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## Federal Habeas Corpus: State Prisoners and the Concept of Custody

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## ARTICLES

### FEDERAL HABEAS CORPUS: STATE PRISONERS AND THE CONCEPT OF CUSTODY—

“Mootness,” “Prematurity,” and “Immediate Release”  
“*There is no higher duty than to maintain it unimpaired.*”<sup>1</sup>

*Frank W. Smith, Jr.\**

#### I

#### INTRODUCTION

FOR several centuries the Great Writ of Habeas Corpus has played a central role in protecting individual liberty, guarding against unlawful detention and against the exercise of power not in compliance with the law of the land. Central to the idea of habeas corpus is that it operates within the limits of unlawful imprisonment or detention. As the boundary line between lawful and unlawful confinement changes with growth in recognized individual rights, then the reach of the Great Writ also shifts.

During the past two decades there has been increased concern with protecting and expanding the rights guaranteed to one accused of a crime as shown by such cases as *Mapp*,<sup>2</sup> *Douglas*,<sup>3</sup> *Gideon*,<sup>4</sup> and

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<sup>1</sup> *Bowen v. Johnston*, 306 U.S. 19, 26 (1939).

<sup>2</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>3</sup> *Douglas v. California*, 372 U.S. 353 (1963).

<sup>4</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

*Miranda*.<sup>5</sup> By these and other decisions the rights of an accused have been significantly and, in the view of some, radically changed. Although not completely unnoticed, significant development in the writ has accompanied this recent expansion of rights but has received less public attention. Perhaps this lack of notice has been due in part to the emphasis and controversy over the "rights" of the accused with the means of protecting these "rights" taking a secondary position. To some observers, the great increase in the use of the Great Writ of Habeas Corpus in recent years<sup>6</sup> may appear to be merely a reflection of the expansion of the rights which the writ protects. However, during this period there have been vital changes in the nature and use of the writ itself which account in part for its greater utility. The development in the writ has greatly shifted and redistributed the political and judicial power in our federal system as it did in England, and today habeas corpus as a post-conviction remedy is an integral part of the criminal process.<sup>7</sup>

This article will examine the concept of custody, which has been one of the barriers to the use of the Great Writ as a post-conviction remedy. Particular reference will be made to multiple offenders who seek to challenge state convictions on constitutional grounds through federal habeas corpus.<sup>8</sup> In three recent decisions,<sup>9</sup> the United States

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<sup>5</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>6</sup> In 1941 there were only 134 petitions filed in federal district courts by state prisoners. S. REP. NO. 1797, 89th Cong., 2d Sess. 1 (1966). In 1963 there were 2147; 3819 in 1964, 5011 in 1965, 5952 in 1966 and 7374 in 1967. 1967 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP. 308.

<sup>7</sup> For a discussion of the role which the writ played in this shift in the English system, see generally D. MEADOR, *HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY* (1966); R. WALKER, *THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY*, (Okla. State Univ. Publication, Vol. 47, No. 9, Norman, Okla., 1960). For its role in America, see also Meador, *Accommodating State Criminal Procedure and Federal Post Conviction Review*, 50 A.B.A.J. 928 (1964); Meador, *The Impact of Federal Habeas Corpus on State Trial Procedures*, 52 VA. L. REV. 286 (1966); R. WALKER, *THE AMERICAN RECEPTION OF THE WRIT OF LIBERTY*, (Okla. State Univ. Research Reports, Stillwater, Okla. 1961). Walker stated: "As foreseen in the debates on the Judiciary Act of 1789, practice on habeas corpus has been a continuing source of problems in defining the relationship between the state and federal court systems."

<sup>8</sup> Multiple offenders and recidivists make up a substantial and important segment of the prison population. See *THE CHALLENGE OF CRIME IN A FREE SOCIETY*, 45-6 (Feb., 1967). "The most striking fact about offenders who have been convicted of the common serious crimes of violence and theft is how often many of them continue committing crimes. Arrest, court and prison records furnish consistent testimony to the fact that these repeated offenders constitute the hard core of the crime problem."

Supreme Court has made great inroads into this barrier. In isolation, these three cases may appear somewhat innocuous; viewed in the background and development of the Great Writ, their significance may be more truly appreciated.<sup>10</sup>

## II

### THE ENGLISH DEVELOPMENT OF THE WRIT

Information about the origin and early use of the writ of habeas corpus is clouded. Almost necessarily most knowledge of the early writ must be derived by inference and speculation from the indirect material available. A common impression is that the Great Writ has its source in Magna Carta.<sup>11</sup> However, other scholars have concluded that habeas corpus is of earlier origin.<sup>12</sup> Still others have asserted that the writ did not come into use until many years after Runnymede.<sup>13</sup> These disagreements may be explained in part as differences in definition as to the essence of habeas corpus. Meador suggests that the gist of habeas corpus—a judicial order directing a person to have the body of another before a tribunal at a certain time and place—may be traced back in court orders to the year 1199, some sixteen years before Magna Carta. In 1214, one year before Magna Carta, the court's order in *Tyrols Case*, based on a criminal complaint, read: “. . . *quod Haberet . . . corpus Baldwinii . . . ad respondendum . . . et quod sumoneret ipsos Rannulfus . . . ad prosequendum.*”<sup>14</sup> Other writers have speculated that

*Id.* at 45.

<sup>9</sup> *Walker v. Wainwright*, 390 U.S. 335 (1968); *Peyton v. Rowe*, 391 U.S. 54 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968).

<sup>10</sup> In defining the nature and scope of the writ, the Supreme Court has frequently considered the history and common law use of the writ. See, e.g., *Fay v. Noia*, 372 U.S. 391, 399 (1963); *McNally v. Hill*, 293 U.S. 131, 136-37 (1934); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807). The Court's use and interpretation of this history has been severely criticized: Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965); Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966).

<sup>11</sup> 2 BLACKSTONE COMM. 131; 2 COKE INST. 52-3; D. MEADOR, *HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY* 5 (1966). He suggests that the first specific statement that Magna Carta was the source of habeas corpus appears to have been made in a parliamentary debate in 1626, some 400 years after the proclamation at Runnymede in 1215.

<sup>12</sup> R. WALKER, *THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY*, *supra* note 7, at 7-16; Cohen, *Some Considerations on the Origin of Habeas Corpus*, 16 CAN. BAR REV. 92, 94-5 (1938).

<sup>13</sup> Jenks, *The Story of Habeas Corpus*, 18 L. Q. REV. 64, 68-72 (1902).

<sup>14</sup> F. MAITLAND, *SELECT PLEAS OF THE CROWN—1200-1225* 67 (1888).

this type of order was known in Roman law and in Normandy.<sup>15</sup> Meador has concluded that by the time of Magna Carta habeas corpus was "in effect a forcible summons to bring parties into court to litigate."<sup>16</sup> There is evidence that by the first quarter of the thirteenth century such orders were fairly well accepted as a forcible summons,<sup>17</sup> and the writ's "simple character as a special kind of summons remained unaltered as late as the first decades of the fourteenth century."<sup>18</sup> By that time the nature of the writ was fairly clear:

It was not an original writ, that is, it did not mark the commencement of an action. Rather it was resorted to when preliminary process such as summons had failed to produce the desired party. Habeas corpus at this stage was a very versatile process in that it could issue against any party whether in custody or not, or to any person who might have custody of the desired party whether public or private.<sup>19</sup>

During the fourteenth century a new form of habeas corpus emerged—"corpus cum causa captis et detentionis." Prior to this time there was no mention in the writ "of production accompanied by a statement as to the cause of detention."<sup>20</sup> The addition of these words, "with the cause of the arrest and detention," indicates that at this point the writ was being used where there was detention and that the issuing court had a right to inquire into the cause of the detention. However, the details of the nature of "cum causa" are not clear.<sup>21</sup> Meador suggests that "corpus cum causa realistically can be taken as the starting point in the story of modern habeas corpus."<sup>22</sup> As early as 1341 *corpus cum causa* was used to require the production before a judge of a prisoner whose petition disclosed that he should not have been im-

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<sup>15</sup> W. S. CHURCH, A TREATISE OF THE WRIT OF HABEAS CORPUS 2-3 (1886); Cohen, *Habeas Corpus Cum Causa—The Emergencies of the Modern Writ—I*, 18 CAN. BAR REV. 10, 11 (1940). Cohen also concluded that the writ was regularly employed by the courts during the time of Edward I, 1277-1307. *Id.* at 12.

<sup>16</sup> MEADOR, *supra* note 11, at 9.

<sup>17</sup> WALKER, *supra* note 7, at 13.

<sup>18</sup> Cohen, *supra* note 15, at 11.

<sup>19</sup> WALKER, *supra* note 12, at 15.

<sup>20</sup> Cohen, *supra* note 15, at 11.

<sup>21</sup> WALKER, *supra* note 7, at 20. Jenks suggests that the writ of habeas corpus was not used to test the validity of commitments until around the sixteenth century. Jenks, *supra* note 13, at 69-72. Cohen disagrees with Jenks and states that *corpus cum causa* may have made its appearance in the first years of the fourteenth century. Cohen, *supra* note 15, at 13.

<sup>22</sup> MEADOR, *supra* note 11, at 10.

prisoned.<sup>23</sup> *Corpus cum causa* was probably the invention of Chancery, although it was used by the King's Bench and the Common Bench during the fourteenth century.<sup>24</sup>

From the fourteenth century until 1679, the writ was involved in the power struggle and jurisdictional conflicts between the various courts, the question of Puritan religious belief, and the exercise of the royal prerogative in detaining persons; its use led to the Petition of Right.<sup>25</sup> During this time the position the Great Writ could play in distributing and checking political power began to appear. In *Darnel's Case*<sup>26</sup> the writ was involved in the political and constitutional power struggle between the courts and the crown. The case grew out of Charles the First's attempts to raise money to finance a holy war of his chief minister, the Duke of Buckingham, against Cardinal Richelieu. Unable to raise new taxes through the dissolved Parliament,<sup>27</sup> Charles had ordered certain wealthy men of the realm to make loans to the crown. Sir Thomas Darnel and four other noblemen refused to make such "loans." As a result of this refusal, Darnel was put in custody of the Fleet. Darnel then filed a petition for habeas corpus *cum causa*, and the return showed that Darnel was in custody "*per speciale mandatum domini regis*" (by Special Command of His Majesty). Thus, the real issue was whether imprisonment by command of the King, without specification of the cause of the imprisonment, was an answer to the writ. It was argued on Darnel's behalf that he had not been imprisoned by the law of the land, in violation of Article 39 of Magna Carta. It was urged that "[i]f this return shall be good, then his imprisonment shall not continue only for a time, but for ever; and the subjects of this kingdom may be restrained of their liberties perpetually and by law there can be no remedy for the subject."<sup>28</sup> In response to this, the Crown contended that imprisonment by the King on his own responsibility was necessary to protect the nation, and that the King was not obligated to give an explanation or have his decision re-examined by judges, and that the reasons for imprisonment might have to be kept

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<sup>23</sup> YEAR BOOKS OF KING EDWARD THE THIRD, YEAR XIV 204 (L. Pike ed. & trans. 1888).

<sup>24</sup> WALKER, *supra* note 12, at 19-20.

<sup>25</sup> See generally Cohen, *supra* note 15, at 20-42; MEADOR, *supra* note 11, at 13-19.

<sup>26</sup> 3 How. St. Tr. 1 (1627).

<sup>27</sup> Charles I had dissolved Parliament in June of 1626 in retaliation for his impeachment by that body. Chafee, *The Most Important Human Right in the Constitution*, 32 B.U.L. REV. 143, 154 (1952).

<sup>28</sup> 3 How. St. Tr. 1, 8 (1627).

secret for the benefit of the state.<sup>29</sup> The decision was in favor of the royal prerogative, but

. . . the importance of habeas corpus was that it had been made the basis for the attack upon an imprisonment commanded by the King himself and had proven a quick method . . . to have one so imprisoned brought before a competent tribunal and there have himself charged and heard and the legality of the detention argued and adjudged. There was no other remedy available to accomplish the same purpose with the same efficiency. Even though the prisoners in this case were denied their freedom, the writ did have their case completely aired before a court.<sup>30</sup>

Four months later, as a result of *Darnel's Case*, the House of Commons presented to King Charles the Petition of Right. In the Petition the House of Commons protested imprisonment of freemen without cause shown either by the King or the Privy Council and petitioned that in such cases the writ of habeas corpus should be awarded, and if no cause of commitment be returned with the writ, the party should be bailed.<sup>31</sup> Charles' reluctant answer, under the press of other circumstances, came on June 7, 1628—" [L]et right be done." <sup>32</sup> With *Darnel's Case* and the Petition of Right, habeas corpus had truly matured as the remedy to protect freemen from imprisonment except by the law of the land. Yet there remained difficulties with the common law writ which Parliament partially dealt with in the famous Habeas Corpus Act of 1679.<sup>33</sup> One of the serious problems had been the uncertainty as to which courts had authority to issue the writ and whether it could be issued in term or during vacation. This uncertainty limited the effectiveness of the writ and when it could only be issued during term, delayed its utility. Another deficiency was that there was no

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<sup>29</sup> For a discussion of the details of the case, see Chafee, *supra* note 27, at 154-59. The argument made on behalf of the Crown was similar to that urged during the American Constitutional Convention in support of a provision for suspension of the writ in extraordinary circumstances.

<sup>30</sup> Cohen, *supra* note 15, at 38, 39.

<sup>31</sup> Portions of the text of the Petition may be found in Chafee, *supra* note 27, at 159-60. For comment on the Petition, see Cohen, *supra* note 15, at 39-40.

<sup>32</sup> Chafee, *supra* note 27, at 159. Subsequent to the Petition of Right, Parliament specifically authorized use of the writ to test the legality of commitment by command of the King or Privy Council. Act of 1640, 16 Car. I, ch. 10.

<sup>33</sup> 31 Car. II, ch. 7, 8 Statutes at Large, 432-39 (1763). There had been prior unsuccessful attempts to remedy some of these difficulties. Cohen, *supra* note 15, at 184, 185.

means of compelling the jailer or warden to make a prompt return in response to the writ. The common practice of waiting for a second or third command before making the return often meant that no prompt relief was available. Then, too, it was common practice for the gaoler to transfer the petitioner out of the jurisdiction or to another party and make a return showing no custody. Chafee has vividly described the practice prior to the Habeas Corpus Act:

Because of such defects in the common-law writ of habeas corpus, the King and his ministers were able to imprison anybody they objected to, for considerable periods. Low judges were afraid to block high officials, high judges would not stoop to bother with obscure prisoners, all judges were reluctant to lift a finger while their courts were not in session which meant a good part of the year. There were other tricks. A gaoler would be served with the writ, rush his prisoner to the Tower, and then make a return that he did not have him in his custody. The head of the Tower could do likewise, and so on, always keeping one jump ahead of the courts. Clarendon, the historian, was accused of sending prisoners to the Channel Islands and to army garrisons. People had to bribe courtiers to get their relatives out of prisons.<sup>34</sup>

Additionally, the courts refused to allow petitioners to deny the truth of the return, thus subjecting prisoners to the perjury of the jail-keeper. The Habeas Corpus Act of 1679 did remedy some of these problems by providing that the lord chancellor and judges of certain courts were authorized to issue the writ in term or in vacation. Equally important, the Act required that the return should be made within certain time limits, depending on distance, and required that a court, within two days after the return had been made, either discharge the prisoner or take sureties for his subsequent appearance before the court. Judges and jailers who failed to act within these time limits were subject to fairly substantial penalties. The scope of the Act was quite limited as it did not extend to "civil" detentions, nor was it available to persons committed for a "felony or treason plainly expressed in the warrant of commitment," nor to "persons convict or in execution by legal process. . . ." <sup>35</sup> Relief from civil commitment or detention was left to

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<sup>34</sup> Chafee, *supra* note 27, at 150. For a detailed account of the difficulties with the writ at this time, see Cohen, *supra* note 15, at 183-84.

<sup>35</sup> Oaks, *Habeas Corpus in the States—1776-1865*, 32 *CHI. L. REV.* 243, 252 (1965). Cohen, *supra* note 15, at 185-97, gives the complete text of the Act and a review of its



the unsatisfactory common law writ. Oaks states that "plainly the benefits of this famous English act were intended primarily for individuals detained for a crime but held without a warrant of commitment or for individuals held without bail upon a warrant charging a minor offense."<sup>36</sup> Although the provisions regarding use of the writ did not extend to serious crimes, Article VII of the Act contained speedy trial provisions for "high treason or felony" and provided that if the person were not indicted during the term he was to be brought to trial, the judge was required, upon motion, to admit the prisoner to bail, unless it appeared that the Crown's witnesses could not have been produced. If the prisoner then were not indicted and tried during the second term, he was to be discharged. Perhaps the major problem in connection with the use of the writ which was not remedied by the Act of 1679 was the refusal to permit questioning of the truthfulness of the return and to allow inquiry into the underlying facts. This was to be a shortcoming of the writ which was to linger on well into the twentieth century.

It is at this stage in the development of the Great Writ that we turn to the acceptance of the Writ of Liberty in the English colonies.

### III

#### THE AMERICAN ACCEPTANCE OF THE WRIT

None of the charters of the original American colonies contained provisions for habeas corpus.<sup>37</sup> Prior to the early 1690's there appears to be no reference in colonial legal records suggesting that habeas corpus was used to test the validity of commitments. However, during the 1690's there is evidence that it came into use in the colonies.<sup>38</sup> Other writers have concluded that the writ was not in use in the colonies until 1710 when the English Habeas Corpus Act was extended to Virginia.<sup>39</sup> Walker attributes this delay in acceptance of the writ to the lack of practicality and lack of necessity for its use, which was inherent in the primitive institutional and legal structure:

The writ of habeas corpus presumed a reasonable separation of remedial effect. Art. VIII of the Act provided that the Act could not be used by a person "charged with debt."

<sup>36</sup> Oaks, *supra* note 35, at 252.

<sup>37</sup> Chafee, *supra* note 27, at 146.

<sup>38</sup> R. WALKER, *THE AMERICAN RECEPTION OF THE WRIT OF LIBERTY*, 1 (Okla. State Univ. Research Reports, Stillwater, Okla. 1961).

