HABEAS CORPUS

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Habeas corpus is commonly called the "Great Writ."[1] It is so called because it tests the reasons why a petitioner is being deprived of his liberty. However it does not lie as an appeal from a judgment of conviction upon a trial or a plea of guilty;[2] and it does not perform the appellate office of determining the sufficiency of evidence, as it relates to guilt or innocence. Rather, it tests the imprisonment of the petitioner against constitutional principles; and if, at some time during the criminal procedure by which the petitioner was finally incarcerated, constitutional rights were violated to his legal detriment, he is entitled to release from custody.[3]

Many petitioners do not realize that habeas corpus is not an appeal from the judgment of conviction; and few fail to plead in their petition for the writ of habeas corpus to be issued that they are innocent of the crime for which they were convicted. The question before the court upon habeas corpus is not the guilt or innocence of the petitioner, and the court cannot be concerned in such a proceeding with allegations of mere error as contra-distinguished from allegations of violation of individual constitutional rights. The question is the constitutionality of the restraint of the petitioner's liberty.

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1. *Chitty's Blackstone,* bk. 1, p. 129: "The writ of *habeas corpus* [is] the most celebrated writ in the English law. Of this there are various kinds made use of by the courts at Westminister, for removing prisoners from one court into another for the more easy administration of justice. Such is the *habeas corpus ad respondendum,* when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner, and charge him with this new action in the court above. . . . . Such also are those *ad prosequendum, testificandum, deliberandum,* [etc.]; which issue when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed.

". . . But the great and effacacious writ, in all manner of illegal confinement, is that of *habeas corpus ad sujiciendum;* directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum,* to do submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf. This is a high perogative writ; (and issuable not only at term-times but also during vacation); for the king is entitled at all times to have an account, why the liberty of any of his subjects is restrained, wherever that restraint be inflicted.

". . . It is necessary to apply for it by motion to the court, as in the case of all other perogative writs, which do not issue without showing some probable cause why the extraordinary power of the crown is called in to the party's assistance.

". . . Freedom is an inherent right in the English people. But to assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible; but the glory of the English law consists in clearly defining the times, the cause and the extent, when wherefore, and to what degree the imprisonment may be lawful. This it is, which induces the absolute necessity of expressing upon every commitment the reason for which it is made: that the court upon an *habeas corpus* may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner."

2. Harlan v. McGaurin, 218 U.S. 442 (1910); *In Re* Schneider, 148 U.S. 162 (1893).
3. Johnson v. Zerbst, 304 U.S. 458 (1937).

The rationale of habeas corpus is that a conviction rendered in a court of competent jurisdiction may be collaterally attacked and the petitioner released if that court was in some manner deprived of its jurisdiction.[4]

Contentions such as the insufficiency of evidence to convict are not such contentions that go to lack of jurisdiction of the convicting court, though several cases have held that the lack of any evidence, in contra-distinction to insufficiency of evidence, is a contention that goes to the jurisdiction of the convicting court.[5] The admission into evidence of evidence illegally seized, in violation of individual constitutional rights, is a contention that goes to the jurisdiction of the convicting court;[6] so also are contentions that a confession made involuntarily, in derogation of individual constitutional rights, was admitted into evidence,[7] and the like.

If the court finds that the petitioner's assertions are factually correct, it must order the release of the petitioner. The court does have discretion in ordering release of a petitioner, in that it may order a conditional-type release. It may frame its order so that the petitioner is retained in custody until a reasonable time has elapsed for the state to begin its procedure of re-trial; and in the event that the state does not institute re-trial within a reasonable time, the petitioner will be released.[8]

The criticism is often made, which is primarily addressed to the effects of habeas corpus, that courts literally free criminals from jail and loose them upon the streets. Such a criticism is not factually correct for conditional release in habeas corpus upon the finding of deprivation of individual constitutional rights is the rule and not the exception.

The rule, again, and not the exception, is that the prosecution is able to obtain anew a conviction, and many times the prisoner is never released from custody during the challenge to his imprisonment.

