

HABEAS CORPUS: FOURTH CIRCUIT ALLOWS WRIT TO ISSUE TO STATE PRISONER NOT YET SERVING SENTENCE UNDER ATTACK

By manipulating the concept of custody to include the legal effects of a conviction precedent to service of sentence, the Fourth Circuit has extended the use of the writ of habeas corpus into new and perhaps questionable areas.

THE WRIT of habeas corpus is the traditional means of securing an inquiry into the cause of a prisoner's confinement.¹ Under the federal habeas corpus statute, a petitioner requesting the writ must be in "custody" before federal jurisdiction to review the cause for confinement may be invoked.² For purposes of this statute, custody has always meant physical confinement under a sentence imposed by an allegedly infirm conviction. In *Martin v. Virginia*,³ the Fourth Circuit has abated the stringency of this jurisdictional requirement by broadening the concept of custody to permit federal court review of a state conviction although the petitioner has not commenced serving his sentence under that conviction.

Petitioner Martin had been serving a fifteen-year sentence for second degree murder when he escaped from prison and committed grand larceny. He was convicted for the escape and larceny and sentenced to an additional eight-year imprisonment, to begin at the expiration of the original murder sentence. The subsequent convictions rendered Martin ineligible for parole under the murder sentence for an additional three years.⁴ He sought federal court review of the second conviction by means of a declaratory judgment⁵ after unsuccessfully petitioning the Virginia state courts for

¹ See Holtzoff, *Collateral Review of Convictions in Federal Courts*, 25 B.U.L. REV. 26 (1945).

² 28 U.S.C. § 2241 (c) (3) (1964).

³ 349 F.2d 781 (4th Cir. 1965).

⁴ Martin had been convicted of second-degree murder in 1960. He was sentenced to imprisonment for fifteen years. Under Virginia law, VA. CODE ANN. § 53-251 (1958), he would have become eligible for parole under that sentence in 1963. 349 F.2d at 783. The second sentence was to begin at the expiration of the first and had the effect of deferring his eligibility for parole under the first sentence until 1966. *Id.* at 782 n.1.

⁵ Martin alleged that he had been deprived of his constitutional right to retain counsel of his own choosing and that a court-appointed counsel who represented him in the later convictions was incompetent and did not effectively represent him. *Id.* at 782-83.

a writ of habeas corpus.⁶ The federal district court dismissed the action without a hearing, asserting that the Declaratory Judgment Act did not provide a substitute for habeas corpus review.⁷ Upon appeal, however, the Fourth Circuit Court of Appeals chose to treat the plea as a petition for a writ of habeas corpus and held that the deferral of parole eligibility under the first sentence as a result of the second conviction satisfied the jurisdictional requirement of "custody."

A federal court may issue a writ of habeas corpus to a state prisoner under the federal habeas corpus statute whenever "he is in custody in violation of the Constitution or laws or treaties of the United States."⁸ This statute and its substantially identical forerunners⁹ have traditionally been construed to require that one

⁶ The Virginia courts reasoned that since Martin had not commenced serving his second sentence, he was not "in custody" under such sentence and thus could not seek review under the Virginia habeas corpus statute. *Id.* at 783. The statute provides: "The writ of habeas corpus ad subjiciendum shall be granted . . . to any person . . . showing by affidavits or other evidence probable cause to believe that he is detained without lawful authority." VA. CODE ANN. § 8-596 (1957).

⁷ 349 F.2d at 783.

⁸ 28 U.S.C. § 2241 (c) (3) (1964).

⁹ The Judiciary Act of 1789, which made the writ of habeas corpus available to federal prisoners, provided: "[A]ll the before-mentioned courts of the United States shall have power to issue writs . . . of *habeas corpus* . . . *Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless . . . they are in custody, under or by colour of the authority of the United States . . ." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82. Thereafter, Congress enacted the Federal Habeas Corpus Act of 1867, which extended the writ to state prisoners. The statute empowered the federal courts to issue the writ in all cases where a person was "restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. The power to grant writs of habeas corpus to foreign prisoners in custody within the United States for acts done in violation of the laws of a foreign nation was conferred upon the federal courts in 1842. Act of Aug. 29, 1842, ch. 257, 5 Stat. 539.

