962) (per curiam).

[15] Hill v. United States, 368 U.S. 424, 430 (1962); Heflin v. United States, 358 U.S. 415, 418 (1959); see also Young v. United States, 337 F.2d 753 (5th Cir. 1964), where the court stated:

> [W]e ought not to follow the rule stated in Crow v. United States, 9th Cir., 1950, 186 F.2d 704, where the court refused to treat a motion under Section 2255 as an application for relief under Fed. R. Crim. Proc. 32(d) . . . . Rather, we would adopt the practice of the Tenth Circuit which has said that "A

built-in time limitations,[16] the Court suggests the availability of collateral attack.[17] It is this interchangeability among the remedies at the higher levels of judicial administration, this proclivity to make the proper avenue of redress available after the issues have been drawn around the improper one, that makes federal post-conviction relief a viable reality. The result is the granting of a hearing to determine the facts upon which the prisoner brings his complaint, with a corresponding increase in the work-load of the district court.[18]

Section 2255 motion can be treated as an application for a writ of coram nobis, and the validity of the sentence may then be tested, in an appropriate case. Igo v. United States, 10th Cir., 1962, 303 F.2d 317, 318."

[16] In refusing to accept excusable neglect as a basis for extending the time limitation for appeal under rule 37(a)(2), the Court in United States v. Robinson, 361 U.S. 220 (1960), said at 225:

> If . . . delayed filing of notice of appeal—found to have resulted from "excusable neglect"—is sufficient to confer jurisdiction of the appeal, it would consistently follow that a District Court may, upon a like finding, permit delayed filing of a motion for a new trial under Rule 33, of a motion in arrest of judgment under Rule 34, and the reduction of sentence under Rule 35, at any time—months or even years—after expiration of the periods presented in those Rules . . . .

The Court said further at 230 that "Certainly that possibility would unnecessarily produce intolerable uncertainty and confusion."

[17] The Court in United States v. Robinson, 361 U.S. 220, 230 n.14, said:

> The allowance of an appeal months or years after expiration of the prescribed times seems unnecessary for the accomplishment of substantial justice, for there are a number of collateral remedies available to redress denial of basic rights. Examples are: The power of a District Court under Rule 35 to correct an illegal sentence at any time, and to reduce a sentence within 60 days after the judgment of conviction becomes final; the power of a District Court to entertain a collateral attack upon a judgment of conviction and to vacate, set aside or correct the sentence under 28 U.S.C. § 2255; and proceedings by way of writ of error *coram nobis.*

But see Berman v. United States, 378 U.S. 530 (1964), where the Court affirmed per curiam the denial of an appeal. The petitioner presented a constitutional ground for attack, *i.e.*, illegal search and seizure. His attorney became ill and did not file the notice of appeal due on Saturday until the following Monday. Mr. Justice Black, in a dissenting opinion joined in by three other Justices, implored the Court to treat the appeal as a collateral attack under § 2255 or to treat the appeal as timely under a liberal construction of the requirements in rule 37(a)(2). *Id.* at 533-34.

[18] Of this, Chief Judge Tuttle of the Fifth Circuit Court of Appeals wrote:

> I am very much concerned about the tremendous load of post-conviction proceedings with which we are now faced . . . . Yet, to save my life, I cannot say that if I were sitting on the Supreme Court I could conscientiously decide any of these cases contrary to the manner in which they have been decided. We do, not infrequently, find that in some of these post-conviction motions the accused is in the right and that he has been denied such constitutional or other basic rights as entitle him not only to raise the question after an appeal, but to obtain the relief sought.

Letter from Chief Judge Elbert P. Tuttle to Walter L. Pope in Address by Walter L.

Ohio, however, has neither the rules nor coram nobis with which to temper denials of petitions under the new Ohio post-conviction remedy statute. This factor would point to the need of liberal interpretation of the Ohio Statutes to include the modes of relief that the rules, coram nobis, and section 2255 altogether encompass for the federal prisoner. In absence of coram nobis and the rules, the federal judiciary might well have given section 2255 such a liberal interpretation. The United States Supreme Court acknowledges that the states must provide adequate post-conviction relief to state prisoners,[19] and has itself restricted section 2255 application only by tempering such restriction with the liberal interchange of remedies provided by coram nobis and the rules.