<sup>39</sup> *Id.*

powers in general and an independent judiciary in particular. But in the colonies a most simple governmental system prevailed in the earlier periods. There was a complete lack of any clear or consistent division of power and little institutional separation of functions.<sup>40</sup>

Frontier justice, because of its equitable and quick nature, did not present crucial problems of personal liberty until the latter part of the seventeenth century.<sup>41</sup> "In short, the problem of individuals languishing in jail without expeditious legal resolution of their causes did not exist in any serious form."<sup>42</sup>

During the 1670's the Crown began to assert more control over the colonies, and there is evidence that Magna Carta and habeas corpus were asserted against exercise of royal authority, although unsuccessfully.<sup>43</sup> From around 1690 the reception and use of habeas corpus seem clear,<sup>44</sup> and by 1710 with a change in royal policy, Governor Spotswood of Virginia proclaimed America's first effective habeas corpus act:

. . . Whereas We are above all things desirous that all our Subjects may enjoy their legal Rights, You are to take especial care that if any person be committed for any Criminal matters (unless for Treason or felony plainly and especially expressed in the Warrant of Commitment) he have free liberty to petition by himself or otherwise, the Chief Barron or any of the Judges of the Common pleas for a writ of Habeas Corpus. . . .<sup>45</sup>

Similar extensions of habeas corpus soon followed in North and South Carolina,<sup>46</sup> and North Carolina became the first state to make a constitutional provision in December, 1776, when the North Carolina Convention in its Declaration of Rights, Article XIII, provided:

<sup>40</sup> *Id.* at 3.

<sup>41</sup> *Id.* at 5.

<sup>42</sup> *Id.* at 6.

<sup>43</sup> *Id.* at 8-10. In 1684 the Privy Council had disallowed the New York Charter of Liberties which sought to incorporate Magna Carta and the English Habeas Corpus Act of 1679. The Council ruled that such acts did not apply to the colonies unless specific reference to the colonies had been made in the acts. Massachusetts and Pennsylvania also failed in similar attempts to make use of the Habeas Corpus Act. However, other colonies, e.g., South Carolina in the 1690's, put the writ into use by indirection. *Id.* at 11-12.

<sup>44</sup> *Id.* at 12.

<sup>45</sup> *Id.* at 13. The exclusion for treason or felony followed the pattern of the Habeas Corpus Act of 1679.

<sup>46</sup> *Id.*

That every freeman restrained of his liberty, is entitled to a remedy, to inquire into the lawfulness thereof and to remove the same, if unlawful; and that such remedy ought not to be denied or delayed.<sup>47</sup>

Although the Articles of Confederation contained no provision regarding habeas corpus,<sup>48</sup> by the time of the Federal Constitutional Convention in 1787, habeas corpus was so well accepted as to be viewed by many as an inherent right, requiring no constitutional provision.<sup>49</sup> At that time, four of the thirteen states—Georgia, Massachusetts, New Hampshire and North Carolina—had constitutional guarantees of habeas corpus;<sup>50</sup> three other states—Virginia, New York and Pennsylvania—had statutory provisions.<sup>51</sup> Apparently, South Carolina was the only state with a Habeas Corpus Act at the time of the Declaration of Independence, having copied in 1712 the English Habeas Corpus Act of 1679.<sup>52</sup> Almost without exception when the original thirteen colonies passed habeas corpus acts, they were modeled after the English Act and did not extend to persons charged with felony or treason or “persons convict.”<sup>53</sup>

During the Constitutional Convention and the subsequent ratifying convention, much of the debate concerned whether it was necessary to provide for habeas corpus and whether there should be any provision for suspension of the writ.<sup>54</sup> The result was article 1, section 9, clause 2 of the Constitution: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.” Objections were raised to the negative form of the clause, and four state conventions urged that a guarantee of the privilege of habeas corpus should be incorporated

<sup>47</sup> Chafee, *supra* note 27, at 145.

<sup>48</sup> *Id.*

<sup>49</sup> See WALKER, *supra* note 38, at 15.

<sup>50</sup> Oaks, *supra* note 35, at 247. Chafee concluded that provisions for the writ were omitted from most early state constitutions because “it had been so long and solidly established in every colony that assertion was probably considered unnecessary.” Chafee, *supra* note 27, at 144. Oaks questions whether *habeas corpus* was so solidly established at this time. Oaks, *supra* note 35, at 248.

<sup>51</sup> Oaks, *supra* note 35, at 251.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 253. The sole exception was Connecticut, which disregarded the English Act and drafted its own act.

<sup>54</sup> See Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?* 40 CALIF. L. REV. 335, 341-44 (1952).

into a bill of rights.<sup>55</sup> However, no provision was enacted into the Bill of Rights.

The First Congress in the Judiciary Act of 1789, which established a system of federal courts, provided:

That all the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus . . . And that either of the justices of the Supreme Court, as well as the Judges of the District Courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment.<sup>56</sup>

For approximately the next hundred years, because the jurisdiction of the federal courts in habeas corpus did not extend to persons held in custody by a state, most of the litigation was in the state courts.<sup>57</sup> However, the early state case decisions do not give an accurate or reliable picture of the actual use of the writ in the states. This is partly due to deficiencies in reporting and the fact that in many of the states the decisions of the courts having habeas corpus jurisdiction were not reported.<sup>58</sup>

During the nineteenth century most of the petitions for the writ which involved criminal commitment were not for post-conviction relief. Many of the petitions were filed immediately after arrest and before the accused had been produced before a magistrate for formal commitment.<sup>59</sup> During this period habeas corpus petitions brought after conviction were confronted with the barriers imposed by most of the state provisions, which had been modeled after the English Habeas Corpus Act of 1679. They did not extend the writ to those "persons convict or in execution by legal process," and the almost insurmountable obstacle that the truth of the return to the writ could not be questioned.<sup>60</sup> Prior to 1850 there were very few reported decisions in-

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<sup>55</sup> *Id.* at 342. Collings, after study of the historical background of the suspension clause, concluded: "It is unlikely that the Framers viewed the clause as establishing a federal right to habeas corpus. . . . It is far more likely that the Framers in drafting the clause were concerned only with limiting the powers of Congress." *Id.* at 344.

<sup>56</sup> 1 Stat. 81, § 14. Collings suggests that this indicated that the First Congress did not view the habeas corpus clause of the Constitution as establishing an affirmative right to the privilege. Collings, *supra* note 54, at 345.

<sup>57</sup> Oaks, *supra* note 35, at 246.

<sup>58</sup> *Id.* at 255-57.

<sup>59</sup> *Id.* at 258.

<sup>60</sup> *Id.* at 260-61. See several early state court cases denying habeas corpus relief to convicts on the ground that the statute specifically excluded them from the benefit of the writ, *id.* at 261.

volving petitions by convicts, but thereafter, for no apparent reason, the number significantly increased.<sup>61</sup>

Returning to the development of the federal writ, the constitutionality of the habeas corpus clause of the Judiciary Act, conferring authority on the Supreme Court to issue the writ, was upheld in *Ex Parte Bollman*.<sup>62</sup> Chief Justice Marshall, although looking to the common law for the nature of the writ, said that "any power to award the writ by any of the courts of the United States must be given by written law."<sup>63</sup> One of the most significant changes in the federal writ was made by the Act of February 5, 1867, which extended the writ to persons held under state commitment by conferring on the United States courts "power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States."<sup>64</sup> As pointed out above, prior to this time because of the limits on federal habeas corpus jurisdiction, most of the litigation had been in the state courts. The popular impression is that the Act of February 5, 1867, was designed to deal with the problems anticipated in the South during Reconstruction,<sup>65</sup> but its real utility in the Reconstruction era has been questioned. Mayers, in a well-documented study of the legislative history of the Act of 1867, makes a convincing refutation of the popular conception that a purpose of the Act was to extend federal habeas

<sup>61</sup> *Id.* at 261 & n. 84. Oaks suggests that the common law writ had no greater scope in regard to convicts than did the writ under the Habeas Corpus Act of 1679 or other similar legislation. *Id.* at 262.

<sup>62</sup> 8 U.S. (4 Cranch) 75 (1807).

<sup>63</sup> *Id.* at 94.

<sup>64</sup> Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (1867). For a survey of the statutory changes in the writ, see H. M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1236-237 (1953); *Habeas Corpus and Post Conviction Review*, 33 F.R.D. 363 (1963); Longsdorf, *Federal Habeas Corpus Acts, Original and Amended*, 13 F.R.D. 407 (1953).

<sup>65</sup> See, e.g., *Fay v. Noia*, 372 U.S. 391, 415-16 (1963); HART & WECHSLER, *supra* note 64, at 1237; Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 426 (1961); Collings, *supra* note 54, at 351. Mayers contends that this popular view is erroneous and that the writ, by its very nature, was useless to protect against violence and was only of value if the person charged with violation of a state statute attacked the constitutionality of the statute; that the first such reported case in the South did not arise until eight years after the Act was passed when Reconstruction was virtually completed. Mayers, *supra* note 10, at 49-50. Mayers states, "as it turned out, the habeas act, instead of aiding the military government in dealing with southern resistance, hindered it. . . . [T]he new statute actually gave aid to those who might be imprisoned by the military for resisting reconstruction." *Id.* at 51. As a case in point, Mayers cites the "resister" in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869). See text p. 13 *infra*.

corpus to state prisoners and concludes that Congress did not intend to include state prisoners.<sup>66</sup> The Act was passed apparently with very little consideration given to it, either in committee or on the floor of either house. Mayers, with force, contends that the Act was designed to protect the rights of freedmen, particularly from labor contracts<sup>67</sup> and contracts of indenture and apprenticeship. In support of this view Mayers points out that the "bill did not speak, as did the three existing habeas corpus statutes, of 'prisoners in jail'; it spoke instead of 'any person . . . restrained of his or her liberty', a phrase apt for describing an ex-slave held in bondage or peonage."<sup>68</sup> In support of his view that the Act was not intended to extend to state prisoners, Mayers considers as particularly significant the novel provisions of the Act allowing a denial of the return and allowing a court "to proceed in a summary way to determine the facts of the case, by hearing testimony. . . ." <sup>69</sup>

An equally important extension of the writ to state prisoners, but yet frequently unnoticed, was the provision in the Act providing for an inquiry into the facts surrounding the detention, thus opening the way to some questioning of the verity of the return to the writ.<sup>70</sup> One of the first major cases under the Act of February 5, 1867, was *Ex Parte McCardle*.<sup>71</sup> McCardle, by means of habeas corpus in a federal circuit court, had challenged his alleged illegal restraint, imposed by a military court under the Military Government Act of 1867. The writ had issued, but the case decided adversely to McCardle on the merits, and as permitted by the Act of 1867, McCardle had been allowed an appeal from the circuit court to the United States Supreme Court.

<sup>66</sup> Mayers, *supra* note 10, at 43.

<sup>67</sup> In several states a person in breach of a labor contract could be punished by criminal sanctions. *Id.* at 44.

<sup>68</sup> *Id.* at 35.

<sup>69</sup> *Id.* at 41. Mayers argued that "in the then conventional pattern of the habeas corpus proceeding on behalf of a prisoner held pending trial, determination of issues of fact was almost unknown. The writ was addressed to the jailer, who made a return. . . . The sole question before the court was the formal legality of the detention. There was no more occasion for the taking of testimony and summary ascertainment of 'material facts' in the case of state than of federal prisoners for whom no such provision had ever been found necessary. A plausible explanation of the provision for determination of fact which is consistent with the genesis of the bill is that the draftsman envisaged a habeas proceeding, instituted not on behalf of a prisoner, but of an ex-slave, allegedly 'restrained of his liberty' under an apprenticeship or contract labor statute." *Id.* at 47.

<sup>70</sup> Collings, *supra* note 54, at 351. The Act provided: "The petitioner may deny any of the material facts set forth in the return or may allege any fact."

<sup>71</sup> 74 U.S. (7 Wall.) 506 (1869).

However, while the appeal was pending, Congress passed the Act of March 27, 1868,<sup>72</sup> withdrawing the authority for the appellate jurisdiction of the Supreme Court for habeas corpus from the circuit courts, and the Supreme Court dismissed McCardle's appeal, holding that it no longer had jurisdiction. The case is often used in support of the view that there is no inherent or constitutional right to habeas corpus, only a statutory right.<sup>73</sup>

Although the Habeas Corpus Act of 1867 had no great immediate impact, when combined with the fourteenth amendment which was declared ratified shortly thereafter in 1868, the basis for the writ's later importance and its present position in preserving due process and equal protection had been laid. However, the early role of the "new" habeas

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<sup>72</sup> Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44. The purpose of this withdrawal of jurisdiction apparently was to prevent the United States Supreme Court from passing on the constitutionality of the Reconstruction Act of 1867. Mayers, *supra* note 10, at 46. This appellate jurisdiction was not restored until 1885 by the Act of March 3, 1885, ch. 353, 23 Stat. 437.

<sup>73</sup> See, e.g., Collings, *supra* note 54, at 348 where he states: "The famous case of *Ex parte McCardle* provided the most dramatic illustration of the life and death power of the Congress over habeas corpus jurisdiction." The question of whether there is a constitutional right to some type of habeas corpus is perhaps academic, but it has been raised in connection with what limitations may be placed upon use of the writ by Congress. Did the habeas corpus clause, although cast in negative terms, create an affirmative right to the writ and if so, what is the nature of the writ? Chief Justice Marshall in *Ex parte Bollman* rejected the argument that the Supreme Court had inherent power to issue the writ by saying, "any power to award the writ by any of the courts of the United States must be given by written law." See text p. 12 *supra*. Collings concludes from these cases that "the appellate jurisdiction of the Supreme Court in habeas corpus cases is subject to exception and regulation by Congress. No lower court can issue the writ unless such jurisdiction is conferred by statute. Thus Congress can deny the courts of appeal jurisdiction to issue the writ." Collings, *supra* note 54, at 348.

In *Jones v. Cunningham* the Court said: "The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available. While limiting its availability to those 'in custody,' the statute does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situation in which the writ can be used." *Jones v. Cunningham*, 371 U.S. 236, 238 (1963). Can Congress deny or suspend the writ by withdrawing from the federal courts jurisdiction to issue the writ? The question was raised, but not decided, in *United States v. Hayman*, 342 U.S. 205 (1952). See Brief for the Respondent at 27-41 by Professor Paul A. Freund. It was urged that substitution of the motion procedure under 28 U.S.C. § 2255 (1964) for federal prisoners suspended their constitutional right to habeas corpus. See also MEADOR, *supra* note 11, at 32-8. This unresolved question of whether there is a constitutional, not merely statutory, right to federal habeas corpus may be relevant to the concept of custody. If there is some constitutional right, what is the nature of the writ? Is "custody" a suspension of this writ? In other words, is the traditional concept of custody unconstitutional in its suspensory, delaying effect?

corpus and the fourteenth amendment was not too significant and hardly foretold the role the two have played during the past several decades. Judge Walter V. Shafer observed:

But looking back on the half century following the ratification of the fourteenth amendment one is struck by the absence of decisions in the areas which today seem of critical importance. . . . [W]e find that the Court was largely concerned with problems which today seem technical or even insubstantial. . . .<sup>74</sup>

Meador has pointed out that this convergence of the Habeas Corpus Act of 1867 and the fourteenth amendment was a reunion in the new world of the Great Charter and the Great Writ.

The Parliamentarians of the 1620's had taken due process, derived from chapter 39 of Magna Carta, and matched it with the remedy of habeas corpus. Now across the sea in the 1860's the Reconstruction Congress had taken this same inherited concept of due process, made it a federally imposed limitation on the States and extended the writ of habeas corpus as a remedy for its transgressions. But few men, if any, in the 1860's realized the full import of what had been wrought. They could scarcely have foreseen the vast constitutional change which would come about in the following century through this combination of the Act of February 5, 1867, and the Fourteenth Amendment.<sup>75</sup>

Before this fusion could indeed become effective, the writ had to be unshackled from a restrictive view as to its scope. In early cases the United States Supreme Court had held that the writ was unavailable to one held for trial or convicted of a felony in a court having jurisdiction of the offense and of the person, limiting the scope of the writ to questions of jurisdiction of the state or convicting court.<sup>76</sup> This re-

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<sup>74</sup> Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956). He suggests that the lack of significant decisions was not due to a reluctance of the Court to decide such cases but was due in part to lack of access to the courts. *Id.* at 4. Collings states that the major reason for this dearth of cases was that the Court was slow to develop the "sophisticated possibilities of the due process clause." Collings, *supra* note 54, at 352.

<sup>75</sup> MEADOR, *supra* note 11, at 57.

<sup>76</sup> See, e.g., *Ex parte Parks*, 93 U.S. 18 (1876); *Ex parte Watkins*, 28 U.S. (3 Pet. 193 (1830)). There seems to have been some minor deviations from this in cases of criminal contempt due to a lack of another remedy for review. Oaks, *supra* note 35, at 263-64.



strictive view was weakened by the Court in 1889 in *Hans Nielsen, Petitioner*,<sup>77</sup> when the Court said that a "party is entitled to a habeas corpus, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner. . . ." <sup>78</sup> And in 1915 this jurisdictional concept was seriously questioned in *Frank v. Mangum*,<sup>79</sup> when the Court suggested that a state court having jurisdiction might "lose" jurisdiction where the trial was so affected by mob influence as to be a denial of due process.<sup>80</sup>

By this time other changes brought about by the Act of 1867 were emerging. Federal courts entertaining habeas corpus petitions were not limiting their inquiry into whether the convicting court had jurisdiction, but were looking behind the verity of the return and examining not only the record but evidence outside the original criminal record to determine if there had been a "loss" of jurisdiction due to denial of constitutional rights. In succeeding cases such as *Johnson v. Zerbst*,<sup>81</sup> *Waley v. Johnston*,<sup>82</sup> *Walker v. Johnston*<sup>83</sup> and others, the question of lack of jurisdiction has gradually been equated to constitutionally defective trial or denial of constitutional rights, so that today it is probably accurate to say that the writ may be used to test the constitutional validity of a conviction without resort to the rhetoric of "lack of jurisdiction."<sup>84</sup>

In tracing the development of the present-day writ, other significant

<sup>77</sup> 131 U.S. 176 (1889).

<sup>78</sup> *Id.* at 184.

<sup>79</sup> 237 U.S. 309 (1915).

<sup>80</sup> In the *Frank* case, however, the Court concluded that the state had afforded an adequate and full review on the merits of the question of whether the prisoner was in custody in violation of the Constitution. For a discussion of the alteration of this "jurisdictional" concept of the scope of the writ, see HART & WECHSLER, *supra* note 64, at 1248-268; Collings, *supra* note 54, at 352-54.

