William & Mary Law Review

Volume 9 (1967-1968)
Issue 3

Article 17

March 1968

Federal Procedure - Habeas Corpus - The Preliminary Doctrine - Rowe v. Peyton, 383 F.2d 709 (4th Cir. 1967)

mendation compiled by the trial judge and the prosecuting attorney.[31] The importance to the defendant of being represented by counsel who has only his best interests in mind when such a recommendation is prepared can not be underestimated.

It is clear from the decision in the present case that the Supreme Court is extending the *Gideon* doctrine beyond the actual trial while looking for factors which *may* prejudice the rights of the accused absent the assistance of counsel. Such an approach will focus increased attention on the administration of State laws which affect the status of the defendant before[32] or after[33] his trial. If state criminal prosecutions are to remain free of the stigma of denial of due process not only must the accused have the assistance of counsel at his trial, but also he must have access to counsel both as the state prepares him for trial and until the court has actually sentenced him following conviction.

Federal Procedure—HABEAS CORPUS—THE PREMATURITY DOCTRINE. Prisoners Rowe[1] and Thacker,[2] while serving consecutive sentences, the second of which would not commence until the years 1993 and 1994 respectively, sought the remedy of habeas corpus to attack their future sentences on constitutional grounds. Rowe's scheduled eligibility for parole is in 1975 and would be advanced to 1971 if his second sentence were invalidated. Thacker becomes eligible for parole in 1976 without any possibility of parole advancement. Conceding that both petitioners

31. WASH. REV. CODE § 9.95.030 (1961).

32. An example would be a determination whether the defendant should be prosecuted as a juvenile.

33. Examples would be probation revocation hearings as in the present case, deferred sentencing as in the companion case—Walkling v. Washington State Board of Prison Terms and Paroles, 389 U.S. 128 (1967), or sentencing under a State Habitual Offender Act.

1. In 1963 Rowe was convicted of rape and sentenced to thirty years, then three days later arraigned for the felonious abduction of the same female. His plea of former jeopardy was overruled and upon advice from counsel he pleaded guilty. He was convicted of the second count and sentenced to twenty years, to run consecutively with the rape sentence. Rowe has attacked his second sentence on the grounds of former jeopardy and the involuntariness of his guilty plea. His petition was rejected by the Supreme Court of Appeals of Virginia without an opinion.

2. In 1964 Thacker was sentenced to the Virginia State Penitentiary to serve a sentence of over sixty years. Petitioner wants to attack three sentences which are scheduled to commence in 1994 and end in the year 2004. His date of eligibility for parole would not be advanced even if the three sentences were vacated. Thacker bases his petition on the grounds of inadequate representation by his counsel at the 1953 convictions.

present a prima facie claim of invalidity of their second sentences, the state contended that the prisoners must wait until the challenged convictions affect them in terms of potential parole before they can bring habeas corpus proceedings.

In reversing the decisions of the district court, the Court of Appeals for the Fourth Circuit held that habeas corpus was available to both prisoners, thus granting them the power to attack the validity of their future state sentences even though the sentences have no immediate effect upon their individual considerations for parole.[3]

Although statutory provisions had been available for almost 150 years,[4] it was not until 1934 that the Supreme Court, in *McNally v. Hill*,[5] directed its attention to the prematurity problem in federal habeas corpus cases. In that case, a federal prisoner, while serving the second of three consecutive sentences, petitioned for a writ of habeas corpus challenging the validity of the third sentence. Petitioner had served enough of his second sentence to be eligible for parole considerations if the third sentence was declared invalid. Basing its decision on the historical concepts of habeas corpus, the Supreme Court rejected the argument that the present denial of possible parole eligibility should sanction an opportunity to attack a future sentence, since the prisoner was not at that time being held in custody under the future sentence.[6]

3. Rowe v. Peyton, 383 F.2d 709 (4th Cir., 1967), *cert. granted*, 389 U.S. 1035 (1968) (No. 802).

4. Congress first granted such power in the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81; In *Ex parte* Bollman, 8 U.S. (4 Cranch) 74, 93 (1807) the Supreme Court held that its only jurisdiction to grant the habeas corpus writ rested in the Constitution and by statute. In 1867 the federal writ was extended to state prisoners. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

5. 293 U.S. 131 (1934).