B. *The Scope of Section 2255*

It is from the cases dealing with the total federal battery of remedies that the scope of section 2255 becomes apparent. The most important avenues of relief emerge as section 2255, rule 35, and coram nobis. Together they form the context of collateral attack.

In *United States v. Hayman*,[20] the constitutionality of section 2255 was upheld by making it the equivalent of habeas corpus. The lower court had held the section a nullity as an unconstitutional suspension of the writ of habeas corpus. The Supreme Court found the purpose of the section was to clear the clogged dockets of the district courts in whose jurisdictions major federal penal institutions were located, and facilitate the administration of post-conviction relief by allowing determination of the claims in the sentencing court—the jurisdiction which had control of the files and records, which was the scene of the facts, and in which the witnesses resided.[21] The Court concluded that section 2255 "was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere . . . do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions."[22] Thus, finding the section not a restriction upon habeas corpus, the Court stated that the sec-

Pope, "Suggestions for Lessening the Burden of Frivolous Applications," 33 F.R.D. 409, 417-18 (1962).

19 Case v. Nebraska, 381 U.S. 336 (1965).

20 342 U.S. 205 (1952).

21 *Id.* at 214-19. The *Hayman* opinion presents a full legislative history of § 2255. For further comment on the history of § 2255, see Sanders v. United States, 373 U.S. 1 (1963); Ladner v. United States, 358 U.S. 169, 179 (1958) (dissenting opinion). For a history of habeas corpus see Fay v. Noia, 372 U.S. 391, 399-426 (1963).

22 United States v. Hayman, *supra* note 20, at 219.

tion's "sole purpose was to minimize the difficulties encountered in habeas corpus by affording the same rights in another and more convenient form."[23] The Court also clarified the Judicial Conference Reviser's note that "section 2255 was 'in the nature of' the coram nobis writ in the sense that [it], . . . like coram nobis, is an independent action brought in the court that entered judgment."[24] The scope of section 2255 was thus tied to the scope of habeas corpus.

And yet, section 2255 gives a broader remedy. Not only is release from custody available through section 2255 proceedings, but the prisoner can receive less drastic revision of sentence through vacating, setting aside, or correcting the sentence.[25]

C. *Need for Constitutional or Jurisdictional Error*

Though the Court once limited the scope of section 2255 to encompass only constitutional questions or questions relating to the trial courts' jurisdiction, earlier cases had allowed nonconstitutional and nonjurisdictional questions of statutory construction to be reached on collateral attack. The scope of section 2255 thus includes all three, *i.e.*, constitutional, jurisdictional, and statutory interpretation questions.

In *Hill v. United States*,[26] the Court defined the scope of section 2255 as a "remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined."[27] This meant, then, that to be raisable by a section 2255 motion, the error must be either jurisdictional or constitutional, or an error that is "a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure."[28]

The requirement of the claim being constitutional or jurisdictional needs some qualification. In an earlier case, *Ladner v. United States*,[29]

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[23] *Ibid.*

[24] *Id.* at 221 n.36.

[25] Andrews v. United States, 373 U.S. 334 (1963).

[26] 368 U.S. 424 (1962).

[27] *Id.* at 427.

[28] *Id.* at 428. The Court, however, held that failure of the district court to follow formal requirements of rule 32(a) in not affording the convicted defendant an opportunity to speak in his own behalf before sentencing (the "allocution" requirement) was not error raisable by collateral attack. *Id.* at 426. For other cases dealing with the allocution requirement, see United States v. Behrens, 375 U.S. 162 (1963); Andrews v. United States, 373 U.S. 334 (1963); Machibrodo v. United States, 368 U.S. 487 (1962); Green v. United States, 365 U.S. 301 (1961).

