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The "Custody" Requirement For Habeas Corpus - Allen v. United States Martin v. Virginia

The "Custody" Requirement For Habeas Corpus

Allen v. United States[1]

Martin v. Virginia[2]

In *Allen v. United States* the defendant was found guilty in federal district court and sentenced to a jail term, but was admitted to bail pending review. The review was unsuccessful, and the defendant, remaining at large by express permission of the court, then filed a petition in the district court claiming the right to be released under 28 U.S.C. § 2255,[3] which was denied. The First Circuit Court of Appeals affirmed on the ground that the defendant was not in sufficient custody to claim this relief because he was out on bail.

The defendant in *Martin v. Virginia* was serving a concededly valid sentence. He was subsequently convicted of escape and grand larceny, with his sentence for these offenses to begin running after expiration of his previous sentence. The immediate effect of the second sentence was to deny his eligibility for parole. The defendant petitioner for a writ of habeas corpus, contending that the second conviction was constitutionally defective. His petition was denied by the state courts on the ground that the writ was available only to attack a sentence presently being served. He then applied for a federal writ of habeas corpus which was denied by the district court. On appeal to the Court of Appeals for the Fourth Circuit, the petition was granted

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1. 349 F.2d 362 (1st Cir. 1965).

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

3. 28 U.S.C. 2255 (1964) states in part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released 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. . . .
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> If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A motion under this section may be made only by a federal prisoner and is a remedy for correcting erroneous sentences — much like state post-conviction procedure acts — without resort to habeas corpus. In view of the similarity in purpose of § 2255 to the federal writ of habeas corpus, Hill v. United States, 368 U.S. 424, 427 (1962), "custody" in the former is attributed the same meaning as "custody" in the latter. United States v. Hayman, 342 U.S. 205 (1962); United States v. Bradford, 194 F.2d 197, 200 (2d Cir.) (dictum), *cert. denied*, 343 U.S. 979 (1952).

on the ground that the denial of eligibility for parole was sufficient custody for habeas corpus.[4]

These cases turned on the differing attitudes of the circuits toward the universal requirement that one petitioning for habeas corpus must be in custody.[5] The underlying reason for this requirement is that it is the writ's function to obtain the release of those who are illegally detained and deprived of their liberty,[6] and it thus cannot operate in the absence of such restraint. It is well settled that actual restraint, as distinguished from moral restraint, is necessary to warrant issue of the writ,[7] but restraint precluding freedom of action is sufficient notwithstanding lack of confinement in a jail or prison.[8]

Traditionally, it has been held that a person out on bail is only morally restrained and therefore is not entitled to a writ of habeas corpus.[9] Moreover, he generally does not become entitled to the writ

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4. The origin of the writ is uncertain, but it was recognized by statute in England in 1679. It later became part of our common law, and a provision prohibiting suspension of the writ was included in art. 1, § 9 of the Constitution. Most states have now codified the common law rules pertaining to the writ.

5. The federal statute appears in 28 U.S.C. § 2241 (1964) and provides in part:
(c) The writ of habeas corpus shall not extend to a prisoner unless—
(1) 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
(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 Maryland statute, MD. CODE ANN. art. 42, § 3 (Supp. 1965), provides:

> Any person committed, detained, confined or restrained from his lawful liberty within this State for any alleged offense or under any color or pretense whatsoever, or any person in his or her behalf, may complain to the court or judge having jurisdiction and power to grant the writ of habeas corpus, to the end that the cause of such commitment, detainer, confinement or restraint may be inquired into; and the said respective courts or judges to whom such complaint is so made shall, unless it appears that the petitioner would not be entitled to any relief, forthwith grant the writ of habeas corpus.

6. See Chin Yow v. United States, 208 U.S. 8, 13 (1908); *Ex parte* Watkins, 28 U.S. 193, 201 (1830). See generally SOKOL, A HANDBOOK OF FEDERAL HABEAS CORPUS (1965); FERRIS AND FERRIS, THE LAW OF EXTRAORDINARY LEGAL REMEDIES (1926).

