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FEDERAL HABEAS CORPUS—THE SEARCH FOR A SOLUTION TO THE PREMATURITY CONCEPT

INTRODUCTION

In 1934 the Supreme Court of the United States reviewed for the first time an issue which several lower courts previously had considered.[1] The case of *McNally v. Hill*[2] presented to the Court the following question: May a prisoner serving the first of consecutive sentences attack by federal habeas corpus a sentence which he has not yet begun to serve, even though he concedes the validity of the sentence he is presently serving? The Court held that a prisoner might not so challenge a second sentence.

Writing for a unanimous Court, Mr. Justice Stone pointed out that a decision favorable to petitioner could not effect his immediate release.[3] Mr. Justice Stone reasoned that the real cause of petitioner's confinement was the first sentence which he was still serving.[4] Since McNally did not contest this term, continued Mr. Justice Stone, the restraint was lawful.[5] The statute authorizing issuance of the writ of habeas corpus dictated that courts might grant the writ "for the purpose of inquiring into the cause of restraint of liberty."[6] The Court thus concluded that an unattached sentence could not be the "cause of restraint of liberty."[7] The Court would not use habeas corpus to test the threat of future confinement.[8]

Since a prisoner may attack a second sentence when it attaches,

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1. See generally note 34 *infra* and accompanying text.
2. 293 U.S. 131 (1934).
3. *Id.* at 134.
4. *Id.* at 135.
5. *Ibid.*
6. 36 Stat. 1167 (1925), 28 U.S.C. § 2241 (1948):

(c) The writ of habeas corpus shall not extend to a prisoner unless—
(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; 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. . . .

The Reviser's Notes to this section indicate that the words "for the purpose of an inquiry into the cause of restraint of liberty" were omitted as "merely descriptive of the writ." 28 U.S.C.A. § 2241 (1948).

Congress first gave federal courts the power to grant the writ in § 14 of the Judiciary Act of September 24, 1789, 1 Stat. 73, 81-82. The Constitution of the United States of America guarantees the privilege of habeas corpus. U.S. Const., art. I, § 9, cl. 2.

7. 293 U.S. at 135.
8. *Ibid.*

courts have assigned the term "prematurity" to the inadequacy of a petition contesting a sentence before it has attached.[9] Standing alone, application of the prematurity principle results in no undue hardship[10] to a multiple offender,[11] since he may simply press his claim when he begins serving the sentence he believes is defective.

However, another factor must be considered in conjunction with the prematurity concept. Parole statutes[12] combine with the *McNally* rule to produce a real hardship for prisoners serving the first of consecutive sentences.[13] A typical state statute and the federal statute provide that a prisoner becomes eligible for parole after he has served a specified fraction of his sentence—usually one-third.[14] In several states prisoners are eligible for parole after they have served the minimum term of a minimum-maximum sentence, for example, ten-to-twenty years.[15] When a judge sentences a convicted criminal to consecutive terms, nearly all parole statutes compel parole boards to compute parole eligibility on the aggregate of all terms.[16] Thus, a prisoner serving the first of two ten-year terms may apply for parole after he has served one-third of twenty years, or six years, eight months.[17] But if the prisoner had been sentenced

9. Commonwealth ex rel. Stevens v. Myers, 419 Pa. 1, 213 A.2d 613, 616 n.7 (1965). The concept of prematurity is closely related to the mootness concept and should be distinguished. Premature petitions are those which are too early—usually they involve determination of sentences not yet attached. On the other hand, courts deny petitions as moot because they are sought too late, as when petitioner has fully served the contested term. *E.g.,* Parker v. Ellis, 362 U.S. 574 (1960). The term "mootness" as applied to habeas petitions is somewhat unfortunate since courts occasionally speak of premature petitions as "moot" in that they do not raise justiciable issues. O'Brien v. McClaughry, 209 Fed. 816, 820 (8th Cir. 1913). The reader should maintain the distinction between moot and premature petitions. The Supreme Court of Pennsylvania noted the importance of the distinction:

> In focusing on the precise issue presented by this case [a case of prematurity], we might note that the problems of mootness and prematurity—along with several other questions, such as the availability of habeas corpus to a convict who is at large on bail—are sometimes grouped together as aspects of a single concept of "custody" which has been deemed requisite to support relief by habeas corpus. Notwithstanding the historical validity of this conceptual assimilation, the several questions present different considerations for judicial resolution and, for that reason, each deserves analysis on its own footing.