[29] 358 U.S. 169 (1958) (on rehearing). Petitioner had been convicted on two counts under 18 U.S.C. § 111 (1965) of assaulting federal officers and was sentenced to ten years on each count, to run consecutively. After the first sentence had been served,

the Court reached a question of statutory interpretation on collateral attack. There the Court said that "the availability of a collateral remedy is not a jurisdictional question in the sense that, if not properly raised, this Court should nevertheless determine it *sua sponte*."[30]

The Court thus distinguished two meanings of jurisdiction: the first referring to jurisdiction with regard to the trial court; the second meaning referring to jurisdiction of the appellate court to hear the collateral attack. *Hill* correctly stated that there is a jurisdictional requirement in the sense that the question must involve either a constitutional question or a question which involves the jurisdiction of the trial court. *Ladner* demonstrates that this meaning of jurisdiction does not include the prisoner's conferring jurisdiction on the appellate court by using the proper remedy to correct the abuse. *Ladner* also recognizes the equitable need to shift among the remedies to reach the merits of a substantial claim. The jurisdictional ground was thus defined in *Ladner* to be that the trial court was without jurisdiction to impose such sentence; and the statute was not intended to be a jurisdictional requirement in the procedural sense of properly raising the collateral attack. That is, the remedy is not to be denied because of the prisoner's failure to give the court jurisdiction over his claim by improperly raising or omitting to raise it in the lower courts. This is in keeping with the liberal attitude toward interchangeability of the remedies noted earlier.

In *Ladner*, statutory construction was neither a constitutional nor jurisdictional question. Since the government had not raised the objection of statutory construction being outside the scope of collateral attack, the Court stated: "We, therefore, proceed to construe . . . [the statute] without, however, intimating any view as to the availability of a collateral remedy in another case where that question [scope] is properly raised, and is adequately briefed and argued in this Court."[31] *Ladner* thus reached a question of statutory construction which did not meet the jurisdictional or constitutional requirement of *Hill*. The scope of section 2255 was thus expanded to include statutory construction. The dissent in *Ladner* incorrectly attempted to restrict the scope of collateral attack by stating: "a collateral attack can be made

petitioner moved under § 2255 to correct the second sentence, claiming he had fired but one shot which had struck two officers and that this violated the statute but once. The Court was thus called upon to interpret whether the statute authorized two convictions for one act or not.

30 *Id.* at 172-73.

31 *Id.* at 173. The dissenting opinion correctly points out that "clearly this is an error raisable by appeal. It did not undermine the jurisdiction of the original trial court . . . . It raises no constitutional issue." *Id.* at 180.

only where the error in the sentence is apparent from the facts alleged in the four corners of the indictment or are admitted by the parties."[32] Surely it is the province of the rules to correct sentences in direct attack. Rule 34 is intended to correct convictions where the "four corners" of the indictment are faulty,[33] and rule 35 is intended to correct illegal sentences where the error is apparent on the face of the record.[34] It is to collateral attack that the prisoner must turn when the error is dehors the record.[35] *Ladner*, and the cases relied upon by *Ladner*'s majority, establish that statutory construction even if nonconstitutional and nonjurisdictional, is within the scope of collateral attack and raisable by a section 2255 motion.[36]

However, *Sunal v. Large*[37] stands for the proposition that the error, if not a question of statutory construction or jurisdiction of the real course, must be constitutional to be raisable.[38] The Court stated:

> An endeavor is made to magnify the error in these trials to constitutional proportions by asserting that the refusal of the proffered evidence robbed the trial of vitality by depriving defendants of their only real defense. But as much might be said of many rulings during

[32] *Id.* at 182.

[33] See United States v. Zisblatt, 172 F.2d 740 (2d Cir. 1949).

[34] Heflin v. United States, 358 U.S. 415 (1959).

