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C. Ralph Kinsey Jr.

Constitutional Law—Custody Requirement for Federal Habeas Corpus

Jurisdiction of the federal courts to grant the writ of habeas corpus is available in five situations.[1] An overwhelming number of habeas corpus petitions are filed pursuant to the requirement that the petitioner be "in custody in violation of the Constitution or laws or treaties of the United States."[2] It is evident from the express wording of the statute and from judicial declaration[3] that custody is a jurisdictional prerequisite to the federal courts' power to hear and determine the constitutional claims presented in a habeas corpus petition.

The custody requirement is not limited to but can be something less than incarceration[4] and is "something more than moral restraint."[5] Outside the fact of actual incarceration, it has been held that a person released on parole,[6] or probation[7] satisfies the custody requirement. In *Jones v. Cunningham,*[8] the Supreme Court, holding that a state parolee was "in custody," equated custody with any significant restraint on a person's liberty "to do those things which in this country free men are entitled to do."[9] This decision provided the lower federal courts with a flexible formula to apply in determining whether the extent and character of a particular restraint on liberty constitutes "custody."

The United States Court of Appeals for the Fourth Circuit, sitting *en banc,* recently applied the *Jones* rationale in *Martin v. Virginia.*[10] The petitioner escaped while serving a concededly valid

[1] 28 U.S.C. 2241(c) (1964).

[2] 28 U.S.C. 2241(c)(3) (1964). Habeas corpus petitions filed by state prisoners in federal district courts increased from 1,903 to 3,531, or 85.5%, from the 1963 to the 1964 fiscal year. Henry v. Mississippi, 379 U.S. 443, 453 n.8 (1965), citing ANN REP. OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, p. 46 (1964).

[3] Fay v. Noia, 372 U.S. 391, 427 n.38 (1963).

[4] See Jones v. Cunningham, 371 U.S. 236 (1963).

[5] Wales v. Whitney, 114 U.S. 564, 571 (1885).

[6] Jones v. Cunningham, 371 U.S. 236 (1963).

[7] Benson v. California, 328 F.2d 159 (9th Cir. 1964). The present Supreme Court rule is that a person is not in custody who has been released on bail. Stallings v. Splain, 253 U.S. 339, 343 (1920). There is a split on this issue in the circuit courts. *Compare* Bates v. Bates, 141 F.2d 723 (D.C. Cir. 1944), *with* Rowland v. Arkansas, 179 F.2d 709 (8th Cir. 1950).

[8] 371 U.S. 236 (1963), noted in 51 CALIF. L. REV. 228 (1963), 17 RUTGERS L. REV. 808 (1963), 48 VA. L. REV. 112 (1963).

[9] 371 U.S. 236, 243 (1963).

[10] 349 F.2d 781 (4th Cir. 1965).

fifteen-year sentence for murder. He was subsequently convicted for escape and grand larceny and sentenced to terms of five and three years respectively. Petitioner contended that these convictions were constitutionally defective because he had been denied counsel of his own choosing and the effective assistance of court-appointed counsel. According to Virginia law, the latter sentences, in addition to the valid sentence, were to be considered in computing petitioner's parole eligibility. As a result of this rule, his parole eligibility was automatically deferred for three years. Petitioner established that the parole board would look with favor upon his parole application if the latter convictions were set aside. The court held that the petitioner was "in custody" and therefore entitled to a hearing on his petition attacking the validity of the sentences to take effect in the future.

The court expressly rejected the Supreme Court ruling in *McNally v. Hill*,[11] that habeas corpus is not available to attack a future sentence when the petitioner is serving a valid sentence. It reasoned that the decisions of *Jones v. Cunningham*[12] and *Fay v. Noia*[13] provided "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."[14]

Martin raises two distinct, but interrelated, questions with respect to the "custody" requirement. First, is the adverse effect of the second sentence upon the petitioner's parole eligibility a sufficient restraint upon his liberty to constitute custody? Second, is the attack on the second conviction premature and hence "moot" in the sense that the petitioner would still be confined under a valid conviction, even if the second conviction is set aside?[15]

In *McNally*, the Court looked to the common law and derived the rule that a sentence to be served in the future in no way affects the lawfulness of the detention under a valid first sentence and that

[11] 293 U.S. 131 (1934).
[12] 371 U.S. 236 (1963).
[13] 372 U.S. 391 (1963). See Comment, 39 N.Y.U.L. REV. 78 (1964); Comment, 42 N.C.L. REV. 352 (1964). See generally Bator, *Finality in Criminal and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961).
[14] 349 F.2d at 783-84.
[15] See SOKOL, FEDERAL HABEAS CORPUS §§ 5.3, 6 (1965).