7. See Wales v. Whitney, 114 U.S. 564 (1885) (naval officer notified of his arrest and directed to remain within a city by the Secretary of the Navy; held, insufficient restraint); Palmer v. State, 170 Ala. 102, 54 So. 271 (1910); Hendershott v. Young, 209 Md. 257, 120 A.2d 915 (1956); Hyde v. Nelson, 287 Mo. 130, 229 S.W. 200, 14 A.L.R. 339 (1921); *In re* O'Brien, 29 Mont. 530, 75 Pac. 196 (1904).

8. See Palmer v. State, 170 Ala. 102, 54 So. 271 (1910); Northfoss v. Welch, 116 Minn. 62, 133 N.W. 82 (1911); Hyde v. Nelson, 287 Mo. 130, 229 S.W. 200, 14 A.L.R. 339 (1921); *Ex parte* Foster, 44 Tex. Crim. Rep. 423, 71 S.W. 593 (1903) (man forbidden to leave city and kept under surveillance of officer).

9. Stallings v. Splain, 253 U.S. 339 (1920); Johnson v. Hoy, 227 U.S. 245 (1913); Baker v. Grice, 169 U.S. 284 (1898); Sibray v. United States, 185 Fed. 401 (3d Cir. 1911); Hendershott v. Young, 209 Md. 257, 120 A.2d 915 (1956). See also Annot., 77 A.L.R.2d 1307 (1961).

by voluntarily surrendering himself into custody,[10] although there is some authority to the contrary.[11] There has existed a minority view, however, that a bailed prisoner can obtain habeas corpus on the theory of constructive custody.[12] It has also been traditionally held that a parolee is not in custody so as to warrant issuance of the writ.[13] But in two jurisdictions, California and Florida, a parolee has long been entitled to the writ on the theory of constructive custody.[14]

In determining whether habeas corpus can issue, the courts generally look to its history both in England and in the United States.[15] In both countries its chief use has been to seek release of persons in the actual physical custody of jail;[16] but England, as well as the United States, has long recognized the writ as proper in circumstances not involving criminal process even where there was no physical confinement.[17] In the United States the writ has been widely used to determine the proper custodian of a child.[18] In such cases it does not matter that the child willingly remained with the contested custodian, since the consent or lack of consent of a child is not material to a finding of restraint.[19] Similarly, it has been available to an alien seeking entry

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10. *Ex parte* Miller, 13 Cal. App. 564, 110 Pac. 139 (1910); Hendershott v. Young, 209 Md. 257, 120 A.2d 915 (1956); People *ex rel.* Posner v. Vollmer, 2 Misc. 2d 575, 130 N.Y.S.2d 468 (1954); Commonwealth v. Green, 185 Pa. 641, 40 Atl. 96 (1898).

11. *Ex parte* Trull, 133 Kan. 165, 298 Pac. 775 (1931). See *Ex parte* Hensley, 33 Tex. Crim. Rep. 31, 24 S.W. 295 (1893).

12. Bates v. Bates, 141 F.2d 723 (D.C. Cir. 1944); *In re* Peterson, 51 Cal. 2d 177, 331 P.2d 24, 77 A.L.R.2d 1291, *appeal dismissed,* 360 U.S. 314 (1959); *Ex parte* Messervy, 80 S.C. 285, 61 S.E. 445 (1908).

13. Weber v. Squier, 315 U.S. 810 (1942); Whiting v. Chew, 273 F.2d 885 (4th Cir.), *cert. denied,* 362 U.S. 956 (1960); Weber v. Hunter, 137 F.2d 926 (10th Cir. 1943); Van Meter v. Sanford, 99 F.2d 511 (5th Cir. 1938); McGloin v. Warden, 215 Md. 630, 137 A.2d 659 (1958) (court said the Supreme Court has indicated that the federal statute should receive a broader interpretation, but whatever the scope of the federal statute, habeas corpus is not available in Maryland in this situation); State *ex rel.* Koalska v. Rigg, 247 Minn. 149, 76 N.W.2d 504 (1956). *But see Ex parte* Snodgrass, 43 Tex. Crim. 359, 65 S.W. 1061 (1901).