[35] *Ibid.*

[36] See Ladner v. United States, 358 U.S. 169 (1958). Based upon this restricted view of collateral attack, the dissent in *Ladner* distinguishes the cases relied upon by the majority as cases in which either the error was apparent on the face of the indictment or the facts were admitted. The dissent attempts to distinguish the cases because in *Ladner* there had to be an evidentiary hearing to determine how many shots the prisoner did fire. 358 U.S. at 181. The only difference between *Ladner* and the other cases and the only reason why the hearing would have to be held, is that Ladner's trial was "not transcribed [and] it will be necessary at the hearing on the motion to reconstruct the trial record" [358 U.S. at 179]; otherwise, the controverted facts would appear in the record and no more need be done than in the others. There appears to be little justification for distinguishing the cases. The dissent's reliance on Sunal v. Large, 332 U.S. 174 (1947), where it was stated: "Wise judicial administration of the federal courts counsels against such a course [habeas corpus attack where the issue could have been, but was not, raised on appeal], at least where the error does not trench on any constitutional rights of the defendant nor involve the jurisdiction of the trial court" [*Id.* at 181-82], is misplaced. *Sunal* did not involve a question of statutory construction, rather the complaint was the trial court's refusal to allow defendants the opportunity to present a defense which the Court classified as an error of law [*Id.* at 182] but not such error as to amount to denial of procedural due process.

[37] 332 U.S. 174 (1947).

[38] In *Sunal* the trial court incorrectly refused to allow the defendant conscientious objectors to show that their selective service classifications were involved in prosecutions for refusing to submit to inductions. They took no appeal. The Court differentiated this type of refusal to admit evidence as improperly excluding a defense from a constitutional question.

> a criminal trial. Defendants received throughout an opportunity to be heard and enjoyed all procedural guarantees granted by the Constitution. Error in ruling on the question of law did not infect the trial with lack of procedural due process.[39]

Hence, the Court though liberal in interchanging the remedies in order to reach the merits of a substantial claim, attempted to show the area of constitutional questions raisable. Simply raising questions of constitutional stature, however, is not an automatic path to collateral attack. In *Hodges v. United States*,[40] petitioner, by implication, claimed his confession was coerced, but had not taken an appeal.[41] The Court found the petition frivolous without passing upon the lower court's basis for denial that "no appeal" barred collateral relief. As the dissent in *Hodges* points out collateral relief is available when a constitutional question is presented if the petition is not frivolous, whether or not appeal is taken. In *Jordan v. United States*[42] the lower court had held failure to appeal barred collateral attack even though petitioner raised a constitutional question. The Supreme Court reversed in a memorandum decision.[43] This, the dissent in *Hodges* correctly states, stands for the proposition that "the constitutional issue, though not raised at trial or on appeal, as could have been done, could be raised in a § 2255 proceeding."[44] This is true even if the prisoner pleaded guilty though his constitutional rights were violated.[45]

Thus, to attack a sentence collaterally by a section 2255 motion, the prisoner must raise questions concerning either the constitutionality of the proceedings in which he was convicted, the jurisdiction of the trial court, or interpretation of the statute.

III. STANDING

The scope of section 2255 being linked to the scope of habeas corpus has ramifications other than the questions that are properly presentable on the specific grounds raisable. The question of standing to invoke the remedy is also tied to the habeas corpus standards. It is here, also, that the availability of other remedies has meaning.

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39 Sunal v. Large, 332 U.S. 174, 182 (1947).

40 368 U.S. 139 (1961).

41 Hodges v. United States, 282 F.2d 858 (D.C. Cir. 1960).

42 233 F.2d 362 (D.C. Cir. 1956).

43 Jordan v. United States, 352 U.S. 904 (1956) (memorandum decision).

44 Hodges v. United States, *supra* note 40, at 142. For other cases where no appeal was taken and § 2255 motion was allowed, see Hill v. United States, 368 U.S. 424 (1962); Green v. United States, 365 U.S. 301 (1961).

45 Smith v. United States, 238 F.2d 930 (5th Cir. 1956), *rev'd on other grounds*, 360 U.S. 1 (1959).

The liberality in interchanging remedies has given the federal prisoner a genuine mode to relief. The statute speaks in terms of a "prisoner in custody" attacking his conviction by way of a section 2255 motion.[46] Though the Supreme Court has not passed upon all the various situations in which federal prisoners find themselves, it has, along with the lower federal courts, decided many of the possible contexts of "custody" and furnished analogies for others. The situations identified below include the lightest touch of "custody"—where the prisoner has already served the sentence—and the most ambiguous—where the prisoner is out on bail.

A. *Where the Sentence Has Been Served*

The custody requirement of section 2255 is not met where the sentence has been served. But the unavailability of this motion does not preclude judicial relief through other collateral remedies.

