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Habeas Corpus in Extradition Proceedings Involving Escaped Convicts

In *Johnson* v. *Dye*,[1] the United States Court of Appeals for the Third Circuit freed a convicted murderer, held for extradition in Pennsylvania, on the ground that while serving his sentence in Georgia, he had been subjected to cruel and unusual punishment in violation of the due process clause of the Fourteenth Amendment.[2] Thus the Court of Appeals sought to enforce its conclusion that, like those principles of the First and Fourth Amendments also included in the concept of due process,[3] that principle of the Eighth Amendment[4] which forbids cruel and unusual punishment by the federal government is "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[5] The Supreme Court, however, has postponed divulging its opinion on this Constitutional question by curtly reversing the Court of Appeals on the procedural ground of failure to exhaust state remedies.[6] Nevertheless, it is very likely that some day the Supreme Court will have to determine the status of cruel and unusual punishments in relation to the Fourteenth Amendment. Habeas corpus petitions on this ground are numerous, and already a district court has freed an Alabama fugitive on the authority of the Court of Appeals decision in the *Johnson* case.[7]

The *Johnson* case arose upon a petition for habeas corpus. Petitioner Johnson had been convicted of murder by a Georgia court, and sentenced to life imprisonment in 1943. He escaped from a chain gang a few months later and came to Pennsylvania, where he was arrested upon demand by the Governor of Georgia for his extradition. While in the Allegheny County jail, Johnson petitioned the Court of Common Pleas for a writ of habeas corpus. The writ was discharged and judgment affirmed on appeal to the Superior Court of Pennsylvania.[8] Johnson sought no further review, but petitioned the Federal District Court for a writ of habeas corpus[9] asserting *inter alia* that following his conviction he was "committed to a chain-gang . . . and was the victim of cruel, barbaric and inhuman treatment at the hands of his jailors to the extent that his life and health were in grave jeopardy."[10] The District Court

1 175 F. (2d) 250 (C.A. 3d 1949).

2 U.S. Const. Amend. XIV §1: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . ."

3 DeJonge v. Oregon, 299 U.S. 353 (1937), Herndon v. Lowry, 301 U.S. 242 (1937) (freedom of speech and assembly); Grosjean v. American Press Co., 297 U.S. 233 (1936); Near v. Minnesota, 283 U.S. 697 (1931) (freedom of press); Hamilton v. Regents, 293 U.S. 245 (1934); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (freedom of religion); Wolf v. Colorado, 338 U.S. 25 (1949) (freedom from unreasonable search and seizure).

4 U.S. Const. Amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

5 Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Palko v. Connecticut, 302 U.S. 319, 325 (1937).

6 18 U.S. Law Week, 3148 (1949); See text at note 19, *infra*.

7 Harper v. Wall, 85 F. Supp. 783 (D.C. N.J. 1949).

8 Commonwealth *ex rel.* Johnson v. Dye, 159 Pa. Super. 542, 49 A. (2d) 195 (1946).

9 Johnson v. Dye, 71 F. Supp. 262 (W.D. Pa. 1947).

10 Johnson's petition, Johnson v. Dye, 175 F. (2d) 250, 252 (C.A. 3d 1949). Johnson also alleged that his constitutional rights had been violated at his trial for murder in Georgia in that several witnesses who testified against him did so under police compulsion, and that, if returned to Georgia, he feared death by mob violence or at the hands of his jailors. The District Court found no evidence to support the former allegation (a finding criticized by the Court of Appeals since there had been Johnson's testimony in support of the allegation), and it found no credible evidence

found evidence that Johnson had received cruel treatment after his conviction and while he was serving his sentence, but concluded that such treatment would not entitle him to his liberty as it did not constitute a custody in violation of the Constitution or laws of the United States,[11] and that the Eighth Amendment was not a limitation upon the states.[12] Without considering the other issues raised by the petition, the majority in the Court of Appeals reversed the District Court and freed Johnson on the ground that he had been subjected to cruel and unusual punishment while on the chain-gang. The Court of Appeals entertained "no doubt that the Fourteenth Amendment prohibits the infliction of cruel and unusual punishment by a state,"[13] citing *Francis* v. *Resweber*.[14]

The Court of Appeals seems to indicate that it considers any punishment which would violate the Eighth Amendment when inflicted by the federal government a violation of the Fourteenth Amendment when inflicted by a state. On the contrary, the three opinions written in *Francis* v. *Resweber* contain language from which it would follow that the Supreme Court has not committed itself to that position,[15] but rather

to support the latter allegation. The Court of Appeals did not resolve the questions raised by these two allegations.

11 Citing Rev. Stat. §1741 (1908), the relevant part of which provided: "The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States . . ." This provision was repealed and substantially repassed in 1948. See new Judicial Code, Judiciary and Judicial Procedure, 28 U.S. Code Cong. Serv. (June 25, 1948) §2241.