14. *Ex parte* Harincar, 29 Cal. 2d 403, 176 P.2d 58 (1946); *In re* Marzec, 25 Cal. 2d 794, 154 P.2d 873 (1945); Sellers v. Bridges, 153 Fla. 586, 15 So. 2d 293, 148 A.L.R. 1240 (1943). Many of the older cases which dismiss a petition for habeas corpus for lack of sufficient restraint on the petitioner speak in terms of mootness. See 51 CALIF. L. REV. 228 (1963), pointing out that the issue is really not one of mootness but whether the statutory requirement of custody has been satisfied.

15. See McNally v. Hill, 293 U.S. 131 (1934).

16. Originally, the writ was primarily a pretrial device to prevent arbitrary imprisonment without a trial. See generally HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1236 (1953).

17. The writ was held to be appropriate to question whether a woman alleged to be the applicant's wife was being constrained by her guardians to stay away from her husband against her will. Rex v. Clarkson, 1 Str. 444, 93 Eng. Rep. 625 (K.B. 1722). Also, the writ was used to produce in court an indentured 18 year old girl assigned by her master to another man for immoral purposes. Rex v. Delaval, 3 Burr 1434, 97 Eng. Rep. 913 (K.B. 1763).

18. See, *e.g.,* Ford v. Ford, 371 U.S. 187 (1962); Boardman v. Boardman, 135 Conn. 124, 62 A.2d 521, 13 A.L.R.2d 295 (1948).

19. See *Ex parte* Swall, 36 Nev. 171, 134 Pac. 96 (1913); *Ex parte* Bellmore, 189 Wis. 431, 207 N.W. 699 (1926).

into the United States to test the legality of his exclusion[20] and to a military draftee to test the legality of his induction.[21]

In 1963 the Supreme Court, in *Jones v. Cunningham,*[22] examined this history and held in a unanimous opinion that one released on parole was in custody within the meaning of the habeas corpus statute. The Court stated:

> 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. . . .
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> 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 its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.[23]

The Court also noted that the statute under which the petitioner was paroled stated that a parolee shall be released "into the custody of"

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20. See, *e.g.,* Brownell v. Tom We Shung, 352 U.S. 180 (1956) and Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213 (1953). The writ of habeas corpus is now the only procedure by which an alien can test an order of exclusion, since the Immigration Act of 1961, 75 Stat. 651 (1961), 8 U.S.C. § 1105a(b) (1964), declares:

> Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 1226 of this title or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

Habeas corpus has also been used by aliens in custody who seek review of deportation orders. See, *e.g.,* Bridges v. Wixon, 326 U.S. 135 (1945). This procedure has been given statutory approval under 75 Stat. 651 (1961), 8 U.S.C. § 1105a(a) (1964):

> The procedure prescribed by . . . [5 U.S.C. §§ 1031–42 (1964)] . . . shall be the sole and exclusive procedure for the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States . . . , except that—
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> (9) [A]ny alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

21. See, *e.g., Ex parte* Fabiani, 105 F. Supp. 139 (E.D. Pa. 1952); United States v. Flint, 54 F. Supp. 889 (D. Conn. 1943) (inductee was drafted and released, to report back in two weeks, during which interval he filed a petition for habeas corpus; the court rejected the contention of insufficient custody); *In re* Falconer, 91 Fed. 649 (S.D. N.Y. 1898). *But see* McKiever v. Jack, 351 F.2d 672, 673 (2d Cir. 1965), where the court, after indicating that the petitioner had not exhausted his administrative remedies, went on to say: "Whatever [the petitioner's] purpose may have been in this petition . . . it is clear that the normal restraint upon an individual's free movement incident to service in the Armed Forces is not such a restraint that one may predicate a petition for habeas corpus relief thereon."

22. Jones v. Cunningham, 371 U.S. 236, 92 A.L.R.2d 675 (1963). Several decisions have subsequently followed *Jones.* See United States *ex rel.* Sadness v. Wilkins, 312 F.2d 559 (2d Cir. 1963); United States *ex rel.* von Cseh v. Fay, 313 F.2d 620 (2d Cir. 1963); United States v. Glass, 317 F.2d 200 (4th Cir. 1963). *Cf.* Alexander v. Rundle, 213 A.2d 644 (Pa. Super. Ct. 1965), where the prisoner, having been paroled from the sentence under attack, was still in actual confinement under a subsequent sentence. The court indicated that while a parolee at liberty may not be in custody for purposes of habeas corpus, he is in such custody where actual confinement continues. *But see* Williams v. State, 275 Ala. 402, 155 So. 2d 322 (1963).