<sup>81</sup> 304 U.S. 458 (1938).

<sup>82</sup> 316 U.S. 101 (1942). There the Court said: "The issue here [coerced plea of guilty] was appropriately raised by the habeas corpus petition. The facts relied on are de hors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." *Id.* at 104-05.

<sup>83</sup> 312 U.S. 275 (1941).

<sup>84</sup> See Note, *Federal Habeas Corpus for State Prisoners*, 55 COLUM. L. REV. 196 (1955); Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657 (1948).

developments in a trilogy of cases, *Fay v. Noia*,<sup>85</sup> *Townsend v. Sain*<sup>86</sup> and *Sanders v. United States*,<sup>87</sup> should be noted. The common concern of these cases

. . . is that at some point in the criminal process a convicted person gets a full evidentiary hearing on the merits of every federal right he asserts. That is the central requirement which must be recognized. The Court allows . . . that if the prisoner gets such a hearing in a state court, that may suffice. . . .

The policy decision for every state now is whether it wants to open up its convictions to collateral attack in its own courts on all federal constitutional grounds. If the state will provide this collateral remedy, it will be in a position to make a final disposition in a large proportion of its criminal cases. But if the state does not provide that kind of remedy, it is probable that an equally large proportion of its cases will be retried in part in the federal district court.<sup>88</sup>

While the above developments were unfolding, there was another aspect of the use of the writ which did not keep pace with the change. Much like the situation earlier in England where the uncertainty as to when and which court could issue the writ had reduced and delayed its utility, so has the concept of custody limited its effectiveness here.

#### IV

##### THE CONCEPT OF CUSTODY

One of the landmark cases construing the provisions of the Habeas Corpus Act of 1867 came in 1934 in *McNally v. Hill*.<sup>89</sup> McNally had been convicted in a federal court on a three-count indictment and had been given a two-year sentence on the first count and four years on the second and third counts, with the sentences on the first and second counts to be served concurrently, and the sentence received on the second and third counts to run consecutively. While serving the sentence received on the second count, but before beginning service on the third count, McNally filed a petition for a writ of habeas corpus

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<sup>85</sup> 372 U.S. 391 (1963).

<sup>86</sup> 372 U.S. 293 (1963).

<sup>87</sup> 373 U.S. 1 (1963).

<sup>88</sup> Meador, *Accommodating State Criminal Procedure and Federal Post Conviction Review*, 50 A.B.A.J. 928, 929 (1964).

<sup>89</sup> 293 U.S. 131 (1934).

in a federal district court, attacking as void only the conviction under the third count. On the question of whether the writ could be invoked to test the validity of the conviction on the third count, the substance of McNally's argument was that under the existing Parole Act<sup>90</sup> a prisoner was eligible for parole after he had served one-third of the sentences received; that he had served one-third of the sentences received on counts one and two but less than one-third of the total sentences received for all three, and consequently, consideration of his application for parole was precluded by the void sentence received on count three. In holding that habeas corpus could not be used to attack the third count, the court said:

We conclude that, as it appears from the petition that the detention of petitioner is lawful under the sentence on the second count, there is no occasion in a habeas corpus proceeding for inquiry into the validity of his conviction under the third.<sup>91</sup>

Acknowledging that neither the Judiciary Act of September 24, 1789, granting power to the Supreme Court and the district courts to issue the writ, nor the Constitution<sup>92</sup> defined the writ, the Court turned to the common law and English usage and concluded:

There is no warrant . . . for its use to invoke judicial determination of questions which could not affect the lawfulness of the custody and detention, and no suggestion of such a use has been found in the commentaries on the English common law. Diligent search of the English authorities and the digests before 1789 has failed to disclose any case where the writ was sought or used, either before or after conviction, as a means of securing the judicial decision of any question which, even if determined in the prisoner's favor, could not have resulted in his immediate release.

Such use of the writ in the federal courts is without the support of history or of any language in the statutes which would indicate a purpose to enlarge its traditional function. . . . [T]he Judiciary Act . . . was at pains to declare that the writ might issue for the purpose of inquiring into the cause of restraint of liberty. . . . Equally, without restraint which is unlawful, the writ may not be used. A sentence

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<sup>90</sup> Parole Act of June 25, 1910, ch. 387, § 1, 36 Stat. 819, *as amended*, Act of January 23, 1913, ch. 9, 37 Stat. 650, 18 U.S.C. § 714 (1964).

<sup>91</sup> McNally v. Hill, 293 U.S. 131, 135 (1934).

<sup>92</sup> U.S. CONST. art. I, § 9, cl.2 is cast only in negative terms that the writ shall not be suspended. *See* text p. 10 *supra*.

which the prisoner has not begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry.<sup>93</sup>

From *McNally* and the requirement of custody<sup>94</sup> there have developed three approaches or interpretations, traceable to the language used in *McNally*.<sup>95</sup> The first is the doctrine of prematurity, *i.e.*, that habeas corpus may not be used to challenge a sentence not presently being served, but one that is to be served in the future. The second is the concept of mootness—that a sentence already served cannot be challenged by habeas corpus. These two are based on the idea that there is no present restraint due to the fully-served or future sentence. The third approach, which might be called the “immediate release concept,” has been based on a somewhat different rationale. Relying upon the language of *McNally*, this approach has centered on the relief which may be afforded by the writ and denied use of the writ unless the petitioner, if successful in his challenge, would be entitled to immediate release from custody.<sup>96</sup>

For multiple offenders, particularly state prisoners, seeking use of federal habeas corpus as a post-conviction remedy, these three branches of the custody requirement have had a particular impact, although they have affected the single offender also.<sup>97</sup> *McNally* and the requirements of “custody,” as they have generally been applied in the past to multiple offenders, have violated the spirit of habeas corpus. Until the recent overruling of *McNally*,<sup>98</sup> by continued allusions to its validity, the

<sup>93</sup> *McNally v. Hill*, 293 U.S. 137-38 (1934).

<sup>94</sup> The present statutory provisions for federal habeas corpus are 28 U.S.C. § 2241-2254. (1964, Supp. 1968). The “custody” requirement pertinent to a state prisoner provides: “The writ of habeas corpus shall not extend to a prisoner unless. . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241(c) (3) (1964).

<sup>95</sup> Although *McNally* was decided under the federal statute, the state decisions generally have followed the concept of custody and its progeny. Recently, however, some states have departed from the traditional approach. The state cases are collected in Note, *Habeas Corpus and the Prematurity Rule*, 66 COLUM. L. REV. 1164 (1966); Note, *Habeas Corpus and Prematurity*, 52 CORNELL L. Q. 149 (1966); Note, *Federal Habeas Corpus—The Search for a Solution to the Prematurity Concepts*, 1 VAL. U. L. REV. 155 (1966).

<sup>96</sup> It is submitted that this “immediate release” approach erroneously emphasized the type of relief which could be afforded rather than looking to the purpose of the writ which is to inquire into and remove unlawful restraint on liberty. The emphasis upon the relief of “immediate release” ignored the present day practice and was not compelled by the statute. See discussion note 190 *infra*.

<sup>97</sup> See cases cited notes 100, 101, 102 *infra* and accompanying text.

<sup>98</sup> *Peyton v. Rowe*, 391 U.S. 54 (1968). See text p. 36 *infra*.

United States Supreme Court undoubtedly contributed to the application and unquestioning acceptance of the concepts.<sup>99</sup>

The impact of the custody requirement may be seen by examining how it has traditionally been applied to multiple offenders seeking to invoke the writ in various situations. Where a single sentence was being served and challenged, the courts have generally held that if the sentence were completely invalid, the writ could be used.<sup>100</sup> These holdings were not inconsistent with the *McNally* prematurity branch, as the prisoner was serving the invalid conviction, and the remedial "immediate release" approach would be satisfied if the sentence were voided. However, if the challenge was only to a portion of the sentence received—e.g., the challenge was that the sentence received exceeded the maximum sentence which could lawfully be imposed—the courts reached differing results. Some courts, emphasizing the "immediate release," held that the writ could not be used until the petitioner had served the valid portion of the sentence, reasoning that until the valid portion was served, the petitioner was not entitled to be released from custody.<sup>101</sup> Other courts issued the writ under such circumstances, apparently under the view that the petitioner was serving or being restrained by the invalid sentence.<sup>102</sup>

For multiple offenders or prisoners who had received more than one sentence, the question of "custody" arose in various situations. Where the prisoner was serving two sentences concurrently, the custody requirements posed a dilemma. If only one of the sentences was challenged, the writ would be denied, as the confinement on the other was valid

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<sup>99</sup> *Darr v. Burford*, 339 U.S. 200, 203 (1950); *Holiday v. Johnston*, 313 U.S. 342 (1941). As late as *Fay v. Noia*, Justice Brennan said: "The difference is illustrated in the settled principle that if a prisoner is detained lawfully under one count of the indictment, he cannot challenge the lawfulness of a second count on federal habeas. *McNally v. Hill*. . . ." *Fay v. Noia*, 372 U.S. 391, 432 (1963).

<sup>100</sup> *United States v. Pridgeon*, 153 U.S. 48 (1894) (*dicta*); *Browning v. Crouse*, 356 F.2d 178 (10th Cir. 1964), *cert. denied*, 384 U.S. 943 (1966). State cases are collected in Note, 66 COLUM. L. REV. 1164 (1966); Note, 52 CORNELL L. Q. 149 (1966).

<sup>101</sup> *United States v. Pridgeon*, 153 U.S. 48 (1894); *Carpenter v. Crouse*, 358 F.2d 701 (10th Cir. 1966); *Browning v. Crouse*, 356 F.2d 178 (10th Cir. 1964), *cert. denied*, 384 U.S. 973 (1966); *Fields v. Hunter*, 167 F.2d 547 (10th Cir. 1948); *McDonald v. Johnston*, 149 F.2d 768 (9th Cir. 1945); *Ammons v. King*, 136 F.2d 318 (8th Cir. 1943). State cases are collected in Note, 66 COLUM. L. REV. 1164 (1966); Note, 52 CORNELL L. Q. 149 (1966).

<sup>102</sup> *United States ex rel. Durocher v. LaVallee*, 330 F.2d 303 (2d Cir. 1964), *cert. denied*, 377 U.S. 998 (1964). State cases are collected in Note, 66 COLUM. L. REV. 1164 (1966); Note, 52 CORNELL L. Q. 149 (1966).

and there could be no immediate release.<sup>103</sup> Consequently, if the valid sentence was served, there was no present restraint and the issue was "moot." Thus the prisoner may have never been in a position to attack by habeas corpus what may have been a concededly illegal sentence—*e.g.*, under *Gideon*—even though serious consequences may have resulted from this illegal sentence.<sup>104</sup> However, some courts, emphasizing "present detention," disregarded the "immediate release" aspect on such concurrent sentences and required only that a present sentence be invalid to issue the writ.<sup>105</sup> Where all of the sentences being served concurrently were challenged, custody does not seem to have been a bar to use of the writ.

If the multiple offender had received sentences to be served consecutively and the challenge was to the future sentence, the writ typically has been denied on the basis of *McNally*, as the prisoner was not presently restrained by the invalid sentence nor entitled to immediate release.<sup>106</sup> If the first of consecutive sentences was challenged while being served, many courts denied the writ, reasoning that if the first sentence were invalidated, the second valid sentence would be accelerated, and therefore the prisoner was not entitled to immediate release unless sufficient time had been served on the invalid first sentence to permit release on the subsequent valid sentence.<sup>107</sup> Once the petitioner had served this first of consecutive sentences, he was probably faced with the "moot-

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<sup>103</sup> *King v. California*, 356 F.2d 950 (9th Cir. 1966); *Collins v. Klinger*, 353 F.2d 731 (9th Cir. 1965); *Wilson v. Gray*, 345 F.2d 282 (9th Cir. 1965); *Von Eiselein v. Taylor*, 344 F.2d 919 (10th Cir. 1965); *Browning v. Crouse*, 327 F.2d 529 (10th Cir. 1964); *United States ex rel. Burke v. Fay*, 231 F. Supp. 385 (S.D.N.Y. 1964). State cases are collected in Note, 66 COLUM. L. REV. 1164 (1966); Note, 52 CORNELL L. Q. 149 (1966).

<sup>104</sup> This invalid concurrent sentence may have a great bearing on the date of eligibility for parole and also chances for parole. See text p. 44 *infra*.

<sup>105</sup> *Dora v. Cochran*, 138 So.2d 508 (Fla. 1962); *State ex rel. Stapleton v. Boles*, 149 W. Va. 645, 142 S.E.2d 896 (1965). Other state cases are collected in Note, 66 COLUM. L. REV. 1164 (1966); Note, 52 CORNELL L. Q. 149 (1966).

<sup>106</sup> *Owensby v. United States*, 353 F.2d 412 (10th Cir. 1965), *cert. denied*, 383 U.S. 962 (1966); *Clark v. Turner*, 350 F.2d 294 (10th Cir. 1965); *Lowther v. Maxwell*, 347 F.2d 941 (6th Cir. 1965); *United States ex rel. Konigsberg v. McFarland*, 348 F.2d 215 (3rd Cir. 1965); *Holland v. Gladden*, 338 F.2d 52 (9th Cir. 1964), *cert. denied*, 382 U.S. 868 (1965); *Gailes v. Yeager*, 324 F.2d 630 (3rd Cir. 1963); *Patskan v. Buchkoe*, 296 F.2d 724 (6th Cir. 1961); *Roberts v. Pepersack*, 286 F.2d 635 (4th Cir. 1960); *Sink v. Cox*, 142 F.2d 917 (8th Cir. 1949); *Seay v. Sanford*, 158 F.2d 281 (5th Cir. 1946); *Pope v. Huff*, 141 F.2d 727 (D.C. Cir. 1944); *Petitions of Shekoski*, 239 F.Supp. 996 (E. D. Mich. 1965).

<sup>107</sup> *Wells v. California*, 352 F.2d 439, 443 (9th Cir. 1965), *cert. denied*, 384 U.S. 1009 (1966); *Hunter v. Smith*, 249 F.2d 651 (4th Cir. 1957).

ness" branch of custody and could not invoke habeas corpus, as he would no longer be serving or restrained by that sentence.<sup>108</sup>

To summarize, the *McNally* rule and its corollaries—prematurity, mootness, and immediate release—generally have meant that habeas corpus cannot be used to attack a sentence to be served in the future, nor to attack a sentence fully served, nor to challenge one of two concurrent sentences where one is conceded to be valid, and in many instances it meant that a state prisoner had no remedy to challenge an invalid sentence.<sup>109</sup>

## V

### THE LEAD OF THE FOURTH CIRCUIT

The traditional approach to the concept of custody, however, did not go unchallenged. In a series of recent cases the Court of Appeals for the Fourth Circuit, departing from an earlier position consistent with the tenets of *McNally*,<sup>110</sup> seriously challenged and altered the concept. Perhaps the appropriate starting point in a review of the concept of custody in the Fourth Circuit is *Jones v. Cunningham*.<sup>111</sup> Jones, serving a sentence as a recidivist in a state prison, sought to attack by federal habeas corpus one of the underlying convictions on constitutional grounds. The writ was denied by the district court and after the appeal had been granted by the Court of Appeals, Jones was released on parole. The Court of Appeals then denied the writ, saying:

In the nature of things, the "Great Writ" of *habeas corpus ad subjiciendum* may issue only when the applicant is in the actual physical custody of the person to whom the writ is directed. . . . The great purpose of the writ is to afford a means for speedily testing the legality of a present, physical detention of a person. It serves no other purpose.<sup>112</sup>

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<sup>108</sup> *Parker v. Ellis*, 362 U.S. 574 (1960); *Morrison v. Heritage*, 324 F.2d 698 (5th Cir. 1963). *But see* *Fiswick v. United States*, 329 U.S. 211 (1946). There the petition for certiorari was not dismissed as moot, even though the petitioner had fully served the sentence, because the conviction subjected him to deportation if it involved a crime of moral turpitude.

<sup>109</sup> See note 127 *infra*.

<sup>110</sup> *Roberts v. Peppersack*, 286 F.2d 635 (4th Cir. 1961); *Whiting v. Chew*, 273 F.2d 885 (4th Cir. 1960); *Hunter v. Smith*, 249 F.2d 651 (4th Cir. 1957).

<sup>111</sup> 294 F.2d 608 (4th Cir. 1961). *Cf.* *Hoptowitz v. United States*, 274 F.2d 936, 938 (9th Cir. 1966). [Parole merely an "extension of prison walls" for purposes of 28 U.S.C. § 2255 (1964).]

<sup>112</sup> *Jones v. Cunningham*, 294 F.2d 608, 609 (4th Cir. 1961). The Court of Appeals

. . . From time to time petitioner must report to a parole officer and he should not change his residence or his employment without the prior or subsequent approval of that officer. Otherwise he is as free as any other citizen to do as he pleases and go where he pleases. His status is predominantly one of liberty.<sup>113</sup>

On certiorari the United States Supreme Court reversed the court of appeals.<sup>114</sup> Noting the restrictions and conditions imposed upon petitioner by the parole,<sup>115</sup> Justice Black pointed out that the English cases as well as those in the United States had not restricted the writ to situations where there was actual physical custody.

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.<sup>116</sup>

. . . 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

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relied on *Wales v. Whitney*, 114 U.S. 564, 571-72 (1885), where the Court stated: "To make a case for habeas corpus there must be actual confinement."

<sup>113</sup> *Jones v. Cunningham*, 294 F.2d 608, 612 (4th Cir. 1961). Judge Sobeloff expressed the view that completion of service of a sentence or being paroled did not end the interest in contesting a conviction because society often imposed hardships on such persons no less severe than imprisonment and stated: "[W]here constitutional rights have been violated, there should be standing to attack a conviction even though the crime had been 'paid for.'" However, he considered as controlling *Parker v. Ellis*, 362 U.S. 574 (1960), which had held that habeas corpus became moot when the petitioner's sentence expired. *Jones v. Cunningham*, 294 F.2d 608, 612-13 (4th Cir. 1961). (Concurring opinion.)

<sup>114</sup> *Jones v. Cunningham*, 371 U.S. 236 (1963); Note, 51 CALIF. L. REV. 228 (1963). The opinion relied heavily on immigration and military induction cases. *Jones*, by implication, overruled *Weber v. Squier*, 315 U.S. 810 (1942), where a petition for a writ of certiorari, from a denial of a writ of habeas corpus, was denied for "mootness" because the petitioner had been paroled and was no longer in control of the warden.