6. *Id.* at 135-138. The Court did feel that McNally should have an adequate remedy but continued to hold that habeas corpus was the wrong remedy. For a discussion of the historical approach to habeas corpus in the Supreme Court and Congress, see Oaks, *Legal History of the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966); D. MEADOR, HABEAS CORPUS AND MAGNA CARTA (1966).

At common law, physical restraint was not necessarily considered essential to satisfy the writ of habeas corpus. *See* Rex. v. Delaval, 3 Burr. 1434, 97 Eng. Rep. 913 (K.B. 1763). However, in 1885 the Supreme Court cautioned that "something more than moral restraint" was needed to uphold the custody requirement. There must be actual confinement or the present means of enforcing it. Wales v. Whitney, 114 U.S. 564, 571 (1885). Habeas corpus will not lie when, prior to the final hearing, the prisoner has escaped, Ragsdale v. Cameron, 329 F.2d 233 (D.C. Cir. 1963); or has obtained presidential pardon, Tornello v. Hudspeth, 318 U.S. 792 (1943) (*cert. denied*, after presidential pardon); or when prisoner has died, United States *ex rel.* Lynch v. Fay, 284 F.2d 301 (2d Cir. 1960). In cases where there is a supervening unconditional re-

Although the narrow, mechanistic custody concept of *McNally* has not been overruled,[7] a liberalization of its tarnished precepts is quite apparent.[8] In *Jones v. Cunningham*,[9] the Supreme Court took a significant step in enlarging the custody concept by recognizing that parole

lease, Parker v. Ellis, 362 U.S. 574 (1960) (*per curiam*), or a release of the prisoner on bail, Stallings v. Splain, 253 U.S. 339 (1960); Johnson v. Hoy, 227 U.S. 245 (1913), the Supreme Court has rendered moot the petition for habeas corpus. Warren, C.J., with Justices Black, Brennan and Douglas, gave a strong dissent in Parker v. Ellis, *supra:*

> If the Court is right in holding that . . . [petitioner's] five year quest for justice must end ignominiously in the limbo of mootness, surely something is askew in our system of criminal justice. 362 U.S. at 577.

See 53 VA. L. REV. 673, 678 (1967) for a decision of the mootness doctrine.

7. In 1941 the Supreme Court reaffirmed its prematurity concept in Holiday v. Johnston, 313 U.S. 342 (1941). *See also* Craw v. United States, 186 F.2d 704 (9th Cir. 1950); Holloway v. Looney, 207 F.2d 433 (10th Cir. 1953), *cert. denied*, 346 U.S. 912 (1953). In the same year the Court came close to making a significant departure from the mechanistic approach to habeas corpus as emphasized in *McNally*, by allowing a prisoner to attack a second conviction which caused revocation of parole and recommitment under the first sentence. *Ex parte* Hull, 312 U.S. 546 (1941). *But see* Heflin v. United States, 358 U.S. 15 (1959) where the Supreme Court affirmed *McNally*. In Wilson v. Bell, 137 F.2d 716 (6th Cir. 1943), the Sixth Circuit went beyond *McNally* and denied habeas corpus to a prisoner who had served a term which was greater than the admittedly valid sentence. However, two recent circuit court cases reached the conclusion that a parolee could attack a conviction provided he was able to satisfactorily prove that his parole was revoked solely because of the conviction. *See* Boseant v. Fitzharris, 370 F.2d 105 (9th Cir. 1966); United States *ex rel.* Gaito v. Maroney 324 F. 2d 673 (3rd Cir. 1963).

8. The first breakthrough allowing state prisoners who were seeking federal habeas corpus to attack state court convictions appeared in Brown v. Allen, 344 U.S. 443 (1953). *See also* In re Chapman, 43 Cal.2d 385, 273 P.2d 817 (1954) 52 VA. L. REV. 1, 133 (1966); 77 HARV. L. REV. 62, 140 (1963).

9. 371 U.S. 236 (1963). The Court extended the custody requirement to its outward limit by stating that a person is in restraint of his liberty if he is unable to "do those things which in this country free men are entitled to do." The Court reasoned:

> It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. 371 U.S. at 243.

