North Dakota Law Review

Volume 44 | Number 3 Article 6

1968

Criminal Law - Habeas Corpus - Device to Attack Future Sentences Not Presently Affecting a Prisoner's Considerations for Parole

Peder Anderson

How does access to this work benefit you? Let us know!

Follow this and additional works at: https://commons.und.edu/ndlr

 Part of the Law Commons

Recommended Citation
Anderson, Peder (1968) "Criminal Law - Habeas Corpus - Device to Attack Future Sentences Not Presently Affecting a Prisoner's Considerations for Parole," *North Dakota Law Review*: Vol. 44: No. 3, Article 6.
Available at: https://commons.und.edu/ndlr/vol44/iss3/6

This Case Comment is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.commons@library.und.edu.

RECENT CASES

CRIMINAL LAW—HABEAS CORPUS—DEVICE TO ATTACK FUTURE SENTENCES NOT PRESENTLY AFFECTING A PRISONER'S CONSIDERATIONS FOR PAROLE—A prisoner of the Virginia State Penitentiary who is presently serving a number of sentences imposed upon him in 1953 sought to attack three of these sentences which were scheduled to commence in 1994, on the basis of inadequate representation by his trial counsel at the time of his convictions. The future sentences did not have any present effect upon the prisoner's parole eligibility date. The state of Virginia conceded the fact that the prisoner's petition sufficiently stated a constitutional claim but rejected the petition on the procedural ground that it was filed prematurely. The United States Court of Appeals for the Fourth Circuit *held* that the federal writ of habeas corpus was available to attack allegedly unconstitutional state sentences to be served in the future even though the sentences had no present effect upon consideration of prisoners for parole. *Rowe v. Peyton*,[1] 383 F.2d 709 (4th Cir. 1967), *cert. granted*, 36 U.S.L.W. 3290 (U.S. Jan. 15, 1968) (No. 802).

This new approach taken by the Court of Appeals for the Fourth Circuit represents a clear inconsistency with the decision of the United States Supreme Court in *McNally v. Hill*.[2] The *McNally* decision adopted the historical common law conception of habeas corpus and declared that the writ was premature and unavailable to question the legality of a sentence unless the court's order would procure the prisoner's immediate release if he prevailed at his hearing. The Court of Appeals thought itself justified in departing from the McNally Rule by intimating that various cases[3] decided by the Supreme Court since *McNally* had so eroded the holding in that case, without specifically overruling it, that the case was no longer of controlling authority. The court stated that it would

1. A companion case was decided under the same decision; both actions sought habeas corpus relief on substantially the same grounds. The above factual situation is second of the two cases considered in the court's opinion. It was chosen over the first case because it represents the broad approach a court has taken in extending the scope of the writ of habeas corpus.

2. 293 U.S. 131 (1934).

3. Fay v. Noia, *infra* note 7; Brown v. Allen, 344 U.S. 443 (1953); Frank v. Mangum 237 U.S. 309 (1915).

adhere to its own view until the Supreme Court had an opportunity to declare what, if any, vitality the *McNally* case retained.

The prematurity doctrine adopted by the Supreme Court in 1934 in *McNally v. Hill*[4] stands today tarnished but not yet overruled. In the more recent case of *Jones v. Cunningham*,[5] the Supreme Court liberalized the doctrine without directly undermining the rationale of *McNally*. The Court stated that the status of being on parole constituted a sufficient restraint on the liberty of a prisoner to permit him to attack the underlying conviction. A view as to the Court's position in regard to the writ of habeas corpus was expressed in its opinion, where it stated:

> 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.[6]

The leading case on this subject is *Fay v. Noia*[7] where the question of federal habeas corpus jurisdiction under 28 U.S.C. § 2241 was discussed regarding its applicability to state criminal justice. The scope of the Great Writ was expanded further in this case from the *Jones v. Cunningham* decision by giving the federal courts power under the federal statute to grant relief despite the applicant's failure to pursue a state remedy not available to him at the time he applied for the writ. The Fourth Circuit also had, prior to *Rowe v. Peyton*, decided two cases which expanded the holding in *McNally*.[8]

The above decisions exemplify various attempts by the courts to make the writ of habeas corpus serve as an adequate post-conviction remedy for prisoners serving a valid sentence, but wishing to attack an allegedly illegal future sentence.

