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### Challenging a Just-Completed Prison Sentence While Serving Another: Is the Prisoner in Custody for Purposes of Seeking Federal Habeas Corpus Relief?

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# Case at a Glance

Harvey Garlotte was sentenced to a three-year prison term on a marijuana conviction. At the same time, he was sentenced to two life terms on two murder convictions. After serving the sentence on the marijuana conviction and while serving the sentences on the murder convictions, Garlotte filed a federal habeas corpus petition challenging the marijuana conviction on the ground that its sentence had delayed his parole date on the murder convictions. Now the Supreme Court decides if Garlotte was *in custody* at the time he filed his habeas petition.

## Challenging a Just-Completed Prison Sentence While Serving Another: Is the Prisoner in Custody for Purposes of Seeking Federal Habeas Corpus Relief?

by Jay E. Grenig

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One of the most controversial issues in the relationship between federal courts and the states is federal habeas corpus relief for state prisoners. (If such relief is granted, the petitioner is either released from state custody outright or is conditionally released with the state having the option of retrying the petitioner.) While some see the writ of habeas corpus as an essential protection of federal constitutional rights, others see it as a source of direct confrontation between federal and state courts. The issues surrounding federal habeas corpus relief raise fundamental questions about federalism, separation of powers, the purposes of the criminal justice system, and the nature of criminal-law litigation.

### ISSUE

Was a prison inmate serving consecutive sentences for possession of marijuana with intent to deliver and two murders in custody when, after completing his sentence on the marijuana conviction, he filed a federal habeas corpus petition challenging the marijuana conviction on the ground that the release date on the murder convictions had been delayed because of the marijuana conviction?

### FACTS

In 1985 Harvey Garlotte pleaded guilty to one count of possession of marijuana with intent to deliver and was sentenced to three years' imprisonment. On the same day he pleaded guilty to two counts of murder and received two life sentences, which the court ordered to run concurrently. However, the trial court also ordered that the concurrent life sentences were to run "consecutive, and after" the three-year sentence on the marijuana conviction. Garlotte did not appeal his marijuana conviction and his two state-law motions for post-conviction relief were denied.

Garlotte then filed a petition for habeas corpus relief in 1989 in the United States District Court for the Southern District of Mississippi, challenging the 1985 marijuana conviction. He named as the defendant, Kirk Fordice, Governor of the State of Mississippi. Fordice responded by filing a motion to dismiss the petition for failure to exhaust state-law habeas remedies. Ultimately, the district court determined that even if

*HARVEY F. GARLOTTE V.  
KIRK FORDICE, GOVERNOR OF  
THE STATE OF MISSISSIPPI  
DOCKET NO. 94-6790*

ARGUMENT DATE:  
APRIL 24, 1995  
FROM: THE FIFTH CIRCUIT

Garlotte had failed to exhaust his state-law remedies, such an effort would be futile and proceeded to dismiss Garlotte's petition as meritless.

When Garlotte appealed to the Fifth Circuit, Fordice argued that his habeas petition should be dismissed for lack of subject matter jurisdiction; specifically, Fordice argued that Garlotte was not in custody for purposes of challenging his marijuana conviction within the meaning of the federal habeas corpus statutes. 28 U.S.C. §§ 2241 and 2254 (1988). Agreeing with Fordice that Garlotte was not in custody for purposes of subject matter jurisdiction because he was attempting to challenge a sentence that had fully expired, the Fifth Circuit affirmed the district court's dismissal of his petition. 29 F.3d 216 (5th Cir. 1994).

Garlotte, proceeding *pro se* (that is, representing himself), prepared and filed a petition for a writ of certiorari with the Supreme Court seeking review of the Fifth Circuit's decision. Although the Court does not often accept *pro se* petitions for writs of certiorari, the Court granted Garlotte's petition. 115 S. Ct. 929 (1995).

### CASE ANALYSIS

The federal writ of habeas corpus has been referred to as the Great Writ. It protects individuals against arbitrary and wrongful imprisonment by the states. Under federal law, a person claiming to be held in custody by a state in violation of the Constitution, treaties, or laws of the United States may seek a writ of habeas corpus from a federal court. As noted above, if the writ is granted, the federal court orders the state prisoner unconditionally released or released subject to the state's right to retry the petitioner. One study has found that the writ is granted in, at most, four percent of the cases in which it is sought.

Federal law requires the person petitioning for a writ of habeas corpus to be in custody. 28 U.S.C. §§ 2241 and 2254. Seventy-five years ago the Supreme Court interpreted the in custody language as requiring imprisonment; physical restraint was a prerequisite for habeas corpus. More recent decisions have held that an individual may use a federal habeas petition to challenge any restriction of liberty.

In *Peyton v. Rowe*, 391 U.S. 54 (1968), the Supreme Court held that a prisoner serving consecutive sentences is in custody under any one of the sentences. The prisoner in *Peyton* thus was able to attack a conviction, the sentence for which he had not yet begun to serve. Garlotte's situation is just the reverse; he seeks to attack a conviction, the sentence for which has been fully served, where a successful attack on the first conviction would shorten the time remaining for him to serve on the sentences he is currently serving.

The Supreme Court later considered whether or not federal habeas corpus could be used to challenge past confinements. *Maleng v. Cook*, 490 U.S. 488 (1989). In that case, the habeas petitioner, Cook, had been paroled from his initial 1958 state-law sentence when he committed other crimes resulting in a second sentence, also under state law. While a prisoner the second time, Cook filed a federal habeas petition challenging the validity of his 1958 conviction and alleging that the 1958 conviction had been used illegally to enhance the sentence imposed on his later-committed crimes.