<sup>115</sup> Justice Black noted that these conditions appeared to be the common ones imposed by parole. *Jones v. Cunningham*, 371 U.S. 236, 243 n. 20 (1963).

<sup>116</sup> *Id.* at 240.



its grand purpose—the protection of individuals against erosion of their rights 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; that is enough to keep him in custody . . . within the meaning of the habeas corpus statute. . . .<sup>117</sup>

*Jones v. Cunningham* was taken by the Fourth Circuit as a signal in succeeding cases for a basic departure from the conventional approach to custody. The first of these cases, *Thomas v. Cunningham*,<sup>118</sup> received very little notice, although it basically departed from the whole concept of custody.<sup>119</sup> Nathan Thomas had been convicted in a state court upon pleas of guilty, all made at the same time, to six felonies and received sentences totaling twelve years, two on each indictment. Several months later, Thomas again pleaded guilty in a different state court to another indictment and was sentenced to an additional five years. Thomas, by a petition for habeas corpus under 28 U.S.C. § 2254 (Supp. 1968) in the district court, challenged all of these sentences on constitutional grounds. When the petition was filed, Thomas was serving the last of the six two-year sentences. However, by the time the district court had held a plenary hearing, but before entering an order requiring petitioner's release,<sup>120</sup> Thomas had fully served the six two-year sentences. Thus, when the appeal came to the court of appeals, the six sentences were fully served and under the traditional "present restraint" requirement were moot.<sup>121</sup> Thomas was then serving

<sup>117</sup> *Id.* at 242-43.

<sup>118</sup> 335 F.2d 67 (4th Cir. 1964). The Ninth Circuit also viewed *Jones* as a sign for a liberal approach and suggested that a petitioner on probation was in "custody" for purposes of habeas corpus. *Benson v. California*, 328 F.2d 159, 162 (9th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965).

<sup>119</sup> Curiously, the Fourth Circuit did not even cite *Thomas* in subsequent cases. See *Williams v. Peyton*, 372 F.2d 216 (4th Cir. 1967); *Tucker v. Peyton*, 357 F.2d 115 (4th Cir. 1966); *Martin v. Commonwealth*, 349 F.2d 781 (4th Cir. 1965). But it did rely on it in *Rowe v. Peyton*, 383 F.2d 709 (4th Cir. 1967). Perhaps the court felt that *Thomas* was limited by the particular facts.

<sup>120</sup> The district court had entered an order that petitioner be released "unless the State within sixty days elects to re-try him or perfects its appeal." 335 F.2d at 68. Such an order is typical where petitioner had been successful in the proceeding but is hardly consistent with the notion that only "immediate release" can be given by habeas corpus. However, it is only fair that the state should be given a reasonable opportunity to re-try the prisoner. See R. SOKOL, A HANDBOOK OF FEDERAL HABEAS CORPUS, 83-4 (1965). See also *Rogers v. Richmond*, 365 U.S. 534 (1961); *Ex parte Medley*, 134 U.S. 160, 173 (1890).

<sup>121</sup> See text p. 19 *supra*. It should be noted that when Thomas filed the petition,

the five-year sentence which had been a "future sentence" at the time the petition was filed and under the traditional *McNally* rule could not have been attacked by habeas corpus.<sup>122</sup> In meeting the mootness question, the court in a per curiam opinion said:

The *ratio decidendi* of *Jones v. Cunningham*, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963) suggests that jurisdiction of the District Court to adjudicate the validity of the Buchanan [six] sentences survived by the expiration of their imprisonment of him. . . . With this greater breadth accorded the writ, we do not think, certainly in the present circumstances, *Parker v. Ellis*, 362 U.S. 574, 80 S.Ct. 909, 4 L. Ed.2d 963 (1960) would be a bar. The review should comprehend not only the last but all the Buchanan [six] sentences. The entire sequence of them was passed at the same time and each was infected with the same infirmity.<sup>123</sup>

As to the five-year Dickenson sentence, the opinion adverted to the prematurity problem but without discussion held "the instant case ripe for a declaration" that the judgment was patently void.<sup>124</sup>

In many respects *Thomas* is classic in highlighting the harsh results of the traditional approach to the requirement of custody. Assume, for example, that Thomas had at one point received two one-year sentences to be served consecutively and that both of these convictions were invalid under *Gideon*;<sup>125</sup> subsequent to this he received another one-year sentence, also invalid, to be served after the expiration of sentences one and two. If Thomas while serving sentence number one filed a writ challenging all three sentences, it would have been "premature" as to number two and three, and if number one were fully served before there was a plenary hearing and the case disposed of, the case would have been moot as to sentence number one.<sup>126</sup> This mootness,

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four of the sentences had been fully served. It might be contended, as urged by Chief Justice Warren, dissenting in *Parker v. Ellis*, 352 U.S. 574, 582 (1960), that jurisdiction attached at the time the petition was filed attacking a present sentence and was not lost when the sentence was fully served. But would this explain attack as to those served prior to filing of the petition?

<sup>122</sup> See text p. 18, *et seq.*, *supra*.

<sup>123</sup> *Thomas v. Cunningham*, 335 F.2d 67, 68-9 (4th Cir. 1964).

<sup>124</sup> *Id.* at 69.

<sup>125</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>126</sup> *Parker v. Ellis*, 362 U.S. 574 (1960). There a petition for a writ of certiorari had been granted to review dismissal of a petition for habeas corpus. However, before the case was heard, the petitioner was released and the case dismissed as moot. However, as pointed out, *Parker v. Ellis* was overruled by *Carafas v. LaVallee*,

as recognized by the court in *Thomas*, may have been due to no fault of the petitioner but to court congestion or other factors, and there may have been no other remedy to challenge the fully-served sentence.<sup>127</sup> There could have been the same result if the petition had been filed while sentence number two was being served. Number one would have been moot and no longer a cause of restraint; number three would have been premature; and number two could have been fully served and become moot before the case was heard. If the petition had been filed during service of the third sentence, the challenge to the first two would have been moot, and the third could have become moot before a decision was made. Apparently recognizing that such a result could leave a prisoner serving a series of consecutive short-term sentences almost without a remedy to attack patently invalid sentences, the Fourth Circuit felt compelled to depart from the traditional view.<sup>128</sup> This justification does not seem to cover the five-year sentence which was a "future" sentence when the petition was filed, although there was present restraint under the five-year sentence when the question reached the court of appeals.

In final analysis the court held that fully-served sentences relating to the identical constitutionally defective trial as the sentence being served at the time the petition is filed may be reached by habeas corpus, even though all sentences may be fully served before final disposition, and that a future sentence may be questioned if it becomes a present restraint prior to disposition of the case.<sup>129</sup>

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391 U.S. 234 (1968), and this result would no longer obtain. See text p. 36 *infra*.

<sup>127</sup> *Thomas v. Cunningham*, 335 F.2d 67, 69 (4th Cir. 1964). In some instances there may have been other remedies available—such as *coram nobis*, motion under 28 U.S.C. § 2255 (1964) for federal prisoners. But in many instances, particularly for state prisoners, there was no other means of redress available. For discussion of alternate remedies, see Note, *Habeas Corpus and the Prematurity Rule*, 66 COLUM. L. REV. 1164 (1966); Note, *Habeas Corpus and Prematurity*, 52 CORNELL L. Q. 149 (1966); Note, *Federal Habeas Corpus—The Search for a Solution to the Prematurity Concept*, 1 VAL. U. L. REV. 155 (1966); Note, *Habeas Corpus, Custody, and Declaratory Judgment*, 54 VA. L. REV. 673 (1967). In several of the cases where the United States Supreme Court invoked "prematurity," it suggested an alternate remedy. *Heflin v. United States*, 358 U.S. 415, 418 (1959) (a § 2255 proceeding; the Court suggested Fed. R. Crim. p. 35); *Holiday v. Johnson*, 313 U.S. 342, 349 (1941) (apply for vacation of sentence); *McNally v. Hill*, 293 U.S. 131, 141 (1934) (mandamus).

<sup>128</sup> The court may have felt justified by the facts in the *Thomas* case. *Thomas* had initially filed a petition for habeas corpus in a state court while serving the fourth of his two-year terms, but by the time he had "exhausted" his state remedy and received a hearing on his federal petition, he had served the remaining two terms.

<sup>129</sup> The court did not cast its holding in these terms and gave no rationale for allowing challenge of the future sentence beyond stating that it was "ripe." An ap-

Shortly after *Thomas*, the Fourth Circuit took another look at the custody requirement in *Martin v. Commonwealth*.<sup>130</sup> James Edward Martin, serving a fifteen-year sentence for murder, escaped from prison and as a result was sentenced to a five-year term for escape and to a three-year term for grand larceny committed during the escape. These sentences were to begin at the expiration of the fifteen-year sentence. While still serving the murder sentence, Martin filed a petition for habeas corpus, alleging that the escape and larceny convictions were constitutionally defective and that because of these convictions his eligibility for parole on the murder sentence had been deferred.<sup>131</sup> The state court denied the writ, apparently on the basis of *McNally v. Hill*,<sup>132</sup> and said that habeas corpus could only be used to attack a sentence presently being served. The Supreme Court of Appeals of Virginia denied a petition for a writ of error. Martin then filed a "Motion for Declaratory Judgment" in the federal district court, making essentially the same allegations. The district court denied the motion on the ground that "the Declaratory Judgment Act does not provide a substitute for habeas corpus or other collateral appeal."<sup>133</sup> On appeal, the Fourth Circuit treated the motion as a petition for a writ of habeas corpus and dealt with the *McNally* prematurity problem.

Over thirty years ago, the Supreme Court held that a sentence which the prisoner had not begun to serve did not satisfy the statutory requirement of "custody" even though a result of the challenged sentence was to thwart his eligibility for parole. *McNally v. Hill*. . . . If this decision stood alone, unqualified by later decisions of the Supreme Court, we as a lower court would be bound to follow it. Since then, however, the Court has relaxed the strictness of this interpretation and held that one on parole is in "custody" within the meaning of the term as used in 28 U.S.C.A. § 2241. *Jones v. Cun-*

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proach that would allow for attack of future sentences, if they became a present restraint prior to disposition of the case, would be difficult to apply. How could a court anticipate which sentences might become "presently served"? Would it invite early disposition as "premature" or delay for "ripening"? The hazards of delay would be present in either event. In later cases the court developed a rationale which offers a workable approach.

<sup>130</sup> 349 F.2d 781 (4th Cir. 1965).

<sup>131</sup> Originally Martin would have been eligible for parole in 1963. However, the subsequent sentences for escape and larceny delayed his eligibility for parole until 1966. Thus Martin's situation and argument were indistinguishable from that in *McNally v. Hill*, 293 U.S. 131 (1934).

<sup>132</sup> 293 U.S. 131 (1934).

<sup>133</sup> *Martin v. Commonwealth*, 349 F.2d 781, 783 (4th Cir. 1965).

*ningham*, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963). Still later, the Court, in broad terms, equated "custody" with "restraint of liberty." *Fay v. Noia*, 372 U.S. 391, 427, 83 S.Ct. 822, 9 L. Ed.2d 837 (1963).

In light of these progressively developing notions as to the scope of the writ of habeas corpus, there is reasonable ground for thinking that were the Supreme Court faced with the issue today, it might well reconsider *McNally* and hold that a denial of eligibility for parole is a "restraint of liberty" no less substantial than the technical restraint of parole. . . . We therefore hold, in keeping with the spirit of these developments, that because Martin's escape and larceny convictions bar his eligibility for parole, he is "in custody" within the meaning of 28 U.S.C.A. § 2241.<sup>134</sup>

In the opinion Judge Sobeloff went farther and suggested that the *Martin* approach would not be "limited to one such as *Martin* who is able to state a strong case for parole consideration."<sup>135</sup>

The significance of *Martin* was quickly noticed<sup>136</sup> and its lead followed in other cases.<sup>137</sup> In *Commonwealth ex rel Stevens v. Myers*,<sup>138</sup> perhaps one of the best opinions to date on prematurity, the Pennsylvania Supreme Court rejected the doctrine of prematurity and overruled a long line of authority holding that the writ of habeas corpus could be used only to test the legality of present restraint.<sup>139</sup> The Pennsylvania court regarded *McNally*, defining the role of the federal writ, as not binding upon the state court. The court considered that in view of the great development of the writ as an instrument of post-conviction litigation and in "face of the present urgent necessity for a state post-conviction avenue which will afford an adequate corrective process for hearing and determining alleged violations of federal constitutional guarantees,"<sup>140</sup> it would be detrimental to carry over from the his-

<sup>134</sup> *Id.* at 783-84.

<sup>135</sup> *Id.* at 784.

<sup>136</sup> Note, 46 B.U. L. REV. 269 (1966); 1966 DUKE L. J. 588; 54 GEO. L. J. 1004 (1966); 44 N.C. L. REV. 824 (1966).

<sup>137</sup> *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967); *Boseant v. Fitzharris*, 370 F.2d 105 (9th Cir. 1966) (state prisoner could use habeas corpus to challenge second illegal sentence which had effect of revoking parole on first valid sentence); *State ex rel. Holm v. Tahash*, 272 Minn. 466, 139 N.W.2d 161 (1965); *State v. Losieau*, 180 Neb. 696, 144 N.W.2d 435 (1966).

<sup>138</sup> 419 Pa. 1, 213 A.2d 613 (1965).

<sup>139</sup> See, e.g., *Commonwealth ex rel. Lewis v. Ashe*, 335 Pa. 575, 7 A.2d 296 (1939), cert. denied, 308 U.S. 596 (1939).

<sup>140</sup> The court pointed out, however, that it was not dealing with the "mootness"

torical uses of the writ the prematurity concept. Particularly compelling to the court was the large number of convictions potentially voidable by means of habeas corpus because of recent constitutional decisions and the consequent retrials which would be necessary. The prematurity concept would only compound the problems due to delay upon retrial. The Court said:

The prematurity concept as applied to petitions collaterally attacking convictions only aggravates these already acute problems. In return for its serious disadvantages, the concept has little to recommend it except the historical lineage of the writ as used in other instances. We do not believe that mere historical considerations, now outdistanced by modern conditions, should be allowed to control the scope of a writ which in this state is clearly adaptable to the exigencies of the times when the writ is used in a new class of cases. . . . Although steeped in tradition, the writ is not insensitive to change. Since the writ has developed as a means of collateral, post-conviction attack, the prerequisites for permitting its use should be adjusted so that the writ may effectively perform that role. Our present judgment must be based on today's needs which the writ is capable of meeting in satisfying the present demands of justice.<sup>141</sup>

Soon after *Martin*, the Fourth Circuit took another step and struck at the "mootness" barrier to use of habeas corpus in *Tucker v. Peyton*.<sup>142</sup> Tucker, a state prisoner, attacked as invalid a sentence which had already been served but did not challenge the sentences he was

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aspect of custody. *Commonwealth ex rel. Stevens v. Myers*, 419 Pa. 1, 5 n. 7, 213 A.2d 613, 616 n. 7 (1965).

<sup>141</sup> *Id.* at 16, 213 A.2d at 622. Soon thereafter the Superior Court of Pennsylvania in a very brief opinion citing *Commonwealth ex rel. Stevens v. Myers* held that the restraint of a prisoner under a valid sentence was no valid reason for denying the writ by which petitioner sought to attack a prior sentence from which he had been "reparoled." *Commonwealth ex rel. Alexander v. Rundle*, 206 Pa. Super. 528, 213 A.2d 645 (1965). (Apparently this meant released on parole on first sentence to begin service on second sentence.) *Jones v. Cunningham*, 371 U.S. 236 (1963), would suggest that parole was sufficient restraint for custody, but yet even if voided, *Alexander* would not have been entitled to his immediate release and it is difficult to see how there was any restraint, except in the *Martin* sense of affecting right to parole under the valid sentence being served. The brief facts do not indicate if this were true. A supplementary opinion reported in *Commonwealth ex rel. Alexander v. Rundle*, 206 Pa. Super. 528, 214 A.2d 304 (1965) indicates that the court considered the sentence under attack either a future sentence as in *Stevens* or in effect a concurrent sentence.

<sup>142</sup> 357 F.2d 115 (4th Cir. 1966). Cf. *Russell v. United States*, 306 F.2d 402, 405 (9th Cir. 1962).

then serving. The Court of Appeals held that the validity of the fully-served sentence could be questioned by habeas corpus on the theory that if the earlier sentence were invalid, the commencement of service of the subsequent sentences would be advanced and the petitioner would have served sufficient time to have fully served the subsequent valid sentences and would be entitled to immediate release. However, the court put limits on this approach by pointing out that the valid sentence could not be moved back beyond the date on which the sentence had been imposed. Thus, the court spoke, at least partially, to the question of mootness in allowing a fully-served sentence to be challenged.<sup>143</sup>

In early 1967 the Fourth Circuit spoke again on the *Martin* problem in *Williams v. Peyton*.<sup>144</sup> Williams, a multiple offender, in his petition for a federal writ of habeas corpus, challenged certain future sentences. At the time of filing the petition, he was eligible for parole on his aggregate sentences, but did not contest the validity of the sentence he was then serving. The court held that habeas corpus was appropriate to challenge the future sentences where the petitioner's chances for parole were manifestly restricted by these future sentences, allegedly invalid. The court said:

Williams is eligible for consideration for parole at this time, but we would be blind to the practicalities of the matter if we were to conclude that the likelihood of his being paroled is not more remote when the records show that he has been convicted six times and sentenced to an aggregate of nineteen years, 33 1/3% of which has been served, than if they were to show that he had been convicted twice and sentenced to a term of seven years, 60% of which has been served. The weight to be afforded these factors is a matter for a parole board. It is, of course, true that the parole board may conclude that Williams should not be paroled, even if his 1956 convictions [future

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<sup>143</sup> The rationale of *Tucker* would be limited by the amount of time served on the invalid sentence which might be credited on the valid sentence. Allowing credit for time served on an invalid sentence runs into the argument on "banking", *i.e.*, serving "time" before the crime or subsequent trial, receiving credit and then in effect being able to commit a crime with impunity. Cf. A.B.A. STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES § 3.6 (Tent. Draft Dec., 1967). In any event, if any credit could be given on the valid sentence, this should be enough detriment flowing from the invalid sentence to be considered restraint under the approach suggested by later decisions of the Fourth Circuit. See also *Capetta v. Wainwright*, 406 F.2d 1238 (5th Cir. 1969).