Myers, *supra.*

10. O'Brien v. McClaughry, *supra* note 9, at 820.

11. For purposes of this note the term "multiple offender," which customarily denotes a larger group of individuals, is used to mean a prisoner serving the first of two or more consecutive sentences.

12. Eligibility for parole of state prisoners is measured on the basis of the state parole statute, even though petitioner may be seeking federal habeas corpus.

13. O'Brien v. McClaughry, 209 Fed. 816, 820 (8th cir. 1913).

14. *E.g.,* N.J.S.A. 30: 123.10. The federal statute is 18 U.S.C. § 4202 (1948).

15. New York Correction Law § 212.

16. See note 14 *supra.*

17. Naturally, this will vary with the fraction.

to serve only one ten-year term, or to two ten-year terms to be served concurrently, he would be eligible for parole after three years, four months. Because the prematurity principle prohibits a prisoner from attacking his second sentence until it attaches, he becomes eligible for parole only after he has served three years, four months more of his term than the one-term or concurrent-term prisoner does—possibly because of a sentence which is later found defective.

The perplexing combination of the *McNally* principle and the restrictions of parole statutes prompted prisoners and their attorneys to search for another remedy for allegedly illegal restraint.

THE McNALLY QUANDARY

In 1931 Charles L. McNally entered a federal penitentiary to begin serving the first and second of three terms to which he had been sentenced.[18] A jury had convicted him on three counts: conspiracy to violate the National Motor Vehicle Theft Act,[19] the interstate transportation of a stolen vehicle, and the unlawful sale of a New York vehicle in New Jersey.[20] The court ordered McNally to serve two terms concurrently before serving his third term.[21] After the time for appeal had expired, McNally petitioned in a federal district court for a writ of habeas corpus.[22] He conceded the validity of the concurrent terms which he was still serving, but he contended that the unattached third term was based on an improper conviction.[23] Although he had served one-third of his concurrent terms and ordinarily would have been eligible for parole, the third, unattached, term extended the eligibility date and thus barred him from parole consideration.[24] The district court, without reference to prematurity, upheld the conviction on the third count on the merits.[25] The Supreme Court granted certiorari.[26]

The Court found pertinent language in the statute which authorized issuance of the writ:

> Section 14 of the Judiciary Act, by the language already quoted,[27] was at pains to declare that the writ might issue for

18. 293 U.S. at 133.
19. 41 Stat. 324, 325 (1919).
20. 293 U.S. at 133.
21. *Id.* at 131.
22. *Id.* at 134.
23. *Ibid.*
24. *Ibid.*
25. McNally argued that the sale of the stolen New York vehicle in New Jersey did not come within the purview of interstate commerce. The district court held that it did. *Id.* at 135.
26. 292 U.S. 619 (1934).
27. See generally note 6 *supra* and accompanying text.

the purpose of inquiring into the cause of restraint of liberty.[28]

Mr. Justice Stone noted that petitioner was lawfully restrained by the first sentence, and therefore, no further inquiry was necessary.[29]

The statute, however, did not define habeas corpus further, and the Court looked to English common law and past Supreme Court cases to justify its position. In *Rex v. Clarkson*,[30] an English case, petitioner filed for habeas corpus to effect the release of a ward from her guardian. When the ward stated she was under no restraint and in fact wished to remain with her guardian, the court denied the petition. In two similar cases, the Supreme Court had held that when no one was restraining petitioner, it was pointless indeed to grant the writ.[31] These cases made clear the Court's position that some restraint must exist before it would grant habeas corpus relief. This point seems clearly beneficial and persists today as what courts call the "custody" requirement.[32]

After a "diligent search" of all English authorities and the American digests before 1789, the Court failed to uncover a case in point.[33] However, it did find that the problem had previously arisen in a number of lower federal courts.[34] These courts had almost universally denied the writ.[35] They often rested their decisions on the ground that a valid sentence which petitioner was then serving operated as a lawful restraint.[36]

An examination of the *McNally* opinion reveals that the court failed to delinate a discernible test for prematurity. In several places, the Court's opinion indicates that it will not permit a prisoner to invoke the writ unless such invocation results in total and immediate release. For example, the Court speaks of withholding the writ "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."[37] Indeed, several note writers have predicated their appraisal of *McNally* on the assumption that "total and immediate release" is its talisman.[38] There

