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The Uncertain Rules of Timeliness in Petitions for the Writ of Habeas Corpus

Edwin M. Goldsmith III

THE UNCERTAIN RULES OF TIMELINESS IN PETITIONS FOR THE WRIT OF HABEAS CORPUS*

I.

INTRODUCTION

As a result of the recent United States Supreme Court rulings in *Escobedo v. Illinois*,[1] *Gideon v. Wainwright*,[2] and *Jackson v. Denno*,[3] prisoners have been accorded new substantive tools to challenge prior state convictions on constitutional grounds. However, these new tools for attacking prior judgments are useful only in so far as procedural methods are available for presenting the prisoner's claim to the courts for adjudication. Since the time for direct appeal from the challenged judgment has often expired, any attack must be instituted collaterally through the writs of habeas corpus and coram nobis.[4]

The writ of error coram nobis, because of its traditional limitations,[5] has been described as unavailable "as a means for vindication of modern constitutional rights."[6] Habeas corpus, on the other hand, has taken on an extremely broadened scope, at least on the federal level.[7] Pennsylvania decisions have declared it the only "comprehensive method of collateral attack. . . ."[8]

One severe limitation on the writ of habeas corpus, however, has been brought into sharp focus by its increased use in proceedings to void prior state convictions on the grounds formulated by *Gideon, Jackson* and *Escobedo*. Traditionally, use of the writ has been limited to challenging the legality of a present confinement with the further qualification that

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1. 378 U.S. 478 (1964).

2. 372 U.S. 335 (1963).

3. 378 U.S. 368 (1964).

4. Prior to the three cases cited in notes 1, 2, and 3 *supra*, the factor which brought about most post-conviction challenges, at least in the federal courts, was the absence of defense counsel in many state trials (in itself raising a constitutional issue) which resulted in the "failure of unrepresented defendants to know and to raise constitutional claims in the proceedings leading to conviction, whether on plea of guilty or full trial." Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 465 (1960).

5. Historically, this extraordinary writ allowed the record to remain in King's Bench where a proceeding was had to demonstrate new facts, dehors the record, upon which the same court could reform its judgment. The writ lies to yield entry to facts which, if known, would have prevented the first judgment (citations omitted).
Commonwealth *ex rel.* Spader v. Myers, 17 Pa. D.&C.2d 275, 277 (1959), *affirmed*, 190 Pa. Super. 62, 152 A.2d 787 (1959).

6. Reitz, *op. cit. supra* note 4, at 466. *But see* note 39 *infra* and accompanying text indicating the United States Supreme Court's use of coram nobis.

7. See Fay v. Noia, 372 U.S. 391 (1963).

8. Commonwealth *ex rel.* Stevens v. Myers, 419 Pa. 1, 11, 213 A.2d 613, 619 (1965).

the writ will not issue unless a court's decision that the challenged sentence is void will secure the prisoner's immediate release.

Several hypothetical situations point up the areas where these limitations have been traditionally applied:

1. Where a prisoner has been convicted on several counts or has been convicted several times in separate trials and, as a result, has been sentenced to consecutive terms, application for a writ of habeas corpus to question any of the convictions, counts, or sentences which he has not yet begun to serve meets with the objection that it is *premature* until his confinement can be attributed to the challenged sentence.

2. Where concurrent sentences are imposed and the writ is instituted to challenge only one, the petitioner must overcome another obstacle, since the unchallenged sentence would bar his right to be released immediately. This doctrine of immediate release is relevant in the above prematurity situation as well, since the petitioner would still have to serve the unchallenged sentence.

3. Where the petitioner employs the writ to attack a conviction and sentence which he has already served, the problem of mootness arises. Issuance of habeas corpus is theoretically precluded by the absence of confinement under the challenged conviction or sentence.

II.

HISTORICAL SETTING

Historically, the writ of habeas corpus was used by the courts of common law and chancery as a judicial challenge to the legality of detentions imposed on persons by rival courts.[9] Its use was limited primarily to situations where defendants were held without being charged or where charges had been made but bail had not been fixed or no time for trial had been set. It was established doctrine that the writ was not available if the defendant was held under a valid warrant of execution of judgment by a proper court. In modern times, however, the writ has been transformed into an important post-conviction remedy.[10]

That the English courts conceived of the writ as a means for questioning the validity of a present restraint was expressed in the case of *Dominus Rex v. Clarkson*,[11] where the court said, "we have nothing to do . . . but only to see that she is under no illegal restraint."[12] Later, in Ex parte *Garcia*,[13] Justice Tyndal recognized the requirement that

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

10. Oaks, *Habeas Corpus in the States*, 32 U. CHI. L. REV. 243 (1965).

11. 1 Stran. 444, 93 Eng. Rep. 625 (K.B. 1721).