In *United States v. Morgan*[47] the petitioner had pleaded guilty to a federal charge, had served his federal sentence, and was in custody under a state sentence. The state sentence imposed was longer since petitioner was a second offender with a prior federal conviction. Petitioner served a writ of error coram nobis to void his federal conviction for failure to furnish counsel. The district court treated it as a motion under section 2255 and dismissed it for lack of jurisdiction because petitioner was no longer in custody.[48] The Supreme Court reversed, holding that section 2255 did not cover the entire field of remedies[49] and that, even without specific statutory authority, the common law writ of error coram nobis was available to correct errors of fact "without limitation of time for facts that affect the 'validity and regularity' of the judgment."[50] Post-conviction relief is thus available to correct a sentence already served, though the section 2255 motion is not proper.[51]

In *Pollard v. United States*,[52] where the petitioner had been released from federal prison while certiorari was pending, the Court held "the possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the

[46] 28 U.S.C. § 2255 (1965).

[47] 346 U.S. 502 (1954).

[48] *Id.* at 504.

[49] *Id.* at 511.

[50] *Id.* at 507.

[51] See United States v. Lavelle, 194 F.2d 202 (2d Cir. 1952) (section 2255 motion dismissed for lack of jurisdiction under similar facts).

[52] 352 U.S. 354 (1957).

merits."[53] Thus, collateral attack under section 2255 was held available though the prisoner was no longer in "custody." But, three years later the Court in *Parker v. Ellis*,[54] denied the same relief to a state prisoner seeking habeas corpus. There the petitioner was released from the state penitentiary pending certiorari and the Court held the case to be moot and the Court to be without jurisdiction. Relying on *Heflin v. United States*,[55] a case dealing with consecutive sentences, the *Parker* Court said of the *Pollard* case: "It is likewise true that 'a motion for relief under 28 U.S.C. § 2255 . . . is available only to attack a sentence under which a prisoner is in custody.' . . . contrary to the unconsidered assumption in *Pollard v. United States*. . . ."[56] Though the Chief Justice argued in an artful dissent that *Pollard* and *Heflin* were reconcilable because they dealt with different situations, and though Mr. Justice Douglas premised his dissent upon the belief that if this were a federal prisoner relief could be granted on the basis of *Pollard*, it would seem that *Parker* does undermine *Pollard*.[57] And in light of *Morgan*'s holding of the availability of coram nobis, *Pollard*-type relief seems somewhat unnecessary.

It would thus seem that having been given an adequate course of relief through coram nobis, the federal prisoner may no longer use a section 2255 motion to correct a sentence where he is no longer in custody. The engrafting of the habeas corpus standards onto the section 2255 motion would clearly point to this result.

B. *Consecutive Sentences*

In contrast to the cases where the petitioner has already served his sentence and is given some form of relief, cases exist which deal with attacks upon consecutive sentences not yet begun to be served. Where the prisoner has not yet begun to serve the sentence to be attacked because it does not begin until the expiration of the one he is presently serving, he has not met the custody requirement of section 2255. As in the cases where the sentence has already been served, however, there is some form of relief available. The prisoner can correct an illegal sentence he is not yet serving by motion under rule 35 of the Federal Rules of Criminal Procedure if the error appears on the face of the record. Where the error is dehors the record, coram nobis is still available. This is what the Chief Justice addressed him-

[53] *Id.* at 358.

[54] 362 U.S. 574 (1960).

[55] 358 U.S. 415 (1959). This case will be discussed later in the section dealing with consecutive sentences.

[56] Parker v. Ellis, 362 U.S. 574, 575 (1960).

[57] See Russell v. United States, 306 F.2d 402 (9th Cir. 1962).

self to in his dissent in *Parker*, differentiating the petitioner's being out of custody in the *Pollard* case from the petitioner's having never been in custody because he had not yet begun to serve the sentence he attacks. Yet, it is a contrast without a difference, for relief of some sort is available to the federal prisoner depending upon the status of his complaint.