<sup>144</sup> 372 F.2d 216 (4th Cir. 1967).

sentences] are set aside and he is not retried, but we must conclude that the number of convictions and aggregate sentences are factors which every parole board probably considers in regard to any prisoner seeking parole, and we cannot expect that the parole board has either the jurisdiction or the authority to inquire into the correctness of any conviction. . . . In *Martin* we had no assurance that the prisoner would be paroled if his subsequent convictions were found invalid and set aside. The mere possibility that Martin's chances for obtaining some limited form of freedom more rapidly was enough to persuade us to allow the challenge. The same factor motivates us here.

We conclude, therefore, as we did in *Martin* that the presence of other convictions may be a real effective basis of appellant's continuing detention in a penal institution instead of being at large, relatively free, even though under parole supervision. . . . That such a possibility is enough to warrant availability of the writ of habeas corpus to inquire into the validity of the future [convictions] has been recognized in other cases. . . . Appellant is, we conclude, "in custody" within the meaning of 28 U.S.C.A. § 2241.<sup>145</sup>

A logical extension of the rationale of *Williams* in cases of mootness where the sentence has already been served would suggest an alternate basis for a *Tucker* situation and allow attack on such sentences, if the prisoner were presently eligible for parole, as they undoubtedly are considered by parole boards in their decisions. If such past-served convictions are invalid, they may have as much restraining effect on chances for parole as did the future ones in *Williams*. *Martin* would also suggest that if voiding the past sentence would mean that the date of eligibility for parole would be advanced so that the prisoner is now eligible, he would have standing to challenge the past-served sentence. But what of the situations where avoidance of the future or past sentence would not mean an advancement of the date of eligibility for parole and would consequently have no present effect on chances for parole?<sup>146</sup>

In August, 1967, the Fourth Circuit again struck at the prematurity

<sup>145</sup> *Id.* at 220. In support of this the court cited *State ex rel. Holm v. Tahash*, 272 Minn. 466, 139 N.W.2d 161 (1965), and *State v. Losieau*, 180 Neb. 696, 144 N.W.2d 435 (1966). See also *United States ex rel. LaNear v. LaVallee*, 306 F.2d 417 (2d Cir. 1962); *United States ex rel. Foreman v. Fay*, 184 F. Supp. 535 (S.D.N.Y. 1960).

<sup>146</sup> At the present the Fourth Circuit has not extended the *Martin* and *Williams* rationale to fully served sentences, allegedly void, although *Thomas* might be explainable on that basis—that is, the past sentences affecting either date of eligibility for parole or chances for parole. The same could be said of the future sentence in *Thomas*. However, the opinion in *Thomas* did not rest the decision on that basis.



concept and went beyond the limiting rationale of "present effect on parole" advanced in *Martin* and *Williams*. In *Rowe v. Peyton*<sup>147</sup> and its companion case, *Thacker v. Peyton*, the court was asked to

. . . decide whether or not any remedy is available to state prisoners seeking to attack on constitutional grounds state sentences to be served in the future which have no present effect upon consideration for parole. We think that the traditional writ of habeas corpus is available to serve the clearly present need of a procedural device to test the legality of these convictions under the Constitution of the United States.<sup>148</sup>

Rowe, serving a thirty-year sentence to be followed by another twenty-year sentence, was not eligible for parole until 1975. By his petition he contested only the second sentence on constitutional grounds. Invalidation of this second sentence would have advanced Rowe's eligibility for parole to 1970 or 1971. Thacker also sought to attack future sentences to begin service in 1944, although his eligibility for parole in 1976 would not be advanced by voiding the future sentences. The court, relying on *Williams v. Peyton*,<sup>149</sup> stated that both Rowe and Thacker would be able to attack the future sentences, once eligible for parole, and considered the fundamental question to be whether they must "patiently wait until the challenged convictions begin to hurt them in terms of an immediate potential parole. The answer involves a more fundamental question, whether the courts are powerless to provide an effective remedy to vacate constitutionally defective convictions at a time when witnesses are available and their memories relatively fresh, when it is certain that, if the prisoner survives so long, there will be an available remedy some years hence."<sup>150</sup> In answering this question, the court of appeals considered the history of the writ, as had the Pennsylvania Supreme Court in *Stevens v. Myers*,<sup>151</sup> the change in the nature of the writ brought about by such cases as *Brown v. Allen*<sup>152</sup> and *Fay v. Noia*,<sup>153</sup> the expansion of due process and equal protection, and concluded that habeas corpus should

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<sup>147</sup> 383 F.2d 709 (4th Cir. 1967).

<sup>148</sup> *Id.* at 710.

<sup>149</sup> 372 F.2d 216 (4th Cir. 1967). *See also* text p. 30 *supra*.

<sup>150</sup> *Rowe v. Peyton*, 383 F.2d 709, 711 (4th Cir. 1967).

<sup>151</sup> 419 Pa. 1, 213 A.2d 613 (1965). *See also* text p. 28 *supra*.

<sup>152</sup> 344 U.S. 443 (1953).

<sup>153</sup> 372 U.S. 391 (1963).

afford such a remedy. The court considered the liberal, less technical concept of the writ as exemplified by *Jones v. Cunningham*<sup>154</sup> and *Fay v. Noia*<sup>155</sup> to be thoroughly inconsistent with the narrow technical approach of *McNally*, and therefore felt free to disregard *McNally* as no longer controlling and to go beyond the strict limits of *Williams* and *Martin*, which were based on the immediate inhibiting effect upon the petitioner's chances of obtaining conditional release on parole.<sup>156</sup> It was clear to the court that delay due to the prematurity concept would be detrimental not only to prisoners but also to the interests of the state. The court concluded "that the writ is available to attack any sentence, service of which will be required in the future by the same custodian who presently detains the prisoner."<sup>157</sup>

A somewhat ironic twist to the impact of *Jones v. Cunningham*<sup>158</sup> was used in *United States ex rel Chilcote v. Maroney*.<sup>159</sup> Chilcote, while serving a valid state sentence, sought to attack a prior sentence, allegedly void, on the basis that his right to apply for state parole had been abridged by the earlier illegal sentences. Although it is not clear from the opinion, apparently Chilcote had been "reparoled" or "constructively paroled" from the allegedly invalid earlier sentences to begin service of the valid sentence.<sup>160</sup> *Jones v. Cunningham*<sup>161</sup> then would suggest that Chilcote was in custody under the "reparoled" sentences.<sup>162</sup> However, the court took the position that under *McNally v. Hill* the only relief available by habeas corpus was immediate release and denied the writ. The court reasoned that even if the earlier sentences were voided, Chilcote would still be held under the valid sentence and even though he might be paroled from the valid sentence, this

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<sup>154</sup> 371 U.S. 236 (1963).

<sup>155</sup> 372 U.S. 391 (1963).

<sup>156</sup> *Rowe v. Peyton*, 383 F.2d 709, 714-15 (4th Cir. 1967).

<sup>157</sup> *Id.* at 717. The court said: "In a technical sense each of the prisoners here is presently serving only one of the sentences imposed to run consecutively, but in a substantive and practical sense Rowe is serving a total commitment of 50 years and Thacker one of more than sixty-four." *Id.*

<sup>158</sup> 371 U.S. 236 (1963).

<sup>159</sup> 246 F. Supp. 607 (W.D.Pa. 1965).

<sup>160</sup> For discussion of Pennsylvania's "reparole" and "constructive" parole, see Commonwealth *ex rel. Alexander v. Rundle*, 206 Pa. Super. 528, 529 n. 2, 214 A.2d 305, 305 n. 2 (1965). See also note 141 *supra*.

<sup>161</sup> 371 U.S. 236 (1963).

<sup>162</sup> The court seemed to acknowledge this fact. *United States ex rel. Chilcote v. Maroney*, 246 F. Supp. 607, 608 (W.D. Pa. 1965).

would not be immediate release because parole was restraint or custody by *Jones v. Cunningham*. Under this approach in a *Martin* or *Williams* type situation,<sup>163</sup> where the only effect of setting aside invalid convictions would be to improve the possibility for parole, the writ would not be available for even if parole were granted, this would not be "immediate release" because parole is still restraint according to *Jones v. Cunningham*.<sup>163a</sup>

One other recent case in the Fourth Circuit seems significant in assessing that court's approach to custody. In *Landman v. Peyton*<sup>164</sup> Landman, a "writ writer" and "agitator," while serving a sentence for robbery in a state prison, apparently filed a petition for a writ of habeas corpus,<sup>165</sup> attacking his confinement in the maximum security section of the penitentiary and petitioned for restoration to the general prison population. He alleged that the maximum security confinement was due to his having instituted certain legal proceedings.<sup>166</sup> The federal district court had afforded a full evidentiary hearing, and the court of appeals considered the merits of the claim but did not discuss whether the type or degree of restraint, imposed on a sentence which itself was not challenged, could appropriately be raised on habeas corpus. The impact of the case is that it allows the degree or type of restraint to be raised and examined on habeas corpus even though the underlying conviction is not challenged and even though there would be no right to "immediate" release from all confinement.<sup>167</sup>

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<sup>163</sup> See text p. 27, 30 *supra*.

<sup>163a</sup> Under *Walker v. Wainwright*, 390 U.S. 335 (1968), discussed p. 36 *infra*, the holding in *Chilcote v. Maroney* would clearly be erroneous.

<sup>164</sup> 370 F.2d 135 (4th Cir. 1966).

<sup>165</sup> It is not clear from the opinion whether the petition was for a writ of habeas corpus or that the court treated it as such. By an amended petition, Landman did request release from all confinement. *Id.* at 137. Cf. *Martin v. Commonwealth*, 349 F.2d 781 (4th Cir. 1965), where the court treated a petition for declaratory judgment as a petition for habeas corpus.

<sup>166</sup> Landman also alleged that he was "denied unhampered access to the courts in violation of his constitutional rights." *Landman v. Peyton*, 370 F.2d 135, 137 (4th Cir. 1966).

<sup>167</sup> See *Johnson v. Avery*, 252 F. Supp. 783 (M.D. Tenn. 1966), *rev'd on other grounds*, 382 F. 353 (6th Cir. 1967), *rev'd*, 393 U.S. 483 (1969). There habeas corpus was used to challenge a prisoner's custody in solitary confinement, although he could not be released from total confinement. See also *United States v. Hart*, 409 F.2d 22 (4th Cir. 1969). There a prisoner was permitted to question by habeas corpus an alleged denial of medical attention, and punishment allegedly due to request for stationery to write an attorney.

## VI

THE RESPONSE OF THE SUPREME COURT:  
THE "GREAT WRIT" IS RELEASED FROM CUSTODY

The Fourth Circuit in some of its decisions had practically pleaded for review of the concept of custody by the Supreme Court, and near the end of the 1968 term the Court spoke in *Walker v. Wainwright*,<sup>168</sup> *Pepton v. Rowe*<sup>169</sup> and *Carafas v. LaVallee*.<sup>170</sup>

In March, 1968, in a brief, per curiam opinion in *Walker v. Wainwright*, the Court clearly repudiated the "immediate release" branch of custody. Walker had been convicted in a state court of first degree murder and received a life sentence. Subsequently, he received a five-year sentence on an assault conviction, to begin service upon completion of the murder sentence. By a petition for a writ of habeas corpus, he challenged the murder conviction on constitutional grounds. Relying on *McNally v. Hill*, the district court denied the writ, reasoning that even a favorable decision on the murder conviction would not result in Walker's immediate release from prison. The court of appeals had summarily denied Walker's application for a certificate of probable cause. In holding that the writ was available, the Supreme Court said: "Here the District Court has turned that doctrine [*McNally*] inside out by telling the petitioner that he cannot attack the life sentence he *has* begun to serve—until after he has finished serving it. . . . Whatever the other function, the great and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention."<sup>171</sup>

The Court has thus apparently said, without any limitation, that any sentence presently being served may be challenged without regard to whether a successful challenge would lead to immediate release. It is significant that the Court did not require a showing that a successful attack, by a credit of time served on the invalid sentence to the valid sentence, would entitle the petitioner to immediate release.<sup>172</sup>

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<sup>168</sup> 390 U.S. 335 (1968).

<sup>169</sup> 391 U.S. 54 (1968).

<sup>170</sup> 391 U.S. 234 (1968).

<sup>171</sup> *Walker v. Wainwright*, 390 U.S. 335, 336 (1968).

<sup>172</sup> From the facts given in the opinion, it is not clear that the Court's characterization of the district court action is necessarily accurate, *i.e.*, that the life sentence had to be fully served before it could be attacked. The district court, by analogy to those cases requiring service of all valid time before allowing attack of the invalid, may have been saying that sufficient time had not been served on the life sentence

By May, 1968, the "prematurity" outgrowth of *McNally* had reached its maturity when the Court reviewed *Rowe-Thacker* in *Peyton v. Rowe*.<sup>173</sup> In an unanimous opinion by Chief Justice Warren, *McNally* was overruled: "We conclude that the decision in that case was compelled neither by statute nor by history and that today it represents an indefensible barrier to prompt adjudication of constitutional claims in federal courts."<sup>174</sup>

On the same day that *McNally* was overruled, the Court in *Carafas v. LaVallee*<sup>175</sup> decided what perhaps may be the most significant decision to date dealing with custody and the doctrine of "mootness." *Carafas* is another classic example of the dissent of yesterday becoming the majority of today when the Court unanimously accepted Warren's dissent in *Parker v. Ellis*<sup>176</sup> and overruled the majority opinion in that case. Carafas, by a petition for a writ of habeas corpus filed in a federal district court, challenged on constitutional grounds a sentence he was then serving. However, by the time the denial of the writ was brought to the Supreme Court on certiorari, Carafas had been unconditionally released from custody.<sup>177</sup> The question squarely faced by the Court was "whether the expiration of petitioner's sentence before his application was finally adjudicated and while it was waiting appellate review terminates federal jurisdiction with respect to the application."<sup>178</sup> The Court answered this by saying: "[W]e conclude that under the statutory scheme, once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner

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which, if "credited" on the five-year sentence, would entitle Walker to immediate release. Cf. *Tucker v. Peyton*, 357 F.2d 115 (4th Cir. 1966); *Capetta v. Wainwright*, 406 F.2d 1238 (5th Cir. 1969). In any event, the holding of the Court seems desirable. As previously noted, requiring service on the present invalid sentence equal to the valid future sentence before allowing habeas attack would in most instances, because of almost unavoidable delay, mean service of more time than had validly been given. Also, it would result in delay in the plenary hearing with its consequent hazards of loss of evidence and staleness.

<sup>173</sup> 391 U.S. 54 (1968).

<sup>174</sup> *Id.* at 55.

<sup>175</sup> 391 U.S. 234 (1968).

<sup>176</sup> 362 U.S. 574 (1960). See text p. 24 and note 121 *supra*.

<sup>177</sup> The petitioner had applied for the writ in June, 1963, and in October, 1964, had been paroled. On March 6, 1967, upon expiration of his sentence, he had been discharged from parole status. The writ of certiorari was granted by the Supreme Court on October 16, 1967. And even by *Jones v. Cunningham*, 371 U.S. 236 (1963), Carafas was no longer in "custody".

<sup>178</sup> *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968).

prior to completion of proceedings on such application.”<sup>179</sup> The Court further stated:

It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these disabilities or burdens [which] may flow from petitioner's conviction, he has “a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.” . . . On account of these “collateral consequences” the case is not moot. *Ginsberg v. New York*, 390 U.S. 629, 633-634, n. 2 (1968). . . .<sup>180</sup>

Significantly, the Court also stressed the fact that relief under the writ is not limited to discharge from physical custody.<sup>181</sup>

After *Walker, Rowe* and *Carafas*, what remains of the concept of custody? Clearly, the “prematurity” and “immediate release” aspects have been repudiated and, at least partially, the “mootness” doctrine. May the writ be invoked to challenge *any* past, present, or future sentence; are there limits or should there be some limits on its use? Of course, at present the statutory requirement that the “writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody . . .”<sup>182</sup> presents a barrier. The real question unresolved for the future, but brought into focus by the opinion in *Carafas v. LaVallee* and by the recent opinions in *Ginsberg v. New York*<sup>183</sup> and *Sibron v. New York*,<sup>184</sup> is whether the federal writ will be extended to the

<sup>179</sup> *Id.* at 238-39.

<sup>180</sup> *Id.* at 237-38.

<sup>181</sup> *Id.* at 239. The statute presently provides that a court may grant “release from custody or other remedy.” 28 U.S.C.A. § 2244 (b) (Supp. 1967).

<sup>182</sup> 28 U.S.C.A. § 2241(c) (1964).

<sup>183</sup> 390 U.S. 629 (1968). Sam Ginsberg had been convicted in a state court of selling obscene material to a minor and had received a suspended sentence which could have been revoked and sentence imposed only within a year. The year had passed before the appeal from the state conviction reached the United States Supreme Court. The Court rejected the contention that the case was thereby moot, relying on the fact that further penalties or disabilities—*e.g.*, ineligibility for certain state or municipal licenses—could be imposed as a result of the judgment.

<sup>184</sup> 392 U.S. 40 (1968). Sibron had completed service of a six-month sentence prior to the time his appeal from the state conviction reached the Supreme Court. *Id.* at 50, n. 8. The Court in holding that the case was not moot said: “*St. Pierre v. United States* [319 U.S. 41 (1943)] must be read in light of later cases to mean that a criminal case is moot only if it is shown that there is no possibility that any collateral legal conse-

truly "moot" sentence or conviction, *i.e.*, one which has been fully served at the time the petition for the writ is filed as in *Thomas v. Cunningham*.<sup>185</sup> To ask the question another way, if civil legal disabilities and disqualifications resulting from a conviction are such restraints not shared by other free men as to sustain jurisdiction and to prevent a challenge from becoming moot once the sentence is fully served, should this be sufficient restraint or "custody" to *initiate* use of the writ? Are not the "collateral legal consequences" flowing from the invalid conviction the same whether the writ is requested before or after an unconditional release? Are these disabilities sufficient to justify use of judicial and legal resources and to insure the necessary adverseness and controversy? *Carafras*, *Ginsberg* and *Sibron* indicate a concern by the Court with the problem of insuring the constitutional integrity of proceedings which may be of "low visibility" because of lack of an adequate opportunity for state or federal review.<sup>186</sup> As the Court noted, this may be due to the impact of mootness where the sentence is fully served because of its short duration or the time required to exhaust state remedies. Yet there may be lasting collateral legal consequences attached to such convictions or proceedings. Should the Court in the future in some manner avoid the barrier imposed by the statutory requirement of custody and allow federal habeas corpus for state prisoners<sup>187</sup> in such moot cases, many other problems would be presented. Does the requirement of "custody," at least in the sense of some type of physical restraint or control, *e.g.* parole, serve the important function of designating who is a proper party to respond to the demand of the writ to justify the constitutional validity of the cause of restraint? Is the voter qualification board of New York a proper

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quences will be imposed on the basis of the challenged conviction." *Id.* at 57. The Court implied that it had already held in *Pollard v. United States*, 372 U.S. 354 (1957) that such "collateral consequences" would be presumed, consonant with "the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." *Id.* at 55.