Another criticism frequently made is that courts loose criminals according to newly developed concepts not in existence at the time the criminal was convicted. This criticism is also addressed to the effects of habeas corpus but it is not well-reasoned. What is desired in criminal law, and habeas corpus is the remedy of assurance, *i.e.,* the extension of individual constitutional rights to all persons accused of crime.

Our system of laws is based upon advocacy. It is deemed a capable means of achieving justice that each side of a controversy retain an advocate who is skilled in law and the art of persuasion; that each side be given the same opportunities of presenting evidence and the like; and that a person also trained in law and advocacy sit and preside and make sure that the rules of advocacy are properly followed. Each side opposes the other and keeps a check on the extent to which the other side may be inclined to go

4. *Ibid.*
5. Garner v. Louisiana, 368 U.S. 157 (1961); Thompson v. Louisville, 362 U.S. 199 (1960).
6. Mapp v. Ohio, 367 U.S. 643 (1961).
7. Malloy v. Hogan, 378 U.S. 1 (1964).
8. United States v. Fay, 300 F.2d 345 (2nd Cir. 1962); *affirmed* 372 U.S. 391.

if given free rein. To allow the prosecution an unfair advantage in the trial of a criminal case offends the underlying principles of our system of advocacy.

There are few who in good faith can dispute the logic of the following statement:

> We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confessions' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation . . . We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizen's abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights.[9]

The argument that courts loose criminals by creation of new rights is not valid. The so-called "new" rights created in recent years are not applied retroactively.[10] Thus persons convicted without being extended these rights may not complain now that they were deprived of due process of law. Other rights that may be said to have been redefined, or clarified, are extended retroactively but these rights in some form or another have been considered individual constitutional rights,[11] and they should have long been afforded, and these rights have been afforded in most areas, to persons accused of crime.

The criticism that recent court decisions have made the future administration of laws more difficult may have some foundation in fact. Such criticism is addressed to decisions such as *Gideon v. Wainwright*[12] which held that the right to counsel in criminal cases in state courts was a constitutional requisite. The answer to this criticism is that advocacy is the basis of our legal system, and there need be no fear that justice will be hindered by affording a person accused of crime an attorney at all critical stages of the criminal process against him. Justice is hindered if an accused is not furnished an attorney unless he desires not to have an attorney and knows full well the consequences of not having an attorney. Justice is hindered if a man waives constitutional rights unintelligently and involuntarily.

The principle is sound that in our system we cannot sanction any practice that allows the prosecution to obtain an unfair advantage in derogation of fundamental rights. There are certain rights of liberty, consonant with social values at any given time in our history, which the people dic-

9. Escobedo v. Illinois, 378 U.S. 478, 488 (1964).
10. Johnson v. New Jersey, 384 U.S. 719 (1966).
11. *Compare* Brown v. Mississippi, 297 U.S. 278 (1935) *with* Jackson v. Denno, 378 U.S. 368 (1964).
12. 372 U.S. 335 (1963).

tate that each individual citizen be afforded. These rights may, of course, be waived, but there is no waiver of any right unless the waiver is made intelligently and voluntarily and with understanding of the consequences of what is being done. To obtain information in derogation of rights of individual liberty, absent the accused's understanding waiver of his rights, is not in accord with our basic legal system.

This writer has witnessed frustration of the federal enforcement bureaus due to recent court decisions in cases that have come before him. This is illustrated by a recent case where two men had given confessions on more than one occasion prior to trial but the prosecution feared that the confessions would be inadmissable because the men had not been specifically informed of certain rights. Without the confessions in evidence (no attempt was made to offer them into evidence) the men were nevertheless convicted, though the verdict returned by the jury, which made mandatory a certain sentence, was perhaps not as severe as it should have been or as it would have been had the confessions been introduced into evidence.

Another case which was tried before this writer involved a crime similar to assault, in that if there was an illegal act intended and the accused acted according to an intent to commit the illegal act, and did something in furtherance of his design, he was guilty. A federal official went to interview the accused and began to make an investigation. After the trial of the accused, at which he was found guilty on the second count of two counts charging the same type crime as mentioned above, the writer learned that the investigator had informed the accused of his identity, and thereupon the accused committed acts which were elements of the crime. The prosecution had *nolle prossed* the count contained in the indictment regarding the commission of the crime in the presence of the investigator, upon the fear that a conviction would not be upheld because the accused had not been informed of his rights.