28. 293 U.S. at 137.
29. *Id.* at 136.
30. 1 Stra. 444.
31. Stallings v. Splain, 253 U.S. 339 (1920); Wales v. Whitney, 114 U.S. 564 (1885).
32. Commonwealth ex rel. Stevens v. Myers, 419 Pa. 1, 213 A.2d 613, 616 n.7 (1965).
33. 293 U.S. at 137.
34. *Id.* at 139 n.6.
35. *Ibid.* The Court noted several cases contra, one of which is discussed at notes 44-49 *infra* and accompanying text.
36. *E.g.*, De Bara v. United States, 99 Fed. 942, 947 (1900).
37. 293 U.S. at 137.
38. *E.g.*, Note 1966 DUKE L.J. 588.

seems to be sounder basis for considering "sufficient restraint" as the real touchstone for prematurity.

Mr. Justice Stone adapted the underlying policies of two federal statutes which authorized habeas corpus for "inquiring into the cause of restraint of liberty."[39] In support of his position, he cited an English case and two Supreme Court cases which held that restraint is a condition precedent to habeas relief.[40] Specifically, the Court said it would not grant the writ unless it would affect "the lawfulness of the custody and detention,"[41] concluding:

> Without restraint of liberty the writ will not issue. Equally, without restraint which is unlawful, the writ may not be used. A sentence which the prisoner has not begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry.[42]

The Court then pointed out that petitioner was lawfully restrained on the first sentence.[43] Thus restraint apparently is the essence of the test, and in each case the petitioner must satisfy the court that he is sufficiently restrained to invoke the writ. Yet, the *McNally* decision is troublesome because the Court did not articulate the boundaries of "restraint." Neither *McNally* nor prior cases in the lower federal courts explain why denial of parole eligibility is not a restraint. The only possible answer inferable from the opinion is that denial of earlier parole eligibility is not restraint because issuance of the writ does not effect an immediate release of a prisoner who would still be confined by the first and valid sentence. The reader should be careful to recognize that in this context, the writ's inability to produce total and immediate release is not the test for prematurity, but only a factor tending to prove that petitioner is under no sufficient restraint.

Prior to *McNally,* the Court of Appeals for the Eighth Circuit grappled with the question of whether denial of parole eligibility is restraint sufficient to warrant issuance of habeas corpus relief. In *O'Brien v. McLaughry,*[44] the court in noting a prior decision in which the Sixth Circuit had withheld relief,[45] stated:

> While it was not so expressly stated by that Court, this [the

39. 293 U.S. at 137.
40. See generally notes 31-32 *supra* and accompanying text.
41. 293 U.S. at 137.
42. *Id.* at 138.
43. *Id.* at 135.
44. 209 Fed. 816 (8th Cir. 1913).
45. De Bara v. United States, 99 Fed. 942 (6th Cir. 1900).

> denial of the writ] was doubtless in part upon the ground that, where a prisoner was held under a sentence lawfully imposed, the question as to whether he was lawfully or unlawfully held on another sentence was a mere moot question.[46] That case was decided in February, 1900, but on June 25, 1910, Congress passed an act to parole United States prisoners. . . .[47]

The court pointed out that petitioner had been sentenced to a five-year term and a three-year term to be served consecutively.[48] Finding the latter sentence defective, the court concluded:

> We cannot conceive that the second sentence against the petitioner, utterly void as it was and is, should be used to defer his right to apply for parole . . . and while fully convinced that the rule would be otherwise in the absence of the parole law, this case is reversed and remanded, with directions to the District Court to discharge the petitioner from the custody of the defendant as to the charge of larceny, but to remand him upon the charge of breaking into a post-office.[49]

Until a recent decision,[50] federal courts systematically followed *McNally*.[51] Of the twenty-five states which have considered the problem, twenty-one still follow the prematurity principle.[52] Almost all of these courts relied directly on *McNally*, or on cases traceable to *McNally*.[53]

The prematurity-parole eligibility problem created a quandary for prisoners serving consecutive terms who sought either federal habeas corpus or the state writ in states following the *McNally* rule. Assume, for example, that a New Jersey jury convicts X of armed robbery and conspiracy, and that the judge sentences X to ten years for each offense, and adds that the sentences will run consecutively, the first beginning on January 1, 1960. X begins to serve the robbery term, and the time for filing an appeal from the judgment of conviction expires. By May,