The rule against allowing the prisoner to attack a consecutive sentence he has not begun to serve was found early in the habeas corpus decisions. Thus, in *McNally v. Hill*,[58] where the petitioner was serving the second of three consecutive sentences and had brought habeas corpus to attack the third conviction, the Court said, "without restraint of liberty the writ will not issue. . . . Equally, without restraint which is unlawful, the writ may not be used. A sentence which the prisoner has not begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry."[59]

The lower courts were not uniform in their application of the *McNally* rule to section 2255 motions. The most enduring of the lower court cases on this point is *Crow v. United States*,[60] where the court, in interpreting section 2255, held that the words "at any time" were controlled by the words "in custody." The court there said that "it is apparent that 'at any time' means at any time the prisoner is in custody under the sentence which he attacks."[61] The court in denying relief concluded that "a prisoner serving the first of two consecutive sentences is not serving the second."[62] The District of Columbia Circuit differentiated the *Crow* rule in *Holloway v. United States*,[63] because in *Holloway* the first of the two consecutive sentences was indeterminate, whereas in *Crow* both sentences were for a time certain. The court said: "The minimum time of the first sentence has now expired. It would be unfortunate to disregard the realities of the situation."[64] The court then referred to rule 35 in its connection with section 2255:

> If the trial court may correct an illegal sentence at any time, certainly a defendant has a right to move the court at any time for a declaration that a sentence is illegal. We do not believe that in employing the phrase "a prisoner in custody under sentence," Con-

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58 293 U.S. 131 (1934).

59 *Id.* at 138.

60 186 F.2d 704 (9th Cir. 1950). *Crow* was not, however, followed on another point, *i.e.*, refusal to allow a motion under § 2255 to be treated as a motion under rule 32(d). See Young v. United States, 337 F.2d 753 (5th Cir. 1964).

61 Crow v. United States, *supra* note 60, at 705.

62 *Id.* at 706.

63 191 F.2d 504 (D.C. Cir. 1951).

64 *Id.* at 507.

> gress intended to limit the court's authority for correcting illegal sentences . . . to those cases where defendants have actually started serving the sentences. We believe the intent of both the statute and the rule is to permit the filing of a motion to correct an allegedly illegal sentence at any time regardless of whether or not execution of the sentence has commenced.[65]

The Supreme Court passed on the situation when presented with the *Crow*-type time certain-consecutive sentences in *Heflin v. United States*.[66] The Court upheld the *Crow* rule, but tempered it with *Holloway* considerations of rule 35 holding that section 2255 is available only to attack a sentence under which a prisoner is in custody, but adding that "relief under Rule 35 . . . is available (at least where matters *dehors* the record are not involved), the only question here being whether the sentence imposed was illegal on its face."[67]

Though the petitioner's motion under section 2255 was not within the time prescribed for a rule 35 motion, the Court dispensed with the time requirement of rule 35 in order to reach the merits "to avoid wasteful circuity."[68] The *Heflin* case thus clarified the rule with regard to consecutive sentences, not allowing a section 2255 motion to be used, but granting relief under rule 35. This availability of some sort of relief tempered the harshness of not allowing a section 2255 motion to raise questions of illegality in sentences not yet begun to be served, and the lower courts have followed the liberality in granting relief.[69]

But *Heflin*'s use of rule 35 is no panacea for the federal prisoner. The use of rule 35 was subsequently limited by *Hill v. United States* to attacks on the illegality of the sentence itself as opposed to the broader questions of the illegal manner in which the sentence was imposed.[70]

Thus *Heflin* left a gap where the error complained of relating to the consecutive sentence yet to be served, was one dehors the record, though it fulfilled the habeas corpus standard of going to the jurisdic-

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65 *Ibid.*

66 358 U.S. 415 (1959).

67 *Id.* at 418.

68 *Id.* at 418 n.7.