It is arguable whether the commission of this type crime in the presence of an official who is making an investigation is a confession as to the other similar act that the accused has been charged with or an entirely different offense of the same nature, or both. However, the point of this discussion is that in some instances there is more apparent frustration than real.

Habeas corpus is a great writ because it is a viable procedural tool:

> "Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of a personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society government must always be accountable to the judiciary for a man's imprisonment: If the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release."[13]

13. Fay v. Noia, 372 U.S. 391 at 401 (1962).

The present act governing federal habeas corpus is found in 28 U.S.C. section 2241 (1959). It is a well drafted law, and it is relatively easy to follow. It provides certain distinctions between state and federal prisoners, the principal distinction being that a federal prisoner must ordinarily seek resort to the court which sentenced him, pursuant to section 2255, before bringing a petition for the writ of habeas corpus in the district where he is incarcerated. This section allows a collateral attack generally as broad as does the habeas corpus remedy.[14]

A law similar to section 2255 has been recently passed in relation to state prisoners. It provides that where there is more than one district court in a state, a state prisoner may file his petition in the district of his incarceration or in the district in which the state court that sentenced him is located, if different, and that one district court may transfer an application of a state prisoner to another.[15]

The act requires application for the writ to be in writing and verified by the applicant or his agent.[16] The application must contain specified allegations of deprivations of constitutional rights,[17] as distinguished from mere conclusory statements. It should contain specified allegations that available state remedies have been exhausted.[18]

Generally, the prisoner petitions filed in this Court are filed by indigents, pursuant to 28 U.S.C. section 1915 (1966), which is the pauper's statute.

If a petitioner wishes to proceed in forma pauperis, without being required to pay filing costs and fees, and is in fact a pauper, he may file with his petition a motion to be allowed to proceed in forma pauperis and accompany it with an appropriate affidavit of poverty.

Some investigation is generally made in this Court as to the truth of an affidavit of poverty. There is, of course, a federal penalty imposed on false swearing and such is certainly some deterrent to petitioners who would seek free court access when able to pay.

A procedure has developed in the writer's court that has worked quite well in view of the volume of prisoner petitions that arise in this district. When a petition is presented to the court, usually through registered mail, it is examined to determine if it states a cause of action on its face, and also to determine if the petition is technically sufficient, but with every benefit of doubt being given to the petitioner on the premise that he is unskilled in legal matters.

14. U.S. v. Hayman, 342 U.S. 205 at 219 (1952).
15. 28 U.S.C. §224 (d) (1933): "Where an application for a writ of *habeas corpus* is made by a person in custody under the judgment and sentence of a state court of a state which contains two or more federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the state court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district for hearing and determination."
16. 28 U.S.C. §2242 (1934).
17. 28 U.S.C. §2243 (1934).
18. 28 U.S.C. §2254 (1934).

Certain key things are looked for: Is the petition verified? Is there a sufficient statement of exhaustion of state remedies? The petition must otherwise state grounds which, if proved, would entitle the petitioner to relief. If the legal principle is colorable and the technicalities fulfilled, the court will direct the respondent to make his return and answer. If the legal principle is clearly not applicable or will not support petitioner's claim for relief, the court will draw an order and deny the petition forthwith. The order of denial usually states the grounds contained in the petition and conclusions for the denial of relief. If the claim of merit is colorable, and the petition is technically deficient, an order will generally be drawn allowing the petition to be filed and allowing twenty to thirty days for amendment in order to cure the specified defect if such can be truthfully amended. If no amendment is made, the order provides for automatic denial of the petition by the passage of the allotted time.

The writer follows the practice of allowing prisoner petitions filed in forma pauperis if the affidavit of poverty is in proper form, despite clear lack of merit in some petitions. If the petition is unmeritorious, an order will then be drawn denying the petition. A permissible practice would be to first determine that the petition did not present merit and that it is frivolous and not presented in good faith, and then deny the motion to proceed in forma pauperis. But it is deemed the better practice to allow the petition to be filed and then to deny it by order, in order that official records will be complete and reflect what has been done in any prisoner's case.