12. *Id.* at 445, 93 Eng. Rep. 625. The writ was requested by the alleged husband of a woman who had returned to the custody of her father.

13. 3 Bing. (N.C.) 299, 132 Eng. Rep. 425 (K.B. 1836).

the challenge must be directed at the action which gave rise to the present confinement.[14]

American courts, both state and federal, apparently recognized the principle enunciated in the *Garcia* case.[15] In *Commonwealth* ex rel. *Lewis v. Ashe*,[16] the relator was sentenced on two bills of indictment; the sentences were to be served consecutively, each to run for not less than five nor more than ten years. During his confinement under the first bill, the relator escaped from prison, and upon his recapture, was sentenced for an additional ten to twenty years to be served after his other terms were completed. He filed a writ of habeas corpus to challenge the ten to twenty year sentence on the ground that it was illegal on its face. Although the Pennsylvania court agreed, it refused to permit resentencing until the initial sentences had been served, declaring that his petition was premature.

The United States Supreme Court, in *McNally v. Hill*,[17] firmly established the rule for the federal courts that the petitioner's confinement must be pursuant to the challenged sentence. The petitioner was convicted and sentenced on three counts, the first two sentences to run concurrently, and the third to commence at the end of the second. During the latter part of the second sentence, the prisoner petitioned for the writ, challenging his third sentence. Motivation for the challenge derived from the fact that avoidance of the third term would entitle him to be considered for parole under the federal parole act.[18] The court first examined statutory authority and found that the Judiciary Act of 1789[19] limited the use of the writ to inquiries into the cause of restraint only when the person was in custody under federal authority. Since the act did not indicate whether the individual had to be in custody *for the* conviction or sentence challenged, the court resorted to the common law at the time of its enactment. No English cases appeared before 1789 "where the

14. The prisoner, who was detained by the Warden of the Fleet, petitioned for the writ, alleging that he was being confined under an insufficient warrant from the commissioners in bankruptcy. The Warden answered that the prisoner was being held for five other actions and that the warrant complained of was directed to the Keeper at Newgate and not the Warden. The court held that "the prisoner may question the legality of the warrant the moment he is in custody under it: here, he is not." *Id.* at 300. 132 Eng. Rep. at 426.

15. See *Ex parte* Ryan, 17 Nev. 139, 28 Pac. 1040 (1882); *In re* Callicot, 4 Fed. Cas. 1075 (No. 2323) (C.C.E.D. N.Y. 1870).

16. 335 Pa. 575, 7 A.2d 296 (1939).

17. 293 U.S. 131 (1934).

18. 37 STAT. 650 (1913) (Now 65 Stat. 150 (1951), as amended, 18 U.S.C. § 4202 (1964)).

19. In 1934, this was embodied in 284 U.S.C. §§ 451, 452, and 453. See 63 STAT. 105 (1949), *as amended*, 28 U.S.C. § 2241 (1964), for the present statutory successor to 28 U.S.C. § 451, 452, and 453. Section 2241 provides in part that:

> (c) The writ of habeas corpus shall not extend to a prisoner unless—
> (1) He is in the 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 . . . .

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."[20] From this the Court concluded that the petition for a writ of habeas corpus could be filed only (1) while the petitioner was in custody, (2) when the present restraint was alleged to be unlawful and (3) when the petitioner could be immediately released if the decision was in his favor.

III.

DEVELOPMENTS IN THE FEDERAL COURTS

Recent Supreme Court decisions and other federal cases indicate a tendency to circumvent the result of *McNally,* although, with the exception of one federal jurisdiction, the courts have continually adhered to its principles. One line of cases, which traces its origin to the rule in Ex parte *Hull,*[21] has circumvented the *McNally* result by reasoning that the confinement was *caused* by the challenged sentence or conviction, although technically the challenged term was not being served. In *Hull,* the petitioner had been paroled from one conviction but was remanded to prison to complete his term solely because of a conviction resulting from a crime committed during the period of parole. The Supreme Court held that the petition attacking the second conviction was not premature, even though the prisoner was still incarcerated under the first. In effect, the Court decided that the second sentence was the real cause for confinement and that petitioner, consequently, was challenging the conviction for which he was in custody.