23. 371 U.S. at 240, 243.

the Parole Board.[24] The federal and Maryland parole statutes contain the same language.[25] A possible test which may be gleaned from *Jones* in attempting to define custody is that it is restraint on a person's liberty which significantly prevents him from doing "those things which in this country free men are entitled to do."[26]

Several courts have recently relied on *Jones v. Cunningham* and have found that one on probation is in sufficient custody to warrant issuance of the writ, the theory being that he remains in the legal custody of the state.[27] The court in the principal case of *Martin v. Virginia* allowed an attack on a sentence not presently being served where its only immediate effect was to deny eligibility for parole.[28] The court dismissed an earlier Supreme Court case which was directly

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24. See VA. CODE ANN. § 53-264 (1950).

25. The federal statute appears at 18 U.S.C. § 4203 (1951) and states in part:

> Such parolee shall be allowed in the discretion of the Board to return to his home, or to go elsewhere, upon such terms and conditions, including personal reports from such paroled person, as the Board shall prescribe, and to remain, while on parole, in the legal custody and under the control of the Attorney General, until the expiration of the term or terms for which he was sentenced.

The Maryland statute, MD. CODE ANN. art. 41, § 107 (1957), states in part:

> [A parole] entitles the recipient thereof to leave the institution in which he was imprisoned, and to serve the remainder of his term outside the confines thereof if he shall satisfactorily comply with all the terms and conditions provided in the parole order. Each such paroled prisoner shall be deemed to remain in legal custody until the expiration of his full, undiminished terms; and upon having violated the conditions of his parole, shall be remanded to the institution from which he was paroled.

26. 371 U.S. at 243.

27. Engle v. United States, 332 F.2d 88 (6th Cir. 1964); Benson v. California, 328 F.2d 159 (9th Cir. 1964); Garnick v. Miller, 403 P.2d 850 (Nev. 1965); Noble v. Siwicki, 197 A.2d 298 (R.I. 1964). In *Ex parte* Bosso, 41 So. 2d 322 (Fla. 1949), Florida reached the same result prior to *Jones* by relying on their earlier decisions holding that a parolee was in custody. See note 14 *supra.*

Probation is very similar to parole. While parole suspends the further execution of a sentence already being executed, probation suspends the imposition of a sentence prior to imprisonment. The federal probation statute and many of the state statutes give the court considerable discretion in determining the conditions to be imposed. The federal statute states that the court may "place the defendant on probation for such period and upon such terms and conditions as the court deems best." 18 U.S.C. § 3651 (1964). The Maryland statute provides that the court may impose such conditions as it deems "proper". MD. CODE ANN. art. 27, § 639 (1957). On conditions, see generally Birzon and Best, *Conditions of Probation: An Analysis,* 51 GEO. L.J. 809 (1963).

28. *Accord, Ex parte* Chapman, 43 Cal. 2d 385, 273 P.2d 817 (1954). *Contra,* United States *ex rel.* Chilcote v. Maroney, 246 F. Supp. 607 (W.D. Pa. 1965), where the court pointed out that the relief authorized by habeas corpus is the discharge of the prisoner, and since the Supreme Court in *Jones v. Cunningham* has held that a parolee is in custody, release on parole is not a discharge. The court reasoned, 246 F. Supp. at 609, "Thus, if actual release on parole is not an authorized remedy under habeas corpus, it follows that the right to apply for parole . . . is not authorized either."