The sections of these statutes dealing with the custody requirement were consolidated in 1875. "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 in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state . . . is in custody for an act done . . . under any alleged right . . . claimed under the . . . sanction of any foreign state . . . or unless it is necessary to bring the petitioner into court to testify." REV. STAT. §§ 751-53 (1875).

The change in phraseology from "restrained of his or her liberty" as provided in the 1867 act to "in custody" in the 1875 act had no significant effect, since the courts required actual confinement under both statutes. See *Wales v. Whitney*, 114 U.S. 564 (1885); *In re Callicot*, 4 Fed. Cas. 1075 (No. 2323) (C.C.E.D.N.Y. 1870).

The phrase "in jail" was dropped from the 1940 edition of the code by the 1948 revision, but the reviser's note, 28 U.S.C. § 2241 (1964), cautioned that changes in phraseology were made to facilitate the consolidation of provisions relating to the writ of habeas corpus, which until then had been scattered throughout the code, and were not designed as substantive alterations.

seeking a writ of habeas corpus in a federal court show that he was in actual confinement.¹⁰ Thus, milder forms of restraint such as parole¹¹ or bail¹² status were considered insufficient to invoke the jurisdiction of a federal court under the habeas corpus statute. Furthermore, a federal court might lose its jurisdiction if, during the course of an otherwise proper habeas corpus proceeding, the petitioner were released from custody, since the reason for seeking the writ, release from physical confinement, would have been satisfied. Thus, if a prisoner were released on bail or on parole, the federal

¹⁰ See *In re Rowland*, 85 F. Supp. 550 (W.D. Ark. 1949), where a petitioner who had been released on bail was denied a writ, the court noting the presence of the word "prisoner" in the habeas corpus statute and asserting that this required actual confinement. *Id.* at 552. In *Biron v. Collins*, 145 F.2d 758 (5th Cir. 1944), the petition for a writ of habeas corpus by a conscientious objector who had been assigned to work one thousand miles from home was denied since he was deemed to be under no actual restraint by virtue of the order. *In re Callicot*, *supra* note 9, involved a petitioner for a writ of habeas corpus who was denied the writ because a pardon had freed him of any physical restraint.

The proffered reason for the "actual restraint" requirement was that since the writ directs that the person detained be brought before the court, it could only be addressed to those who actually detained the petitioner by physical confinement. See *Sibray v. United States*, 185 Fed. 401, 404 (3d Cir. 1911). The requirement of actual confinement, however, was not limited to detention in jail; it was satisfied by actual confinement anywhere. For example, in *In re McDonald*, 16 Fed. Cas. 17 (No. 8751) (D.C.E.D. Mo. 1861), the writ was issued where the petitioner was confined in a military post, but not formally detained in jail.

Consistent with the articulated reason for requiring actual confinement, the writ was also available where *immediate means* were available to enforce actual confinement. *Wales v. Whitney*, 114 U.S. 564 (1885). For example, where an officer arrests someone, he has the authority and the power to confine, and if the arrestee resists, immediate physical power may be exerted. *Id.* at 572. In *Wales*, the Supreme Court defined custody as "actual confinement or the present means of enforcing it." *Id.* at 572. In that case, a naval doctor was ordered by the Secretary of the Navy to await court martial proceedings. The court observed that since the doctor was physically free to leave Washington, D.C., whenever he chose, there were no immediate means available for insuring his continued presence within the city. Thus, the restraint did not satisfy the custody requirement, the court characterizing it as a mere "moral restraint." *Ibid.*

¹¹ *Siercovich v. McDonald*, 193 F.2d 118 (5th Cir. 1951) (writ addressed to a warden dismissed since a prisoner released on parole was no longer in the warden's custody); *Factor v. Fox*, 175 F.2d 626 (6th Cir. 1949) (same); *Owens v. United States*, 174 F.2d 469 (5th Cir. 1949) (same); *Van Meter v. Sanford*, 99 F.2d 511 (5th Cir. 1938) (same, the court doubting whether parole could be equated with "custody" under any circumstances).