However, the rule in *Hull* proved to be a limited method for avoiding a dismissal for prematurity. Later cases involving similar facts define the limits. In *United States* ex rel. *Parker v. Ragen*[22] the Court of Appeals for the Seventh Circuit reversed the district court's nullification of a second sentence on the ground that the reconfinement under the first conviction was not dependent on the fact that the petitioner had been convicted for the second crime and that, therefore, the petition attacking the second conviction was premature. The facts of the case do not indicate the basis for reconfinement under the original sentence but, apparently, the judge believed that the parole had been revoked on grounds other than the second conviction.

That there must be a clear showing that the parole was revoked because of the challenged second conviction is evidenced by *United States* ex rel. *Gaito v. Maroney,*[23] a recent Third Circuit decision. In that case, the parole board ordered the prisoner recommitted "for violation of

20. 293 U.S. at 138.
21. 312 U.S. 546 (1941).
22. 167 F.2d 792 (7th Cir. 1948).
23. 324 F.2d 673 (3d Cir. 1963).

parole by conviction on a new offense to serve unexpired time."[24] The court, however, denied the petition because the specific ground for commitment had not been firmly established. The court attempted to ameliorate its harsh decision by stating that the appellant should have the specific reason for his reconfinement established in the state courts where several writs of habeas corpus were pending.[25] In the very recent case of *United States* ex rel. *Bowers v. Rundle*,[26] *Hull* was again distinguished. The relator had been sentenced to two consecutive terms of two and one half to five years; the petition attacked the second term. The court ruled that since the petitioner still had two and one half years to serve on the first term, he was still validly confined. Though he was eligible for parole, the parole board was the only body with the power to release him. Thus, the petition was dismissed for prematurity and *Hull* was distinguished because the petitioner's freedom would not be assured even if the second term was found to be invalid.

A second means for avoiding a dismissal for failure to meet *McNally's* rules for timeliness of the writ has evolved from the argument that confinement is a much broader concept than mere physical custody. In the 1963 case of *Jones v. Cunningham*[27] the petitioner had been convicted in a Virginia state court in 1953 and had been sentenced as a third-offender. He petitioned for habeas corpus in 1961 asserting that a 1946 Virginia conviction, which formed a partial basis for his 1953 sentence, was invalid. Before petitioner's case was argued in the Fourth Circuit Court of Appeals he was paroled to the custody of the Virginia Parole Board. The court of appeals dismissed on the ground that the case was moot, since the petitioner was not in the custody of the prison superintendent, the only respondent. Moreover, the court determined that the parole board was not a proper party because they did not hold him in physical custody and, thus, permission to add it as a respondent was refused. The Supreme Court reversed, holding that parole was sufficient custody for the purposes of habeas corpus petitions and that mere parole did not render the petition moot. Thus, the *Jones* decision permitted a hearing of the petition of a prisoner who was no longer incarcerated for the challenged sentence yet preserved the principles of *McNally*. *Jones,* however, should not be interpreted as extending to all cases where the petitioner is attacking a sentence under which he is no longer physically confined. *Parker v. Ellis,*[28] which preceded *Jones* and which has not been overruled, held that the petition of a prisoner who has been absolutely released must be dismissed as moot.

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24. *Id.* at 674.

25. See Commonwealth *ex rel.* Gaito v. Maroney, 416 Pa. 199, 204 A.2d 758 (1964). In the state proceeding, no explicit mention was made of the Hull problem. The facts appear to indicate, however, that the reconfinement was a direct result of the conviction challenged.

26. 240 F. Supp. 323 (E.D. Pa. 1965).

27. 371 U.S. 236 (1963).

28. 362 U.S. 574 (1960).