The parole issued by the Virginia Parole Board is in effect placing the paroled prisoner under "the custody and control of the Virginia Parole Board." VA. CODE ANN. § 53-264. 18 U.S.C. § 4203 (1964) places the federal parolee in the "legal custody of the Attorney General." See Anderson v. Corall, 263 U.S. 193, 196 (1923) where the Court held that "while [parole] . . . is an amelioration of punishment, it is in legal effect imprisonment."

It is interesting to note that the three circuit judges whose decision was reversed by the Supreme Court in the *Jones* case were the same three who decided the *Martin* case. See 51 CALIF. L. REV. 228, 230 (1963) for a discussion of this case. A petitioner on "probation," in light of the *Jones* case, is considered to be in custody. Benson v. California, 328 F.2d 159, 162 (9th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965).

constitutes sufficient restraints upon the prisoner's liberty to allow him to attack the underlying conviction. Likewise, the Supreme Court landmark decision, *Fay v. Noia*,[10] in 1963 indicated a liberal judicial attitude toward federal post-conviction proceedings in equating custody with restraint of liberty.

These developments led to the Fourth Circuit's archetype decision in this area, *Martin v. Commonwealth of Virginia*,[11] which held that future state sentences operating to defer parole eligibility were subject to federal habeas corpus proceedings to determine their legality. The court maintained that if the future sentence was the obstacle which stood between the prisoner and immediate parole, then essentially it was the "real, effective basis" of his detention.[12] The *Martin* court, relying upon *Jones* and *Noia*, reasoned that the Supreme Court, if faced with the prematurity rule today, would reconsider its *McNally* decision.[13] More recently, in *Williams v. Peyton*,[14] the Fourth Circuit

10. 372 U.S. 391 (1963); *See* Townsend v. Sain, 372 U.S. 293 (1963); Sanders v. United States, 373 U.S. 1 (1963). For a more complete treatment, see *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 140-149 (1963).

11. 349 F.2d 781 (4th Cir. 1964). Prisoner, while serving a second degree murder sentence, escaped and committed grand larceny before his recapture. He was given an additional eight year sentence for the escape and grand larceny charges. These convictions had the effect of deferring until 1966 his parole eligibility on the sentence he was presently serving. See 52 VA. L. REV. 129 (1966); 54 GEO. L. J. 1004 (1966); 46 B.U.L.REV. 269 (1966). A more recent case in the Ninth Circuit found the court relying to some extent on the *Martin* decision, suggesting that because there was little substantive difference between parole and probation, the prisoner could attack a sentence which he had already served. The court emphasized that it has repeatedly followed *McNally* but that recent decisions have eroded its strict rule. Arketa v. Wilson, 373 F.2d 582, 584 (9th Cir. 1967).

12. 349 F.2d 781, 784 (4th Cir. 1964). *See also* Thomas v. Cunningham, 335 F.2d 67 (4th Cir. 1964).

13. *Id.* at 783. Various writers have questioned the wisdom of this conclusion that the Supreme Court would reconsider the *McNally* case. *See generally* 66 COL. L. REV. 1164, 1173 (1966); 55 GEO. L. J. 851, 862 (1967); 53 VA. L. REV. 673, 676 (1967); 54 GEO. L. J. 1004; 1006 (1966); 52 CORNELL L. Q. 149, 156 (1966). Such reasoning is also questionable in light of the 1959 decision of Heflin v. United States, 358 U.S. 415 (1959), where the writ of habeas corpus was equated with a motion to vacate under 28 U.S.C. § 2255, and the prisoner was denied the opportunity to question a sentence he has not yet served.

14. 372 F.2d 216 (1967). While petitioner was serving the first of four sentences on various robbery convictions he escaped from prison and was sentenced to another year upon recapture. Subsequently, parole was denied and he brought a habeas corpus proceeding. The Fourth Circuit maintained that the future sentence would serve to strongly influence the Parole Board's action. *See* 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); Commonwealth *ex rel.* Stevens v. Myers, 419 Pa. 1, 213 A.2d 613 (1965). In the latter case,

has logically extended the *Martin* rationale to the challenges of future sentences when the prisoner has already been eligible for parole.