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46. As to the term "moot," see note 9 *supra*.
47. 36 Stat. 819 (1910). 209 Fed. at 820.
48. 209 Fed. at 820.
49. *Id.* at 821.
50. Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965). This case is discussed at length *infra*.
51. See Commonwealth ex rel. Stevens v. Myers, 419 Pa. 1, 213 A.2d 613, 617 n.9 (1965) and cases cited therein.
52. See Commonwealth ex rel. Stevens v. Myers, 419 Pa. 1, 213 A.2d 613, 618 n.10 (1965) and cases cited therein. States adhering to the *McNally* doctrine include: Alabama, Arizona, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Montana, Nevada, New Jersey, Ohio, Oklahoma, Rhode Island, South Carolina, Texas and Washington. *Ibid.* For states which have abandoned the principle, see notes 161-62 *infra* and accompanying text.
53. Stevens, *supra* at 618.

1963, X has served one-third of the first sentence. He tells an attorney that his first sentence is clearly valid, but that police brutally coerced him to confess to the conspiracy conviction. The attorney notes that X is not yet serving the conspiracy sentence, and yet he realizes its adverse effect on his client. Parole eligibility in New Jersey matures after one-third of the total sentence,[54] and a statute compels parole boards to aggregate all sentences in computing parole eligibility.[55] If there were no conspiracy sentence to attach in 1970, X would be eligible for parole in May, 1963. But since this second term must be included in the eligibility computation, X will be eligible for parole after one-third of twenty years—September of 1966. The attorney is confident that he can upset the conviction at a hearing, thus making X eligible for parole in May, 1963. He files a petition for habeas corpus in a New Jersey court. New Jersey follows the *McNally* rule[56] and the court denies X a chance to gain a hearing on his conviction. His attorney then files for federal habeas corpus relief. Relying on *McNally,* federal courts likewise deny a hearing.

In September, 1966, X becomes eligible for parole. Whether the board paroles him or not, X is technically still serving the first sentence and is subject to it until January 1, 1970. At that time he becomes subject to the second sentence. Now, whether in jail or on parole, he may attack this second term, for now it, and not the first sentence, is the cause of restraint.[57] If courts now find this second sentence invalid, the hardship is apparent. X spent three years, four months (from May, 1963 to September, 1966) in jail without parole eligibility because of computation based on a defective sentence.

A corollary to this dilemma follows. Assume the same facts, except that X concedes the validity of the second sentence, but claims the robbery conviction was defective. In May, 1963, X is ineligible for parole since one-third of the twenty-year aggregate sentence has not expired, and will not expire until September, 1966. His attorney files a petition for habeas corpus in a federal court and asserts that the robbery term is presently the cause of restraint of liberty. There is authority, however, for denial of the writ in this case also. The Court of Appeals for the Ninth Circuit, following the reasoning of *McNally,* pointed out that even were X to prevail at a hearing, he would immediately become subject to the second, admittedly valid, sentence.[58] Thus, the first sentence alone

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54. See note 14 *supra* and accompanying text.
55. See note 16 *supra* and accompanying text.
56. State v. Hatterer, 75 N.J. Super. 400, 183 A.2d 424 (1962).
57. Jones v. Cunningham, 371 U.S. 236 (1963). Indeed, some prisoners may find it hard to believe that the courts denied their habeas petitions while they were still in jail yet granted them when on parole. This problem is discussed *infra.*
58. Woykovsky v. United States, 309 F.2d 381 (9th Cir. 1962).

is not sufficient restraint to warrant invocation of the writ.[59] Since this last fact situation is analogous to the *McNally* holding, further reference to the prematurity principle or to *McNally* should be deemed as embracing this corollary also.

In sum, the *McNally* doctrine left prisoners serving the first of consecutive sentences in a quandary. Since federal habeas corpus relief was unavailable, prisoners and their attorneys took a variety of approaches in search of a remedy.

THE MOTION TO VACATE

Until 1948 federal prisoners, whose only relief ordinarily lay in habeas corpus, were confronted with the *McNally* doctrine. In 1948, however, Congress provided federal prisoners with a statutory substitute for habeas corpus.[60] As a result, habeas relief was no longer available to federal prisoners; instead they had the right to file a motion to vacate sentence.[61] The act further provided: "A motion for such relief may be made at any time."

Anticipating that this language kept the motion outside of the *McNally* principle which surrounded habeas corpus, one federal prisoner, ineligible for parole due to a sentence he had not yet begun to serve, filed a motion pursuant to the act.[62] The Supreme Court confronted this situation in *Heflin v. United States.*[63] Mr. Justice Douglas, speaking for the minority on this issue,[64] said:

> It is now argued that when consecutive sentences are imposed, Section 2255, no more than habeas corpus . . . can be used to question a sentence which the prisoner has not begun to serve.