<sup>185</sup> 335 F.2d 67 (4th Cir. 1964). See text p. 24 *supra*.

<sup>186</sup> In *Sibron* the Court said: "Many deep and abiding constitutional problems are encountered primarily at a level of 'low visibility' in the criminal process—in the context of prosecutions for 'minor' offenses which carry only short sentences. We do not believe that the Constitution contemplates that people deprived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct." 392 U.S. at 52-3.

<sup>187</sup> For federal convictions in this area of mootness, a remedy seems to exist in the form of the writ of *coram nobis* by which fully served sentences may be challenged. See, *e.g.*, *United States v. Morgan*, 346 U.S. 502 (1954). Cf. *Mathis v. United States*, 369 F.2d 43 (4th Cir. 1966).

party to respond to such a demand to justify an Arizona conviction already served?<sup>188</sup> Procedurally, could and should the state of Arizona be required to respond in a federal district court in New York if New York asserts voter disqualification based on a prior Arizona conviction, or could the writ be brought in Arizona? The recent opinions by the Court do not answer these questions, and it is, of course, difficult to anticipate how far and in what manner the Court will move in the future. In trying to resolve some of these questions and to determine if there is a sound rationale underlying the recent changes in the custody requirements, a look at the groundwork laid by the Fourth Circuit may be helpful in assessing the soundness of the Court's decisions and what the future course should be. The Fourth Circuit has suggested an outline for an approach which is compatible with the recent changes in custody, covers some of the areas of obvious concern to the Court and suggests solutions to some of the unanswered questions.

## VII

### THE SIGNIFICANCE OF THE FOURTH CIRCUIT APPROACH

Until removed or by-passed in some manner, the statutes granting jurisdiction to the federal courts and the requirement of custody impose certain limits on federal habeas corpus relief for state prisoners.<sup>189</sup> Even under the liberal approach charted by the Fourth Circuit, which seems to equate custody with any type of "restraint not shared by other free men," there are limitations. From the series of decisions in the Fourth Circuit discussed above in Part V, is there a discernible "theory" or developing concept of custody and what are its limitations? How would it operate in the case of multiple offenders? With

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<sup>188</sup> Perhaps a part of the problem here is in the "collateral legal disqualifications" themselves. A re-examination of the relationship between the specific disqualifications and the crime might be very beneficial in removing some of these "consequences."

<sup>189</sup> For the relevant statute, see note 94 *supra*. Conceivably the Court could bypass the statute by holding that there is a constitutional right to habeas corpus and that its nature is such that it cannot be restricted by "custody." See note 73 *supra*. This of course would bring into question the validity of *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869) and *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), and whether Congress could "suspend" the writ by restricting the jurisdiction of the federal courts. This was a latent question in the proposed amendments made in Congress in 1968 to Title II of the Omnibus Crime Bill, to remove federal court jurisdiction to grant habeas corpus to state prisoners. See S. REP. No. 1097, 90th Cong., 2d Sess. 10, 63-6, 233-48 (1968).



the many varying factual situations in which either prematurity, mootness or immediate release may be involved, it is clear that in the cases decided in the Fourth Circuit all of the variations have not been considered. It is submitted, however, that the cases and their logical extension do present a sound and workable approach to custody for federal habeas corpus for state prisoners. Such an approach eliminates the greatest hazards of prematurity, the loss of evidence due to delay in holding the plenary hearing, and provides for a reasonable, limited approach to mootness.

First, it is clear that the Fourth Circuit has rejected any requirement of "immediate release"<sup>190</sup> as shown by *Martin, Williams* and *Rowe-Thacker*. The gist of the approach suggested by the Fourth Circuit is this: If the sentence under attack, whether fully served<sup>191</sup> or to be served in the future, may affect the date of eligibility for parole or the chances for parole,<sup>192</sup> whether the defendant is presently eligible for parole or not, then habeas corpus may be used. *Rowe-Thacker*<sup>193</sup> suggests that even though the present or past sentences, if avoided, would not make petitioner presently eligible for parole and thus not presently affect chances for parole, if there is certainty that petitioner in the future may attack the sentence, then the hazards of delay and the need for early finality are overriding, and attack by habeas corpus should be allowed now. Under this approach if there is some present restraint or legal detriment not shared by other free men attributable to the invalid sentence, then the writ should be available.<sup>194</sup>

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<sup>190</sup> The immediate release approach focused on the relief to be granted rather than the nature of the restraint. It is not compelled by the statute which provides: "The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." 28 U.S.C. § 2243 (1964). Frequently, even if the petitioner is successful, there will be no immediate release, but the state will be given a reasonable time to re-try the prisoner. See, e.g., the order in *Thomas v. Cunningham*, 335 F.2d 67, 68 (4th Cir. 1964), discussed in note 120 *supra*. Relief other than immediate release may be obtained by habeas corpus. *Landman v. Peyton*, 370 F.2d 135 (4th Cir. 1966). See note 167 *supra*.

<sup>191</sup> *Tucker v. Peyton*, 357 F.2d 115 (4th Cir. 1966).

<sup>192</sup> *Williams v. Peyton*, 372 F.2d 216 (4th Cir. 1967); *Martin v. Commonwealth*, 349 F.2d 781 (4th Cir. 1965).

<sup>193</sup> *Rowe v. Peyton*, 383 F.2d 709 (4th Cir. 1967). For convenience, *Rowe-Thacker* will be used to designate the Fourth Circuit opinion and *Peyton v. Rowe* for the Supreme Court decision.

<sup>194</sup> The *Rowe-Thacker* situation, where there is no present effect on parole, is the most difficult to deal with under the Fourth Circuit approach. In *Rowe-Thacker*, relying on *Thomas v. Cunningham*, 335 F.2d 67 (4th Cir. 1964), the court said that in effect the petitioners were presently serving all of the sentences for which they were held, treating all of the sentences as one. This is also the approach suggested

Perhaps the best way to evaluate the approach charted by the Fourth Circuit is to examine its impact on a state prisoner who, much as in *Thomas*, has been convicted of several crimes. First, how would the approach work in the case of a fully-served sentence? Under the limits of this theory, once served, until the one-time offender is again convicted, he would not be able to challenge the prior sentence. Until then, challenges to the fully-served sentence, although it may have a restraining effect on employment and carry with it social stigma, can really be considered moot.<sup>195</sup> Upon receiving a subsequent conviction, the prisoner could then challenge the past sentence because of its effect on his chances of parole, as in *Williams*.<sup>196</sup> It should be noted that if the writ is then made available, but not during the interim prior to a subsequent conviction, relief will have been delayed and with it the consequent potential loss of evidence. However, this result may be justified. Under the traditional application of custody, once served, the sentence could not thereafter have been challenged by habeas corpus.<sup>197</sup>

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by the A.B.A. STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES, § 3.4(c) (Tent. Draft Dec., 1967), which provides: "(c) Corrections and parole authorities should be directed to consider an offender committed under multiple sentences as though he had been committed for a single term, the limits of which were defined by the cumulative effect of the multiple sentences." The comment to this section acknowledges "that subsection (c) could perhaps be interpreted to eliminate in some contexts the question of whether an offender is in custody under the sentence he wants to challenge by habeas corpus. Such an effect would be desirable." *Id.* at 181. The Court in *Peyton v. Rowe* accepted this view and said: "Nothing on the face of § 2241 militates against an interpretation which views Rowe and Thacker as being 'in custody' under the aggregate of the consecutive sentences imposed on them. Under that interpretation, they are 'in custody in violation of the Constitution' if any consecutive sentence they are scheduled to serve was imposed as the result of a deprivation of constitutional rights." 391 U.S. at 64-5. Is the Court suggesting a prisoner is also in "custody" under a past, as well as future, consecutive sentence?

<sup>195</sup> *But see* the views of Judge Sobeloff in *Jones v. Cunningham*, 294 F.2d 608, 612-13 (4th Cir. 1961) (concurring opinion). It must be acknowledged that these "civil" and collateral consequences of conviction may well have a more damaging impact than the prison sentence itself. The PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT, CORRECTIONS 88-92 (1967); Note, *Civil Disabilities of Felons*, 53 VA. L. REV. 403 (1967). *Carafas* and *Sibron* reduce, but do not eliminate, the possibility of mootness.

<sup>196</sup> It might also be challenged on the basis of *Martin* if the date of eligibility for parole would be advanced; on the basis of *Tucker*, if credit for time served on the invalid sentence could be allowed on the valid sentence. See discussion, note 143 *supra*.

<sup>197</sup> In some situations this past sentence may be attacked by *coram nobis*. See, e.g., *Morgan v. United States*, 346 U.S. 502 (1954). There petitioner was allowed to attack a federal sentence which had already been served as there was no requirement of "custody" for *coram nobis*. For citations dealing with alternative remedies, see note 127 *supra*.

Secondly, until such prior conviction has some substantial restraining effect such as affecting chances of eligibility for parole,<sup>198</sup> it should be considered de minimus for habeas corpus purposes. In providing for an ideal system, it may well be argued with force that there should be some provision for an "advisory opinion" proceeding to erase the stigma, "civil" disadvantages, and employment handicap resulting from an invalid conviction even though there is no present effect on parole or a recidivist sentence.<sup>199</sup> However, during the "interim" there is no certainty that there will be a future conviction and effect on future parole possibilities. In terms of allocation of resources involved in providing such a forum for all past-served sentences, it is submitted that this cannot presently be justified.<sup>200</sup> The judgments underlying this are several. It is doubtful whether mere expunging of "the record of conviction" can have any real impact in removing the stigma of being an ex-convict without a basic change in the public attitudes which make such status a handicap.<sup>201</sup> There are generally available legislative and

<sup>198</sup> Or is detrimental in a *Tucker* sense, *i.e.*, if voided and any credit may be allowed on the valid sentence, then the past sentence should be considered a significant restraint.

<sup>199</sup> The real answer is for the states to provide a post-conviction remedy for these moot cases. *See* text p. 49 *infra*.

<sup>200</sup> The President's Crime Commission in its *Task Force, Report on the Courts* has estimated that as a result of recent cases the most immediate need for legal manpower felony charges—will require "for adequate representation of all felony defendants in State and Federal courts [the] equivalent to the full-time services of between 1,700 and 2,300 lawyers each year." The report also estimated that between 300 and 1,000 lawyers would be required each year for appeals, collateral attacks and revocation hearings. *Id.* at 56. The report concluded: "The aggregate range of these estimates is between 8,300 and 12,500, which represent the upper and lower limits of the number of lawyer years needed to provide adequate representation for adult defendants in all criminal cases except traffic offenses each year. The actual number of lawyers needed will, of course, be much larger than the number of lawyer years, perhaps several times greater, because a large part of the need will be met by lawyers who practice only part of the time in criminal matters. Furthermore, this estimate does not include lawyers for delinquency proceedings in the juvenile courts. . . ." *Id.* at 56. Also, there is a real need for counsel at the misdemeanor level—the "low visibility" area. *See generally* Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685 (1968). Equally critical is the need for lawyers in civil matters in the "poverty" area. *See, e.g.*, the views of Justice Douglas in *Johnson v. Avery*, 393 U.S. 483, 491 (1969) (concurring opinion) and *Hackin v. Arizona*, 389 U.S. 325 (1967) (dissenting opinion).

<sup>201</sup> The computer age raises the question of whether even the record could be erased. Once the record of conviction is fed into a criminal crime record computer—*e.g.*, much like credit information—and then proliferates out into numerous other computers and data retrieval systems, it might be impossible to know the extent of the dissemination of the record and to erase such a record. *See* A. WESTIN, *PRIVACY*

executive pardons which could be used, without involving judicial and legal resources, in urgent cases where there is a showing of an improper conviction. If the courts through habeas corpus were opened up to such "advisory opinions," there is danger, perhaps unfounded, that the courts would be flooded with such petitions.<sup>202</sup> Perhaps the most compelling reason for not bringing these "interim moot convictions" within the purview of federal habeas corpus (except as they may become a substantial restraint with a later conviction) is that with the removal by *Walker and Peyton v. Rowe* of the "immediate release" and "prematurity" barriers and the removal in *Carafas* of the danger of "mootness" through completion of the sentence before completion of proceedings on the writ, it is hoped that with time there will be no real need for an *ex post servio* habeas remedy. Under this liberalized approach to custody, the single offender will at all times during service of his sentence be allowed to challenge it by habeas corpus even though the sentence may be invalid only in part.<sup>203</sup> The limited legal resources available should be expanded in preventing constitutionally defective convictions and when the full impact of *Douglas*,<sup>204</sup> *Gideon*,<sup>205</sup> *Miranda*,<sup>206</sup> and *Gault*<sup>207</sup> is felt, many basic constitutional defects should be prevented, thus reducing the necessity for post-conviction relief. Also, if competent counsel is provided to assist the prisoner in his initial habeas corpus proceeding, this too would further reduce the necessity for subsequent habeas corpus proceedings.<sup>208</sup> Use of the limited resources in these areas would be a more effective utilization and should present an ample opportunity, under present standards, to exhaust the possibilities and to discern the truth with finality. Should at some

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AND FREEDOM 298-326 (1967); Karst, "The Files": Legal Controls Over the Accuracy and Accessibility of Stored Personal Data, 31 LAW & CONTEMP. PROB. 342, 365-71 (1966).

<sup>202</sup> Many have expressed the view that the courts are already flooded with frivolous petitions. See, e.g., Pope, *Suggestions for Lessening the Burden of Frivolous Applications*, 33 F.R.D. 409 (1963); Pope, *Further Developments in the Field of Frivolous Applications. Is Proliferation Probable?*, 33 F.R.D. 423 (1963); Shaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 17 (1956).

<sup>203</sup> If the state courts adopted a liberal approach to post-conviction remedies, e.g., that suggested by the A.B.A. STANDARDS-POST-CONVICTION REMEDIES, (Tent. Draft Jan., 1967) which eliminates the requirements of custody, many of the contentions should be resolved during the "exhaustion of state remedy" process.

<sup>204</sup> *Douglas v. California*, 372 U.S. 353 (1963).

<sup>205</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>206</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>207</sup> *In Re Gault*, 387 U.S. 1 (1967)

<sup>208</sup> See text p. 56 *infra*.

future date the one-time offender be again convicted and then have standing to challenge the prior sentence by habeas corpus, hopefully he would already have been heard on his contentions during service of the first sentence. Providing counsel in any prior habeas corpus petition should increase this possibility. If his contentions have not been heard, the writ would be available unless the subsequent conviction were a non-parolable one.<sup>209</sup>

Turning to the multiple offender, under the rationale of *Martin* and *Williams*, a fully-served sentence would not become moot until all of the sentences had been served, as presumably this past sentence would affect either date of the eligibility for parole or chances for parole.<sup>210</sup> If the subsequent sentence or sentences are non-parolable, the past-served sentence could not be challenged as there would be no effect on parole.<sup>211</sup> When all sentences have been fully served, the prisoner would be in the same position as the single offender described above.

If only a sentence presently being served is challenged and there are other valid concurrent or future sentences, the writ should be available even though there may be no immediate release, as there is present confinement under the challenged sentence. If only future sentences are attacked, under *Martin* and *Williams* the writ should be available if the future sentence affects chances for parole or present eligibility for parole. Conceivably, there will be situations where avoiding the future sentence will not advance the eligibility for parole so that the prisoner will then be eligible, as in *Martin*, and thus present

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<sup>209</sup> Even if the prior invalid sentence had no effect on parole, it should be subject to attack if any credit for time served on the invalid could be credited on the subsequent valid sentence. See discussion, note 143 and note 198 *supra*.

<sup>210</sup> This assertion is based on the typical parole statute under which the prisoner must serve a specified minimum portion of his total sentence before he is eligible for parole. See, e.g., 18 U.S.C. § 4202 (1964) (prisoner eligible for parole after serving  $\frac{1}{2}$  of term or after 15 years if a life sentence or sentence over 45 years); ARK. STAT. ANN. § 43-2823 (1964) (after service of  $\frac{1}{2}$ ); N.J. STAT. ANN. § 30.4-123.10 (1964) ( $\frac{1}{2}$ ); VA. CODE ANN. § 53-251 (1967) ( $\frac{1}{4}$  if less than 48 or if total exceeds 48, a minimum of 12); Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134 (1960). Prior convictions generally are an important factor affecting possibilities for parole.

<sup>211</sup> These past sentences may have a *Tucker*-type restraint if credit may be allowed on the present sentence. See discussion note 143 *supra*. In that event there should be "standing" for habeas corpus. Also if the prior sentence is utilized under a recidivist statute or the ineligibility for parole is attributable to the prior sentence, attack by habeas corpus should be allowed. See *Stubblefield v. Beto*, 399 F.2d 424 (5th Cir. 1968); *Durocher v. LaVallee*, 330 F.2d 303 (2nd Cir. 1964).

chances for parole are not affected, as in *Williams*.<sup>212</sup> It is at this point that the "effect on present eligibility or present chances for parole" seems to have reached its limit and presents the greatest difficulty to the Fourth Circuit approach. It should be noted that this is the area of prematurity and its hazard of delay; holding the writ in abeyance pending maturity, *i.e.*, until there is present effect on the eligibility or chances for parole, only pushes the sources of the truth farther into the past. This essentially is the *Rowe-Thacker* situation where a successful challenge to the future sentence would not advance the date of eligibility so that petitioner would presently be eligible for parole and thus not affect present chances for parole. The same problem could arise where the prisoner is presently serving a sentence from which he cannot be paroled and wishes to challenge a future sentence.<sup>213</sup> *Rowe-Thacker* suggests a reasonable approach for making the writ available to attack future sentences. If the future sentence to be challenged will with reasonable certainty (excluding the intervening death of the prisoner) at some point in the future be subject to attack because it then affects present eligibility for parole under *Martin* or because it then affects present chances for parole by *Williams*<sup>214</sup> or if the future sentence may be attacked upon commencement of its service, then the writ should be available immediately.<sup>215</sup> Read broadly, *Rowe-Thacker* says that if it is clear that at some point in the future the prisoner will have standing to question the future or past sentence, the collateral attack by habeas corpus should be allowed now.<sup>216</sup> The important factor here is the hazard of stale or lost evidence due to suspension of the writ. There is assurance of at least some future restraint or detriment resulting from the future sentence.

