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Habeas Corpus and Prematurity

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NOTES

HABEAS CORPUS AND PREMATURITY

The present need for a state post-conviction procedure which can collaterally test constitutional issues, as well as issues going to the jurisdiction of the sentencing court, has manifested itself in a recent conflict between the state and federal courts.[1] As a result of this conflict, state remedies have rapidly expanded to meet the federal requirements. This has been achieved either through legislative action or through judicial expansion of existing procedures—generally the writ of habeas corpus.[2]

Despite this substantive expansion of the writ of habeas corpus to permit the testing of constitutional issues, one of its procedural aspects, the concept of prematurity, has been slow to yield. A court invokes prematurity when it refuses to consider a prisoner's petition for habeas corpus challenging the validity of a conviction, if a favorable determination will not effect his immediate release. As a result, the prisoner must await the time when his release would be imminent (but for the allegedly invalid conviction) before filing a petition for habeas corpus.

Background

> A *Habeas Corpus* is a Writ of Right, which the Subject may demand, and is the most usual Remedy, by which a Man is restored again to his Liberty, if he hath been against Law deprived of it.[3]

Certain consequences may flow from Bacon's classic definition of habeas corpus. *First,* since the present deprivation of liberty must be illegal, a future sentence or portion of a sentence may not be made the subject of the writ. *Second,* since its issuance must result in the restoration to liberty, the writ may not test the validity of only one of several concurrent sentences or the first of consecutive sentences. The concept of prematurity is based upon these two principles.

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[1] A number of articles have been written on the subject; see, e.g., "Symposium: Habeas Corpus—Proposals for Reform," 9 Utah L. Rev. 18 (1964); Bailey, "Federal Habeas Corpus —Old Writ, New Role: An Overhaul for State Criminal Justice," 45 B.U.L. Rev. 161 (1965); Meador, "Accommodating State Criminal Procedure and Federal Postconviction Review," 50 A.B.A.J. 928 (1964). See also Case v. Nebraska, 381 U.S. 336, 340 (1965) (Brennan, J., concurring).

[2] See Comment, "State Post-Conviction Remedies and Federal Habeas Corpus," 40 N.Y.U.L. Rev. 154 (1965); Note, 66 Colum. L. Rev. 1164 (1966). At present some jurisdictions do provide for an attack upon a future sentence by means other than habeas corpus. A prisoner in New York may challenge such a sentence through a writ of error coram nobis. People ex rel. Hardin v. Jackson, 1 App. Div. 2d 749, 147 N.Y.S.2d 48 (3d Dep't 1955). The Maryland Supreme Court has so construed its post-conviction statute, Md. Ann. Code, art. 27, § 645A(e) (Supp. 1965), as to provide similar relief. Simon v. Director, 235 Md. 626, 201 A.2d 371 (1964). Further, the federal courts, under Rule 35 of the Federal Rules of Criminal Procedure, permit the challenge of a future sentence. See Duggins v. United States, 240 F.2d 479 (6th Cir. 1957), for a thorough discussion of Rule 35 and its relation to 28 U.S.C. § 2255 (1964).

[3] 3 Bacon, Abridgment of the Law *4 (4th ed. 1778). See generally 11 Halsbury's Laws of England 24-52 (3d ed. 1955); Church, The Writ of Habeas Corpus (1884); Cohen, "Habeas Corpus Cum Causa—The Emergence of the Modern Writ," 18 Can. B. Rev. 10, 172 (1940); Oaks, "Habeas Corpus in the States—1776-1865," 32 U. Chi. L. Rev. 243 (1965).

The leading case espousing the concept of prematurity is *McNally v. Hill*,[4] decided by the Supreme Court in 1934. There the petitioner sought to have a future sentence declared void, alleging that he would otherwise be eligible for parole. Since federal habeas corpus at that time was provided for but not defined by statute,[5] the Supreme Court looked to the common law to ascertain the "meaning and the appropriate use of the writ in the federal courts . . . ."[6]

> Diligent search of the English authorities and the digests before 1789 . . . failed to disclose any case where the writ was sought or used, either before or after conviction, as a means of securing the judicial decision of any question which, even if determined in the prisoner's favor, could not have resulted in his immediate release.[7]