59. It should be noted that when X finishes serving his first sentence, he may then attack it in a coram nobis proceeding, and, if successful, credit time served under it toward service of the second, admittedly valid, term. See note 108 *infra* and accompanying text.

60. 28 U.S.C. § 2255 (1948).

> A prisoner in custody under the 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. . . .

61. The constitutionality of this act was upheld in United States v. Anselmi, 207 F.2d 312 (1953), *cert. denied,* 347 U.S. 902 (1953).

62. See Heflin v. United States, 358 U.S. 415, 416 (1958).

63. *Id.* at 415.

64. Mr. Justice Douglas delivered the opinion of the Court, which granted relief under Rule 35 of the Federal Rules of Criminal Procedure. As to the § 2255 issue, however, Mr. Justice Douglas was in the minority. The applicability of rule 35 is discussed *infra.*

> The Court is divided on that issue. Some think that when Section 2255 says "a motion for such relief may be made at any time," it means what it says. To them the correction of sentence, if made, will affect "the right to be released" protected by Section 2255, even though that right will not be immediately realized. A majority, however, are of the view shared by several Courts of Appeals[65] . . . that Section 2255 is available only to attack a sentence under which a prisoner is in custody.[66]

The majority[67] did not scrutinize the *McNally* reasoning, but rather attempted to ascertain whether Congress intended any substantial change in the scope of relief available to federal prisoners. The Court decided that Congress did not intend to provide federal prisoners with a remedy broader in scope than that afforded previously by habeas corpus.[68] In his majority opinion, Mr. Justice Stewart pointed to *Hayman v. United States,*[69] a case in which Mr. Chief Justice Vinson in exploring the congressional motivation for enacting this statute, held that the only purpose of the act was to minimize difficulties in the administration of habeas corpus for federal prisoners.[70] In *Heflin,* Mr. Justice Stewart said of the *Hayman* ruling:

> No chronicle of the genesis and purpose of a legislative enactment could be more authentic, because almost the entire legislative history is to be found in the deliberation and recommendation of the Judicial Conference of the United States, over which Mr. Chief Justice Vinson then presided.[71]

The Supreme Court recently bolstered this position by holding that section 2255 and habeas corpus are substantively identical in scope.[72] Therefore, for purposes of this note federal habeas corpus and section 2255 are used interchangeably and should be so understood. All comments concerning *McNally* are equally relevant to *Heflin.*

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65. See 358 U.S. at 418 n.5 and cases cited therein.
66. *Id.* at 417-18.
67. Mr. Justice Stewart, joined by Mr. Justice Frankfurter, Mr. Justice Clark, Mr. Justice Harlan, and Mr. Justice Whittaker.
68. 358 U.S. at 421.
69. 342 U.S. 205 (1952).
70. *Id.* at 213-14. Habeas corpus traditionally is brought *in the district in which petitioner is confined.* Courts in districts which housed federal penitentiaries, therefore, were spending inordinate amounts of time hearing habeas corpus petitions. Section 2255 provided that the *sentencing court* hear motions for collateral relief, thereby spreading the post-conviction cases more evenly throughout the districts. *Ibid.*
71. 358 U.S. at 420-21.
72. Sanders v. United States, 373 U.S. 1, 17 (1963).

Thus, the motion to vacate proved to be of no avail to prisoners languishing behind the *McNally* impasse. In the continuing effort to circumvent the prematurity principle, however, another approach has been partially satisfactory.

CORAM NOBIS

The Supreme Court has partially alleviated the hardship resulting from the prematurity concept by resurrecting the ancient writ of coram nobis.[73] In *Morgan v. United States*[74] petitioner attempted to procure coram nobis relief in order to circumvent another problem of federal habeas closely related to prematurity—the concept of mootness.[75]