¹² *Stallings v. Splain*, 253 U.S. 339 (1920); *Sibray v. United States*, 185 Fed. 401 (3d Cir. 1911); *In re Rowland*, 85 F. Supp. 550 (W.D. Ark. 1949). *But see MacKenzie v. Barrett*, 141 Fed. 964 (7th Cir. 1905), where bail was deemed a sufficient restraint of liberty to constitute custody because the petitioner was considered to be in the custody of his sureties. However, this decision has not been followed by other courts. See *In re Rowland*, *supra*, at 555. Also, *MacKenzie* seems to have been overruled in a subsequent decision by the same court, *United States v. Tittmore*, 61 F.2d 909, 910 (7th Cir. 1932).

court would be without jurisdiction to proceed upon the merits of the petition.¹³ Moreover, the courts consistently construed the term "custody" to preclude habeas corpus review of a conviction where the petitioner had not actually commenced serving the sentence under attack.¹⁴ Thus, a petitioner serving consecutive sentences could seek review only of that conviction under which he was presently confined, even though a subsequent conviction might have affected his eligibility for parole under the prior sentence.¹⁵

A significant departure from the requirement of actual confinement occurred in 1963 when the Supreme Court in *Jones v. Cunningham*¹⁶ held that the conditions and restrictions of parole were a sufficient restraint to satisfy the requirement of custody.¹⁷ The Court reasoned that "while petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom . . ." ¹⁸ Prompted by

¹³ See *Johnson v. Hoy*, 227 U.S. 245, 248 (1912), where the petitioner gave bond and thus secured a release from physical restraint. The Supreme Court denied the writ, reasoning that such a release constituted an emancipation from physical restraint, which the writ was calculated to afford.

¹⁴ *Palumbo v. New Jersey*, 334 F.2d 524 (3d Cir. 1964); *Gailes v. Yeager*, 324 F.2d 630 (3d Cir. 1963). In both cases petitioner was required to serve intervening sentences before he could be granted a writ of habeas corpus to inquire into later convictions. See *Pope v. Huff*, 117 F.2d 779 (D.C. Cir. 1941) (same); *Macomber v. Hudspeth*, 115 F.2d 114 (10th Cir. 1940) (same); *Carter v. Snook*, 28 F.2d 609 (5th Cir. 1928) (same); *DeBara v. United States*, 99 Fed. 942 (6th Cir. 1900) (same).

¹⁵ *McNally v. Hill*, 293 U.S. 131 (1934). Petitioner was denied parole eligibility under a prior sentence as a result of a subsequent conviction. The Supreme Court held that since the writ is available for inquiring into the legality of a *present* confinement, it 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." *Id.* at 138. *Accord*, *United States v. Banmiller*, 187 F. Supp. 513 (E.D. Pa. 1960); *Hollman v. Wilkinson*, 124 F. Supp. 849 (M.D. Pa. 1954). The Fourth Circuit in *Martin* expressly contravened the *McNally* rule, finding that "the Court has relaxed the strictness of this interpretation and held that one on parole is in 'custody' within the meaning of the term as used in [28 U.S.C. § 2241 (1964)]. . . ." 349 F.2d at 783, citing *Jones v. Cunningham*, 371 U.S. 236 (1963).

¹⁶ 371 U.S. 236 (1963).

¹⁷ The *Jones* decision was antedated by several state decisions which deemed parole to be a sufficient restraint of liberty to constitute the "custody" required under state habeas corpus statutes. *E.g.*, *In re Marzec*, 25 Cal. 2d 794, 154 P.2d 873 (1945); *Sellers v. Bridges*, 153 Fla. 586, 15 So. 2d 293 (1943).

In 1960, it was held in *United States v. Brilliant*, 274 F.2d 618 (2d Cir. 1960), that the release of a *federal* prisoner on parole would not render the question of habeas corpus moot, because the petitioner under the terms of 18 U.S.C. § 4203 (1964) was still in the legal custody and control of the Attorney General until the expiration of the term for which he was sentenced. *United States v. Brilliant*, *supra* at 620.