Some few petitions are not allowed filed in forma pauperis. These relate mainly to prisoner suits for damages that are clearly without merit.

Prisoners who present a petition that withstands the preliminary examination and whose petitions are allowed filed are appointed attorneys as a matter of course, with or without resuests for counsel. The bar is burdened by these appointments, but the practice is much more satisfactory with an attorney pleading the cause than with a petitioner, unlearned in the law, pleading his own case. There is as yet no provision to compensate the attorneys who serve the habeas corpus petitioners, inasmuch as habeas corpus matters are deemed to be strictly civil proceedings and attorneys are not yet constitutionally required to serve habeas petitioners.[19]

It is fair to have petitioners represened by attorneys, for the attorneys are skilled in the workings of the law, and are better equipped to know what points in the petition are meritorious and what points should not be insisted upon. It is likewise fair to pay them for their services. The burden of free representation falls most heavily on the single practioner, though, of course, the burden is by no means slight upon the firm with one or more young associates who are called upon to plead the cases of indigent prisoners.

19. See Dillon v. United States 230 F. Supp. 487 (D. Ore., 1964); *rev'd*, 346 F.2d 633 (9th Cir. 1965).

Once the proposition is granted that a person accused of crime is entitled to an attorney at any critical stage of the proceedings instituted against him, it follows that he is in need of legal aid at every stage of the proceedings. The argument is, of course, that habeas corpus is civil, in the nature of a writ of error coram nobis, and that the prosecution is ended; and the petitioner was (usually) represented by counsel at that time and that this representation satisfied the constitutional requirement of legal aid and assistance.

The answer to that argument is that habeas corpus is indeed civil, but that it is a remedy to correct constitutional errors that have occurred in relation to the trial process of the petitioner. It is a remedy to correct the errors, and to see that individual liberty is preserved inviolate. Legal aid is needed at all stages of the proceedings, and habeas corpus certainly is one stage of the proceedings.

Many petitioners include with their pleadings motions and requests for various transcripts and documents. One recent petition prayed for the immediate issuance of some ten subpoenas for witnesses, with the promise that a request for twenty additional subpoenas would be forthcoming. These requests are handled as a matter of course by an order denying them which informs the appointed attorney of their nature without prejudice to the attorney's later motion requesting such of the items as he deems in the best interest of his client.

The state is directed to make a return and answer, if the petition withstands the preliminary examination and is allowed filed, normally within twenty days from the date of the order.[20]

A hearing is set depending upon the circumstances of the case. During term time, this writer has developed the practice of hearing habeas corpus cases one day per month. Sometimes two days will be allotted for these hearings. During vacation, hearings may be held more frequently. A hearing is held and evidence is produced. There are generally few live witnesses, most of the testimony being presented by deposition.[21]

A determination is made on the evidence and an order and judgment drafted. If the judgment is for the respondent, the petitioner may not appeal on the merits of the decision without obtaining from the district court a certificate of probable cause though he may appeal from the denial of such a certificate.[22] Such a certificate, if granted, represents the conclusion of the court that a substantial question that may have merit is presented and that it warrants further determination. If the appellant is indigent, he must again make an affidavit of his poverty and seek leave to appeal in forma pauperis.[23]

20. 28 U.S.C. §2243 (1934).
21. See 28 U.S.C. §§2245-2247 (1934).
22. 28 U.S.C.. §2253 (1934).
23. See 28 U.S.C. §915 (1934).

If the decision is in favor of the petitioner, the respondent may appeal without a certificate of probable cause.[24]

Most of the petitions presented to this writer's court are heard in a plenary hearing. Probably no more than fifteen or twenty petitions filed in the last half of the calendar year 1966 were dismissed or denied upon preliminary examination.

Yet, it would be possible to bring to a trickle the number of hearings required. Almost all of the petitions have been presented to the City Court of Reidsville, upon the same grounds before coming to this Court. Reidsville is the city where the state prison is located. Many of the petitions contain claims that have also been litigated upon appeal in the state's high courts.