Jones v. Cunningham has had widely divergent consequences in the federal courts. The First Circuit decided, in *Allen v. United States,*[29] that the *Jones* rule was inapplicable where the petitioner was free on bail. The court reasoned that the *Jones* definition of "custody" for the purposes of habeas corpus did not include situations where "essentially the only restriction imposed upon a defendant . . . is to be subject to the court's call upon reasonable notice, . . .".[30]

In contrast to this conservative view, the Fourth Circuit has used a tangential application of *Jones v. Cunningham* to overrule the *McNally* principles. In *Martin v. Virginia,*[31] the prisoner's motion for a declaratory judgment asserted that his sentences for prison escape and larceny were invalid. These convictions had been incurred after he escaped from prison while serving a term for second degree murder. When he moved for the declaratory judgment, his imprisonment was still pursuant to the murder sentence, but he would be eligible for parole if the larceny and prison escape sentences were voided. The court chose to treat his motion as a petition for the writ of habeas corpus, and held that it was not premature, reasoning that since these challenged sentences rendered him ineligible for parole, his custody could be deemed pursuant to them and the writ could issue. Moreover, the court indicated its belief that the *Jones* decision represented a relaxation of the rules on timeliness proposed by the Supreme Court in *McNally.* It reasoned further that the new ruling that parole was sufficient status for a determination of the legality of custody could be easily extended to the situation where the alleged confinement was denial of eligibility for parole. Thus, the court transformed the *Jones* ruling, which arose on a question of mootness, to control a situation of traditional prematurity.

Further complication ensued when a United States District Court in Pennsylvania denied habeas corpus to a prisoner, who, while confined under unchallenged sentences, sought to attack a prior sentence which he had already served but which stood in the way of his parole. In *United States* ex rel. *Chilcote v. Maroney,*[32] the court reasoned that since *McNally* required that petitioner's immediate release or admission to bail be possible if the court decides in his favor, the writ is not available to one incarcerated on an admittedly valid charge, even though he would be eligible for parole if the challenged sentence were voided. The court determined that eligibility for parole did not conform to the immediate release requirement of *McNally,* since the parole board would still have wide discretion to refuse parole even if the disputed sentence was voided. Further the court reasoned that because *Jones* had considered parole to be confinement within the meaning of the habeas corpus statute, the

29. 349 F.2d 362 (1st Cir. 1965).
30. *Id.* at 363.
31. 349 F.2d 781 (4th Cir. 1965).
32. 246 F. Supp. 607 (W.D. Pa. 1965).

prisoner would remain in custody in violation of the *McNally* rule even if the board granted immediate parole when the sentence was eliminated.

Obviously, *Chilcote* does violence to the *Hull* principle that permits challenge of a conviction which is the direct cause of his loss of parole. The *Chilcote* rationale would conclude that such a prisoner remains confined when his parole is reinstated after the avoidance of a later conviction.

Contrasting the First Circuit ruling with *Chilcote,* the prime distinction is that *Martin* considered the problem of confinement under the challenged sentence, while *Chilcote* focused on the *McNally* doctrine of immediate release. The opinions illustrate the two extreme and diametrically opposed positions which can be derived from *Jones,* but *Allen's* true significance lies in the indication that the federal courts will not construe "custody" into a meaningless term; even though *Jones* rejected actual incarceration as a test of custody, significant restraints on the person must be shown for the court to rule that he is confined.

The Supreme Court has indicated a method, aside from *Jones,* for avoiding all prematurity or mootness problems attached to habeas corpus writs, the use of Rule 35 of the Federal Rules of Criminal Procedure.[33] In *Heflin v. United States,*[34] the petitioner used section 2255,[35] the statutory formulation of habeas corpus for federal prisoners,[36] to attack a sentence which he had yet to serve. The trial court had sentenced him to ten years on one count for taking property by force and violence, one year on a second count for receiving stolen goods, and three years on a third count for conspiracy, all sentences to run consecutively. The petitioner challenged the second count while serving the ten year sentence. He contended that he could not be convicted simultaneously for felonious taking and felonious receiving. The entire Court agreed that the petitioner's argument against the second count was valid, but they could not agree as to the reason why the petition should not be dismissed for prematurity.

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33. FED. R. CRIM. P. 35:

> The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after the receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after the receipt of an order of the Supreme Court denying an application for a writ of certiorari.

34. 358 U.S. 415 (1959). The petition was denied for reasons other than prematurity.

35. 63 STAT. 105 (1949), *as amended,* 28 U.S.C. § 2255 (1958). A pertinent part of the section reads:

> 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.

36. Under the old statute, the prisoner was forced to bring the writ in the court of the district where he was confined. The purpose of this section is to permit habeas corpus petitions in the court wherein the prisoner was tried and sentenced which had been the procedure followed with writs of coram nobis. See United States v. Hayman, 342 U.S. 205 (1952).