As the petitioner's detention was lawful, the Court held that the writ could not issue. "A sentence which the prisoner has not begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry."[8]

The petitioner, however, had an alternate remedy. Since he had been seeking a ruling which would establish his eligibility for parole, the Court suggested that he bring a mandamus proceeding to compel the parole board to consider his petition.[9]

The Supreme Court generally has continued to follow the *McNally* decision.[10] The single exception was a case in which revocation of the petitioner's parole had resulted from the imposition of an invalid sentence which was to be served subsequent to the first.[11] As this was a state case, the Court did not assume, as it had in *McNally*, that the petitioner would be able to mandamus the parole board. Had the petition been dismissed because of prematurity, the petitioner would have been left without a remedy.[12]

Upon denying the writ of habeas corpus on grounds of prematurity, the Supreme Court has always suggested an alternative route,[13] and this has been true in cases arising under the recent codification of federal habeas corpus rules.[14] Apparently many of the jurisdictions relying upon the authority of

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[4] 293 U.S. 131 (1934).

[5] The Habeas Corpus Act of Feb. 5, 1867, ch. 27, 14 Stat. 385. For a history of the Habeas Corpus Act see Mayers, "The Habeas Corpus Act of 1867: The Supreme Court As Legal Historian," 33 U. Chi. L. Rev. 31 (1965).

[6] McNally v. Hill, 293 U.S. 131, 136 (1934).

[7] Id. at 137-38.

[8] Id. at 138. But see Cohen, "Some Considerations on the Origins of Habeas Corpus," 16 Can. B. Rev. 92, 109-11 (1938), where the author points out that originally, in the early thirteenth century, detention was not a prerequisite to the issuance of the writ.

[9] McNally v. Hill, supra note 6, at 140.

[10] Darr v. Burford, 339 U.S. 200, 203 (1950) (dictum); Holiday v. Johnston, 313 U.S. 342 (1941).

[11] Ex parte Hull, 312 U.S. 546 (1941).

[12] The petition was ultimately dismissed on the merits. Id. at 551.

[13] Holiday v. Johnston, supra note 10 (apply for vacation of the sentence); McNally v. Hill, 293 U.S. 131, 140 (1934) (mandamus the parole board to compel consideration of the petition for parole).

[14] The federal writ of habeas corpus is codified in 28 U.S.C. §§ 2241-2255 (1964). "[T]he 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." United States v. Hayman, 342 U.S. 205, 219 (1952). In Heflin v. United States, 358 U.S. 415 (1959), the Court denied review of a future sentence under § 2255, which reads in part: "A motion for such relief may be made at any time," but suggested that relief might be available, at least as to matters not dehors the record, under Fed. R. Crim. P. 35, which reads in part: "The court may correct an illegal sentence at any time." Heflin v. United States, supra at 418.

McNally have overlooked this aspect of the Court's decisions, with the result that the petitioner's only recourse is to await the termination of the valid confinement before seeking a determination on the allegedly invalid one.[15]

Variations on a Theme

The prematurity concept is applicable to four distinct categories of cases: (1) those involving a single sentence, part of which is challenged; (2) those involving concurrent sentences, one of which is challenged; (3) those involving consecutive sentences, the first of which is challenged; and (4) those involving consecutive sentences, the second of which is challenged.

The minimum extent to which a court could remove the prematurity restriction is represented by invalidation of part of a single sentence. Maximum removal of the restriction would allow an attack on the second of consecutive sentences. Due to the different criteria applied by the various courts, the relative priority of the other two categories cannot be determined. It may be presumed, however, that if a jurisdiction permits the use of habeas corpus to attack a confinement falling within the fourth category, it would also permit the writ to issue within the other three.