The rule is that a hearing is not necessary if there are facts in dispute upon a state prisoner's petition for habeas corpus if the state court trier of fact has reliably found the relevant facts in a full and fair fact hearing.[25]

There have been very few instances in which the District Court for the Southern District of Georgia or the court of appeals has reversed a determination on constitutional rights by the state court, and it may be said that there would be concord upon viewing the transcripts of state proceedings, and rendering a decision without requirement of a hearing. The practice is not followed to any great degree.[26] To require a transcript of each court proceeding in each prisoner case would be a financial burden upon the state greater than presenting the same evidence that has been accumulated for other proceedings. To require this Court to pour over the transcripts in each case would be another burden.

One improvement may be made in the efficiency of conducting habeas corpus trials, and this writer is informed that steps towards this goal have been taken by many prosecutors. The improvement is suggested in a recent decision not yet reported.[27] In this case, the petitioner brought a petition for habeas corpus into federal court. He testified that he had pled guilty to the offense of molesting a minor and had been sentenced to a

24. Texas v. Garner, 352 F.2d 514 (5th Cir. 1965).

25. Townsend v. Sain, 372 U.S. 293, 312 (1963): "Where the facts [presented by a state prisoner in his petition for habeas corpus] are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and evidentiary hearing in a state court either at the time of the trial or in a collateral proceeding. In other words, a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts. . . . . We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: 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."

26. See Townsend v. Sain, 372 U.S. 293, at 318-319 (1962): See also Brown v. Allen, 344 U.S. 445 at 457 (1952).

27. Molignaro v. Dutton, Case No. 23652, 5th Cir., March 3, 1967.

term of fifteen years, without being afforded counsel and without having waived his right to counsel. The respondent, in rebuttal, introduced into evidence answers to interrogatories propounded to the then solicitor general who had prosecuted the case against the petitioner. The solicitor was asked whether the petitioner was advised of his constitutional rights concerning the appointment of legal counsel and he answered, "He was so advised."

The court of appeals held that it was unable to determine if the constitutional mandate had been followed in the criminal case against the petitioner from the solicitor's answer. It could not tell how and in what way the petitioner had been advised of his right to counsel. The court stated that an accused must be first advised of his right, as an indigent, to counsel without cost to himself before he can intelligently waive his right to counsel, or that he must otherwise know of his right to free counsel. It held further: "We are careful not to condemn written interrogatories as such. With the large volume of cases arising in the City Court of Reidsville and later in the Federal District Court, and with witnesses scattered, the State is to be encouraged in exploiting all administrative improvisations for the development of the facts. All are under the admonition to exercise judicial inventiveness. [citations omitted]. But this case again points up that these must be carefully constructed to elicit specific facts, not conclusory generalities."[28]

The improvement is that advice concerning rights of an accused which is given by a court or in the presence of the court, and which is recorded by a court reporter, may be effectively utilized at future inquiries into the validity of waiver of constitutional rights without the necessity of scattering about for witnesses who may testify that a petitioner was advised of his rights. Such recorded advice serves two purposes: It is an assurance that an accused has been informed of his rights, and it is a greater assurance to have recorded advice in open court than to have witnesses testify as to their recollection, which is often hazy.[29] Furthermore, it is a simple and inexpensive defensive weapon in collateral proceedings upon a conviction.

A unique procedure has been adopted by the writer, pursuant to the new FEDERAL RULES OF CRIMINAL PROCEDURE, Rule 11. It is hoped it will be an improvement in this area. Basically, the plan encompasses the court's personally asking of each accused who comes before it certain material questions. The questions are asked regardless of whether the accused is

28. *Ibid.*

29. Perhaps, the day is not far away when such sessions of recorded advice are required as a matter of principle. See Miranda v. Arizona, 384 U.S. 471 (1966): "Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during the interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in this stead. Only through such a warning is there *ascertainable assurance* that the accused was aware of this right." (Emphasis added.)

represented by an attorney. The questions and answers are taken down by the court reporter.