The opinion of the Court, written by Mr. Justice Douglas, indicated that some of the Justices interpreted the words of section 2255, "a motion for such relief may be made at any time," to mean exactly what they said. However, five Justices, concurring in a separate opinion, firmly upheld the principle of prematurity but avoided its result by saying that Rule 35 could be used to correct a sentence illegal on its face; they refused to discuss whether Rule 35 would apply when the invalidity could not be determined from the record.

In addition to Rule 35, the writ of coram nobis is available in the federal courts, but the situations where it can be used are limited. In *United States v. Morgan*,[37] the prisoner had served his full term of four years in federal prison when he was subsequently convicted in a state court, a longer sentence was imposed because of the prior federal conviction. Alleging that his right to counsel had been denied without a proper waiver, the prisoner attacked the prior federal conviction by a writ of coram nobis to the federal district court in New York. The district court treated the writ as a motion under section 2255, and refused relief because the prisoner was no longer confined under the federal sentence. However, the court of appeals[38] and the Supreme Court agreed that the federal habeas corpus statute could be avoided by the writ of coram nobis. The confinement rules inherent in a habeas corpus proceeding were not deemed applicable. The Court did not say that the timeliness rules for habeas corpus had been revoked; rather, they held that when the facts of a particular case lend themselves to challenge by writ of coram nobis, habeas corpus restrictions on timeliness would not be a bar to the proceeding.[39]

IV.

DEVELOPMENTS IN STATE COURTS

A. *Generally*

State courts, have not been subjected to the strictures of the *McNally* decision in their attempt to liberalize the traditional timeliness rules. Rather, they remain unaffected by the Supreme Court decisions in this area and free to construe their local statutes and overrule their own precedents in a continuing trend to do away with the rules of prematurity and mootness.

37. 346 U.S. 502 (1954).
38. 202 F.2d 67 (2d Cir. 1953).
39. It should not be thought that coram nobis can be used in all situations where habeas corpus would be restricted by timeliness rules. The writ of coram nobis is used to correct errors in facts which would affect the validity of the judgment. In United States v. Morgan, *supra* note 37, the record did not indicate that the petitioner had improperly waived his right to counsel but only said that he was without counsel. There is an apparent presumption that if the trial judge knew that the waiver was improper, the petitioner would not have been convicted. Thus, it is assumed that the judge did not know of any improper waiver, because the trial was permitted to continue. A writ of coram nobis would, therefore, correct the error in fact, that is, that the waiver was proper.

As early as 1954, California, in Ex parte *Chapman*,[40] overruled a demurrer which opposed the petitioner's application for the writ on the grounds that immediate release would not be available to him. The court determined that the writ would lie, though petitioner was serving the first of two consecutive terms attacking the second for the purpose of making him eligible for parole in the future.

In *State* ex rel. *Goodchild v. Burke*[41] the relator was free on parole from two murder convictions when he was found guilty of burglary. His parole was revoked, and a challenge to the murder conviction was instituted before the burglary sentence was due to commence. The Wisconsin Court rejected the argument that the petition was premature because the unchallenged burglary sentence would have to be served whether or not the petitioner was successful. The reasons stated for their decision were that (1) the murder convictions would hamper the prisoner's eligibility for parole, (2) no other post-conviction procedure was available to adjudicate alleged constitutional errors in a conviction once the time for appeal had passed, and (3) the delay caused by a dismissal for prematurity would only mean that the evidence would be more difficult to assemble if a new trial was ordered at a subsequent date.

West Virginia has also decided to ignore the doctrine of immediate release in habeas corpus petitions. In *State* ex rel. *White v. Boles*[42] a petitioner's attack upon one of two concurrent sentences was allowed, and, upon finding the challenged sentence illegal, the court remanded the petitioner to prison to complete the uncontested portion of his concurrent term.