"without restraint which is unlawful, the writ may not be used."[16] The *McNally* test for habeas corpus was one of immediate release from present physical detention, and, since a successful attack on the second sentence would not produce this result, habeas corpus was not available.[17] In *Ex Parte Hull,*[18] the Court carved out an exception to *McNally* by permitting attack on a future sentence that was the sole cause of the petitioner's parole revocation and recommitment to prison under a prior valid conviction. The Court distinguished *McNally* by reasoning that an immediate declaration of the invalidity of the second sentence would enable the petitioner to regain his former parole status, rather than to be subject to continued incarceration under a valid sentence as in *McNally.*

The *McNally* rule is firmly entrenched in federal case law,[19] and as late as 1959 the Supreme Court indicated that it still subscribes to the rule.[20] The *McNally* rule is generally considered a test of mootness in the sense that an attack on a second sentence is premature as long as there remains time to be served under a valid sentence.[21]

In *Martin,* it is clear that the court was primarily concerned with the custody requirement and did not consider the mootness problem presented by *McNally.* Relying heavily upon the *Jones* rationale, the court reasoned that the "subsequent convictions which cause the vast difference between continued confinement without eligibility for consideration for parole and conditional release are in the truest sense a present restraint upon . . . [petitioner's] liberty,"[22] and "that a denial of eligibility for parole is a 'restraint of liberty' no less substantial than the technical restraint of parole."[23]

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[16] McNally v. Hill, 293 U.S. 131, 138 (1934).

[17] The purpose of the proceeding . . . [is] to inquire into the legality of the detention, and the only judicial relief authorized . . . [is] the discharge of the prisoner or his admission to bail, and that only if his detention were found to be unlawful.

Id. at 136-37.

[18] 312 U.S. 546 (1941).

[19] *E.g.,* Holiday v. Johnston, 313 U.S. 342 (1941); Wilson v. Gray, 345 F.2d 282 (9th Cir. 1965), *cert. denied,* 34 U.S.L. WEEK 3172 (U.S. Nov. 16, 1965); Palumbo v. New Jersey, 334 F.2d 524 (3d Cir. 1964); Osborne v. Taylor, 328 F.2d 131 (10th Cir. 1964); Holland v. Gladden, 226 F. Supp. 654 (D. Ore. 1963); United States *ex rel.* Jackson v. Banmiller, 187 F. Supp. 513 (E.D. Pa. 1960).

[20] Heflin v. United States, 358 U.S. 415, 418 (1959).

[21] See SOKOL, *op. cit. supra* note 15, at § 6.

[22] 349 F.2d at 784.

[23] *Ibid.*

The *Martin* decision establishes a distinct modification of the "release from custody" test set out by the Supreme Court in *McNally*. Under the *Martin* rationale, a successful habeas corpus proceeding need only result in the petitioner's release from the restraints on his liberty, and not his immediate release from actual physical restraint. Conceptually, the restraints in *Martin* are but one form of custody, and relief from them necessarily results in a "form of discharge from custody."[24]

The total effect of this form of relief from custody is to render the petitioner eligible to be considered for parole in the same manner as he would have been had the second sentences not been imposed. There is a very strong argument that since parole is a matter of legislative grace,[25] exercised through the sole discretion of state parole boards,[26] the federal district courts should summarily dismiss habeas corpus petitions in cases such as *Martin* because there is no assurance that the petitioner will be granted parole.[27] Furthermore, the state has a viable interest in the enforcement of its penal laws and may desire to retry the petitioner. A retrial does not expose the petitioner to former jeopardy,[28] and a valid conviction effectively diminishes the petitioner's eligibility for parole. Whether or not a state elects to grant parole or to deny it or to retry the petitioner would, of course, vary from case to case depending upon the individual petitioner's record. The court anticipated this problem and recognized the possibility that future courts might limit *Martin* to its facts and require the petitioner to show that he will be favorably considered for parole. This possibility was negated

[24] Fay v. Noia, 372 U.S. 391, 427 n.38 (1963).

[25] See Jones v. Rivers, 338 F.2d 862 (4th Cir. 1964), where it was stated that "freedom, on parole from confinement in a penal institution prior to serving all of an imposed sentence, is a matter of legislative grace—it is neither a constitutionally guaranteed nor a God-given right." *Id.* at 874.

[26] The West Virginia statute illustrates this point: "The board of probation and parole, *whenever it shall be of the opinion that the best interests of the state and the prisoner will be subserved thereby,* . . . shall have authority to release any such prisoner on parole for such terms and upon such conditions as are provided by . . . [statute]." W. VA. CODE ANN. § 6291(20) (1961). (Emphasis added.)

[27] The court in *Martin* assumed that the Virginia Parole Board would not substantially penalize the petitioner for his escape. But see the VA. CODE ANN. § 53-227 (1958), which provides that "in case a prisoner attempts to escape or leaves, without permission, the State penitentiary . . . *he shall, upon being recaptured or taken, lose all his accumulated time.*" (Emphasis added.)