¹⁸ 371 U.S. at 243. The parolee is "confined by the parole order to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer, permit

this relaxation of the necessary degree of physical control, the Fourth Circuit in *Thomas v. Cunningham*¹⁹ extended the concept of custody to permit federal court review of a conviction after the expiration of a sentence. The petitioner in *Thomas* was awaiting decision on an appeal from the denial of his petition for a writ of habeas corpus when his sentence expired and he was released. The court reasoned that since the *effect* of the conviction projected beyond the termination of the imprisonment,²⁰ "the ratio decidendi of *Jones v. Cunningham* . . . [would suggest] that jurisdiction of the District Court to adjudicate the validity of the . . . sentences survived the expiration of their imprisonment of [Thomas] . . ."²¹

the officer to visit his home and job at any time, and follow the officer's advice. He is admonished to keep good company and good hours, work regularly, keep away from undesirable places, and live a clean, honest and temperate life." *Id.* at 242.

It has been suggested that the only distinction between parole and probation is that a parolee serves a period of time in prison, while the probationer never enters jail. DRESSLER, *PROBATION AND PAROLE* 13 (1951). Since the restraints of parole and probation are similar, probation might easily be defined as a sufficient restraint of liberty to constitute custody. Indeed, a recent Nevada Supreme Court case, *Garnick v. Miller*, 403 P.2d 850 (Nev. 1965), held that the disabilities imposed by probation constituted a sufficient degree of restraint to permit the court to entertain a petition for the writ under the state habeas corpus statute.

The decision in *Jones* does not actually overrule *Van Meter v. Sanford*, 99 F.2d 511 (5th Cir. 1938), because the latter case merely refused to issue a writ which was addressed to the warden of the prison rather than to the parolee's parole board.

¹⁹ 335 F.2d 67 (4th Cir. 1964) (per curiam).

²⁰ *Id.* at 69. Effects persisting past the end of a sentence have been held sufficient to prove a basis for jurisdiction over actions other than habeas corpus. In *Pollard v. United States*, 352 U.S. 354, 358 (1957), an incarcerated prisoner moved under the federal habeas corpus statute, 28 U.S.C. § 2255 (1954), to vacate his sentence, claiming that it was unconstitutional because it was imposed for violation of an invalid probation order. Section 2255 of the code allows a prisoner in custody to request the court which imposed the sentence to vacate it if (1) it was imposed in violation of the Constitution or laws of the United States or if (2) that court was without jurisdiction to impose such a sentence, or if (3) the sentence was in excess of the maximum authorized by law. The Supreme Court held that the possibility of collateral consequences was sufficient to justify decision on the merits although *Pollard* had been released from prison after his petition for a writ of certiorari had been granted. *Pollard v. United States*, *supra* at 358. See *United States v. Morgan*, 346 U.S. 502, 512-13 (1954) (the writ of *coram nobis* may be utilized to vacate a conviction after sentence had been served because collateral effects of the conviction continued past the end of the sentence); *Fiswick v. United States*, 329 U.S. 211, 220-22 (1946) (certiorari proper even though petitioner released from prison, since future effects of conviction do not render petitioner's cause moot). *Thomas* is the first decision to apply the collateral effect rationale in a habeas corpus proceeding.

²¹ 335 F.2d at 68-69.

The *Thomas* court may have been overly presumptuous in its reliance on *Jones*, where the parolee was still deemed to be "in custody" under the sentence imposed for the conviction attacked, since parole is considered a part of the original sentence. 371 U.S. at 242 n.17; see note 30 *infra*. That decision does not in terms hold that a conviction could be reviewed by a writ of habeas corpus after the sentence served thereunder had completely expired.