12 Citing Collins v. Johnston, 237 U.S. 502, 510-511 (1915).

13 Johnson v. Dye, 175 F. (2d) 250, 255 (C.A. 3d 1949).

14 329 U.S. 459 (1947). There the petitioner, sentenced to execution for murder, was placed in the electric chair and the switch thrown. Due to a mechanical defect in the chair, he did not die. It was uncertain whether he had received any electrical shock at all. In a five to four decision, the Supreme Court decided that it would not violate any provision of the Constitution to put the petitioner in the electric chair again and carry out the sentence.

15 Mr. Justice Reed, speaking for himself and three other justices, said in Francis v. Resweber, 329 U.S. 459, 462 (1947): "To determine whether or not the execution of the petitioner may fairly take place after the experience through which he passed, we shall examine the circumstances under the assumption, but without so deciding, that violation of the principles of the Fifth and Eighth Amendments, as to double jeopardy and cruel and unusual punishment, would be violative of the due process clause of the Fourteenth Amendment." As a positive indication that the Court intends to consider each cruel and unusual punishment individually in the light of due process, Mr. Justice Reed said at page 463: "The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner."

Mr. Justice Frankfurter, concurring, said at pages 469 and 470: "Again, a state may be found to deny a person due process by treating even one guilty of crime in a manner that violates standards of decency more or less universally accepted though not when it treats him by a mode about which opinion is fairly divided. But the penological policy of a state is not to be tested by the scope of the Eighth Amendment and is not involved in the controversy which is necessarily evoked by that Amendment as to the historic meaning of 'cruel and unusual punishment.'"

Mr. Justice Burton, speaking for the four dissenting justices, said at page 477: "In determining whether a case of cruel and unusual punishment constitutes a violation of due process of law, each case must turn upon its particular facts."

It should, however, be here noted that three of the justices who concurred in the dissent, and one who concurred with the majority have since stated their view to be that the Fourteenth Amendment was intended to make the first eight amendments applicable to the states. Black, J., dissenting in Adamson v. California, 332 U.S. 46, 68, 123 (1947).

that it means to treat cruel and unusual punishment as it has treated double jeopardy in *Palko* v. *Connecticut*.[16] That is, punishment which would be cruel and unusual in violation of the Eighth Amendment might or might not be unconstitutional when subjected to the test of due process. On this basis, the bare finding by the Court of Appeals that Johnson received cruel and unusual punishment would not alone support the conclusion that the state of Georgia deprived Johnson of due process of law. Rather, an examination of the specific indignities inflicted upon Johnson would be required,[17] and a finding that they were irreconcilable with those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" would be necessary.[18]

Conceding, however, that some cruel and unusual punishment at least is banned by the Fourteenth Amendment, and assuming that the punishment inflicted upon Johnson was of such a nature, the serious question of remedy arises in two aspects: first, the issue on which the Supreme Court reversed the Court of Appeals, whether Johnson properly directed his petition for habeas corpus to the federal courts before having exhausted state remedies, and, second, whether in an extradition proceeding habeas corpus is a proper remedy where the prisoner is claiming that he has been denied due process in the demanding state.

The Supreme Court did not comment in reversing the Court of Appeals except to cite *Ex parte Hawk*.[19] This ruling must be taken to mean that in extradition cases the federal courts will not grant habeas corpus until state remedies are exhausted. The Court of Appeals had sought to avoid the mandate of *Ex parte Hawk* on the theory that the doctrine of exhaustion of state remedies in habeas corpus cases does not apply to extradition proceedings because the fugitive is held under color of authority derived from the Constitution and laws of the United States.[20]

16 302 U.S. 319 (1937). By the law of Connecticut, the state could appeal the decision in a criminal case, and, if successful, retry the defendant. Although this procedure was forbidden to the Federal government by the "double jeopardy" clause of the Fifth Amendment, it was held to be permissible when practiced by a state. The Court indicated, however, that some other kinds of double jeopardy may be forbidden to the states by the Federal Constitution.

17 The Court of Appeals, having concluded, apparently, that the punishments prohibited by a cruel and unusual punishment clause are conterminous with those prohibited by a due process clause, noted only that leg-irons and most frequent beatings were among the minor constant cruelties. Not so long ago in some states, a sentence of whipping was held not to violate a constitutional provision against cruel and unusual punishment. Commonwealth v. Wyatt, 6 Rand. 694 (Va. 1828); Foote v. State, 59 Md. 264 (1883). In view of this history, query whether a prohibition against beating is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." See note 5 *supra*.