The accused is asked if he has an attorney. If he answers in the affirmative, he is required to state his attorney's name. The accused is informed of the charges against him by the reading to him of the charges set out in the indictment.

The prisoner is asked if he understands the nature of the charges against him. If he does, he is advised of the maximum penalty that can be imposed upon him upon a plea of guilty or a plea of not guilty and conviction by a jury. If there are several counts, he is told of the penalty for each type offense charged and the maximum cumulation of sentences that could be imposed upon him.

He is also informed that the court may probate him in the court's discretion. If he does not understand the charges, the court attempts to explain them so that the charges may be understood.

The accused then pleads. He has been handed a copy of the indictment before the questioning by the court commences. Upon a plea of guilty, or *nolo contendere,* if the court allows it, an agent who made an investigation of the crime presents the facts with which he is acquainted and the circumstances of the arrest. Normally, the court is then furnished a copy of the probation office's pre-sentence investigation, with the recommendations of that office.

The court will normally read certain material portions of the pre-sentence investigation, and the attorney for the accused is then permitted to make any statement that he desires to make. The accused is then offered the opportunity to make a statement, and sentence is then imposed.

If the accused does not have an attorney, the court will advise him at the very beginning of the questioning period of his right to counsel. The accused is asked if he has counsel; if he answers in the negative, the court advises that he has a right to an attorney, and that if he cannot afford to hire one that the court will appoint one for him at no charge to him, but that he may waive his right to an attorney.

Such a procedure is required by the new Rule 11.[30] It attempts to assure that a person accused of a federal crime is aware of his rights and the crime with which he is charged, which are necessary elements of due process of law. However, failure to follow Rule 11 is not ipso facto reversible error, but it shifts the burden to the government in a challenge to prove

30. FED. R. CRIM. P., Rule 11; as amended Feb. 28, 1966, eff. July 1, 1966: "A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty and shall not accept such a plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. . . . The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

The rule before it was amended required only that the court ascertain that it was made voluntarily with understanding of the nature of the charge, before accepting a plea of guilty or *nolo contendere.* . . . Such a provision could be satisfied without the court's personally asking questions of the accused.

that the accused was advised of his rights.[31] It also serves as an aid to the court in the event of a collateral attack upon the sentence and conviction by a petitioner in determining contentions of coercion pleas, incompetent counsel, lack of advice to constitutional rights and the like.

Of course, in a collateral attack upon a judgment of conviction, the burden is upon the petitioner to prove his contentions by a preponderance of the evidence. He may make such assertions, and fail to prove them, and be remanded to the custody of the respondent. But by a petitioner's filing his petition on these grounds, coupled with the fact that there is no court record that will show conclusively that the contentions are without merit, the court will normally be required to order a hearing into the factual merits of the controversy. Justice is not served by hearings on unmeritorious matters that could be disposed of summarily if certain procedures were followed.

Rule 11, of course, applies to federal courts trying persons accused of federal crimes. But the principles upon which the questions are based are of universal application to persons convicted of crime in the state courts.

There is one area of habeas corpus that has been omitted until now that warrants some discussion, though any question about it is now apparrently moot.

Habeas corpus in federal courts brought by state prisoners goes to the root of our federal system of government. Potentially, a federal district court may reverse the decisions of several state courts in a given habeas corpus case, including the decision of the state's supreme court. This presents an area of great philosophical conflict. The conflict is between the

31. See the recent decision of the fifth circuit in the case of Lane v. United States, Case No. 23004, Feb. 24, 1967, as yet unreported, for the effect of failure of the court to follow the mandate of Rule 11. The court reaffirmed a prior holding that: "Explicit questioning of a defendant before the acceptance of a guilty plea not only helps to insure that a plea is indeed being entered voluntarily and knowingly, but it also greatly eases the task of the courts in a subsequent 2255 proceeding."

In the case before the court, the petitioner had pleaded guilty to two indictments charging him with violation of the federal whisky tax laws. He contended that the district judge had failed to ascertain that the plea was made voluntarily with understanding of the consequences; in addition that he had agreed to plead guilty only upon the assurance by the district attorney and the judge that the charges pending against his father would be dropped: that a sentence of no more than four years would be imposed; that sentence would be ordered to run concurrently with another sentence from which petitioner had been paroled, but the parole had been revoked.