69 See, *e.g.*, Bayless v. United States, 288 F.2d 794 (9th Cir. 1961).

70 As the Fifth Circuit Court of Appeals described it in Johnson v. United States, 344 F.2d 401, 410 (5th Cir. 1965):

> As to Rule 35, although the Supreme Court in Heflin appeared to open the door to a reading of Rule 35 which would have allowed it to be used in a broad range of cases falling without the ambit of § 2255, the door was subsequently closed tight in Hill . . . . It was there stated: "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 imposition."

tion of the court or was a constitutional question. Rule 35 is restricted to the face of the record and cannot reach matters dehors the record.[71] This gap is filled, however, by the availability of coram nobis which *Morgan* had allowed. This was the relief the Fifth Circuit allowed in *Johnson v. United States*[72] when faced with *Heflin* and *Hill*, when it found that through coram nobis "questions concerning the basic fairness of a conviction may be raised both before and after a sentence has been served."[73] In discussing the modes of relief presented by section 2255, rule 35, and coram nobis, the Tenth Circuit Court of Appeals said:

> While Rule 35 and § 2255 undoubtedly provide overlapping remedies, in that both authorize the correction of an illegal sentence, Rule 35 authorizes the correction of an "illegal sentence at any time," whether the correction results in the release of the prisoner ... or even though the petitioner has served his sentence .... The Rule is available to correct errors of law appearing on the face of the judgment, and the ancient writ of error coram nobis is available to correct fundamental errors of fact.[74]

Therefore when the sentence has been served, the prisoner can bring coram nobis. When the sentence is consecutive and not yet served, rule 35 is available if the error is apparent on the face of the record; and where dehors the record coram nobis affords relief.

There are other situations in which the prisoner finds himself which differ from the already served and consecutive sentence problems. In *Russell v. United States*,[75] the prisoner had served the sentence he was attacking, but was still in custody under consecutive sentences imposed in the same case. The Ninth Circuit granted section 2255 relief holding that "where the first of two or more consecutive sentences imposed is asserted to be invalid, the prisoner will be deemed to have been first confined under the admittedly valid sentence or sentences."[76] This presumption avoids any problems in shifting among writs, motions, and rules.

Where the prisoner elected not to commence serving his sentence pending an appeal, and thus was not yet in custody, section 2255 relief was available as "the appeal is therefore deemed to have been abandoned."[77] But where the prisoner was still in state custody and the

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71 See Heflin v. United States, 358 U.S. 415, 418 (1959).

72 *Supra* note 70.

73 *Ibid.*

74 Scarponi v. United States, 313 F.2d 950, 952 (10th Cir. 1963).

75 306 F.2d 402 (9th Cir. 1962).

76 *Id.* at 405.

77 Black v. United States, 269 F.2d 38, 41 (9th Cir. 1959).

federal sentence he was attacking was to begin upon completion of the state confinement, a section 2255 motion was held to be "premature."[78] Yet, even in this situation, in an appropriate case, rule 35 or coram nobis would be available.[79]

C. *Pardon, Probation, and Parole*

Differing amounts of the restraining forces of custody cause different results. A pardon bars relief under section 2255 because the custody requirement is not met. This is true also of probation. But other relief, in the form of coram nobis, is probably available. Parole, on the other hand, is sufficient custody to give the court jurisdiction to reach the merits. When the petitioner was pardoned by the President, his motion under section 2255 to expunge the record was held to allege no facts that would give the court jurisdiction.[80] It is probable, however, that petitioner could have gotten the relief he sought through coram nobis, for in *United States v. Bradford*,[81] where the petitioner received a suspended sentence and probation, even though the court held that a section 2255 motion did not lie for lack of custody, petitioner had his claim decided on the merits in a subsequent petition for a writ or error coram nobis.[82] The availability of coram nobis would thus remove the harshness of leaving intact a completed conviction, for as the Chief Justice observed in his dissent in *Parker*: "conviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities."[83] In *Callanan v. United States*,[84] the Supreme Court reached the merits of petitioner's claim on motion under rule 35, though petitioner's sentence was suspended and he was placed on probation.

The court in *Bradford* had observed that petitioner "might have been in a position to review his conviction by habeas corpus or section 2255, if he had been paroled"[85] for "a convict, paroled under Chapter 311 of Title 18 U.S.C., is in 'legal custody,' because section 4203

78 Ellison v. United States, 263 F.2d 395, 396 (10th Cir. 1959).

79 See Young v. United States, 337 F.2d 753 (5th Cir. 1964).

80 Viles v. United States, 193 F.2d 776 (10th Cir.), *cert. denied*, 343 U.S. 915 (1952).

81 194 F.2d 197 (2d Cir.), *cert. denied*, 343 U.S. 979 (1952), *cert. denied*, 347 U.S. 945 (1954).