The remedies presently available to a prisoner, other than the writ of habeas corpus, include: Rule 35 of the Federal Rules of Criminal Procedure, coram nobis, mandamus, declaratory judgment and 28 U.S.C. § 2255. Section 2255[9] was enacted in 1948 to

---

4. McNally v. Hill, *supra* note 2.
5. 371 U.S. 236 (1963).
6. *Id.* at 243.
7. 372 U.S. 391 (1963). In support of its opinion the Court said: "Only two Terms ago this Court had occasion to reaffirm the high place of the writ in our jurisprudence: 'We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired,' *Bowen v. Johnston*, 306 U.S. 19, 26 (1939), and unsuspended, save only in the cases specified in our Constitution.' *Smith v. Bennett*, 365 U.S. 708, 713." *Id.* at 400.
8. Williams v. Peyton, 372 F.2d 216 (4th Cir. 1967); Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965). Unlike the instant case, the future sentences under attack in the *Martin* and *Williams* cases had an immediate inhibiting effect upon the petitioner's chances of obtaining a conditional release on parole.
9. The relevant clause in 28 U.S.C. § 2255 provides: "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released

"provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined."[10] In practice, the Supreme Court has treated §2255 as essentially equivalent to a writ of habeas corpus, postulating that the sole purpose of § 2255 "was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum."[11] In considering the jurisdictional question of whether or not a motion under §2255 was available to question the legality of a future sentence, the Supreme Court in *Heflin v. United States*[12] held that such a motion could not be entertained. The statement in the federal habeas corpus statute providing that "[a] motion for such relief may be made at any time" was interpreted to mean only that "as in habeas corpus, there is no statute of limitations, no res judicata, and the doctrine of laches is inapplicable."[13] The federal courts have followed the Supreme Court's interpretation of §2255 and thus have limited the use of the motion to attack only sentences where a prisoner is in custody and is claiming the right to be released.[14]

Rule 35 of the Federal Rules of Criminal Procedure provides in part: "[t]he court may correct an illegal sentence at any time. . . ." The rule is applicable to those sentences that the judgment of conviction did not authorize.[15] In comparison, §2255 covers the broader field of collateral attack upon the validity of a conviction by reason of matter dehors the record.[16] As a result of *Heflin*, Rule 35 appears to be available to prisoners who wish to attack sentences in the future, but only in instances where the sentences being attacked are illegal on their face.[17] Rule 35 alleviates, to some extent, the problems associated with the *McNally* decision, but it still lacks the scope necessary to become an appropriate remedy in all prematurity situations.

The ancient writ of coram nobis was confirmed in *United States v. Morgan*[18] as an effective remedy to permit a prisoner to attack a federal conviction that he had fully served. This, in effect, cir-

---

upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. A motion for such relief may be made at any time."

10. United States v. Hill, 368 U.S. 424, 427 (1962).
11. United States v. Hayman, 342 U.S. 205, 219 (1952).
12. 358 U.S. 415 (1959).
13. *Id.* at 420 (concurring opinion).
14. Johnson v. United States, 344 F.2d 401 (5th Cir. 1965); Scarponi v. United States, 313 F.2d 950 (10th Cir. 1963); Bayless v. United States, 288 F.2d 794 (9th Cir. 1961), *cert. denied*, 366 U.S. 971 (1961).
15. United States v. Morgan, 346 U.S. 502, 505-06 (1954).
16. United States v. Hayman, *supra* note 11, at 211-13.
17. Heflin v. United States, *supra* note 12.
18. United States v. Morgan, 346 U.S. 502 (1951).

cumvented the custody requirements of habeas corpus and §2255. Furthermore, a number of cases have allowed the use of coram nobis to challenge a future sentence not open for question under habeas corpus.[19] The Fourth Circuit in *Mathis v. United States*[20] carried this approach one step further by not requiring the showing of present imposition as a prerequisite to granting coram nobis relief. Several drawbacks make the writ inapplicable as an all-inclusive remedy. The theory of the writ is to petition the sentencing court to correct its own error and, therefore, federal courts can grant coram nobis only to attack conviction for federal crimes.[21] A state writ of coram nobis is also available to state prisoners as a remedy for illegal convictions in a state court.[22] The scope of the writ of coram nobis has been narrowly construed by the courts and as a result it has been denied in some cases to prisoners who failed to seek timely relief under the writ.[23] The United States Supreme Court has stated that the writ can only be available to correct errors in fact as opposed to those of law and then only those errors "of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid."[24] These substantive limitations make the writ of coram nobis unavailable to many prisoners who fall within one of the above restrictions.