The *Rowe* and *Thacker* decisions represent a further liberalization of the custody concept by the Fourth Circuit in line with its prior *Martin* and *Williams* decisions. In the two previous cases the future sentences had an effect upon the prisoner's immediate release, but now the court faced the situation where the future sentences had no present effect upon the prisoner's parole considerations. The court emphasized that the statute[15] in question does not require that the court's order be able to procure the immediate release of the prisoner but rather treated the custody concept in a "substantive and practical sense." [16] The court

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the court refused to dismiss a habeas corpus petition challenging the validity of a future sentence:

> The prematurity concept has little to recommend it except the historic lineage of the writ. 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. 213 A.2d at 622.

15. 28 U.S.C.A. § 2241 (c) states in part:

> The writ of habeas corpus shall not extend to a prisoner unless—
>
> . . .
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . .

Coupled with this, Section 2255 contains explicit requirements that the prisoner must be asserting a present right to release. The decisions of Heflin v. United States, 358 U.S. 415 (1959), and United States v. Hayman, 342 U.S. 205 (1952) point out that § 2255 is "impliedly" included in § 2241. As Judge Learned Hand stated in United States v. Bradford, 194 F.2d 197, 200 (2d Cir. 1952) *cert. denied*, 343 U.S. 979 (1952):

> [Section 2255] should be read as coextensive in substance with the writ [of habeas corpus], and as confined to amending the procedure; and it follows that in it the word 'custody' has the same meaning as in habeas corpus.

See also Sanders v. United States, 373 U.S. 1, 14 (1963); Hill v. United States, 368 U.S. 424, 427 (1962). The basic purpose of § 2255 was to minimize the difficulties found to exist in habeas corpus proceedings so as to afford these same rights in another and probably more convenient forum. Attacks upon the constitutionality of § 2255 as inadequate to satisfy U.S. CONST. art. I, § 9 have proven unsuccessful. *See* Stirone v. Markley, 345 F.2d 473 (7th Cir. 1965) *cert. denied*, 86 Sup. Ct. (1965). For a lengthy discussion of post-conviction remedies, especially sections 2241 and 2255, see Note, *Post-Conviction Remedies: The Need For Legislative Change*, 55 GEO. L. J. 761, 851 (1967); Note, *Habeas Corpus and the Prematurity Rule*, 66 COL. L. REV. 1003, 1164 (1966).

16. 383 F.2d 709, 717 (4th Cir. 1967). The Fourth Circuit admits that in a technical sense the prisoners are presently only serving one sentence, but it emphasized the effect of consecutive sentences upon one's parole eligibility. Also since Virginia considers the aggregate time imposed by the consecutive sentences as the term of imprisonment, VA. CODE ANN. § 53-251 (1967), the court felt that, in substance, each prisoner was serving each of the sentences under which he was committed. 383 F.2d 709, 718 (4th Cir. 1967). For a discussion of the prematurity rule in relation to single sentences, con-

went all the way in stating that habeas corpus was available to attack any sentence which was to be served in the future, reasoning that this extension of the *Martin* and *Williams* rulings was both logical and necessary.[17]

The basis upon which habeas corpus has stood is gradually being eroded by interpretations of the custody concept as legal fiction,[18] and through various post-conviction remedies.[19] Today, the prisoner is not confronted with the clear-cut imprisonment-freedom dichotomy but can visualize the possibilities of parole under the modern techniques of penology.[20] The court in the present case said that "justice delayed for want of a procedural, remedial device over a period of many years is, indeed, justice denied to the prisoner and, in an even larger degree, to Virginia." [21] Although the *Martin-Williams-Rowe* approach to the prematurity rule has kept attuned to modern penal concepts, complete abandonment of this custody requirement, through judicial decisions does not seem likely.[22] However, in light of reinterpretations of the

current sentences and consecutive sentences, see 52 CORNELL L. Q. 149, 151-156 (1966). An interesting highlight to this complex situation existed in Tucker v. Peyton, 357 F.2d 115, 118 (4th Cir. 1966) where the court allowed an attack upon a prior completed sentence, while the prisoner was serving a valid later sentence, reasoning that if the prior sentence was invalid it could affect the computation of the later valid sentence.