B. *The Pennsylvania Problem*

Pennsylvania, in a series of cases in 1965, completely abrogated their prematurity limitations, which had been set out in *Commonwealth* ex rel. *Lewis v. Ashe*.[43] *Commonwealth* ex rel. *Stevens v. Myers*[44] presented the court with the classic prematurity situation: a petitioner serving the first of two consecutive sentences, for robbery and murder respectively, was attacking the second conviction, contending that he had been denied counsel during an attempt to appeal. The prematurity question had not been raised by the prosecution nor was it mentioned by the lower court which had dismissed the petition. The Pennsylvania Supreme Court, however, took the opportunity to review the validity of the rule in a modern-day context. Justice Roberts, speaking for the majority, carefully confined his opinion to the facts presented on appeal. Considering only those situations where the second of two consecutive sentences was being attacked while the petitioner was serving the first, Justice Roberts found

40. 43 Cal. App. 2d 385, 273 P.2d 817 (1954).
41. 27 Wis. 2d 87, 133 N.W.2d 753 (1965).
42. 140 S.E.2d 591 (W. Va. 1965).
43. 335 Pa. 575, 7 A.2d 296, *cert. denied*, 308 U.S. 596 (1939).
44. 419 Pa. 1, 213 A.2d 613 (1965).

support for retention of the prematurity rule only in historical precedent. Against the firm weight of tradition, the court proposed that a delay of twenty years (the maximum term of the first conviction) in permitting the petition would add great difficulty to the commonwealth's prosecution or the prisoner's defense, should a new trial finally be ordered, simply because the evidence would become stale. The difficulty of proving guilt beyond a reasonable doubt would be formidable after such a passage of time. The underlying motive, however, for eliminating the prematurity rule seemed to be a determination that it was a needless and archaic burden in an era when the uses for the writ had grown and new avenues had been created for post-conviction attacks. The staleness of evidence argument, which was the apparent rationale of the court should be confined to the particular fact situation found in *Stevens*. The decreased vitality of such a proposition becomes obvious in a case where the sentence which actually confines the prisoner is of short duration.

Although the court attempted to limit *Stevens* to its facts, two decisions which immediately followed indicate that the timeliness rules are rapidly losing their influence in the Pennsylvania courts.

Commonwealth ex rel. *Ensor v. Cummings*[45] decided that a petition was not rendered moot when the relator was paroled from the challenged sentence. The question arose again, in a somewhat different context, when a petition was instituted to challenge a sentence from which the prisoner had been paroled so that he could begin serving a second term for another offense.[46] The Pennsylvania Superior Court was confused as to which sentence the prisoner was actually serving, because the parole from the first sentence was merely constructive, a term applied when a prisoner is paroled from one offense so that a consecutive sentence can begin. The court entertained the writ reasoning that if he was still confined under the first sentence, there was obviously no problem, while if he was being held under the second sentence and paroled from the first, the *Stevens* reasoning indicates that he would still be under sufficient restraint for the writ to issue.

Whether Pennsylvania courts will ever be able to entertain a petition for the writ of habeas corpus where the petitioner is completely free of any restraint is, at present, highly doubtful and, in fact, it is possible that the prematurity rule will be reintroduced into Pennsylvania procedure. Seven months after the *Stevens* decision, the legislature passed the Post Conviction Hearing Act,[47] which under section 2,

> establishes a post-conviction procedure for providing relief from convictions obtained and sentences imposed without due process of law. The procedure hereby established shall encompass all common law and statutory procedures for the same purpose that exist when this statute takes effect, including habeas corpus and coram nobis.

45. 420 Pa. 23, 215 A.2d 651 (1966).
46. Commonwealth *ex rel.* Alexander v. Rundle, 206 Pa. Super. 528, 214 A.2d 304 (1965).
47. Pa. Laws 1966, act 554.

> However, nothing in this act limits the availability of remedies in the trial court or on direct appeal.[48]

Section 3 is crucial and could have marked effect on timeliness rules. To be eligible for the procedure the petitioner must prove:

> (a) That he has been convicted of a crime,
>
> (b) That he is incarcerated in the Commonwealth of Pennsylvania under a sentence of death or imprisonment, or on parole or probation,
>
> (c) That his conviction or sentence resulted from one or more of the following reasons: . . . .[49]