The *Maleng* Court emphasized that it had never held that a federal habeas petitioner is in custody under a conviction when the sentence imposed for that conviction has fully expired at the time the

petition is filed. The Court suggested that once the sentence imposed for a conviction has completely expired, the collateral, i.e., indirect, consequences of that conviction are not sufficient to render an individual in custody for the purposes of a federal habeas attack on it.

Pointing out that almost all states have habitual offender statutes and that many states provide for specific enhancement of subsequent sentences on the basis of prior convictions, the *Maleng* Court said that the in custody requirement would be read out of the statute if a petitioner whose sentence has completely expired is permitted to use the federal habeas statute to mount a latter-day challenge on the conviction underlying the expired sentence. However, the Court went on to say that because Cook was in custody under the second sentence, he satisfied the in custody requirement and could challenge the sentence for which he was currently in custody as enhanced by the allegedly invalid prior conviction. The Court warned that it was expressing no view on the extent to which Cook's 1958 conviction itself could be challenged in the attack on the later sentences which it was used to enhance.

The Fifth Circuit's decision being reviewed in this case conflicts with the decisions of other courts of appeals on the same issue. In *Fox v. Kelso*, 911 F.2d 563 (11th Cir. 1990), the Eleventh Circuit held that it had jurisdiction to review prior convictions although the federal habeas petition was filed after the sentences had been served, where the served sentences delayed the date from which the inmate would receive credit for time served against convictions under which he was currently imprisoned.

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In *Harrison v. Indiana*, 597 F.2d 115 (7th Cir. 1979), the Seventh Circuit held that a federal court had jurisdiction over a federal habeas petition brought by a state prisoner to challenge a conviction for which he had fully served the sentence, where the earlier conviction delayed the start of his current imprisonment and would delay his release. The court stressed that, whichever conviction he attacked, his petition was filed while he was in custody.

The Seventh Circuit reached a similar conclusion in *Farwett v. Bablitch*, 962 F.2d 617 (7th Cir. 1992). In that case, the petitioner was not in custody on the first conviction for sexual contact with a minor when he filed his federal habeas petition. However, he was on probation for a second conviction for a similar offense at the time the petition was filed. Noting that probation is a form of custody, the court concluded that a person serving a sentence that has been enhanced because of a prior conviction may challenge the validity of that conviction by way of federal habeas corpus.

Likewise, in *Bernard v. Garraghty*, 934 F.2d 52 (4th Cir. 1991), the Fourth Circuit held that a prisoner serving the second of two consecutive state sentences is in custody for purposes of bringing a federal habeas corpus challenge to the first, already served sentence. The court held that *Peyton*, not *Maleng*, was the controlling Supreme Court precedent. According to the Fourth Circuit, under *Peyton*, custody of a prisoner serving consecutive sentences is defined not by any one particular sentence but by the aggregate of the sentences. The court pointed out that in *Maleng* the Supreme Court did not address consecutive sentences or attempt to define when the first sentence is discharged.

The Eighth Circuit, on the other hand, reached a similar conclusion as was reached by the Fifth Circuit in this case. In *Allen v. Dowd*, 964 F.2d 745 (8th Cir. 1992), the Eighth Circuit determined that an offender serving consecutive sentences is not in custody on the first of those sentences if the first sentence has technically expired. The court, however, observed that the prisoner was entitled to a new petition attacking the conviction for which he was then in custody.

### SIGNIFICANCE

The expansion of the federal constitutional rights of criminal defendants following World War II also resulted in a dramatic expansion of the scope of federal habeas corpus relief. However, in recent years, the Supreme Court has imposed substantial new obstacles to habeas relief. The Rehnquist Court has repeatedly emphasized the costs of federal habeas relief in disrupting the finality of convictions and causing friction between federal and state courts. The Court's decision in this case will indicate whether the Court will continue to restrain the use of the Great Writ.

### ARGUMENTS

**For Harvey F. Garlotte** (Counsel of Record: Brian D. Boyle; O'Melveny & Myers; 555 13th Street, NW, Suite 500 West, Washington, DC; (202) 383-5300):

1. Consecutive sentences must be aggregated for purposes of the in custody requirement of the federal habeas corpus statutes.
2. *Maleng v. Cook* forecloses federal habeas corpus jurisdiction only with respect to convictions that no longer impose any present restraints on the habeas corpus petitioner.

**For Kirk Fordice, Governor of the State of Mississippi** (Counsel of Record: Marvin L. White, Jr., Special Assistant Attorney General of the State of Mississippi; P.O. Box 220, Jackson, MS 39205; (601) 359-3680):

1. Dismissal of the petition for a writ of habeas corpus was proper because Garlotte no longer met the in custody requirement at the time the petition was filed.
2. Because Garlotte's parole delay merely constitutes a collateral consequence of his marijuana conviction, he has failed to allege a positive and demonstrable connection between the marijuana conviction and the murder sentences he is now serving.

### AMICUS BRIEFS

**In support of Harvey F. Garlotte**

Joint brief of the Post-Conviction Assistance Project of the University of Virginia and the National Legal Aid and Defender Association (Counsel of Record: Harold J. Krent; Chicago-Kent College of Law; 565 West Adams Street, Chicago, IL 60661; (312) 906-5397).

**In support of Kirk Fordice, Governor of the State of Mississippi**

Criminal Justice Legal Foundation (Counsel of Record: Kent S. Scheidegger; Criminal Justice Legal Foundation; 2131 L Street, Sacramento, CA 95816; (916) 446-0345).