82 United States v. Bradford, 272 F.2d 396 (2d Cir. 1959).

83 Parker v. Ellis, 362 U.S. 574, 593-94 (1960).

84 364 U.S. 587 (1961).

85 United States v. Bradford, *supra* note 81, at 200.

expressly so declares."[86] In *Jones v. Cunningham*,[87] the petitioner brought habeas corpus against the state sentence from which he had been paroled. The Supreme Court, using a common law test, concluded that habeas corpus would lie to test the conviction, though the prisoner was on parole.[88] Thus, with *Bradford* and *Jones* so decided, there can be little doubt that parole is no bar to bringing a section 2255 motion to test a conviction.

D. *Bail*

The Court had early held that one out on bail could not use habeas corpus for his release. In *Johnson v. Hoy*[89] the Court said: "He is no longer in the custody of the marshal to whom the writ is addressed, and from whose custody he seeks to be discharged. The defendant is now at liberty, and having secured the very relief which the writ of habeas corpus was intended to afford . . . the appeal must be dismissed."[90] This has been the continuing habeas corpus rule.[91] In *Matysek v. United States*,[92] the Ninth Circuit decided the rule applied to section 2255 motions. In a carefully reasoned opinion, the court

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[86] *Ibid.*

[87] 371 U.S. 236 (1963).

[88] The Court said at 240-43:

> History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus . . . . The custody and control of the [state] Parole Board involve significant restraints on petitioner's liberty because of his conviction and sentence. . . . It is not relevant that conditions and restrictions such as these may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the Great Writ. Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the "custody" of the Virginia Parole Board within the meaning of the habeas corpus statute. . . .

[89] 227 U.S. 245 (1913).

[90] *Id.* at 248.

[91] See, *e.g.*, Eagles v. Samuels, 329 U.S. 304, 307 (1946). *But see* MacKenzie v. Barrett, 141 Fed. 964 (7th Cir. 1905).

[92] 339 F.2d 389 (9th Cir. 1964). See also Allen v. United States, 349 F.2d 362 (1st Cir. 1965).

gave the history of collateral attacks when the petitioner was out on bail, and concluded that the district court was without jurisdiction to consider the merits.[93] The court hinted that rule 35[94] and coram nobis[95] would be available under appropriate circumstances. Neither habeas corpus nor section 2255 would be proper to attack bail as excessive; the proper procedure is a motion for reduction of bail and an appeal from an order denying such motion.[96]

CONCLUSION

The federal judiciary has made section 2255 a viable remedy for redressing trial abuses by reading it in context with other available federal remedies and liberally allowing the interchange of the remedies, after the issues have been drawn, to effect the needed result of reaching the merits of substantial claims of abuse. Since Ohio does not have the same context into which its new post-conviction remedy statute can be injected, a more liberal reading of its procedure may be required to give the state process similar relief-giving potential. Section 2255 has been tied to habeas corpus standards, though the relief given by section 2255 need not be so drastic as in habeas corpus: the prisoner can seek other than complete discharge through section 2255; he can seek revision or correction of his sentence. Yet habeas corpus standards do apply with regard to questions such as standing, where custody is a requisite to relief. The purpose of the federal statute was to shift the burden of heavy traffic in relief-seeking by federal prisoners to a more convenient forum. Some states, on the other hand, need measures such as section 2255, not so much to merely shift the work load among courts, but to, in effect, begin giving relief where it was denied on technical grounds before. For this reason states, such as Ohio, with new post-conviction relief statutes may have the need to go beyond the federal model in order to effectively supplement their criminal jurisprudence.

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93 Matysek v. United States, *supra* note 92, at 395.

94 *Ibid.*

95 *Id.* at 392. See also Shelton v. United States, 242 F.2d 101 (5th Cir. 1957), where the court treated a petition under § 2255 as a writ of error coram nobis and granted relief.

96 Stuck v. Boyle, 342 U.S. 1 (1951).