1. Single Sentence, Part of Which Is Challenged. A distinction is frequently made between a sentence which is void *in toto* and one which is void only in part.[16] The courts have generally held that if a sentence is completely void, the writ will issue and the petitioner will either be released or remanded for proper sentencing.[17] If, however, a sentence is void only in part and that part is severable, some courts will deny issuance of the writ until the valid portion has been served.[18] Other courts will issue the writ and remand the petitioner for proper sentencing.[19]

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[15] See Goodman v. State, 96 Ariz. 139, 393 P.2d 148 (1964); People ex rel. Martin v. Ragen, 401 Ill. 419, 82 N.E.2d 457 (1948), cert. denied sub nom. Crawford v. Ragen, 336 U.S. 968 (1949); Wright v. Bennett, — Iowa —, 131 N.W.2d 455 (1964); In re Amor, 144 Mont. 300, 395 P.2d 731 (1964); De Mello v. Langlois, 94 R.I. 497, 182 A.2d 116, cert. denied, 371 U.S. 879 (1962); Ex parte Rios, 385 S.W.2d 677 (Tex. Crim. 1965); Smyth v. Holland, 199 Va. 92, 97 S.E.2d 745 (1957), cert. denied, 357 U.S. 944 (1958). But see In re Carey, 372 Mich. 378, 126 N.W.2d 727 (1964), where the court denied relief on habeas corpus but treated the petition as one for mandamus of the parole board to consider the petitioner's eligibility for parole.

[16] Leifert v. Turkington, 115 Conn. 600, 162 Atl. 842 (1932); State ex rel. Reed v. Boles, 149 W. Va. 557, 142 S.E.2d 733 (1965); see generally Church, supra note 3, §§ 348, 363.

[17] Michaelson v. Beemer, 72 Neb. 761, 101 N.W. 1007 (1904); French v. Cox, 74 N.M. 593, 396 P.2d 423 (1964); Ex parte Custer, 88 Okla. Crim. 154, 200 P.2d 781 (1948); In re Parent, — Vt. —, 218 A.2d 717 (1965); State ex rel. Wright v. Boles, 149 W. Va. 371, 146 S.E.2d 524 (1965). An extreme case of remanding for resentencing is found in Ex parte Browne, 93 Fla. 332, 111 So. 518 (1927). The petitioner was convicted of murder and sentenced to be electrocuted before the effective date of the statute providing for electrocution. In issuing the writ, the court remanded the petitioner with directions that he be resentenced to be hanged.

[18] Carpenter v. Crouse, 358 F.2d 701 (10th Cir. 1966); Leifert v. Turkington, 115 Conn. 600, 162 Atl. 842 (1932); In re Chase, 18 Idaho 561, 110 Pac. 1036 (1910); Shoemaker v. Dowd, 232 Ind. 602, 609-10, 115 N.E.2d 443, 447 (1953) (dictum); Wright v. Bennett, — Iowa —, 131 N.W.2d 455 (1964); Wallace v. White, 115 Me. 513, 99 Atl. 452 (1916); Gamron v. Jones, 148 Neb. 645, 28 N.W.2d 403 (1947); Matter of Current, 76 Nev. 41, 348 P.2d 470 (1960); State v. Ziesemer, 93 N.W.2d 803 (N.D. 1958); Ex parte Hammonds, 398 S.W.2d 283 (Tex. Crim. 1966).

[19] United States ex rel. Durocher v. LaVallee, 330 F.2d 303 (2d Cir.), cert. denied, 377 U.S. 998 (1964); In re Seeley, 29 Cal. 2d 294, 176 P.2d 24 (1946); Richardson v. Hand, 182 Kan. 326, 320 P.2d 837 (1958); State ex rel. Holm v. Tahash, — Minn. —, 139 N.W.2d 161

The single sentence category is particularly important today because recent Supreme Court decisions, such as *Gideon v. Wainwright*,[20] may have the effect of invalidating prior convictions. If a multiple offender is sentenced under a recidivist statute, the enhanced portion of his sentence, based on a prior invalid conviction, is itself invalid and may be subject to attack.[21]

The Supreme Court of Minnesota recently faced this situation.[22] The petitioner alleged that he had been denied counsel in proceedings which led to his prior conviction and, consequently, the additional sentence imposed upon a subsequent conviction was void. Had the court abided by its previous decisions, the petition would have been dismissed as premature since the valid portion of the sentence was still being served.[23] But the court, in permitting the attack, noted the recent Supreme Court cases expanding the rights of criminal defendants[24] and the resulting need for adequate post-conviction procedures. Failure to provide such procedures "not ouly would be disruptive to the maintenance of proper relations between state and Federal courts, but would also erode the doctrine of exhaustion of state remedies as a prerequisite for access to the Federal courts."[25] In the absence of legislative action, it could "be regarded as an abdication of [its] . . . primary responsibility for the administration of criminal justice"[26] should the court fail to act.