17. 383 F.2d 709, 715 (4th Cir. 1967). It is apparent from the court's opinion that it will continue to hold contra to the *McNally* case. "We will adhere to that view [*Martin-Williams-Rowe*] until the Supreme Court has an opportunity to declare what, if any, vitality that case [*McNally*] presently retains." *Id.* at 714.

18. Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965).

19. *See generally* Note, *Post-Conviction Remedies*, 55 GEO. L. J. 851, 865-877 (1967).

20. See *The Tasks of Penology: A Symposium on Prisons and Correctional Law* (3 Parts) 45 NEBR. L. REV. 1, 499, 669 (1966).

21. Rowe v. Peyton, 383 F.2d 709, 715 (4th Cir. 1967).

22. In 1941 only 134 writs of habeas corpus were filed in the federal district courts, but the figure gradually rose to a total of 4,845 applications in fiscal year 1965. A recent Senate report, however, was quick to point out that more than 95 percent of these habeas corpus applications were held to be without merit. Because additional burdens have been placed upon federal courts by habeas corpus petitions, Congress recently acted to provide a greater degree of finality of judgments in habeas corpus proceedings. An amendment to the habeas corpus statute in 1967 permits the district courts flexibility in entertaining successive applications if the writ does not state new grounds for relief. 28 U.S.C.A. § 2244, 2255 (Fed. Supp. 1967). *See* S. REP. No. 1797, 89th Cong., 2d Sess. (1966); Note, 53 VA. L. REV. 673, 699 & n. 123 (1967).

The American Bar Association Advisory Committee on Sentencing and Review recommended last year that the custody requirement can be resolved by legislative abandonment. The recommendation was as follows:

> The availability of post-conviction relief should not be dependent upon the applicant's attacking a sentence of imprisonment then being served or

standards of fairness afforded in criminal proceedings via the due process and equal protection clauses of the Fourteenth Amendment, changes in the *McNally* prematurity rule seem almost certain. While it is debatable whether the Supreme Court will go to the limits that the Fourth Circuit has gone, it is nevertheless clear that the Fourth Circuit has lighted a path which the Supreme Court may choose to follow.

Labor Law—Union Authorization Cards. In *NLRB v. S. S. Logan Packing Co.*,[1] a union had sought to organize the employees of a food packing company. The union obtained signed authorization cards from a majority of the employees and then requested a bargaining conference with the company's president. The president refused the request,[2] and the union filed charges of violations of §§ 8(a)(1)[3] and 8(a)(5)[4] of the National Labor Relations Act. The National Labor Relations Board found that the union represented a clear majority of employees and that the employer could have had no good faith doubt of this fact.[5] The

other present restraint. The right to seek relief from an invalid conviction and sentence ought to exist:

(i) even though the applicant has not yet commenced service of the challenged sentence;

(ii) even though the applicant has completely served the challenged sentence;

(iii) even though the challenged sentence did not commit the applicant to prison, but was rather a fine, probation, or suspended sentence.

ABA Standards Relating to Post-Conviction Remedies § 2.3 (Tent. Draft No. 1, 1967). It is interesting to note that Judge Sobeloff, the author of the *Martin* opinion and also sitting on this present case before the Fourth Circuit, was chairman of the ABA Advisory Committee.

1. 386 F.2d 563 (4th Cir. 1967).

2. The company also filed a formal charge of coercive practices by the union in the use of threats to obtain signatures on authorization cards. These charges were dismissed by the NLRB, but did have a bearing on Logan's good faith in withholding recognition of the union.

3. "It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . ." Labor Management Relations Act (Taft-Hartley Act) § 8(a)(1), 29 U.S.C. § 158(a)(1) (1964).

4. "It shall be an unfair labor practice for an employer—

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Labor Management Relations Act (Taft-Hartley Act) § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964). See note 6, *infra*, for § 9(a).

5. It was found that the employer could have had no good faith doubt despite the fact that four years earlier the union had claimed to represent a majority of the employees, but thereupon had lost a consent election, the validity of which is unchallenged.