18 Hebert v. Louisiana, 272 U.S. 312, 316 (1926); Palko v. Connecticut, 302 U.S. 319, 328 (1937).

19 321 U. S. 114 (1944). At page 116, the Court there said, "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all the state remedies available, including all appellate remedies in the state courts and [in the United States Supreme Court] by appeal or writ of certiorari, have been exhausted." It should be noted that the rule has recently been liberalized to preclude the absolute necessity of petition to the United States Supreme Court after the highest state court has rendered a decision on the merits. Wade v. Mayo, 334 U. S. 672 (1948).

20 U. S. Const. Art. IV, §2, clause 2: "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the Executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." The constitutional provision is executed by statute. See new Criminal Code, Crimes and Criminal Procedure, 18 U. S. Code Cong. Serv. (June 25, 1948) §3182.

Whether or not to apply the rule under these circumstances had given rise to a split of authority in the federal courts.[21] The split, however, was not based on disagreement as to the power of the federal courts to grant habeas corpus to any prisoner held in violation of his constitutional rights. The power is given by statute.[22] Rather, the consideration is one of comity between the federal and state governments. It reflects a reluctance on the part of the federal courts to interfere with state processes before a prisoner has attempted to utilize all the remedies afforded to him by the state.[23]

The reason for the rule requiring exhaustion of state remedies would seem to be as cogent in extradition proceedings as in any other habeas corpus cases. Conceding that both the authority and the mandate to extradite fugitives from one state to another flow from the Constitution and laws of the United States,[24] nevertheless the extradition process itself depends completely upon state initiative and state action. The federal government cannot enforce the Constitutional mandate; hence the duty of a state to extradite a fugitive is a moral one only, resting entirely "on the fidelity of the State Executive to the compact entered into with the other states . . ."[25] The fugitive, moreover, is held in state rather than federal custody, and the courts of the state clearly have jurisdiction over the prisoner if he seeks their aid. All things considered, the holding of a fugitive for extradition bears so many of the characteristics of a holding under color of state rather than federal authority that the exhaustion rule would seem to be applicable. Since it is, however, only a rule of comity, it could still be waived by the federal courts under the same circumstances that they will waive it in any case, *i.e.*, "whenever necessary to prevent an unjust and illegal deprivation of human liberty."[26]

The second aspect of the remedy problem involves the propriety of the consideration by any court in an asylum state of due process questions in a habeas corpus proceeding. The dissenting judge in the Court of Appeals demonstrated his position with respect to this issue by supposing the case of two prisoners, X and Y, denied due process at their trial. After conviction, X escapes from prison in the jurisdiction in which he was convicted. On the authority of the Court of Appeals opinion in *Johnson* v. *Dye*, a court in an asylum state where X was apprehended would seem to be justified in freeing X unconditionally because he had been denied a fundamental constitutional right. Y, on the other hand, appeals in the state where he was convicted and obtains a reversal of the conviction. Y must then stand trial again. Clearly the result is incongruous and would seem to place a premium on jailbreaking. Moreover, to give the escaped prisoner a due process hearing in the asylum state

21 *Compare* Kauffman v. Mount, 131 F. (2d) 112 (C. A. 5th 1942) and Lyon v. Harkness, 151 F. (2d) 731 (C. A. 1st 1945), *cert. denied*, 327 U. S. 782 (1946), *with* Roberts v. Reilly, 116 U. S. 80 (1885), Marbles v. Creecy, 215 U. S. 63 (1909); *Ex parte* Dawson, 83 Fed. 306 (C. A. 8th 1897), *cert. denied*, 170 U.S. 705 (1898), and U. S. *ex rel.* Darcy v. Superintendent of County Prisons, 111 F. (2d) 409, (C. A. 3d 1940), *cert denied*, 311 U.S. 662 (1940). In the latter cases the federal court in each instance heard the petition on the merits with no specific consideration of the doctrine of exhaustion of state remedies.

22 New Judicial Code, Judiciary and Judicial Procedure, 28 U. S. Code Cong. Serv. (June 25, 1948) §2241.

23 Wade v. Mayo, 334 U. S. 672 (1948).

24 See note 20 *supra*.

25 Kentucky v. Dennison, 65 U. S. 66, 109 (1861).

26 Wade v. Mayo, 334 U. S. 672, 681 (1948).

presents the practical difficulty of marshaling evidence since the question would be adjudicated in a forum far removed from the scene of the events.[27] Add to the hypothetical case, however, the probability that upon retrial the defendants would again be deprived of their constitutional rights, and the dissenting judge would grant the propriety of intervention by a foreign court.

The facts of *Johnson* v. *Dye* present a slightly varied problem. The cruel and unusual punishment suffered by Johnson resulted not from an erroneous trial court judgment which a new trial could correct, but from unlawful acts of state penal officers subsequent to trial. Just as the dissenting judge would not intervene in the former case unless it were shown that the error would not be corrected upon retrial, so he would not interfere in the latter unless it appeared that Johnson would suffer further cruel and unusual punishment upon his return to Georgia.