In 1939 a federal district court sentenced Morgan to a four-year term which he served in full.[76] In 1950, a New York court sentenced him to a term which he began to serve in a state penitentiary.[77] Pursuant to New York's multiple-offender statute,[78] the authorities lengthened Morgan's term because of the prior federal conviction.[79] Morgan filed a petition in a New York court asking it to declare his earlier federal conviction invalid. Had he been successful, the multiple-offender statute would have been inapplicable, and his term would have been shortened to the original sentence. However, because of comity, New York courts decline to review convictions of other jurisdictions.[80] Moreover, Morgan could not invoke the motion to vacate because he was no longer in custody under the challenged sentence.[81] Consequently, he petitioned a United States district court for coram nobis relief, claiming that the federal court in which he had been convicted had failed, in the absence of a competent waiver on Morgan's part, to furnish him with counsel.[82] The district court found no authority for the use of coram nobis in these circumstances, but treated his petition as a motion to vacate under section 2255 and denied relief. The circuit court held that coram nobis was available,[83] and the Supreme Court granted the government's petition for

73. At common law, courts granted writs of coram nobis to correct errors of fact which, had they been known at trial, would have produced a different result. FRANK, CORAM NOBIS 1 (1953).
74. 346 U.S. 502 (1954).
75. See note 9 *supra*.
76. 346 U.S. at 503.
77. *Ibid.*
78. NEW YORK PENAL LAW § 1941.
79. 346 U.S. at 504.
80. People v. McCullough, 300 N.Y. 107, 110, 89 N.E.2d 335, 337 (1949).
81. Apparently Morgan anticipated that federal courts would hold that custody was requisite in a § 2255 proceeding as much as in habeas corpus. As we have seen, the Supreme Court did hold the two identical in scope. See note 72 *supra* and accompanying text.
82. 346 U.S. at 504.
83. *Id.* at 504, 505. The decision of the district court is unreported.

certiorari.[84]

The Court dealt with several serious objections to the use of coram nobis under the circumstances. The first problem concerned Rule 60(b) of the Federal Rules of Civil Procedure,[85] which expressly abolishes writs of coram nobis. The Court noted, however, that coram nobis is a direct attack upon a conviction and, as such, comes within the realm of criminal practice.[86] Consequently, the civil rules are inapplicable. In contrast, habeas corpus is a collateral attack, a separate civil action necessitating a new record.[87]

The Court then faced the government's contention that section 2255 not only precluded federal prisoners from invoking habeas corpus, but also abolished all other forms of post-conviction relief.[88] However, the majority in pointing (as it did in *Heflin*)[89] to the congressional intent of section 2255, first announced in *Hayman*,[90] emphasized that: "[N]o-where in the history of section 2255 do we find any purpose to impinge upon prisoners' rights of collateral[91] attack upon their conviction." As further authority for revitalizing the ancient writ the Court cited the "All-Writs Act" of the Judicial Code.[92] The pertinent language of that act states that:

> The Supreme Court and all other courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.[93]

The majority stated that coram nobis is a remedy available to federal prisoners to test any error of fact.[94] The dissenters disagreed with this interpretation of the the writ's nature, citing authority which held that coram nobis traditionally corrected only those errors which, unknown to the judge at the time of the trial, would have necessitated a different result had he been aware of them at the time.[95] Since the basis of the petition was the court's failure to appoint counsel, four dissenting justices

84. 345 U.S. 974 (1953).
85. 18 U.S.C.
86. 346 U.S. at 505 n.4.
87. *Ibid.*
88. *Id.* at 510.
89. See notes 68-70 *supra* and accompanying text.
90. As previously stated, the Court found that the legislative intent was one of minimizing administrative difficulties. See note 70 *supra*.
91. 346 U.S. at 511. The term "collateral" is apparently an error, since the Court had emphasized that coram nobis is not collateral in nature. *Id.* at 505 n.4.
92. 28 U.S.C. § 1651(a).
93. *Ibid.*
94. 346 U.S. at 509-10.
95. *Id.* at 516. There is more authority for this position. See note 73 *supra*.

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argued that the judge must have known of the error.[96] In his dissenting opinion, Chief Justice Vinson said:

> What then was it that the court didn't know which if it had known would probably have produced a different result. The respondent doesn't say, nor does he suggest how a lawyer might have helped him unless he picked the lock on the jailhouse door.[97]

The dissenting opinion discloses that Mr. Chief Justice Vinson's skepticism of the majority's decision was grounded on the respondent's laches.[98] That a man could have a conviction vacated eight years after he had finished serving the sentence annoyed the dissenters. They argued that there must be a definite point when litigation is final.[99] In their opinion the limitations of section 2255 provided for such a final determination.[100] They agreed with the government's contention that section 2255 was intended to absorb coram nobis relief. To support that proposition they cited the following language from the reviser's notes: "[section 2255] reiterates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis."[101] Annoyed with resurrection of this "extraordinary writ," the dissenters voiced strong disapproval of its use. Further, they maintained that using coram nobis under these circumstances did not bring it within the authoritative scope of the "All-Writs Act" which grants power to federal courts to issue writs in aid of their jurisdiction.[102] The dissenters reasoned that the writ did not aid the jurisdiction of the federal courts; it aided only the jurisdiction of New York courts.[103]