Apart from the effect of the invalid sentence on eligibility for parole, the court was also aware of the difficulties involved in retrying issues years after the original trial.

> In order to protect against future false claims by prisoners, it is clearly desirable that as little delay as possible occur before a claimant is put to his proof . . . . Apart from the nonexistence of witnesses, the records would be unavailable . . . .[27] It seems only reasonable that if we are to permit these delayed collateral attacks at all, the courts should hear them when presented rather than aggravate the difficulties by permitting further passage of time to operate to the disadvantage of either the petitioner or the state.[28]

For these reasons, the court refused to delay consideration of the merits of the petitioner's contention even though he had yet to serve the maximum sentence on the underlying conviction.

2. Concurrent Sentences, One of Which Is Challenged. When serving concurrent sentences, the petitioner is confronted with a dilemma: whichever sen-

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(1965); Michaelson v. Beemer, 72 Neb. 761, 101 N.W. 1007 (1904); State ex rel. Reed v. Boles, 149 W. Va. 557, 142 S.E.2d 733 (1965).

20 372 U.S. 335 (1963).

21 See, e.g., N.Y. Pen. Law § 1943.

22 State ex rel. Holm v. Tahash, — Minn. —, 139 N.W.2d 161 (1965).

23 See State v. Castle, 260 Minn. 293, 295-96, 109 N.W.2d 593, 595 (1961), cert. denied, 368 U.S. 978 (1962).

24 E.g., 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).

25 State ex rel. Holm v. Tahash, supra note 22, at —, 139 N.W.2d at 164 (1965).

26 Ibid.

27 Minnesota has provided by statute that several classes of official records be destroyed after ten years. Minn. Stat. Ann. §§ 384.14 (Supp. 1965), 485.23 (1958). See also, In re Carlson, — Cal. 2d —, 410 P.2d 379, 48 Cal. Rptr. 875 (1966), where the petitioner was unable to obtain a copy of the original complaint which had been filed against him as it had been destroyed by order of the presiding judge pursuant to Cal. Pen. Code § 1428b.

28 State ex rel. Holm v. Tahash, — Minn. —, 139 N.W.2d 161, 165 (1965).

tence he chooses to challenge, he is still legally confined under the other. This has led those jurisdictions which look only to the validity of the present confinement or to the possibility of immediate release to deny the writ.[29] A few courts require only that a present sentence be invalid and will issue the writ, relieving the petitioner of the invalid sentence.[30]

While no state has recently expanded habeas corpus on facts involving concurrent sentences, an interesting example of this situation is presented by a recent West Virginia case.[31] The petitioner was convicted in 1961 of the crime of breaking and entering. He was not represented by counsel and, upon a plea of guilty, was sentenced to a term of from one to ten years. While confined under this sentence, he escaped from prison but was recaptured. At his second trial he was represented by counsel but again pleaded guilty and was sentenced to fifteen months for escape and a term of from one to ten years for grand larceny committed while at large. The two sentences were to run concurrently and were to commence upon the expiration of the 1961 sentence. The convictions were challenged on a petition for habeas corpus.

The 1961 conviction obtained while the petitioner was without counsel was unquestionably invalid. This left the petitioner confined under the two concurrent sentences. Since West Virginia law provides that an escape from imprisonment under a void judgment does not constitute a crime,[32] the conviction for escape was invalid. Petitioner was therefore relieved of that sentence, leaving only the sentence for grand larceny to be served.