While the trend toward a broader construction of "custody" has made the writ of habeas corpus available to a petitioner on parole or to a petitioner whose sentence has expired after his petition has been filed, *Martin* represents a further erosion of the requirement of actual restraint. The court equated deferral of parole *eligibility* in *Martin* with the "technical restraint of parole"²² which existed in *Jones* and found that such deferral was a sufficient restraint of liberty to constitute custody.²³

The *Martin* decision is a departure from prior precedent²⁴ and reflects a shift in emphasis from the more rigid determination of jurisdiction based on the character of the physical restraints imposed to a flexible determination which gives consideration to the type of legal disabilities attendant to a conviction. Decisions indicate that in order to seek habeas corpus review, the petitioner must be entitled to immediate release from the custody complained of should the writ issue.²⁵ However, a reversal of the second con-

²² 349 F.2d at 784.

²³ The court in *Martin* justified its decision by noting the increasingly liberal Supreme Court interpretation of the scope of the writ of habeas corpus as exemplified in *Jones* and *Fay v. Noia*, 372 U.S. 391 (1963). 349 F.2d at 783. In *Fay*, the petitioner was convicted of murder, but did not appeal from the conviction for fear of receiving a death penalty on retrial. *Fay v. Noia*, *supra* at 396-97 n.3. He petitioned for a writ of habeas corpus, but the lower federal courts refused to issue the writ because by not appealing, the petitioner had failed to exhaust his state remedies. The Supreme Court held that the petitioner need exhaust only those state remedies available to him at the time he petitions the federal courts for a writ. *Id.* at 399. The *Martin* court cites *Fay* as equating "custody" with "restraint of liberty." 349 F.2d at 783. The particular use of this equation presents an interesting anomaly, since *Fay* relied for that proposition on *McNally v. Hill*, 293 U.S. 131 (1934). *McNally*, while in general terms equating "custody" and "restraint on liberty," *id.* at 135-36, held that denial of parole eligibility as a result of a second conviction was not a sufficient restraint of liberty to constitute custody. *Id.* at 138. This holding on its facts is directly contrary to the *Martin* decision. Thus, it would seem that reliance by the Supreme Court in *Fay* on the *McNally* decision would preclude the *Martin* court from finding specific justification in *Fay* for reaching a conclusion opposite from that reached in *McNally*.

²⁴ The decision is clearly contrary to the Supreme Court holding in *McNally v. Hill*, *supra* note 23.

Curiously, the Fourth Circuit in *Martin* made no reference to the earlier case of *Thomas v. Cunningham*, which held that habeas corpus was available to a petitioner whose sentence had expired while his petition was pending on appeal. Although the language in the *Thomas* opinion is shrouded in ambiguity and imprecision, the Fourth Circuit did assert that "a sentence results in more than physical confinement and is not spent by the lapse of its stated period. It persists in many aspects beyond its calendared end. With its effect projecting beyond termination of the imprisonment, its termination should not foreclose correction." 335 F.2d at 69.

²⁵ *McNally v. Hill*, *supra* note 23; *Gailes v. Yeager*, 324 F.2d 630 (3d Cir. 1963) (per curiam); *Schultz v. Hudspeth*, 123 F.2d 729 (10th Cir. 1941); *Pope v. Huff*, 117 F.2d 779 (D.C. Cir. 1941); *Macomber v. Hudspeth*, 115 F.2d 114 (10th Cir. 1940); see *Palumbo v. New Jersey*, 334 F.2d 524, 525-26 (3d Cir. 1964).

viction would only entitle Martin to consideration for parole at an earlier date; it would not release him from confinement under the first sentence.²⁶ Therefore, the "custody" considered sufficient to satisfy the jurisdictional requirement is not in reality the additional three-year confinement resulting from the delay in eligibility for parole occasioned by the second conviction. Rather, "custody" inheres in the legal disability collaterally created by the second conviction—the deferral of consideration for parole.²⁷ Thus, by equating custody with the legal disability created rather than with the existing physical restraint, the requirement of immediate release is satisfied since removing the second conviction immediately restores Martin's eligibility for parole.

