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Federal Criminal Procedure: Habeas Corpus: Disposition of Prisoner in State Custody After Finding Illegal Detention

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CONCLUSION

Certainly free speech may in some instances be abridged lawfully through the valid use of the loyalty oath. At the same time, however, it is evident that particular attention will be paid to the nature of the area wherein its use is sought. The present decision impliedly indicates a growing tendency on the part of the court to look askance at indiscriminate usage of the oath, particularly in view of its manifest curtailment of free speech. It reveals that the myth entertained by a few courts that tax benefits (and conceivably unemployment benefits, public housing, etc.) are merely in the nature of a governmental bounty, to be bestowed or withheld at will, is untenable. The Supreme Court refuses to overlook the fact that withholding "bounties" because of alleged disloyalty, as evidenced solely by a refusal to make a loyalty declaration, circumscribes free speech while accomplishing little towards the actual protection of a government from subversion.

MAURICE GARVEY

Federal Criminal Procedure: Habeas Corpus — Disposition of Petitioner in State Custody after Finding Illegal Detention—Petitioner was convicted in a state trial court in 1948 of armed robbery and sentenced to an indeterminate period with life as the minimum and maximum duration of imprisonment. Immediately after the trial a notice of appeal was filed and a verbatim record of the evidence and proceedings requested. Before the official court reporter had transcribed his notes from shorthand he suffered a physical breakdown and was incapacitated from doing any further work. During this illness the shorthand notes were lost or destroyed. During the following ten years the petitioner prosecuted numerous appeals in order to obtain a review of his conviction, including three petitions to the United States Supreme Court for writs of *certiorari,* all of which failed. In 1958, on petition to the United States District Court for a writ of *habeas corpus,* the court ordered the writ to issue and after a full hearing

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the denial of an application for unemployment compensation for refusal to take a loyalty oath. Rudder v. United States, 105 A.2d 741 (Mun. Ct. App. D.C. 1954), upholding the right to evict petitioner for refusal to subscribe a loyalty oath. Reversed in 226 F. 2d 51 (D.C. Cir. 1955) without deciding the actual constitutionality of an eviction from public housing for failure to comply with loyalty oath requirements. Compare reasoning of court in Peters v. New York City Housing Authority, 283 App. Div. 801, 128 N.Y.S. 2d 712 1954), at 714: "Furthermore, in the present day context of world crisis after crisis, it is our opinion that the danger the Congress is seeking to avoid (*i.e.,* infiltration of government housing by subversive elements) justifies the requirement that tenants herein choose between government housing and membership in an organization they know to have been found subversive by the Attorney General." Note: Reversed on Non-constitutional grounds in 307 N.Y. 519, 121 N.E.2d 529 (1954).

found that the relator was denied due process of law under the provisions of the Fourteenth Amendment because he was unable to obtain a transcript of record for use in perfecting his appeal from the conviction in the original trial. The warden appealed from an order discharging the prisoner from custody. *Held:* It was the duty of the district court not to disturb the custody of the prisoner, but to remand him to the state court which tried him originally with instructions to vacate the judgment of conviction and to grant him a new trial. *United States ex rel. Westbrook v. Randolph,* 259 F.2d 215 (7th Cir. 1958).

Once again the court was faced with the problem of determining the scope and application of the directive contained in the Habeas Corpus Act[1] which requires that:

> The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

The above final phrase of section 2243 would seem to be susceptible of an extremely broad construction. Speaking for the court in the case of *In Re Bonner,*[2] Mr. Justice Field stated in this regard:

> The court is invested with the largest power to control and direct the form of judgment to be entered in cases brought up before it on *habeas corpus.*

At least it has been settled in a long line of cases that where upon *habeas corpus* it is concluded that the detention is unlawful, the outcome is not necessarily an order directing the immediate discharge of the prisoner.[3]

Granting such broad power in *habeas corpus* proceedings before the federal courts, nevertheless, the custody of the petitioner is a significant factor. Where the prisoner is in the custody of federal officials the courts are under no restraints in hearing the petition and making a proper disposition of the matter. Where, however, the prisoner is in state custody the delicate problem of federal-state relations enters the picture and additional factors must be considered.[4]

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[1] 28 U.S.C.A. §2243.

[2] 151 U.S. 242 (1894).