3. Consecutive Sentences, the First of Which Is Challenged. Here again the petitioner is confronted with a dilemma, for if the first sentence is invalid, he may still be legally confined under the second. Many courts have treated this category in the same manner as they would concurrent sentences, refusing to issue the writ until the valid sentence has been served.[33] This approach looks only to the remedy; until release can result, the writ will not issue. Other courts, placing emphasis on the validity of the present confinement, will issue the writ.[34]

Wisconsin recently faced the prematurity problem in a case involving an attack on the first of two consecutive sentences.[35] The state's contention that the petition was premature was cursorily dismissed. The court gave three

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[29] King v. California, 356 F.2d 950 (9th Cir. 1966); Collins v. Klinger, 353 F.2d 731 (9th Cir. 1965); Lowther v. Maxwell, 347 F.2d 941 (6th Cir.), cert. denied, 382 U.S. 881 (1965); VonEiselein v. Taylor, 344 F.2d 919 (10th Cir. 1965); United States ex rel. Chilcote v. Maroney, 246 F. Supp. 607 (W.D. Pa. 1965); De Mello v. Langlois, 94 R.I. 497, 182 A.2d 116, cert. denied, 371 U.S. 879 (1962); Shelnut v. State, 247 S.C. 41, 145 S.E.2d 420 (1965); State ex rel. Dickens v. Bomar, 214 Tenn. 493, 381 S.W.2d 287 (1964).

[30] In re Cruz, — Cal. 2d —, 410 P.2d 825, 49 Cal. Rptr. 289 (1966); Dora v. Cochran, 138 So. 2d 508 (Fla. 1962); Ex parte Badgley, 7 Cow. 472 (N.Y. Sup. Ct. 1827); People ex rel. Colan v. LaVallee, 19 App. Div. 2d 439, 243 N.Y.S.2d 977 (3d Dep't 1963); State ex rel. Stapleton v. Boles, 149 W. Va. 645, 142 S.E.2d 896 (1965).

[31] State ex rel. Robison v. Boles, 149 W. Va. 516, 142 S.E.2d 55 (1965).

[32] State v. Pishner, 73 W. Va. 744, 81 S.E. 1046 (1914).

[33] See Wells v. California, 352 F.2d 439 (9th Cir. 1965); In re Rhyndress, 317 Mich. 21, 26 N.W.2d 581 (1947); Petition of Wagner, 145 Mont. 101, 399 P.2d 761 (1965); People ex rel. Metz v. Fay, 11 App. Div. 2d 1067, 206 N.Y.S.2d 369 (2d Dep't 1960).

[34] Edwards v. Nash, 303 S.W.2d 211 (Mo. Ct. App. 1957); State v. De Lucia, 63 N.J. Super. 90, 164 A.2d 81 (App. Div. 1960), cert. denied, 365 U.S. 853 (1961); Connors v. Pratt, 38 Utah 258, 112 Pac. 399 (1910); State ex rel. Robison v. Boles, 149 W. Va. 516, 142 S.E.2d 55 (1965); State ex rel. Goodchild v. Burke, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

[35] Ibid.

reasons for its action. *First,* the allegedly invalid sentence would affect the petitioner's eligibility for parole. *Second,* the legislature had provided no other post-conviction procedure which would test constitutional issues once the time for appeal had passed. *Third,* where the issuance of the writ results in a new trial or a rehearing "years after . . . conviction either or both the prosecution and defense may be handicapped by the dimming memory of witnesses that may still be available and by the death or absence of other witnesses."[36] The court could see no merit to delaying the consideration of grievances involving constitutional rights.

4. Consecutive Sentences, the Second of Which Is Challenged. This situation presents the courts with the greatest conceptual difficulty; the petitioner is neither entitled to release, nor is he presently confined under an invalid sentence. A writ which would issue in such a case would have few of the characteristics of the traditional writ of habeas corpus. Consequently, a majority of those jurisdictions which have been confronted with such situations have refused to consider a petition for habeas corpus.[37] A few courts, however, have completely abandoned the concept of prematurity and have permitted a future, consecutive sentence to be challenged by means of a writ of habeas corpus.[38] California was the first and, for a number of years, the only jurisdiction which allowed a habeas corpus attack on future sentences.[39] Recently, however, two jurisdictions have followed California's lead—Pennsylvania[40] and the Fourth Circuit.[41]

The Pennsylvania case concerned the plight of a petitioner convicted for murder and sentenced to life imprisonment while already serving a term for robbery. The life sentence was to commence at the expiration of the prior sentence. A writ of habeas corpus was sought to test the validity of the former. Precedent would have dictated that the writ be denied.[42] Instead, the court held that "in

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[36] Id. at 252, 133 N.W.2d at 757. On this problem see "Symposium: Habeas Corpus—Proposals for Reform," 9 Utah L. Rev. 18, 20-24 (1964) (remarks by Chief Judge Desmond of the New York Court of Appeals); "Applications for Writs of Habeas Corpus and Post Conviction Review of Sentences in the United States Courts," 33 F.R.D. 363, 423 (1963) (Address by Judge Pope, Senior Circuit Judge of the Ninth Circuit).