What the *Morgan* decision lacked by failing to achieve full accord among the members of the Court, it soon made up in progeny. Numerous prisoners have invoked coram nobis to attack federal sentences which, because of state recidivist statutes, lengthened subsequent state sen-

96. *Ibid.*

97. *Id.* at 516-17. Their argument was that since the present case was not a proper application of coram nobis, it was not "agreeable to the usages and principles of law" which the All-Writs Act demands.

98. *Id.* at 518.

> [Respondent] has not established that these proceedings were instituted within a reasonable time after entry of judgment of conviction, even if the one-year period of limitation is not applicable. Respondent has not sought to explain his long delay in seeking to set aside the federal judgment, and twelve years' delay would appear to be unreasonable on its face absent unusual circumstances which are not shown to be present here.

Ibid.

99. *Id.* at 519-20.

100. *Id.* at 519.

101. *Ibid.*

102. 346 U.S. at 515.

103. *Ibid.*

tences.[104] Federal courts have issued the writ to vacate convictions which nullified petitioner's right to vote,[105] or his privilege to practice law[106] or his right not to be deported.[107] Prisoners have used coram nobis successfully to gain credit toward admittedly valid terms for time served under challenged sentences.[108] In some cases, federal convictions violate express conditions of a state prisoner's parole. Prisoners have attacked these federal convictions by coram nobis proceedings in order to be paroled again by state authorities.[109] Most of these cases helped to alleviate the problem created by the mootness concept of federal habeas corpus. And courts soon took the next obvious step—they employed coram nobis to afford relief to federal prisoners in the *McNally* quandary.

In *Thomas v. United States*[110] the Court of Appeals for the District of Columbia issued a writ of coram nobis to a petitioner who attacked a sentence which, though it had not yet attached, barred him from parole eligibility.[111] Since coram nobis is not limited by any prematurity principle, it has provided an important inroad into the *McNally* rule. Yet the substantive shortcomings of this ancient writ render it powerless to relieve many multiple offenders in the *McNally* quandary.

A serious defect of federal coram nobis is its inability to test state court convictions since "the use of the writ is limited by tradition . . . and cannot be used as a collateral writ of error between state and federal jurisdictions."[112] As the Supreme Court pointed out in *Morgan,* the writ comes within criminal practice, being a direct attack upon a conviction.[113] Therefore a prisoner convicted in a state court cannot obtain federal coram nobis because he must carry his direct attack through the state courts. Of course, he may seek collateral help in a federal court by a

104. Azzone v. United States, 341 F.2d 417 (8th Cir. 1965); Young v. United States, 337 F.2d 753 (5th Cir. 1964); United States v. Fariano, 319 F.2d 617 (2d Cir. 1963); Pledger v. United States, 272 F.2d 216 (4th Cir. 1959); Mathis v. United States, 246 F. Supp. 116 (E.D.N.C. 1965); Ansourian v. United States, 240 F. Supp. 864 (D.C.N.Y. 1965).

105. Kyle v. United States, 288 F.2d 440 (2d Cir. 1961).

106. United States v. Cameron, 204 F. Supp. 915 (D.C. Texas 1962), *aff'd,* 311 F.2d 223 (5th Cir. 1963).

107. United States v. Cariola, 323 F.2d 180 (3d Cir. 1963).

108. United States v. Gernie, 228 F. Supp. 329 (D.C.N.Y. 1964).

109. United States ex rel. Bogish v. Tees, 211 F.2d 69 (3d Cir. 1954).

110. 271 F.2d 500 (D.C. Cir. 1959); followed in Moon v. United States, 272 F.2d 530 (D.C. Cir. 1959); *accord,* Johnson v. United States, 344 F.2d 401 (5th Cir. 1965).

111. As we have seen, there is a corrollary to the *McNally* rule. See note 58 *supra* and accompanying text. Interestingly enough, the same case which denied habeas corpus in this situation, granted coram nobis relief. Woykousky v. United States, 309 F.2d 381 (9th Cir. 1962).