In a recent case in Maryland the defendant was convicted, subsequently adjudicated a defective delinquent and committed to Patuxent Institution. Defendant petitioned for habeas corpus, attacking the adjudication of defective delinquency. The court held it had jurisdiction, saying that the effect of the adjudication was to deny defendant eligibility for parole and to give him an indeterminate sentence. Monroe v. Director, Patuxent Institution, 227 F. Supp. 295 (D. Md. 1964). *But see* Turner v. Maryland, 303 F.2d 507, 511 (4th Cir. 1962), where the court stated that if a prisoner's sentences run consecutively, his petition for habeas corpus must be denied if it involves a sentence not yet being served.

contrary,[29] interpreting *Fay v. Noia*[30] to equate "custody" with "restraint of liberty" and declaring that in the light of that case and the *Jones* case the Supreme Court would reconsider its earlier decision if faced with the issue today.

Closely related to this problem is that where the sentence under attack has already been completed at the time the petition is heard. In *Parker v. Ellis*[31] the defendant was in prison at the time he petitioned the lower courts, which denied his petition. The Supreme Court granted certiorari, but prior to hearing, the sentence expired and the prisoner was released. The Court in a 5–4 decision dismissed the case.[32] The dissent argued that the fact of the prior conviction affected the defendant's reputation and economic opportunities and that it was in the public interest to declare an unconsitutional conviction invalid.[33] However, in a similar situation in *Thomas v. Cunningham,*[34] the Fourth Circuit Court of Appeals recently held that a petition for habeas corpus could properly be brought. The defendant here had been convicted of six felonies with sentences totaling twelve years and had been subsequently convicted of grand larceny with an additional sentence of five years. By the time the petition attacking the sentence under the first conviction reached the court, the sentence had expired and he was serving the five year term. The court stated that the result was suggested by the "ratio decidendi" of *Jones.*[35]

The court in *Martin* also pointed to the fact that several states in recent years under their post-conviction procedures have permitted a prisoner presently to litigate his right to freedom at a future date. At least one state has recently permitted this by use of habeas corpus,[36]

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29. McNally v. Hill, 293 U.S. 131 (1934).

30. 372 U.S. 391, 427 n.38 (1963). In this case the federal district court had denied a state prisoner's petition for habeas corpus on the ground that he had failed to exhaust the available state remedies within the meaning of 28 U.S.C. § 2254 (1964). This section requires such denial when it appears that the applicant has not exhausted the remedies available in the state courts. The Supreme Court opened the way for increased use of federal habeas corpus by interpreting § 2254 as referring only to a failure to exhaust state remedies still open at the time the petitioner files for habeas corpus. The court said the state procedures must yield to the "grand purpose" of releasing one unconstitutionally restrained.

31. 362 U.S. 574 (1960).

32. *Accord,* Miller v. United States, 324 F.2d 730 (10th Cir. 1963); Bledsoe v. Johnston, 164 F.2d 481 (9th Cir. 1948). In Midgett v. Warden, 217 F. Supp. 843 (D. Md. 1963), *aff'd,* 329 F.2d 185 (4th Cir. 1964), a petition attacking a conviction for assault was denied where a sentence for assault and a longer one for kidnapping ran concurrently, and the assault sentence expired prior to the petition. In Viles v. United States, 193 F.2d 776 (10th Cir. 1952) defendant, who had been granted an unconditional pardon and who petitioned to have the indictment and sentence stricken from the court records, was held not entitled to relief.

33. 362 U.S. at 593–94.

34. 335 F.2d 67 (4th Cir. 1964).

35. *Id.* at 68.

36. Stevens v. Myers, 213 A.2d 613 (Pa. 1965). The court pointed out that evidence will be more readily obtainable if the petitioner is allowed to litigate his claim soon after the offense, rather than wait until the particular sentence under attack begins. It also noted that the history, traditional use and recent development of the writ all indicate its flexibility as a vehicle for reaching unconstitutional restraints.

even where the second sentence had no immediate effect such as denial of eligibility for parole. The Maryland Court of Appeals has construed the Maryland Post-Conviction Procedure Act[37] to permit attack on a sentence not yet being served if the prisoner is incarcerated under another sentence.[38] The court has denied a motion under the act, however, where the applicant was released on parole[39] and also where the applicant's term expired prior to the hearing.[40]