[37] See Owensby v. United States, 353 F.2d 412, 416 (10th Cir. 1965), cert. denied, 383 U.S. 962 (1966); Clark v. Turner, 350 F.2d 294 (10th Cir. 1965); Gailes v. Yeager, 324 F.2d 630 (3d Cir. 1963); Phillips v. State, 40 Ala. App. 698, 122 So. 2d 551 (1960); Goodman v. State, 96 Ariz. 139, 393 P.2d 148 (1964); Fretwell v. Wainwright, 185 So. 2d 701 (Fla. 1966); Balkon v. Chastain, 220 Ga. 265, 138 S.E.2d 319 (1964); McQueen v. Crouse, 192 Kan. 821, 391 P.2d 68 (1964); In re Petition of Amor, 144 Mont. 300, 395 P.2d 731 (1964); Rainsberger v. Leypoldt, 77 Nev. 399, 365 P.2d 489, cert. denied, 368 U.S. 516 (1961); State v. Hatterer, 75 N.J. Super. 400, 183 A.2d 424 (1962) (alternative holding); Ball v. Maxwell, 1 Ohio St. 2d 77, 204 N.E.2d 62 (1965); McCall v. State, 247 S.C. 15, 145 S.E.2d 419 (1965); Ex parte Rios, 385 S.W.2d 677 (Tex. Crim. 1965); Ashley v. Delmore, 49 Wash. 2d 1, 297 P.2d 958 (1956), cert. denied, 353 U.S. 986 (1957).

An example of the extreme to which the present detention requirement has been carried is found in United States ex rel. Konigsberg v. McFarland, 348 F.2d 215 (3d Cir. 1965). The petitioner, while imprisoned by New Jersey authorities, challenged the validity of a federal sentence which was to commence upon the termination of the state sentence, three days hence. Because that sentence had not yet begun, the petition was dismissed as premature.

[38] See Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965); In re Chapman, 43 Cal. 2d 385, 273 P.2d 817 (1954); Commonwealth ex rel. Stevens v. Myers, 419 Pa. 1, 213 A.2d 613 (1965).

[39] In re Chapman, supra note 38.

[40] Commonwealth ex rel. Stevens v. Myers, supra note 38.

[41] Martin v. Virginia, supra note 38.

[42] See Commonwealth ex rel. Lewis v. Ashe, 335 Pa. 575, 7 A.2d 296, cert. denied, 308 U.S. 596 (1939).

view of vastly changed circumstances affecting the use of the writ, we believe it appropriate to reconsider this judicial rule governing the function of the writ as it applies to cases of the present nature."[43] The "vastly changed circumstances" to which the court referred are the recent Supreme Court decisions which have expanded the rights afforded to persons accused of crimes.[44] In addition, the Pennsylvania court, like the Supreme Court of Minnesota, was concerned with the problems created by a delayed rehearing of issues. "Such delay naturally places a serious and sometimes fatal strain on the Commonwealth's ability to present its case on retrial."[45] The only justifications the court could find for refusing the issuance of the writ were historical and they were manifestly outweighed by practical considerations.

> [W]e conclude that the prematurity concept should be modified in circumstances such as those present here and that the writ of habeas corpus may be sought in postconviction attacks on the validity of a final judgment of conviction even though the petitioner has not yet begun to serve the sentence imposed.[46]

There was, however, a dissenting opinion—the only one in any of the recent cases which have abandoned the concept of prematurity either entirely or in part. The dissenters felt that staleness of evidence presents no more of a problem today than it did when the Supreme Court decided *McNally v. Hill*.[47] They further felt that:

> [T]he majority has perverted the writ of habeas corpus, increased the case load pressure with premature cases, and unnecessarily decided constitutional issues—with no immediate benefit to the lawfully confined petitioner.[48]

As was pointed out by the majority, this view has only history to recommend it.