In equating the "technical restraint of parole" with the "denial of eligibility for parole," however, the court seemingly ignores the qualitative differences between the two. The reasoning in *Martin* was founded in part upon *Jones*, in which parole was held to be a sufficient restraint to constitute custody. Since parole is in theory considered to be part of the sentence served outside prison walls,²⁸

²⁶ Talismanic manipulation of the term "restraint" may work to the detriment of future petitioners. Even if issuance of a writ of habeas corpus would release Martin on parole, it would not free him from all "restraint" since under the rationale of *Jones*, parole also constitutes a restraint. See notes 16-21 *supra* and accompanying text. This is illustrated in *United States ex rel. Chilcote v. Maroney*, 246 F. Supp. 607 (W.D. Pa. 1965), where a prisoner was not allowed to attack an earlier conviction by means of habeas corpus even though removal of the earlier conviction would confer on him an immediate right to consideration for parole. The court states that since the issuance of a writ of habeas corpus would not release the prisoner from confinement, but merely make him eligible for parole, the writ could not issue. In an interesting dictum, the court asserted that if parole was a restraint of liberty sufficient to allow the issuance of habeas corpus, to grant him a writ in such a case would *not* free him from restraint. *Id.* at 609. Thus *Jones* is hoist with its own petard. While allowing the issuance of writs of habeas corpus to those on parole by defining parole as custody, the case has perhaps foreclosed the possibility of release on any but the most unconditional basis to those still actually imprisoned. Note that the *Martin* rationale may avoid this problem if read as defining custody in terms of legal disability rather than in degrees of physical restraint.

²⁷ The *Martin* opinion cautioned that the decision should not be limited to those situations where a prisoner is virtually guaranteed parole in the absence of the second conviction.

"There is . . . every reason for the court to assume that the parole board would look with favor upon Martin's application if it were given an opportunity to do so, and that he would be actually paroled upon becoming eligible for it, or soon thereafter.

"We do not suggest, however, that the principle we glean from *Jones v. Cunningham* as applied by us today should be limited to one such as Martin who is able to state such a strong case for parole consideration." 943 F.2d at 784.

²⁸ *Anderson v. Corall*, 263 U.S. 193 (1923); *United States ex rel. Gutterson v. Thompson*, 47 F. Supp. 150 (E.D.N.Y. 1942), *aff'd per curiam*, 135 F.2d 626 (2d Cir. 1943), *cert. denied*, 320 U.S. 755 (1943).

the restraint of parole in *Jones* may be viewed as imposed in service of a sentence. However, the deferral of parole eligibility in *Martin* is a secondary, incidental *effect* of a conviction and was not directly imposed by the sentence. Attempting to equate the physical restraint imposed by a sentence, however mild, and the collateral legal consequences of a conviction, regardless of their effect, unduly blurs the definition of custody.

The expansion of the concept of "custody" seemingly reflects a judicial policy of affording a petitioner a means of redress for any adverse legal consequence which might result from a conviction before or after the sentence has been served. Thus, for example, loss of the right to vote,²⁹ hold office,³⁰ or to perform jury duty³¹ might be sufficient grounds alone to support federal jurisdiction.³² If this reasoning is extended, federal habeas corpus might be available to a petitioner on bail while awaiting state review of his conviction,³³ since the burden imposed by bail of reporting to a court upon reasonable notice is arguably a legal disability which provides sufficient grounds for issuance of the writ of habeas corpus.³⁴

²⁹ See Note, 37 VA. L. REV. 105, 107 (1951).

³⁰ *Ibid.*

³¹ *Id.* at 110.

³² In *Witte v. Fèrber*, 219 F.2d 113 (3d Cir. 1955), a federal district court had denied a petition for habeas corpus review of the state conviction of a police chief for a misdemeanor. While awaiting appellate review of this decision, the sentence expired and the petitioner was released. The Third Circuit held that his petition for a writ of habeas corpus was rendered moot by the expiration of the sentence and refused to review his conviction even though it resulted in loss of pension payments. Under a broad reading of *Martin* and *Thomas*, this legal detriment *alone* might be sufficient to permit a federal court to review the prior conviction. *Thomas* is directly apposite to the factual situation in *Witte*, and is authority for the proposition that expiration of a sentence during the appellate pendency of a petition will not render the request for the writ moot. See notes 20-24 *supra*.