As to the failure of the court to ascertain if the plea was entered voluntarily, the court of appeals held: "Our finding that Rule 11 was not complied with is not dispositive of the ultimate issue—which is, of course, whether the pleas were in fact voluntarily and understandingly made. If they were, then appellant was in no way prejudiced by the non-compliance. Domica v. United States 292 F.2d 483 (5th Cir. 1961). It does not follow, however, that this finding of non-compliance is without significance. The established import of such a finding is that it shifts to the government the burden of proof on the question whether the plea of guilty was entered voluntarily and understandingly.

The court of appeals reversed the decision of the district court, which denied the motion to vacate, and remanded the case for further proceedings, and particularly for the imposition by the court upon the United States of the burden of proving voluntariness.

protection and preservation of individual constitutional rights by the federal courts and the preservation of the integrity of state court decisions.

Federal habeas corpus was extended to state prisoners in 1867.[32] History is vague to us, at times, and some say that the writ was satisfied in olden times by the showing in the return that the petitioner was being deprived of his liberty by process issued out of a court of competent jurisdiction. At least one case in this country took this statement of the law literally, and it became an established doctrine.[33]

But the office of habeas corpus remains the same even as to that old construction, in that it looks only to whether the court had jurisdiction to impose sentence. The difference between the application of the principle is that now it is conceded that a court may lose jurisdiction on many more occasions than previously.[34]

The conflict is aroused when there is an adequate state ground for affirmance of a conviction that does not reach the constitutional claim. Upon appeal to the United States Supreme Court from the state court's affirmance of conviction, the Supreme Court is ordinarily bound to follow the adequate state ground rule.[35] The expression was once made by the Supreme Court that:

> It is this court's conviction that orderly federal procedure under our dual system of government demands that the states' highest courts should ordinarily be subject to reversal only by this court and that a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court. From this conviction springs the requirement of prior application to this Court to avoid unseemly interference by federal district courts with the state criminal administration.[36]

32. See the thorough discussion and analysis in Fay v. Noia, *supra* n. 12.
33. See Frank v. Mangum, 237 U.S. 309 (1916).
34. See the case of Johnson v. Zerbst, *supra* n. 3 at 485, a leading case that illustrates the growth of the jurisdictional challenge concept. The court was primarily concerned with the question whether the scope of habeas corpus permitted a court to delve not merely into the record behind the court's final judgment, but matters outside of the record in regards to a federal prisoner's petition for the writ:
". . . habeas corpus cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial; and the 'writ of habeas corpus cannot be used as a writ of error.' These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since the adoption of the sixth amendment. In such a proceeding, 'it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court' and the petitioner court has 'power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject matter or to the person, even if such inquiry . . . . [involves] an examination of facts outside of, but not inconsistent with, the record.' . . . [A] prisoner in custody pursuant to the final judgment of a state court or criminal jurisdiction may [now] have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to a judgment against him. . . ."
35. See Fay v. Noia, *supra* n. 12 at 428-431.
36. Dair v. Burford, 339 U.S. 200, 217 (1950).

The philosophy that dominated in this struggle was that constitutional rights must be preserved at any cost; this is to hazard a simplification not warranted by such a complex subject. With this ascendent philosophy went the adequate state ground theory of affirming state court decisions in cases of criminal law while not reaching constitutional questions.[37]

As a matter of efficacy, the task of determining complaints was given to the district courts. There simply was not the manpower in the Supreme Court to determine all such cases that warranted investigation from the appearance of the contentions.[38] The dissent of Mr. Justice Holmes, in the case of *Frank v. Mangum*,[39] was followed literally: ". . . habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been an empty shell."[40]

37. Fay v. Noia, *supra* n. 12.
38. See Brown v. Allen, 344 U.S. 433, 488 (1952). Separate opinion of Frankfurter, J.).
39. 237 U.S. 309 (1915).
40. *Id.* at 346.