Under the Fourth Circuit approach a prior sentence which is used as a basis for imposing an enhanced sentence under a "repeater" or recidivist statute would be open to attack by habeas corpus. The prior sentence contributing to the recidivist sentence may thus adversely

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<sup>212</sup> This could also be true where the present sentence is one from which parole cannot be granted.

<sup>213</sup> If the prisoner cannot be paroled from the present sentence because of the future sentence, there would be a *Martin* type of restraint.

<sup>214</sup> *Williams v. Peyton*, 372 F.2d 216 (4th Cir. 1967).

<sup>215</sup> See also *Commonwealth ex. rel. Stevens v. Myers*, 419 Pa. 1, 213 A.2d 613 (1965), discussed in text p. 28 *supra*.

<sup>216</sup> Implicit in the holding of the Supreme Court in *Peyton v. Rowe* is the fact that the sentences would be subject to challenge by habeas at some point in the distant future.

affect the date of eligibility for parole. However, under some parole statutes, *e.g.*, those of Virginia, the increase due to the prior invalid sentence may not affect the date of parole eligibility.<sup>217</sup> Once the prisoner is eligible for parole, the prior conviction could affect his chances for parole and at that point, or when he began to serve the enhanced portion attributable to the prior sentence, the recidivist could attack the prior sentence. Then applying the *Rowe-Thacker* rationale, to eliminate the risks of delay, challenge of the prior sentence by habeas corpus should be allowed when the recidivist sentence is imposed.

The Fourth Circuit approach would also allow attack of one concurrent sentence even though the other is conceded to be valid. The invalid one may affect either the date of parole, *e.g.*, if the invalid sentence were the longer, or may affect the chances for parole.<sup>218</sup>

A central question raised by the Fourth Circuit approach and the foregoing analysis is whether such an approach depends too much upon the type of parole statute and makes "standing" for habeas corpus depend upon an irrelevant factor. A related question is what is left of the mootness, prematurity and immediate release concepts? The immediate release concept is rightly abandoned.<sup>219</sup> The prematurity concept is also abandoned. As has been shown above, in most cases there will be some present or future adverse effect on parole which is a legal restraint on freedom. Even if there is no such effect on parole, there will be restraint under the sentence in the future which can be challenged then but should be resolved now. The use of the parole statutes is particularly relevant in past-served sentences, the area of "mootness," to determine and insure that there is sufficient legal detriment or restraint to justify habeas corpus relief.<sup>220</sup> If the past sentence has no such effect or is not invoked under a recidivist statute, the social

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<sup>217</sup> In Virginia to be eligible for parole, the prisoner must serve one-fourth of the aggregate if less than 48, or if the total is over 48, a minimum of 12 years, or 15 if a life sentence. VA. CODE ANN. § 53-251 (1967). Thus, if the prisoner got fifty years on the underlying second conviction and received five years as a recidivist, the recidivist sentence would not affect date of eligibility for parole.

<sup>218</sup> It has been suggested that the sentences should also be treated as one if there were no effect on the date of eligibility for parole. See *Peyton v. Rowe*, 391 F.2d 54, 64 (4th Cir. 1968); *Rowe v. Peyton*, 383 F.2d 709 (4th Cir. 1967); *Thomas v. Cunningham*, 335 F.2d 67 (4th Cir. 1964). See also discussion in note 194 *supra*.

<sup>219</sup> See discussion, note 190 *supra*.

<sup>220</sup> As noted, it is in the area of "mootness" that the Supreme Court has not given a clear indication as to what remains of "mootness." See text p. 37 *supra*. *Carafas* did not deal with the truly moot sentence, *i.e.*, one fully served at the time the petition was filed. It is perhaps significant that the Court in *Carafas* did cite *Thomas* which involved fully served sentences. See 391 U.S. 234, 240, n. 14 (1968).

stigma and hardship should be considered de minimis for federal habeas corpus relief.

There are other difficulties with the approach. Suppose, for example, that the past sentence or the future sentence to be served was received in a state other than the state in which the petitioner is presently incarcerated, or that the prior sentence, allegedly invalid, invoked under a recidivist statute was received in another state. The Fourth Circuit in *Rowe-Thacker* suggested certain limits upon that holding by saying "that the writ is available to attack any sentence, service of which will be required in the future by the same custodian who presently detains the prisoner."<sup>221</sup> Is such a limitation necessary to attack future or past sentences under the Fourth Circuit approach? There is a difficult question here of the propriety and desirability, in a federal habeas corpus proceeding, of requiring the custodian state to defend against constitutional challenge a past or future sentence imposed by another state. Is it a sufficient answer to say that if the custodian state is utilizing or will use such a sentence in such a manner as to have an inhibiting effect on parole or uses it as the basis for an enhanced recidivist sentence, then it should be prepared to defend the validity of the sentence received in another state?<sup>222</sup> Does this assure

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<sup>221</sup> 383 F.2d at 717. The Supreme Court in *Peyton v. Rowe*, involving a future sentence, did not suggest such a limit. Quare whether in the light of *Word v. North Carolina*, 406 F.2d 352 (4th Cir. 1969), the Fourth Circuit will so restrict use of the writ. See discussion p. 49 & note 222 *infra*.

<sup>222</sup> Cf. *State ex rel. Holm v. Tahash*, 272 Minn. 466, 139 N.W.2d 161 (1965). A similar problem area, presenting many of the same difficult procedural questions, is that of a detainer filed by another state with the custodian state. Do the changes in custody have significance for this area? These detainers, which may be based on a conviction or merely an indictment or complaint filed against the prisoner, in many instances may seriously limit the possibilities of parole or affect the type of confinement. *Smith v. Hooey*, 393 U.S. 374 (1969). Should habeas corpus be allowed to challenge the validity of the charge or conviction upon which the detainer is based where the "present restraint" is attributable to such a future or potential sentence? In other words, is a prisoner "in custody" under a detainer? Could proper relief be afforded? May a state prisoner in New York, by a writ of habeas corpus in the federal district court in that state, challenge a detainer filed by Florida? Does *Peyton v. Rowe* provide the answer by suggesting that the future Florida sentence of a prisoner presently incarcerated in New York can now be attacked by habeas corpus in a Florida District Court? There is authority which indicates that the writ will not be available in the demanding state: "The courts have long taken the position that the proper party respondent is 'some person who has immediate custody of the party detained, with the power to produce the body of such party—before the court or judge. . . .' *Wales v. Whitney*, 114 U.S. 564, 574 (1885)", cited in *Sokol*, *supra* note 120, at 39. Earlier under *Ahrens v. Clark*, 335 U.S. 188 (1948), it seemed clear that a district court had no jurisdiction if the petitioner was not detained within the terri-



that there will be sufficient interest by the custodian state to insure that such a hearing will not be merely an *ex parte* suit not disputed by the state, or to conclude that if the custodian state does not have sufficient interest to defend the out-of-state sentence, then it should not be permitted to assert its detrimental effect? Or should federal habeas corpus attack of past and future sentences be limited to those of the custodian state as suggested by *Rowe-Thacker*, thus requiring that the custodian state defend only its own sentences even though it may "use" other out-of-state sentences? Can such a disparity in availability of the writ—allowing attack of "in-state" convictions but not "out-of-state" convictions—be justified? Requiring the custodian state to defend the sentence imposed by another would present difficult problems of availability of records, witnesses and evidence. By analogy, the repeater or recidivist statutes may be helpful. In such statutes, where out-of-state convictions may be used, the United States Supreme Court in *Chewning v. Cunningham*<sup>223</sup> held that the state had such an interest. Although there appears to be no clear holding by the United States Supreme Court that an attack on the constitutional

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torial jurisdiction of the court where the petition was filed. See also *Whiting v. Chew*, 273 F.2d 885 (4th Cir. 1960); Comment, *G.I.'s Overseas and Habeas Corpus*, 1 STAN. L. REV. 555 (1949). However, the continuing validity of these cases may be questioned in view of the expansion of the reach of the writ from physical restraint to other types of restraint such as parole and "collateral consequences." Here again the Fourth Circuit has taken a lead in *Word v. North Carolina*, 406 F.2d 352 (4th Cir. 1969) in allowing use of the writ to attack detainers. The court said: "We have for decision the question whether in light of *Peyton v. Rowe*, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426, federal habeas corpus provides a present remedy for a state prisoner seeking to attack, on constitutional grounds, a conviction in another state which underlies a detainer filed with his keeper. We hold that it does and that the action is properly brought in a district court in the demanding state." 406 F.2d at 353. The majority felt that *Abrens v. Clark* did not preclude use of the writ even though the petitioner was not physically present within the jurisdiction of the district court where the petition was filed. But see the dissenting opinions of Winter and Sobeloff respectively. *Word v. North Carolina*, 406 F.2d 352, 362, 364 (4th Cir. 1969). They felt that *Abrens v. Clark* was still controlling. The majority indicated there may be situations where the writ would be available in the state of confinement to challenge a detainer filed by another state. Sobeloff was of the opinion that the state of confinement was the proper forum to attack the detainer. Cf. *Desmond v. United States Board of Parole*, 397 F.2d 386 (1st Cir. 1968).

<sup>223</sup> 368 U.S. 443 (1962). The recidivist statute under which *Chewning* had been convicted provided for use of out-of-state convictions. One means of avoiding the problem is by not making use of the out-of-state convictions. See, e.g., *Simms v. Cunningham*, 203 Va. 347, 124 S.E.2d 221 (1962), where an "equal protection" attack was made against a state policy of invoking only "in-state convictions under the recidivist statute."

validity of such prior sentences must be allowed in the recidivist hearing, there seems to be little doubt that denial of such an opportunity would be a denial of due process.<sup>224</sup> If it is thought necessary to require the asserting state in a recidivist proceeding to defend the constitutional validity of an out-of-state conviction, should it not also be appropriate to require the "custodian state" in a habeas corpus proceeding to defend out-of-state convictions, past or future, which are asserted with a detrimental effect on parole in the custodian state? It should be noted that these difficult problems could exist should states adopt a liberal approach such as the Fourth Circuit or that suggested by the American Bar Associations' *Standards Relating to Post-Conviction Remedies*, which recommends that the availability of post-conviction relief should not be dependent upon the applicant's attacking a sentence of imprisonment then being served or other present restraint, but should be available even as to future sentences and completely served sentences.<sup>225</sup> Perhaps therein lies the solution to the perplexing questions above. Should each state provide such a broad post-conviction relief procedure,<sup>226</sup> then the prisoner could be required to obtain a determination in the state rendering the sentence which should then be recognized

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<sup>224</sup> In *Chewning v. Cunningham*, 368 U.S. 443, 446-47 (1962), the Court said: "Virginia has held that the validity of any of the prior convictions used to bring the multiple offender statute into play, may be inquired into. . . . These may involve judgments of conviction in any state or federal court in the Nation. . . . A trial under this statute may present questions such as whether the courts rendering the prior judgments had jurisdiction over the offenses . . . whether in a prior trial the defendant was represented by counsel and whether it was a fair and impartial trial." And in *Oyler v. Boles*, 368 U.S. 448, 454 (1962), also a recidivist case, the Court said: "Indeed we may assume that any infirmities in the prior conviction open to collateral attack could have been reached either because the state law so permits or due process so requires." Dissenting in the same case, Justice Douglas said: "A hearing under these habitual offender statutes requires 'judicial hearing' in order to comport with due process. . . . The charge of being an habitual offender is also effectively refuted by proof that the prior convictions were not constitutionally valid. . . ." *Id.* at 455. See also Note, *Recidivism and Virginia's "Come-Back Law"*, 48 VA. L. REV. 597 (1962); Note, *The Pleading and Proof of Prior Convictions in Habitual Criminal Prosecutions*, 33 N.Y.U. L. REV. 210 (1958).

<sup>225</sup> A.B.A. STANDARDS RELATING TO POST-CONVICTION REMEDIES, § 2.3 (Tent. Draft Jan., 1967). This proposal would go beyond the Fourth Circuit approach and would allow attack on the truly "moot" cases—e.g., past-served sentences where there is no subsequent conviction or potential effect on parole or under a multiple offender statute—with certain limits on relief for stale claims and a present need for requested relief. See comment, *id.* at 41-5.

<sup>226</sup> As discussed before, the impact of *Rowe*, *Walker* and *Carafas* may well be that the states will be compelled to adopt such a liberal post-conviction procedure or else they will be bypassed. See text p. 54 *infra*.

in the custodian state, making it unnecessary for the custodian state to defend these challenges. Making the prisoner resort to this state remedy as part of the exhaustion of remedies requirement should then eliminate much of the difficulty and hopefully avoid the necessity for federal habeas corpus. For the present, however, the question will remain whether the limit of *Rowe-Thacker* should be retained or attack of out-of-state sentences allowed. Surely there should be no limit.

However, to provide a federal remedy, perhaps it is not necessary that habeas corpus be used in the custodian state to challenge such sentences, past or future, or charges pending in another state. First, as to charges pending in another state, which may affect present detention even though not promptly prosecuted, there is a remedy, enforceable in federal courts under the sixth amendment guarantee of a right to a speedy trial, by mandamus in the state in which the charges are pending. This was illustrated during the past term of the Court by the decision in *Smith v. Hooy*.<sup>226a</sup> Secondly, if the Fourth Circuit is correct in its recent decision of *Word v. North Carolina*<sup>226b</sup> that *Abrens v. Clark* does not preclude use of the writ in a federal district court in which the petitioner is not physically present, then future (or past?) sentences may be challenged in the sentencing state. The *Word* approach has the advantage of placing the proceeding in the sentencing district where records, witnesses, etc., are more readily available and where the sentencing state may be made a party to respond to the writ.<sup>226c</sup> Again, the Fourth Circuit in *Word* is blazing the trail as to use of the writ in attacking future and past sentences rendered outside the custodian state.

## VIII

### JUSTIFICATION FOR A LIBERAL APPROACH TO CUSTODY

In making an evaluation of what is a valid approach to custody in

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<sup>226a</sup> 393 U.S. 374, (1969). Smith, a prisoner serving a term in a federal penitentiary in Kansas, sought by mandamus to compel dismissal of pending, but unprosecuted, charges in a Texas State Court. Mandamus had been denied by the Texas Supreme Court. The United States Supreme Court, noting that such charges could affect the duration and condition of petitioner's present imprisonment, said: "[W]e hold today that the Sixth Amendment right to speedy trial may not be dispensed with so lightly either. Upon the petitioner's demand, Texas had a constitutional duty to make a diligent good faith effort to bring him before the Harris County [Texas] court for trial." 393 U.S. at 383.

<sup>226b</sup> See note 222 *supra*.

<sup>226c</sup> The opinions in *Word* highlight the problems of using the writ in *either* the custodian state or the sentencing state.

federal habeas corpus, one central fact should be kept in mind. This fact is that a state prisoner asserting a constitutional defect in his trial or conviction will be afforded a habeas corpus or some other post-conviction remedy, either in a state or federal court and such proceeding must be of a nature to meet the requirements of *Townsend v. Sain*.<sup>227</sup> The approach suggested by the American Bar Association's *Standards Relating to Post-Conviction Remedies*<sup>228</sup> seems to be based on a recognition of this fact. It may be acknowledged that a liberal approach to post-conviction remedies such as that of the Fourth Circuit or the American Bar Project may afford a remedy where previously there generally had been no remedy, either federal or state, e.g., in cases of mootness, and may even go beyond what is compelled by the recent Supreme Court decisions. Yet as the above analyses of the Fourth Circuit approach have shown—e.g., the prior or future sentence and its effect on parole—the previously unchallengeable invalid conviction may have as much present adverse effect as one for which there was a remedy. In the past too often there seems to have been a failure to recognize that it is not a question of whether or not there will be a remedy and an inquiry into the validity of the conviction, but that it is a question of whether a remedy will be afforded *now* or in the future. There seems to have been in some courts a vague attitude of antagonism to the use of the writ as a post-conviction remedy and a feeling that if things were delayed long enough, then maybe the problem would go away or become moot. This attitude is coupled with the often voiced complaint that the changes in and liberal use of habeas corpus are flooding the courts with frivolous petitions. However, can misuse or abuse of a remedy justify its denial or suspension in the hope that a guaranteed constitutional right will not be asserted? If the Great

<sup>227</sup> *Townsend v. Sain*, 372 U.S. 293 (1963). This right to a federal writ is, of course, subject to the requirements of exhaustion of presently available state remedies [Fay v. Noia, 372 U.S. 391 (1963)], and to the requirements of the recent Federal Habeas Corpus Act of 1966, 28 U.S.C. §§ 2244, 2254, S. REP. NO. 1797, 89th Cong. 2nd Sess. 2 (1966). Note, 45 TEX. L. REV. 592 (1967). There is a question of whether a state is required to provide a post-conviction remedy. Schaefer stated: "It has been frequently stated, in opinions of the Justices of the Supreme Court and elsewhere, that the decision in *Mooney v. Halohan* [294 U.S. 103 (1935)] laid down the requirement that each state must afford some corrective judicial process by which a claim of violation of constitutional right can be tested in the state court. There have been references in the opinions to the 'duty' resting upon the states to provide such a remedy." Schaefer, *supra* note 74, at 16. In any event, within the above restrictions, if there is no state remedy, federal habeas corpus will be available to state prisoners.

<sup>228</sup> A.B.A. STANDARDS RELATING TO POST-CONVICTION REMEDIES, (Tent. Draft Jan., 1967).