The Fourth Circuit case which allowed an attack on a future sentence involved a petitioner who had escaped from a prison camp while serving a fifteen year state sentence for second degree murder. He was convicted and sentenced to five years for escape and three years for grand larceny, both to commence at the expiration of the fifteen year sentence. Though he originally would have been eligible for parole in 1963, the subsequent convictions delayed his eligibility until 1966. The petitioner challenged the validity of the future sentences, alleging denial of his right to effective assistance of counsel. The court held contra to *McNally v. Hill* and issued a writ of habeas corpus.

The court's primary support for its departure from *McNally* was the 1963 case of *Jones v. Cunningham*.[49] In recognizing that a parolee is "in custody" within the meaning of Title 28, Section 2241 of the United States Code,[50] that

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[43] Commonwealth ex rel. Stevens v. Myers, supra note 38, at 5, 213 A.2d at 616.

[44] See, e.g., Jackson v. Denno, 378 U.S. 368 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

[45] Commonwealth ex rel. Stevens v. Myers, 419 Pa. 1, 15, 213 A.2d 613, 621 (1965).

[46] Id. at 20, 213 A.2d at 624.

[47] 293 U.S. 131 (1934); see text accompanying notes 4-9 supra.

[48] Commonwealth ex rel. Stevens v. Myers, supra note 45, at 28, 213 A.2d at 628 (Cohen, J., dissenting).

[49] 371 U.S. 236 (1963). See Oaks, "Legal History and the High Court—Habeas Corpus," 64 Mich. L. Rev. 451, 468 (1966) for a criticism of this case.

[50] 28 U.S.C. § 2241(c) provides in pertinent part:

case broadened the meaning of "custody" as it relates to federal habeas corpus. The Fourth Circuit saw this as a liberalizing trend which prompted it to consider a subsequent conviction which prevented the prisoner from applying for parole and conditional release to be "in the truest sense a present restraint upon . . . [his] liberty."[51] The court concluded 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."[52]

The court may have been overly optimistic. It apparently overlooked the fact that *Fay v. Noia*,[53] another 1963 case which it cited as evidence of a liberalizing trend, had expressly recognized the "settled principle" of *McNally*.[54] Moreover, the court seemed to feel that a complete departure from the restrictions of prematurity might be in order. By way of dictum, it indicated that perhaps its holding "should [not] be limited to one such as . . . [the petitioner] who is able to state a strong case for parole consideration."[55]

Conclusion

As the noted decisions indicate, there appears to be a trend toward removing prematurity as a barrier to issuing the writ of habeas corpus. Of the jurisdictions which recently considered the issue, only two, Pennsylvania and the Fourth Circuit, confronted factual situations which lend themselves to complete removal of the prematurity limitation, *i.e.*, permitting an attack on a future, consecutive sentence.

The Wisconsin court decided only that the existence of a future, consecutive sentence will not delay challenge of a present sentence. The Minnesota court's decision is also limited in scope providing only that when a defendant has been sentenced as a recidivist, "habeas corpus is available to collaterally attack the validity of the prior conviction [which caused the additional sentence to be imposed] upon the ground of a claimed denial of Federal constitutional rights."[56] Both opinions, however, evidence a willingness to remove the procedural restrictions on the writ, and their rationales would seem to be applicable to all prematurity situations.

Many factors influenced these decisions. The cases point out the difficulties caused by delaying the hearing of issues, such as missing witnesses, destroyed records, and further confinement pending the litigation. Also important is the effect a potentially invalid sentence might have on parole eligibility. In addition, the modernization of sentencing procedures has had an impact on the concept of prematurity:

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 . . . .

51 Martin v. Virginia, 349 F.2d 781, 784 (4th Cir. 1965).

52 Ibid.

53 372 U.S. 391 (1963).

54 Id. at 432.

55 Martin v. Virginia, supra note 51.

56 State ex rel. Holm v. Tahash, — Minn. —, —, 139 N.W.2d 161, 165-66 (1965). Another recent Minnesota decision denying the writ to a petitioner serving concurrent sentences, State ex rel. Nelson v. Tahash, 265 Minn. 330, 121 N.W.2d 584 (1963), also serves indirectly to limit the effect of this decision.