[3] See Medley, Petitioner, 134 U.S. 160 (1889); In re Bonner, *supra* note 2; Mahler v. Eby, 264 U.S. 32 (1924); Dowd v. U.S. ex rel. Cook, 340 U.S. 206, 19 A.L.R. 2d 784 (1951).

[4] See Justice Jackson concurring in Brown v. Allen, 344 U.S. 443 (1953); See also 28 U.S.C.A. §2241 Power to Grant Writ
"...
"(c) The writ of *habeas corpus* shall not extend to a prisoner unless—
(B) He is in custody in violation of the Constitution or laws or treaties of the United States."
It appears that for a considerable period of time after the passage of the *Habeas Corpus Act* the possibilities of federal *habeas corpus* to procure release from state detention were not fully appreciated.
Petitions filed in federal district courts for *habeas corpus* challenging state convictions increased from one hundred twenty-seven in 1941 to five hundred forty-one in 1952. Speck, *Statistics on Federal Habeas Corpus,* 10 OHIO ST. L. J. 337 (1949).

In the present case there seems little question that the relator was entitled to relief upon his petition for *habeas corpus*. The opinion of the court by Judge Hastings and the dissent of Judge Finnegan both concur in the finding by the district court that the state remedies had been exhausted,[5] and that the petitioner was being denied his rights under the Fourteenth Amendment.[6]

Therefore the only problem was the nature of the relief to be granted. The order of the court was as follows:[6a]

> . . . The order of the district court releasing petitioner from custody is reversed and this cause is ordered remanded to that court with instructions that it remand petitioner to the Circuit Court of Christian County, Illinois, *with directions to the latter court to vacate the judgment of conviction and to grant petitioner, Charles Westbrook, a new trial;* and that upon the failure of the Circuit Court of Christian County, Illinois to vacate said judgment of conviction and to grant said new trial within six months after the date of the actual physical delivery of petitioner to the custody of said circuit court, the petitioner shall be finally discharged from custody. (Emphasis supplied.)

Read literally, such an order would seem beyond the power of the court. Judge Finnegan states in his dissent, "I have grave doubts that a U.S. District Court can order the Circuit Court of Christian County to vacate this judgment of conviction." U.S. District Courts have no supervisory power over the administration of the states' criminal law,

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[5] Required by 28 U.S.C.A. §2254 State custody; remedies in state courts. "An application for a writ of *habeas corpus* in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented."
Judge Schnackenberg, while agreeable with the desposition, pointed out in a concurring opinion that he did not believe the prisoner had exhausted his state remedies because of the availability of a bystander's bill of exceptions, that is, a bill of exceptions prepared from someone's memory in condensed or narrative form and certified by the trial judge, and therefore a dismissal of the petition was justified. (259 F. 2d at 220.) It is submitted that this position detracts from the persuasive value of the decision by, in effect, leaving the case without a majority opinion.

[6] While the right of appeal is not essential to due process, McKaine v. Durston, 153 U.S. 684 (1894), ILL. REV. STAT. 1955, C. 38 §769.1 provides: "Writs of error in all criminal cases are writs of right and shall be issued of course." Thus the inability of the petitioner to obtain a review of his conviction was a denial of equal protection of the laws and due process of law. Also under Illinois Supreme Court Rule 65 it is necessary for the defendant to furnish the appellate court with a bill of exceptions or report of proceedings at the trial certified by the trial judge in order to get full direct appellate review of alleged errors by a writ of error. ILL. REV. STAT. 1955, C. 110, §101.65.

[6a] 259 F. 2d at 219.

and the three cases cited in support of the decision are lacking in any authority for such action.[7]

It is submitted that the order, read in conjunction with the time limitation imposed, should be construed not as directing the state court to vacate its judgment of conviction and grant a new trial, but merely as allowing the state six months within which to take affirmative action on its own motion in granting the petitioner a new trial, failing which the prisoner was to be finally discharged from custody.

So construed the disposition is more in accord with prior decisions. In *re Medley*[8] the court found the petitioner was sentenced under a state *ex post facto* law and therefore in custody in violation of the United States Constitution; but was, nevertheless, guilty of a capital offense. Disposition: The warden of the prison was ordered to notify the attorney general of the state of the precise time when the prisoner was to be released from custody at least ten days beforehand and then to discharge the prisoner at that time.