The court in the present *Allen* case held that because of the differences between bail and parole, *Jones* did not warrant either "overruling [those] cases which hold that habeas corpus is not available to one enlarged on bail, . . . nor tenuously construing 'custody' virtually to read the word out of the statute."[41] Most of the recent cases faced with the *Allen* situation are in accord and hold that *Jones* does not require the earlier decisions on bail to be overruled.[42] But at least one recent case has taken a liberal view of *Jones* and assumed there was sufficient custody where the petitioner was released into the custody of his wife and the local parish priest pending decision, on condition that he surrender himself within three days after the decision if so required.[43]

The law of parole is largely statutory in the various states. A parole may be granted upon such terms as the granting power sees fit,

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37. The Maryland act, MD. CODE ANN. art. 27, § 645A (Supp. 1965), states in part:

> Any person convicted of a crime and incarcerated under sentence of death or imprisonment . . . who claims that the sentence of judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of this State, . . . or that the sentence is otherwise subject to collateral attack upon any ground of alleged error which would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy, may institute a proceeding under this subtitle to set aside or correct the sentence. . . .
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> The remedy herein provided is not a substitute for, nor does it affect any remedies which are incident to the proceedings in the trial court on or before the trial magistrate . . . or any remedy of direct review of the sentence or conviction. A petition for relief under this subtitle may be filed at any time. Hereafter no appeals to the Court of Appeals of Maryland in habeas corpus or coram nobis cases, or from other common law or statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment shall be permitted or entertained. . . .

The act did not abolish any of the remedies formerly available; it only took away the right of appeal from an order denying any of them. Motions under the act are less frequently used than writs of habeas corpus. See Note, 19 MD. L. REV. 233 (1959) and Comment, 24 MD. L. REV. 46 (1964).

38. Simon v. Director, 235 Md. 626, 201 A.2d 371 (1964); Roberts v. Warden, 221 Md. 576, 155 A.2d 891 (1959).

39. Carter v. Warden, 219 Md. 692, 150 A.2d 242 (1959).

40. Spencer v. Warden, 223 Md. 678, 164 A.2d 522 (1960).

41. 349 F.2d at 363.

42. See Matysek v. United States, 339 F.2d 389 (9th Cir. 1964); Tennessee *ex rel.* Ford v. Morris, 236 F. Supp. 780 (D. Tenn. 1965); Minnesota v. Clark, 132 N.W.2d 811 (Minn. 1965). *But see* Robinson v. State, 42 Ala. App. 489, 168 So. 2d 491 (1964).

43. United States *ex rel.* Martinez-Angosto v. Mason, 344 F.2d 673, 675 n.1 (2d Cir. 1965). The petitioner was a Spanish seaman who had been arrested and ordered deported.

provided they are not immoral, illegal or impossible of performance.[44] A parole does not destroy the judgment. The convict is still subject to discipline and can be remanded to prison at any time before the end of the sentence if he violates any of the parole conditions.[45] In the absence of a statutory provision for a hearing, it has been held that parole may be revoked at the discretion of the parole board without either notice or hearing.[46]

The court in *Allen* distinguished bail and parole by saying that a parolee's economic, social and moral life is regulated in detail, but that the only restriction on one on bail is to be subject to the court's call upon reasonable notice,[47] the object of bail being to compel the accused to appear and submit to prosecution of the charges.[48] It has been said, however, that one on bail is in the constructive custody of the law,[49] that he is deemed to be as much under the power of the court as if he were in the custody of the proper officer,[50] and that the custody of bail is a continuance of the original imprisonment.[51] Hence, a few courts have concluded that bail is sufficient constructive custody to warrant issuance of the writ.[52] Some courts have even found an actual custody because the accused is in the custody of his sureties, since they have authority over his person and have the duty to prevent him from leaving the state.[53]

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44. *Ex parte* Prout, 12 Idaho 494, 86 Pac. 275 (1906). A condition in the parole agreement that the prisoner must be deported to Italy and never return to the United States was held a valid condition in *In re* Cammarata's Petition, 341 Mich. 528, 67 N.W.2d 677, *cert. denied*, 349 U.S. 953 (1954). Also see Crooks v. Sanders, 123 S.C. 28, 115 S.E. 760, 761, 28 A.L.R. 940 (1922).