The propriety of intervention in the latter case ought, perhaps, to depend not only on the likelihood that Johnson would again be subjected to cruel and unusual punishment, but also on the seriousness of the bodily harm he might suffer and the availability to him of preventive remedies in Georgia. If it should appear, first, that the treatment awaiting Johnson were not such as to place him in imminent danger of serious or permanent bodily harm, and secondly, that the Georgia prison officials would not deprive him of access to the courts, then it would seem he might properly be returned to Georgia to seek his remedy.

The circumstances appear to present a proper case for use of the federal court injunction against the prison authorities. The Civil Rights Act specifically provides for suits in equity in federal district courts against persons acting under color of state law.[28] That exercise of this equity jurisdiction is justified would seem to follow from the fact that maltreatment of Johnson was repeated, and, if continued, could result in irreparable injury. In *Hague* v. *Committee for Industrial Organiza-*

[27] At Johnson's hearing in Pennsylvania, all of Johnson's witnesses except one were escaped convicts from Georgia who happened to be lodged in the Allegheny County jail. The remaining witness was a former officer in the Army who had spent a portion of his service in Georgia and who was then confined in the Allegheny County jail. None of these could testify as to the punishment actually inflicted upon Johnson, but only as to the treatment of chain-gang prisoners in general.

[28] Rev. Stat. §7905 (1908), 8 USCA §43 (1942): "Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The new Judicial Code, Judiciary and Judicial Procedure, 28 U. S. Code Cong. Serv. (June 25, 1948) §1343, gives jurisdiction over such suits to the federal district courts.

While an action for damages could be maintained under the statute against the prison guards, they are likely to be judgment proof. Moreover the threat of jail for violation of an injunction would be more of a deterrent to future maltreatment.

The new Criminal Code, Crimes and Criminal Procedure, 18 U. S. Code Cong. Serv. (June 25, 1948) §242 provides criminal penalties for anyone who, "under color of any law . . . or custom, willfully subjects any inhabitant . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . ." The difficulty in prosecuting the prison guards under this provision would probably stem from the decision in Screws v. United States, 325 U. S. 91 (1945) where the Court said that in order to convict, the jury must find that the defendants had the purpose to deprive the prisoner of a constitutional right, and the right of which the defendants intend to deprive the prisoner

tion,[29] the Supreme Court has demonstrated a willingness to enjoin the deprivation by state officers of the right to freedom of speech and freedom of assembly. If the right to be free of cruel and unusual punishment is now to be valid as against the states, then it should merit equally effective enforcement. By resort to these considerations, rather than automatically granting habeas corpus in circumstances like those presented by *Johnson* v. *Dye*, the courts could strike a more satisfactory balance between "the social need that crime shall be repressed," on the one side, and "on the other, the social need that law shall not be flouted by the insolence of office."[30]

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must be one which has been made specific by the express terms of the Constitution or laws of the United States or decisions interpreting them. Since the Supreme Court has not yet said that the Constitution enjoins the States from imposing such cruel and unusual punishment as was inflicted on Johnson, that offense would not yet be sufficiently specific on which to base a criminal prosecution.

The predecessor to this new criminal provision, 35 Stat. 1092 (1909) to similar effect, was rarely used before 1940. Since then it has been invoked several times. *Cf.* Screws v. United States, 325 U. S. 91 (1945); United States v. Classic, 313 U. S. 299 (1941); Crews v. United States, 160 F. (2d) 746 (C. A. 5th 1947); Pullen v. United States, 164 F. (2d) 756 (C. A. 5th 1947).

29 307 U. S. 496 (1939).

30 Cardozo, J., in People v. DeFore, 242 N. Y. 13, 24-25, 150 N. E. 585, 589 (1926).

Abstracts of Recent Cases

Bingo with Payoff in Merchandise Is Gambling—In the course of passing on the validity of a license revocation by the City of East Detroit, the Michigan Supreme Court held that under the statute which prohibits any lottery or gift enterprise and the disposition of any property by it, bingo games paying off in merchandise were gambling. In the instant case concessionaires operating the game in the plaintiff's amusement park paid two hundred dollars a week to the plaintiff and a similar amount to a local charity for the use of its name as sponsor. The plaintiff alleged that charitable and other non-profit organizations were permitted to conduct bingo games with impunity. Even so, said the court, that fact does not legalize the playing of bingo which comes within the terms of the statute.

Although the offense of gambling is strictly statutory and its scope dependent upon the terminology employed in the particular statute, this case does give some support to attempts to include bingo within the ban, particularly where the statute is drafted to cover the disposition of real or personal property by lottery. In any event, it stands as precedent for the opinion that bingo is a lottery or gift enterprise. (*Eastwood Park Amusement Company* v. *Stark*, 38 N. W. (2d) 77 (Mich., 1949).)