[28] United States v. Tateo, 377 U.S. 463 (1964).

when the court expressly stated that the principle of custody applied by it to permit attack on a future sentence was not "limited to one . . . who is able to state a strong case for parole consideration."[29]

The decision in *Martin* appears to be sound on three grounds. First, *Martin's* designation of denial of parole eligibility as custody is but a logical extension of the *Jones* formula equating parole with custody. The only difference between the restraints on liberty in the two cases is one of degree and not substance. In each case the petitioner has a distinct interest in procuring his release from custody. Second, a present attack on these convictions appears to be more practical because it lessens the possibilities that witnesses will die or move away or that the record of the case will become "cold." If the *McNally* rule had been followed in *Martin,* the second sentences could not have been attacked until they had been implemented.[30] Third, the rationale of *Martin* is in harmony with the trend of the Supreme Court's progressive motions[31] as to the scope and purpose of habeas corpus to protect "individuals against erosion of their right to be free from wrongful restraints upon their liberty."[32]

It is implicit in the *Martin* decision that the Fourth Circuit recognizes the importance of parole, in contrast to continued confinement, as a means of rehabilitating a prisoner, and that the possibility of his being extended the privilege of parole is a protectable interest of the petitioner who is being denied it because of an invalid future sentence. Whether the states,[33] in the administration of their post-conviction procedures, the other circuits,[34] or the Supreme

[29] 349 F.2d at 784.

[30] See SOKOL, *op. cit. supra* note 15, at § 6.

[31] See Sanders v. United States, 373 U.S. 1 (1963); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Jones v. Cunningham, 371 U.S. 236 (1963).

[32] Jones v. Cunningham, 371 U.S. 236, 243 (1963).

[33] The states of New York, Oregon, and Maryland presently permit an attack on a sentence to be served in the future. 349 F.2d at 784 n.2. It is reasonable to infer from the very broad language of the North Carolina post-conviction statute that it is permissible to attack a sentence to be served in the future. N.C. GEN. STAT. § 15-217 (1965). See Note, 44 N.C.L. REV. 153 (1965).

[34] *But see* Wilson v. Gray, 345 F.2d 282 (9th Cir. 1965), *cert. denied,* 34 U.S.L. WEEK 3172 (U.S. Nov. 16, 1965), where the petitioner was denied relief under the *McNally* and *Hull* rules. However this case is distinguishable from *Martin* in that the immediate invalidation of the second sentence would not have entitled petitioner to immediate release from incarceration, nor would it have rendered him eligible for parole.

Court follow the lead in *Martin* is yet to be seen. It is hoped that neither the technical requirement of *McNally* that petitioner be released from physical custody, nor the states' discretionary power to deny parole or retry petitioner, will be utilized as a jurisdictional barrier to prevent federal district courts from determining the validity of sentences to be served in the future.

C. RALPH KINSEY, JR.

Corporations—"Profit Realized" In Section 16(b)—Insider Transactions

Gamble-Skogmo, Inc., owner of more than ten per cent of the stock of the plaintiff corporation, bought 32,000 additional shares for a Gamble-Skogmo employees' trust fund.[1] Only 25,942 of those shares were transferred to the fund, however, and the remaining shares were retained by the purchaser. Within six months of this purchase, Gamble-Skogmo sold[2] all of its stock in the plaintiff except that held by the trust fund. Plaintiff sought recovery of Gamble-Skogmo's "profits" on all 32,000 shares under section 16(b) of the Securities Exchange Act of 1934.[3] Only the profit made on the 6,058 retained shares was paid, and plaintiff sued for the profits[4] that would have been realized had the 25,942 shares in the trust fund been included in the short-swing transaction. The district

[1] Gamble-Skogmo was not required to make its contribution to the trust fund in Western Auto stock, or in any other stock for that matter. Western Auto Supply Co. v. Gamble-Skogmo, Inc., 348 F.2d 736, 738 (8th Cir. 1965), *cert. denied*, 382 U.S. 987 (1966).

[2] The sale was pursuant to an antitrust consent decree. United States v. Gamble-Skogmo, Inc., Civil No. 12776, W.D. Mo., July 18, 1960.

[3] 48 Stat. 896 (1934), 15 U.S.C. § 78p(b) (1964). See 44 N.C.L. REV. 835 n.3 (1966) for the full text of the statute. See generally 2 Loss, SECURITIES REGULATIONS 1040-90 (2d ed. 1961); Cole, *Insiders' Liabilities Under the Securities Exchange Act of 1934*, 12 SW. L.J. 147 (1958); Cook & Feldman, *Insider Trading Under the Eecurities Exchange Act* (pts. 1 & 2), 66 HARV. L. REV. 385, 612 (1963); Painter, *The Evolving Role of Section 16(b)*, 62 MICH. L. REV. 649 (1964); Rubin & Feldman, *Statutory Inhibitions Upon Unfair Use of Corporate Information by Insiders*, 95 U. PA. L. REV. 468 (1947). At the time their articles were written, Mr. Cook was Chairman, and Mr. Feldman, Special Council, of the Securities and Exchange Commission, though they did not purport to be speaking on behalf of the Commission.

[4] The profit was calculated at $3.65 per share, a total of $116,800.00, based on the difference between the price per share paid for the 32,000 shares and the price per share received when all 1,262,102 shares were sold. Also, two dividends of $.35 per share, paid on the stock before the short-swing sale, were included.