It is impossible to say whether section 2 completely replaces the common law writ of habeas corpus, since its enactment was very recent and no judicial interpretation has yet been made. If the statute does supersede the traditional procedure, section 3 looms as a possible bar to collateral attacks on convictions or sentences where the prisoner is still serving a previous term or where the prisoner has been absolutely released from the challenged sentence and is incarcerated under another. It is certainly arguable that when subsections (b) and (c) are read together the clear import is that "conviction" under (c) refers to the incarceration under (b). Logic repels a rationale that the statute means that a petitioner need only be "incarcerated" under *any* sentence, parole or probation to attack a particular conviction; such a rule finds no basis in common law usage, recent precedent or reason. Further support for the position that the statute demands that the prisoner be challenging the conviction which confines him is found in a comparison of the Pennsylvania act with section 2241 of the federal act, which the Supreme Court, has interpreted as requiring some form of restraint under the sentence being attacked.[50] Section 2241, requires at least "custody in violation of the Constitution or Laws or treaties of the United States. . . ."[51] The Pennsylvania act, sections 3 (b) and (c), seem to impose the same requirement although the exact "violations" are spelled out. Of course, the argument could be made that section 2241 demands only incarceration or detention of some sort under the challenged sentence because of *McNally's* interpretation of the common law, and, further, that Pennsylvania is not bound by this determination. But the question remains, why the legislature passed a statute so similar to section 2241 when it knew of the *Stevens* decision? And, more pointedly, why did the Pennsylvania act specifically provide for the *Ensor* type fact situation and yet completely fail to accommodate the ruling in *Stevens?* Clearly, the prematurity situation will have to be relitigated in light of this act, and whether the courts

48. Pa. Laws 1966, act 554, § 2.
49. Pa. Laws 1966, act 554, § 3.
50. See text at note 36, *supra.*
51. 63 STAT. 105 (1949), as amended, 28 U.S.C. § 2241 (Supp. 1965).

will incorporate the *McNally* rule of eligibility for immediate release into the act remains a further problem to be determined. The latter question will arise when, in the future, a prisoner attacks one of several concurrent sentences, or for that matter, one of several consecutive sentences.

V.

CONCLUSION

The only situation in which the federal courts have universally liberalized the timeliness rules is in the case of a petitioner who has been paroled from the challenged sentence. In regard to prematurity, the decision in *Heflin* indicates that the Supreme Court is following *McNally* by a very narrow majority, and the use of rule 35 in that case to avoid *McNally* can, perhaps, be interpreted as a desire on the part of the Court to mitigate the consequences of a strict timeliness rule. Although the requirement of custody is firmly imbedded in federal statute, its dilatory effect can be mooted by using the rationale of the *Martin* case to say that denial of eligibility for parole is sufficient custody for the purposes of the statute. If the *Martin* rationale is accepted, it would appear that the requirement of immediate release should not stand in the way of a petition challenging one of two consecutive or concurrent sentences. From a practical point of view, no reason precludes the petitioner from being released from the voided sentence and then remanded to serve the remaining terms.

In the state courts, the trend is clear. The timeliness rules will have less importance as time goes on, with the exception of those states where the rules have been frozen into statute.

It is submitted, on the basis of these cases, that courts, in the future, will recognize the timeliness rules for what they are, archaic and outworn appendages remaining from an era when the writ could be brought only before conviction by a proper court. In their historical context, the rules had a rational foundation. The courts were concerned with interminable incarceration without the authority of a proper court; the writ was in no way concerned with situations where the prisoner had been found guilty by a court of competent judisdiction, though on illegal grounds or by an illegal method.[52] Thus, the petitioner was necessarily confined under the charge he was challenging; the purpose of the writ was to test that confinement, and if it was found illegal, the prisoner had the right to be immediately released.

In modern times, however, the writ of habeas corpus has been used after conviction and the court is concerned not so much with the fact of confinement as with the methods or principles used by the convicting court. Coupled with this change is the relatively modern system of parole and probation which was not a factor for consideration when the

52. See note 10 *supra* and accompanying text.

writ was solely a remedy for release prior to conviction. Thus, when the ancient timeliness rules are applied in a modern context they tend to hinder the courts from correcting past errors and to deny the prisoner his eligibility for the privilege of parole.

Perhaps another method for collaterally attacking prior convictions or sentences should be developed by statute outside the framework of the writ of habeas corpus. Such a solution might be preferable to the current situation where courts, in order to use the writ and yet avoid the prematurity problem, have been forced to define "confinement" as broadly as actual parole or denial of eligibility for parole. Under the present structure, the Supreme Court has placed the federal courts in the difficult position of denying a petition which challenges a future confinement while permitting a petition where parole has terminated the physical confinement. Clearly, the timeliness rules must be thoroughly re-examined and their validity in modern-day criminal procedure redetermined, for constitutional rights are meaningless if the procedural structure bars their exercise.

Edwin M. Goldsmith, III