The petitioner in *Dowd v. U.S. ex rel Cook*[9] was held to have been detained in violation of his Constitutional rights in that the warden of the prison prevented a timely appeal of his conviction by suppressing the appeal papers. The Supreme Court remanded the case to the district court with instructions to that court to enter such orders as were appropriate to allow the state a reasonable time in which to afford the petitioner the full appellate review he would have received but for the suppression of his papers, failing which he was to be discharged.[10]

The position taken by the court in the present case, it is believed, follows the policy which should generally prevail where the petitioner has been convicted in a state court and the illegal detention results from an improper sentence or a failure to provide adequate appellate review; the purpose being to afford the state a reasonable time for corrective action. The broad powers in federal *habeas corpus* must be

[7] Mahler v. Eby, *supra,* note 3 and Tod v. Waldman, 266 U.S. 113 (1924) are immigration case opinions involving rulings of federal administrative officials, not the judgment of a state trial court. These opinions would appear to have no application in the present situation. The third case cited was Chessman v. Teets, 354 U.S. 166 (1957), one of a number of decisions in the much publicized *Chessman* case arising in California. Chessman was convicted of a capital offense in the state court. The official court reporter died before his notes were transcribed and a substitute reporter transcribed them in close collaboration with the prosecutor. The petitioner was not represented in person or by counsel when the trial record was settled, and such record was used on appeal to the state supreme court. In the federal *habeas corpus* proceedings it was held that the *ex parte* settlement of the record violated due process under the 14th Amendment. The U.S. Supreme Court remanded the case with orders that the state should be allowed a reasonable time for corrective action, failing which the petitioner was to be discharged. This case also fails to provide any support for the order in question.

[8] *Supra* note 3.

[9] *Supra* note 3.

[10] See also Chessman v. Teets, *supra* note 7, and O'Brien v. Lindsey, 202 F. 2d 418 (1st Cir. 1953).

exercised in aid of the state's administration of justice, not to defeat or needlessly embarrass it.

Under the particular facts of this case a strong argument can be made in favor of affirming the action of the district court. The dissent of Judge Finnegan does just that. As the record clearly shows the petitioner filed a notice of appeal and requested a verbatim record immediately after his conviction. Through no fault of his own he was prevented from further prosecuting the appeal. The matter was before the State Supreme Court on at least three separate occasions[11] when action could have been taken to grant a new trial. It would seem that during the ten year period preceding the present case the state had already had a reasonable time in which to take corrective action and that now law and justice would require the prisoner to be discharged.

Aside from the final disposition of the case, there is a question of the propriety of the order of the district court discharging the prisoner in view of the request by the state attorney general that the prisoner be not released pending appeal. In *O'Brien v. Lindsey*[12] the following comment was made:

> Weighing the relevant considerations of policy, it is by no means clear that as a matter of right and routine a state prisoner should be set at large pending review in a court of appeals of a federal district court order discharging the prisoner on *habeas corpus.*

Considering here the fact that the district judge certified that there existed probable cause for appeal[13] and also the attorney general's request, it would appear that the discharge should have been delayed pending the appeal.

FRANK C. DEGUIRE

Federal Income Taxation: Depreciation Deduction—Useful Life and Salvage Value Under the Declining Balance Method—Taxpayer corporation is engaged in the business of renting automobiles. On an average, during the tax years in issue, new cars were held by the taxpayer for a period of 26 months and then sold, although, generally, such autos had a useful life to someone of four years. Taxpayer contended that it should be allowed to depreciate the cars on the declining

[11] 1951—Westbrook, appearing *pro se,* prosecuted a writ of error to the Illinois Supreme Court, contending the sentence imposed was improper. The Court held that the sentence was not for an indeterminate period and remanded the the case for imposition of a proper sentence. He was resentenced to 30-50 years imprisonment. People v. Westbrook, 411 Ill. 301, 103 N.E. 2d 494 (1952). 1952—Illinois Supreme Court affirmed a denial of petition for a hearing under the Illinois Post Conviction Hearing Act, ILL. REV. STAT. 1953, C. 38, §§26-832. 1956—Petition for writ of *habeas corpus* dismissed. See 259 F. 2d at 217.

[12] 202. F. 2d 418, 420 (1st Cir. 1953).

[13] See 28 U.S.C.A. §2253.