³³ A petitioner for a writ of habeas corpus in a federal court must exhaust all state remedies before seeking the writ. *Ex parte Hawk*, 321 U.S. 114 (1944) (per curiam). This holding is codified in 28 U.S.C. § 2254 (1964). However, in exceptional circumstances a federal court may issue a writ of habeas corpus even where state remedies have not been exhausted. *Darr v. Burford*, 339 U.S. 200 (1950); *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13 (1925). For example, in *In re Loney*, 134 U.S. 372 (1890), petitioner was charged with having given perjured testimony in a federal court case involving a contested congressional election. The writ of habeas corpus was granted on the ground that to permit him to be prosecuted in the state courts for testimony given in a federal tribunal would impede the administration of justice in the federal tribunal. *Id.* at 375.

³⁴ A person on bail has, by definition, not exhausted all state remedies. Thus, even if the legal restrictions of bail might be considered sufficient to constitute custody, the petitioner must, in addition, show that exceptional circumstances exist which will permit a federal court to review his state conviction. See note 33 *supra*. Since bail status is temporary, such a showing might be extremely difficult.

The First Circuit has recently decided in *Allen v. United States*, 349 F.2d 362 (1st

A broad extension of the concept of custody, however, would seem to extend the scope of the writ far beyond its traditional purpose, which was to command authorities to produce the person detained in order to inquire into the cause of such detention.³⁵ Moreover, issuing a writ of habeas corpus years after a sentence has expired impairs the effectiveness of the review process, because of the difficulties involved in collecting stale evidence.³⁶ Alternatively, where review of a conviction is sought before sentence under that conviction has commenced, potential interference with the state administration of justice may result since premature federal review might not accord proper weight to post-conviction state remedies.³⁷ Such policy factors might militate against a broad reading of *Martin* and might justify an interpretation more consistent with the original purpose of the writ. The decision might be construed narrowly to require that the incidental effects of a conviction must result in continued "physical confinement" under a previous sentence, including the restrictions of parole, before the custody requirement is satisfied.³⁸ Thus a petitioner on bail would be precluded from successfully petitioning for the writ since there is no concurrence of the legal disability with actual restraint. The writ would be available under this interpretation of custody only in a situation similar to that in *Martin*, such as a case where the petitioner's good

Cir. 1965), that bail is an insufficient restraint of liberty to justify the issuance of a writ of habeas corpus. The case emphasized that the degree of restraint involved in parolee status is far greater than that imposed upon one on bail. *Id.* at 363.

³⁵ See *Sibray v. United States*, 185 Fed. 401 (3d Cir. 1911). Some evidence that Congress has not sanctioned an extension of the writ to cases beyond those originally envisaged can be inferred from the fact that the federal habeas corpus statute has remained substantially unaltered since 1867. See note 9 *supra*.

³⁶ This argument would not be as forceful in situations where habeas corpus review is sought *before* the petitioner has commenced serving his sentence. A review at an earlier date will avoid the problem of stale evidence.

In *Commonwealth ex rel. Stevens v. Myers*, 419 Pa. 1, 213 A.2d 613 (1965), a prisoner serving one sentence was granted a writ of habeas corpus to review a subsequent conviction when the sentence imposed by the latter conviction would not begin for ten years. The court adverted to staleness of evidence as an important factor in its decision. *Id.* at —, 213 A.2d at 621-22. The dissent, *id.* at —, 213 A.2d at 627, pointed out, however, that staleness was as much a factor in 1934 when *McNally v. Hill*, 293 U.S. 131 (1934), was decided as it is today.

³⁷ See notes 33-34 *supra*.