The prisoner's purpose in seeking a writ of habeas corpus in *McNally* was to establish his eligibility for parole. The Supreme Court thought that might be done by a petition for mandamus instead of habeas corpus, in order to require the parole board to entertain a petition for parole.[25] Although a parole board might be compelled under mandamus to consider a petition for parole, it would not be a sufficient remedy since the board would still be vested with the discretion to determine when the prisoner should be entitled to parole.[26] As a practical matter, the continued existence of an allegedly void consecutive sentence would probably result in a board decision to postpone parole eligibility.[27]

The Circuit Court of Appeals in the *Rowe* case[28] considered briefly the applicability of an alternative contention made by the

19. *E.g.*, Johnson v. United States, *supra* note 14; Thomas v. United States 271 F.2d 500 (D.C. Cir. 1959); Williams v. United States, 267 F.2d 559 (10th Cir. 1959), *cert. denied*, 361 U.S. 867 (1959).
20. 369 F.2d 43 (4th Cir. 1966).
21. Thomas v. Cunningham, 335 F.2d 67 (4th Cir. 1964). The jurisdiction to entertain the federal writ of coram nobis is conferred by 28 U.S.C. § 1651(a).
22. United States v. Morgan, *supra* note 18, at 507.
23. Kiger v. United States, 315 F.2d 778, 779 (7th Cir. 1963), *cert. denied*, 375 U.S. 924 (1963); United States v. Moore, 166 F.2d 102 (7th Cir. 1948), *cert. denied*, 334 U.S. 849 (1948). These cases refused an application for the writ under the doctrine of laches.
24. United States v. Morgan, *supra* note 18, at 509 n. 15 (quoting United States v. Mayer, 235 U.S. 55, 69 (1914)).
25. McNally v. Hill, 293 U.S. 131, 140 (1934).
26. *Cf.* Sturm v. McGrath, 177 F.2d 472 (10th Cir. 1949).
27. *See* Hibdon v. United States, 204 F.2d 834, 839 (1953).
28. Rowe v. Peyton, 383 F.2d 709, 719 (4th Cir. 1967), *cert. granted*, 36 U.S.L.W.

prisoner; that a remedy was available under a declaratory judgment. The court dismissed this request since it reached the conclusion that habeas corpus was available to the prisoners. Under the Federal Declaratory Judgment Act a prisoner can establish his parole eligibility through a declaration of the invalidity of a concurrent or consecutive sentence.[29] State[30] and federal[31] courts have not, however, given favorable acceptance to this remedy as a means of relief when other remedies were available to a prisoner.

It is apparent after a review of the above remedies that one factor remains common to them all. This factor is the inability to provide a satisfactory relief for a prisoner wishing to attack a future sentence which is unconstitutional, but is not presently effecting his parole considerations. This inherent weakness explains why the Fourth Circuit's decision in the present case chose the writ of habeas corpus as the proper method to provide the underlying judicial determination to claims of constitutional deprivation. The rationale used by the court points out the problems that arise when a prisoner is compelled to wait until a valid sentence is completed and a future sentence begins to have an impact upon his being considered for parole in order to satisfy the custody language of 28 U.S.C. §2241.[32] First, the time lapse from the date of the prisoner's conviction to the time when he can at last contest the future sentence would dim the memories of officials and witnesses who may be the only hope the prisoner has to substantiate his claim. Secondly, the inability to reproduce various records at a later date would also reduce the likelihood of the truth of the matter being established. Third, the state, as well as the prisoner, would be placed at a disadvantage since eventually when the prisoner is able to request that the writ of habeas corpus be granted

---

3290 (U.S. Jan. 15, 1968) (No. 802).

29. 28 U.S.C. § 2201.

30. Forsythe v. Ohio, 333 F.2d 678 (6th Cir. 1964); Waldon v. Iowa, 323 F.2d 852 (8th Cir. 1963).

31. Gajewski v. United States, 368 F.2d 533 (8th Cir. 1966), *cert. denied,* 386 U.S. 913 (1967); Hurley v. Lindsay, 207 F.2d 410, 411 (4th Cir. 1953). The court in *Hurley* said the primary purpose of the Declaratory Judgment Act was to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated have been properly adjudicated.