Writ is to continue to play its historical and traditional function, its availability should not be predicated upon its misuse or upon making its invocation difficult to curb unfounded use. The measure of its value should not be gauged in terms of its abuse. There is no way to insure that by making the availability of the writ difficult, there will be an effective screen, filtering out or discouraging frivolous petitions but at the same time permitting and not discouraging meritorious claims which the writ is designed to protect. It is probably true that the more readily available the writ is, the more frivolous petitions there will be, as well as more meritorious ones. Yet the opponents of a liberal approach to availability of the writ failed to show how a restrictive approach to custody can function as a *selective* filter on frivolous petitions.<sup>229</sup>

Perhaps the most compelling reason for abandoning the concepts of "mootness," "immediate release" and "prematurity" has already been pointed out. The longer the delay in affording a remedy, the farther in the past the questioned circumstances will be and the greater the difficulties of determining what these circumstances were. In this respect all three branches of custody are alike in that their invocation brings the blur of time if a remedy is to be available sometime in the future. This blur may have a prejudicial effect, not only upon the chances of the petitioner establishing his contentions, but also upon the state.<sup>230</sup> The delay does not always bear with an equal impact upon both the state and the prisoner. Too frequently it seems the state has not recognized that delay may not be in its best interest. In a habeas corpus proceeding the petitioner will be entitled to release or at least a new trial upon a showing of a constitutional defect by the preponderance of the evidence.<sup>231</sup> Whereas upon retrial, the state would

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<sup>229</sup> The observation of Judge Schaefer that much of the recent increase in the use of the writ is due to accessibility to the courts seems also to suggest that the unquestioned greater protection given to individual and constitutional rights in recent years by means of the writ is also due to a concomitant greater availability of the writ. Schaefer, *supra* note 74.

<sup>230</sup> *Fay v. Noia*, 372 U.S. 391 (1963) quite vividly illustrates this prejudicial result. The petitioner in that case had been convicted in 1942, solely on the basis of a coerced confession, although there seemed to be little question of his guilt. This conviction was finally overturned in 1963 by means of habeas corpus. The Court pointed out: "Even though Caminto and Bonino still remain under indictment, it is most probable that they will never be tried again. . . . The obtaining of new evidence would appear at this late date impossible." *Id.* at 396.

<sup>231</sup> *Johnson v. Zerbst*, 304 U.S. 458, 469 (1938) (*dictum*). The impact of such cases as *Griffin v. Illinois*, 351 U.S. 12 (1956), requiring states to furnish indigent defendants with a transcript of the trial proceedings, may have mitigated against

have its usual burden of proof beyond a reasonable doubt. If there can be no retrial or reconviction upon retrial, due to loss of evidence, then the state may have lost whatever benefits of rehabilitation, etc., which might have come from conviction. Further, the state has a valid interest in protecting the "appearance of justice." Failure to retry or reconvict may unjustly reflect upon the integrity of the criminal process. Such reflections were caused by loss of evidence due to delay should be eliminated if possible. The aim in post-conviction review should be to have the hearing on the merits, if there is to be one, at the earliest date, not one of delay for "ripeness" at some future date. Such an approach is consistent with all the demands underlying provisions for "speedy trial."<sup>232</sup> Custody, as it traditionally has been involved, inherently conflicts with the rationale of the guarantee of a speedy trial. Is there any more reason to delay the retrial by habeas corpus than to delay the initial trial? As has been shown, in many instances there may be more of a present restraining or adverse effect in the post-conviction stage than in the pre-trial stage.

With respect to the prematurity concept, there are other factors which make it particularly oppressive. In a *Thomas*-type<sup>233</sup> case, why should the prisoner with several short-term sentences be compelled to begin service of a potentially invalid sentence which may be fully served and thus moot, before he can be heard and the sentence set aside? If there is no reconviction or credit given on other offenses,<sup>234</sup> there is no adequate means of restoring or compensating for the time served under the invalid sentence. Mere expunging of the record does not restore the lost time spent in prison or under restrictions not shared by other free men. The majesty of the Great Writ is that no price may be put on liberty, nor should there be a requirement that the challenged sentence "begins to hurt" by present restraint before the writ is available. Delaying the use of the writ may merely be an invitation to while away the interim filing of other frivolous petitions. Prisoners are indeed notorious for "adopting" the latest decision as their such blurring by making states more careful in preserving the "record" which frequently had not been done. Cf. A.B.A. STANDARDS RELATING TO PLEAS OF GUILTY, § 1.7 (Tent. Draft Feb., 1967), recommending a verbatim record of pleas of guilty including inquiry into the voluntariness and accuracy of the plea. However, these developments will not completely solve the problem as often the basis for attack on habeas corpus will involve matters and facts outside the court record.

<sup>232</sup> See generally A.B.A. STANDARDS RELATING TO SPEEDY TRIAL, (Tent. Draft May, 1967).

<sup>233</sup> *Thomas v. Cunningham*, 335 F.2d 67 (4th Cir. 1964). See text p. 24 *supra*.

<sup>234</sup> See text p. 30 *supra*.

own, whereas an early complete hearing and development of the true facts might prevent or preclude subsequent unfounded petitions.

In a different context of habeas corpus, Professor Bator has made a plea for finality in criminal cases at an early date so that the rehabilitative process, disrupted by lack of finality, may begin.<sup>235</sup> If finality aids the rehabilitative process, this would seem to urge that the concepts of custody which delay finality should be eliminated.

Equal protection and fairness considerations are present also. Why should prisoner *A*, who has been convicted of two crimes, the second of which is to be served in the future and is patently invalid, as in *Thomas*, be forced to wait to attack the second sentence when prisoner *B*, who is not a multiple offender, may presently attack his sentence which was received for the same offense, at the same time and shares the same constitutional defect as prisoner *A*? Is there a valid basis for the difference in the availability of a remedy?<sup>236</sup> Prisoner *A* may well be denied parole because of the invalid conviction.

## IX

### THE IMPACT OF THE FOURTH CIRCUIT APPROACH ON THE STATES

A proper federal-state working relationship would suggest that questions raised on habeas corpus by state prisoners should be resolved by the states so long as there is compliance with the mandates of *Fay v. Noia*<sup>237</sup> and *Townsend v. Sain*.<sup>238</sup> The states should bear the front line responsibility for reviewing and policing their own courts with the federal courts remaining in a position of secondary resort if there is no adequate state remedy or hearing meeting the requirements of *Fay* and *Townsend*. However, in maintaining this proper relationship, disparities in the federal rule on custody and the state rule can only contribute to an imbalance. If, for example, the Commonwealth of Virginia continued to adhere to its approach based on *McNally* and denied use of the writ to one attempting to attack a future sentence he is not yet serving, the end result would be that the full burden of reviewing such state cases would fall on the federal courts, as there would then be no existing state remedy and the state courts would be completely by-

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<sup>235</sup> Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963).

<sup>236</sup> For a discussion of the possibilities of a group petition raising common claims, see Note, *Multi-Party Habeas Corpus*, 81 HARV. L. REV. 1482 (1968).

<sup>237</sup> 372 U.S. 391 (1963).

<sup>238</sup> 372 U.S. 293 (1963).

passed as in *Williams* and *Rowe*.<sup>239</sup> On the other hand, if a state takes a progressive approach, as has Maryland under the Uniform Post-Conviction Procedure Act,<sup>240</sup> and abandons the requirement of custody, it may well be that a petitioner may exhaust (*e.g.*, in attacking future sentences) the present state remedy, and relief may be denied on some independent adequate state ground. Even though the state hearing may be such a review as would not meet the requirements of *Townsend* to bar federal relief, petitioner would have been compelled to wait until the sentence was being served for a federal remedy if the federal rule had continued to be *McNally*. The federal review then could have been so delayed that it may have had very little value as a stimulus to the state court to afford an adequate review initially or to make its procedures conform to constitutional standards. The more remote the federal review, the less its corrective impact will be on deficiencies in the state criminal process. It would seem apparent that the state and federal rule should be compatible with both court systems providing a remedy without regard to the traditional application of custody.

## X

### RESOLVING THE BASIC PROBLEMS

Perhaps no discussion of the Great Writ is complete without looking at the basic factors giving rise to the need for such a remedy. The great increase in the use of habeas corpus is attributable in large part to alleged constitutional defects, either in the trial or in events leading up to the trial. Several commentators have suggested that the real solution to the basic problems which have caused this increase is to provide and to insure that persons accused of crime are represented by competent counsel.<sup>241</sup> Competent counsel, provided at an early

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<sup>239</sup> This is precisely what was happening. See *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967), a case arising in Virginia. Following the Fourth Circuit decision in *Rowe-Thacker*, the Virginia legislature apparently recognized this fact and modified its statutory provision to allow attack of suspended and future sentences. It is not clear from the statute if any change was made in the "mootness" area. VA. CODE ANN. § 8-596 (1964). This liberalization of the state remedy is having the desired result of compelling a petitioner to seek redress through the state remedy before resorting to the federal writ. See, *e.g.*, *Strouth v. Peyton*, 404 F.2d 537 (4th Cir. 1968) (remand to hold in abeyance pending exhaustion of expanded Virginia state remedy permitting challenge of future sentences).

<sup>240</sup> *Simon v. Director*, 235 Md. 626, 201 A.2d 371 (1964).

<sup>241</sup> *Bailey, Federal Habeas Corpus—Old Writ, New Role: An Overhaul for State Criminal Justice*, 45 B.U. L. REV. 161, 205-06 (1965); *Reitz, Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U.P.A. L. REV. 461 (1960). Reitz stated:



stage, should contribute significantly to reducing the need for habeas corpus by preventing many of the defects and raising the constitutional questions in the initial trial. In this respect *Gideon*,<sup>242</sup> *Miranda*,<sup>243</sup> *Douglas*,<sup>244</sup> and *Wade*<sup>245</sup> may greatly reduce the occasions for habeas corpus in the future. Developments in other areas such as pre-trial discovery may also contribute to a reduced need for post-conviction remedies by allowing areas of potential constitutional deficiency to be explored initially. For example, the recent case of *Miller v. Pate*<sup>246</sup> might well have been prevented with adequate pre-trial discovery and not left to "discovery" by habeas corpus years later. Additionally, much of the present flood of habeas corpus petitions is no doubt due to the retroactive effect of cases such as *Gideon* and other constitutional decisions which, in effect, "changed the rules." Once this temporary backlog of "stale" cases is dealt with and such rights are pressed and preserved initially and the cases become current, undoubtedly there will be a further decrease in the number of habeas corpus petitions. How long this "temporary problem" will last is, of course, unclear.<sup>247</sup> In any event, there undoubtedly will be a continuing need for habeas corpus. Here, too, assistance of counsel should contribute to reducing multiplicity of petitions.<sup>248</sup> If counsel is provided to assist indigent prisoners in their initial post-conviction attack and given the opportunity to fully develop any potential defect which may be raised on habeas corpus, there should be a consequent reduction of the number of petitions and piecemeal litigation of defects—raising one question now, one

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"But the one factor which contributes most to the necessity for collateral attack is the lack of counsel to represent the accused. . . ." *Id.* at 465.

<sup>242</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>243</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>244</sup> *Douglas v. California*, 372 U.S. 353 (1963).

<sup>245</sup> *United States v. Wade*, 388 U.S. 218 (1967).

<sup>246</sup> *Miller v. Pate*, 386 U.S. 1 (1967).

<sup>247</sup> Perhaps one of the factors which may have influenced some courts to abide by the old custody requirements was the fear of adding to the flood of habeas corpus petitions. Elimination of these barriers may temporarily increase the flood, although as noted earlier, it may only be a matter of allowing the petition now, rather than in the future. See Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 249 (1968). Cases decided since *Walker, Carafas, and Peyton v. Rowe* seem to bear this out. See, e.g., *Velasquez v. Rhay*, 408 F.2d 9 (9th Cir. 1969); *Lydy v. Beto*, 399 F.2d 59 (5th Cir. 1968); *Fletcher v. Wainwright*, 399 F.2d 62 (5th Cir. 1968).

<sup>248</sup> It has been suggested, and no doubt this was one of the intended purposes. that the Federal Habeas Corpus Act of 1966, *supra* note 227, will also reduce the number of petitions by state prisoners. See Note, *Habeas Corpus, Custody and Declaratory Judgment*, 53 VA. L. REV. 673, 698 (1967).

later. Although at the present there seems to be no decision of the United States Supreme Court holding that counsel must be provided in habeas corpus proceedings, one may venture the guess that there would be such a requirement were the Court to decide the question.<sup>248a</sup> However, many courts have taken the position that habeas corpus is a civil remedy and therefore there is no requirement that counsel be provided.<sup>249</sup> It would seem clear that providing counsel would be beneficial to all parties involved and may well be a more efficient use of resources than failure to do so.<sup>250</sup> Central to this question is the fact

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<sup>248a</sup> Cf. the various opinions in *Johnson v. Avery*, 393 U.S. 483 (1969). The majority held that in absence of other sources of assistance, the State of Tennessee could not prohibit "jailhouse lawyers" from assisting other prisoners in preparation of habeas corpus petitions. Justices Black and White expressed the view that: "[I]f the problem of the indigent and ignorant convict in seeking post-conviction relief is substantial, which I think it is, the better course is not in effect to sanction and encourage spontaneous jailhouse lawyer systems but to decide the matter directly in the case of a man who himself needs help and in that case to rule that the state must provide access to the courts by ensuring that those who cannot help themselves have reasonably adequate assistance in preparing their post-conviction papers. Ideally, perhaps professional help should be furnished and prisoners encouraged to seek it so that any possible claims receive early and complete examination. But I am inclined to agree with Mr. Justice Douglas that it is neither practical nor necessary to require the help of lawyers. . . . The same legislative judgment which should be sustained in concluding that the evils of jailhouse lawyering justify its proscription might also support a legislative judgment that jailhouse lawyering under carefully controlled conditions satisfies the prisoner's constitutional right to help." *Id.* at 501 (dissenting opinion).

<sup>249</sup> See, e.g., *Flowers v. Oklahoma*, 356 F.2d 916, 917 (10th Cir. 1966), where the court said: ". . . habeas corpus is a civil proceeding, and it is settled law that there is no constitutional right to counsel in habeas corpus proceedings in federal courts." *Harris v. United States*, 371 F.2d 160, 165 (7th Cir. 1967) (dissenting opinion); *Summers v. Rhay*, 67 Wash.2d 898, 410 P.2d 608 (1966). But see *Sokol*, *supra* note 120, at 72. He suggests that it is fairly clear that there is a constitutional right to counsel on habeas corpus. Cf. *Johnson v. Avery*, 393 U.S. 483 (1969); *Smith v. Bennett*, 365 U.S. 708 (1961); *People v. Shipman*, 62 Cal.2d 226, 42 Cal. Rptr. 1, 397 P.2d 993 (1965); *People ex rel. Harris v. Ogilvie*, 35 Ill.2d 512, 221 N.E.2d 265 (1966); *People v. Hughes*, 15 N.Y.2d 172, 204 N.E.2d 849 (1965).

<sup>250</sup> Counsel is seldom provided to assist in preparation of the initial application and frequently legal aid organizations are uninterested in post-conviction proceedings. Note, *Multiparty Habeas Corpus*, 81 HARV. L. REV. 1482, 1484 (1968). The PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT, COURTS, 54 (1967) concluded: "The need for counsel in collateral attack is particularly acute because the issues often are important and highly technical, and the offender seeking collateral relief is confined in an institution and is less able to investigate relevant legal and factual matters. Petitions from prisoners are often a jumble of rambling factual assertions and legal conclusions culled from the latest appellate reports that have made the prison rounds. It is often impossible to identify the claims made or to discern their factual or legal bases. Hours may be spent by

that the Supreme Court has made the basic judgment that wading through the numerous petitions, searching for the needle in the haystack must be done to insure that one may not be convicted except by the law of the land. Perhaps one feasible way of aiding in this would be to provide "house counsel" for indigents in prisons who would be available to prisoners who contemplated or sought to use habeas corpus in a state or federal court. Once such house counsel gained the confidence and respect of the prisoner by showing that he would effectively present any legitimate claims, but not those unfounded or frivolous, and his advice became accepted, this might greatly decrease the number of frivolous petitions which clog the courts. Yet it would also assure that the one innocent person whom the system seeks to protect would have his case effectively presented in such a manner as to be noticed and not lost among the clutter due to ineffective presentation in a *pro se* petition. If tried, such a procedure may well be justified in terms of a saving in judicial time and that of other court officials. After dealing with the numerous cases and problems concerning the concept of custody, one cannot help wondering how many might well have been disposed of on their merits with no greater expenditure of resources than was consumed in dealing with the concept of custody.

#### CONCLUSION

As the court has observed, the Great Writ of Liberty "is not now and never has been a static, narrow, formalistic remedy. . . ." <sup>251</sup> The Court of Appeals for the Fourth Circuit has continued in the spirit of the tradition—*Darner's* case, the Petition of Right, the English Habeas Corpus Act of 1679, the Reconstruction Habeas Corpus Act—in its reappraisal and abandonment of the concept of custody. Its lead foreshadowing the demise of prematurity, mootness and immediate release has been followed by the Supreme Court. The Fourth Circuit in its decided cases and their logical extension has outlined a workable approach for federal habeas corpus for state prisoners, abolishing the

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the judge or prosecutor in determining from the prisoner's papers and from previous records of the case whether he has grounds to justify collateral relief. Moreover, the petitioner may have additional facts or claims which are not reflected in his papers and which will be the basis of subsequent attempts to gain freedom. . .

" . . . On the other hand, if counsel is provided and adequately represents a prisoner in his first postconviction proceedings, it would obviate the need for subsequent hearings on claims once raised and litigated and would substantially reduce the burden of reviewing the merits of successive petitions."

<sup>251</sup> *Jones v. Cunningham*, 371 U.S. 236, 242-43 (1963).

traditional concept of custody except in one area of mootness. Even there it may be that the state should provide a post-conviction proceeding to relieve the substantial civil disabilities and handicaps which may flow from an invalid conviction. The suggested approach, tied to present or future effect on eligibility or chances for parole or some other substantial detriment, such as use in a recidivist statute, insures that there is some substantial restraint to justify the use of federal habeas corpus and stops short of hearing all cases of mootness which may not justify expenditure of judicial time, etc. Of foremost importance, such an approach avoids the needless hazard of delay in making a remedy available. With the removal of the "prematurity" and "immediate" release concepts, "finality" may be reached at an earlier date. Recognizing that there must be a hearing on constitutional claims, this developing trend in the federal writ speaks to the states to provide an equally broad state post-conviction remedy, else they will default on their prime responsibility of insuring the integrity of their own criminal process.

Fundamentally, the point which should not be obscured is that the Great Writ is the device for insuring the right of access to the courts as protectors of civil rights and liberties.