³⁸ It is possible to infer that actual physical imprisonment may still be necessary. "[W]e are persuaded that from a practical point of view the convictions for escape and larceny are the real, effective basis of *Martin's* continuing detention in a penal institution instead of his being at large, relatively free, though under parole supervision [T]he subsequent convictions which cause the vast difference between continued confinement . . . and conditional release are in the truest sense a present restraint upon *Martin's* liberty." 349 F.2d at 784.

behavior credits have been voided by a second conviction, thereby forcing him to remain in prison for several more years.³⁹

Regardless of the scope of the *Martin* decision, an erroneous conviction which creates a collateral legal disability before or after service of the sentence imposed demands redress. The expansion of the concept of custody can bring these situations within the scope of the writ of habeas corpus. It is questionable, however, whether the fictionalization of the custody requirement is the most feasible means of establishing broader federal protection of constitutional guarantees. Appeal to the Supreme Court upon denial by a state court of a petition to reopen a constitutionally infirm conviction may be one alternative method of affording federal review, although the strictures of certiorari procedure make redress more difficult to obtain by such a tack. Alternatively, federal protection might be logically achieved by allowing review in situations similar to *Martin* by means of a declaratory judgment⁴⁰ rather than converting the

³⁹ But see, e.g., *Wilson v. Bell*, 137 F.2d 716 (6th Cir. 1943). Another example of a situation squarely covered by a narrow reading of *Martin* is *United States ex rel. Chilcote v. Maroney*, 246 F. Supp. 607 (W. D. Pa. 1965). See note 26 *supra*.

⁴⁰ See, e.g., *Koyce v. United States Bd. of Parole*, 306 F.2d 759 (D.C. Cir. 1962). Plaintiff was convicted of murder by a military court-martial and sentenced to a term of life imprisonment which was later reduced by the Secretary of the Army to a term of eight years, to end April 30, 1964. He was initially committed to a military prison but was later transferred to a civilian penitentiary. As a result of good time credits, he was due to be released January 15, 1962. *Id.* at 760. A civilian prisoner released before the termination of his sentence as a result of good time credits is usually considered as "on parole" until the termination of his sentence. See, e.g., *Miller v. Taylor*, 290 F.2d 8 (10th Cir. 1961); *Howard v. United States*, 274 F.2d 100 (8th Cir.), *cert. denied*, 363 U.S. 832 (1960). Military prisoners, on the other hand, are usually released unconditionally when good time credits shorten the period of imprisonment. *Koyce v. United States Bd. of Parole*, *supra* at 761. Prior to his release, the petitioner filed suit in the district court against the United States Board of Parole, seeking a declaratory judgment that parole conditions could not validly be applied to him upon his release because he had been convicted by military court-martial. *Ibid.*

The court held that the jurisdictional question of case or controversy was not controlled by decisions in habeas corpus proceedings where relief was denied because sought prior to the time for actual release: "*The writ of habeas corpus has its own special function; it is ordinarily available only to vindicate the right to be free of restraint at the time the writ is sought, not at some future time. Relief by a declaratory judgment is not so limited.*" It may be had though habeas is not the appropriate remedy. Appellant was not obliged to wait until released and actually subjected to the allegedly illegal restraint before obtaining a decision as to the validity of such restraint." *Ibid.* (Emphasis added.) Note that under the terms of 18 U.S.C. § 4203 (1964), the petitioner as a federal prisoner, would have been in custody for the purpose of the requirements of the habeas corpus statute when released on parole. See note 17 *supra*.

The court further held that a justiciable issue had been presented, which could be adjudicated by means of a declaratory judgment: "When . . . [petitioner] filed suit

writ of habeas corpus into a judicial panacea by which the federal courts may cure any legal ill created by a conviction.

there existed a definite legal impact upon . . . [him] due to the administration of his sentence as one to which parole conditions applied. The impact upon him naturally would increase when he would be actually subjected to restraints upon his release, but he need not await a greater impact if there existed a sufficient one. When he sued there existed a clear legal controversy affecting his status and the conditions of his confinement and release." *Koyce v. United States Bd. of Parole, supra* at 761.

Since the complainant in *Koyce* was allowed to adjudicate the validity of his status, it would seem that Martin could do so by the same means. There was at least as much *immediate* legal impact on Martin by virtue of his second conviction as there was on *Koyce* by virtue of his transferral into a civilian prison; and there would have been a greater impact eventually, since Martin faced continued imprisonment under the second sentence, while *Koyce* faced only parole. Where the one situation presents a justiciable issue, so should the other.