32. 28 U.S.C. § 2241(c): The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

the burden is then placed upon the state to re-establish the validity of the conviction being attacked.

In a technical sense, a prisoner serving consecutive terms is only serving one of them at any given time. By taking a more practical approach, it would seem that each of the separate sentences comprises a part of the prisoner's total commitment and substantively governs his ultimate release whether by parole or by sentence service.[33] The determination of which sentence or sentences a prisoner is to serve first is usually accomplished by an administrative process which is in some instances subject to variation and adjustment. In certain circumstances the terms may be designated to be served in the inverse order of their convictions.[34] In this respect it is only in a highly technical sense that a prisoner may be said to not be serving the sentence he seeks to attack.

The concern over the effects of broadening or expanding the application of the writ of habeas corpus was expressed by Justice Clark in his dissenting opinion in *Fay v. Noia*.[35] It deserves mention at this point for it would not be proper to leave this discussion by conveying solely the impression that by liberalizing the scope of habeas corpus, all problems associated therein will be solved. Justice Clark, in dissent, stated that to allow habeas corpus to be granted to prisoners who knowingly failed to perfect state remedies before they requested federal habeas corpus would close "the doors of justice in the face of the State." He foresaw two unfavorable consequences resulting from the marjoity's opinion:

> 1) that prisoners would flood the courts with frivolous applications which would prevent the already overburdened courts from giving the proper attention to those claims which deserved consideration; and
>
> 2) that the state courts would receive a staggering blow as a result of the federal court's ability to collaterally attack a state conviction at any time, disrupting the orderly disposition of state court prosecutions in disregard of the state's comprehensive procedural safeguards which had always been respected by the federal courts.

Although the burden of habeas corpus petitions is increasing upon the federal courts to some extent, the writ nevertheless is in many instances the last hope of a prisoner who may be illegally detained.

33. Jones v. Cunningham, 371 U.S. 236, 240 (1963); Thomas v. Cunningham, 335 F.2d 67 (4th Cir. 1964). In *Jones v. Cunningham* the Court recognized the fact 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." *Id.*

34. Rowe v. Peyton, *supra* note 28, at 717-18.

35. 372 U.S. 391, 445 (1963).

This should be reason enough to provide him with the habeas corpus remedy to insure that his individual rights are fully protected.

Courts should consider giving a liberal interpretation to the custody requirement of the Great Writ in recognition of the fact that the range of modern penal sanctions encompasses many restraints on a person's liberty which are more subtle than a plain physical confinement, yet serve essentially the same functions. The writ of habeas corpus is not a creature of the legislature, but a device fashioned by the courts to protect and extend their own jurisdiction. It should not require legislative reform before it can become a viable remedy for those citizens who are victims of illegal restraint. This is particularly true at a time when rapid expansion of the meaning of the due process and equal protection clauses of the Fourteenth Amendment is being made. In this respect the writ of habeas corpus commands general recognition as the essential remedy to safeguard a citizen against unjust imprisonment by state or federal government in violation of his constitutional rights.

PEDER ANDERSON

USURY—INTEREST AFTER MATURITY--APPLICABILITY OF USURY STATUTE—Defendant executed and delivered a promissory note to the Republic Supply Company in August 1962. The note called for repayment of the principal in five installments with interest on each installment at the rate of seven percent per annum. In the event of default in any payment of principal or interest, the note specified interest thereon at the highest legal rate permitted by contract under state law, but in no event in excess of ten percent per annum, from the date of default until paid. In February, 1965, when the entire note was in default, Republic assigned it to the plaintiff. The plaintiff sued to collect the note and defendant contended that the clause in the note which provided for a possible higher rate after maturity than the lawful rate in North Dakota made the note usurious. The trial court held that the provision called for greater interest after maturity than before and was void, and that after maturity the note drew interest at the legal rate of four percent. Defendants appealed, specifying as error the trial court's failure to apply the penalty for usury by forfeiting all of the interest and one fourth of the principal as provided by Section 47-14-10 of the North Dakota Century Code. The North Dakota Supreme Court *held* that the usury statute applied only to interest before maturity