The Supreme Court in *Jones* indicated that the parole conditions in the case before it were those common to most parole agreements. Thus, the Court's holding was not based on any unusual restraints on the parolee. See 371 U.S. at 243 n.20.

45. Fuller v. State, 122 Ala. 32, 26 So. 146, 45 L.R.A. 502 (1899); *Ex parte* Patterson, 94 Kan. 439, 146 Pac. 1009 (1915). In Sellers v. Bridges, 153 Fla. 586, 15 So. 2d 293, 148 A.L.R. 1240 (1943), the court said, 15 So. 2d at 294:

> [The parolee] is enduring compulsory expiation of an offense. He is under daily personal restraint. He is at all times answerable to prison system officials for his conduct. Such officials have authority to greatly circumscribe his freedom of choice and action. Being amenable to prison system rules and authority and under immediate restraints is he not, at all practical purposes, in custody?

46. *Ex parte* Anderson, 191 Ore. 409, 229 P.2d 633, 29 A.L.R.2d 1051 (1951). One reason is that the revocation does not make a parolee a prisoner, since one on parole remains in legal custody. See *Ex parte* Tabor, 173 Kan. 686, 250 P.2d 793 (1952). On parole, see generally Comment, 5 WAYNE L. REV. 237 (1959).

47. 349 F.2d at 363. In Shannon v. State, 207 Ark. 658, 182 S.W.2d 384 (1944), one on bail was compelled by the court to submit himself to the sheriff for fingerprinting.

48. See Thompson v. Evans, 256 Ala. 379, 54 So. 2d 775, 776 (1951); Varholy v. Sweat, 153 Fla. 571, 15 So. 2d 267, 270 (1943); State v. Benedict, 234 Iowa 1178, 15 N.W.2d 248 (1944).

49. See Taylor v. Taintor, 83 U.S. (16 Wall.) 366 (1872); State v. Bates, 140 Conn. 326, 99 A.2d 133 (1953); *In re* Lexington Sur. & Indem. Co., 272 N.Y. 210, 5 N.E.2d 204 (1936).

50. State v. Schenck, 138 N.C. 560, 49 S.E. 917, 918 (1904).

51. Taylor v. Taintor, 83 U.S. (16 Wall.) 366 (1872); State v. Bates, 140 Conn. 326, 99 A.2d 133 (1953).

52. See note 12 *supra*. The court in Bates v. Bates, 141 F.2d 723 (D.C. Ct. App. 1944), said at 724, one on bail "'is in the custody of the law, and is most unquestionably restrained of his liberty.' [Costello v. Palmer, 20 App. D.C. 210, 218]."

53. See United States v. Simmons, 47 Fed. 575 (C.C. N.Y. 1891); State v. Wynne, 356 Mo. 1095, 204 S.W.2d 927 (1947); State v. Pelley, 222 N.C. 684, 24 S.E.2d 635, 638 (1943).

It has been suggested that one on bail may be distinguished from a parolee in that the former will sooner or later be physically seized and become entitled to the writ, whereas the parolee may continue to live his restricted life without ever being actually imprisoned.[54] There is, however, little merit in this argument, for if the petitioner's constitutional rights are at stake, their abuse should not have to be aggravated before relief may be sought. The mere fact that a person has been arrested may often have a marked effect on his reputation and standing in the community, frequently with economic consequences. If the arrest is illegal, the person should have an opportunity to rid himself of its effects at the earliest possible moment. The usual justification for denying habeas corpus to one on bail is that a person on bail already has the liberty he seeks, and it therefore would be futile to direct a release.[55] But while the restraints imposed on one on parole or probation are greater than those on one released on bail, persons on bail still are subjected to "restraints not shared by the public generally. . . ."[56] The spirit of *Jones* — to protect "individuals against erosion of their right to be free from wrongful restraints upon their liberty"[57] — would certainly seem to call for the extension of the right to habeas corpus to one on bail.

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54. See 17 RUTGERS L. REV. 808, 811 (1963).

55. See 77 A.L.R.2d 1307, 1308 (1961).

56. Jones v. Cunningham, 371 U.S. 236, 240 (1963).

57. *Id.* at 243.