112. Rivenburgh v. Utah, 299 F.2d 842, 843 (10th Cir. 1962); *accord,* Thomas v. Cunningham, 335 F.2d 67 (4th Cir. 1964); Barber v. Page, 239 F. Supp. 265 (D.C. Okla. 1965); Dunkle v. Cavell, 151 F. Supp. 675 (D.C. Pa. 1957).

113. 346 U.S. at 505 n.4.

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habeas corpus petition. As previously noted, the Supreme Court in *Morgan* relied on the "direct" nature of coram nobis to rebut arguments based on language contained in the Federal Rules of Civil Procedure.[114] But the writ's direct nature prohibits its use to state prisoners.

Nor does coram nobis resolve all the problems facing federal multiple offenders. The overwhelming majority of post-conviction petitions allege violation of constitutional rights, often at the trial stage.[115] Courts have said, however, that ordinarily they will not grant coram nobis "to correct errors committed in the course of a trial, even though such errors relate to constitutional rights."[116] This judicial reluctance to grant coram nobis increases in those cases in which petitioners were represented by counsel.[117] Prisoners who have tried to invoke coram nobis by alleging that they were inadequately represented at the trial have found the courts reluctant to grant the writ except in those cases in which counsel was so incompetent that the trial was a mockery or farce.[118] The defense of laches is not available to the government in a coram nobis proceeding, but tardiness in petitioning—which does not place the habeas corpus petitioner at a disadvantage—increases petitioner's burden of proof and reflects adversely on his good faith and credibility.[119] This added burden can be fatal to petitioner's claim when evidence is lost, witnesses are unavailable, or memories have dimmed.

Although coram nobis has afforded relief to prisoners barred from habeas corpus because of the mootness concept, it has provided too little relief in prematurity cases to be a satisfactory solution to the *McNally* quandary.

FEDERAL RULES OF CRIMINAL PROCEDURE: RULE 35

One note writer[120] has suggested that the prematurity problem might be remedied by seeking relief under Rule 35 of the Federal Rules of Criminal Procedure.[121] The rule provides that "[T]he court may correct an illegal sentence at any time." In 1962 a federal prisoner, relying on its broad wording, invoked the rule, and asked the Supreme Court to vacate a sentence. He claimed that the convicting court had denied him

114. *Ibid.*
115. SOKOL, A HANDBOOK OF FEDERAL HABEAS CORPUS 10 (1965).
116. Howell v. United States, 172 F.2d 213, 215 (4th Cir. 1949); *accord,* Moon v. United States, 272 F.2d 530, 532 (D.C. Cir. 1959).
117. Smith v. United States, 88 U.S. App. D.C. 80, 187 F.2d 192 (1950), *cert. denied,* 341 U.S. 927 (1951).
118. United States v. Garguilo, 324 F.2d 795 (2d Cir. 1963).
119. United States v. Marcello, 210 F. Supp. 892 (D.C. La. 1962), *aff'd,* 328 F.2d 961 (5th Cir. 1964), *cert. denied,* 377 U.S. 992 (1964).
120. See Note, 2 U.C.L.A. L. REV. 415, 419 n. 18 (1955).
121. 18 U.S.C.

his right to speak a few words in his own behalf before imposition of sentence.[122] Although he was not beset with the prematurity predicament, the decision in his case, *Hill v. United States,*[123] nevertheless foreclosed all hopes that this remedy might resolve the *McNally* dilemma.

The wording of the rule is similar to language in section 2255, the motion to vacate.[124] Because the Supreme Court had already held that section 2255 was inadequate to cope with the prematurity problem, rule 35 might also be ineffectual in this respect if it were closely related in tradition and use to section 2255. However, in *Heflin,* decided three years before Hill filed his motion under rule 35, the Supreme Court rejected the contention that section 2255 and rule 35 were closely related. The Court said that "the rule became effective more than two years before the enactment of section 2255[125] and has an entirely different history."[126] Nevertheless, the Court held that rule 35 was available only to test the validity of the sentence and not to test the conviction on which it rested.[127] Speaking for a majority of five, Mr. Justice Stewart concluded:

> As the Rule's language and history make clear, the narrow function of Rule 35 is to permit correction at any time of an illegal *sentence,* not to re-examine errors at the trial or other proceeding prior to the imposition of sentence. The sentence in this case is not illegal. The punishment meted out was not in excess of that prescribed by the relevant statute, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any respect.[128]

Few post-conviction petitions allege errors in the sentence itself; the majority of petitions are predicated upon alleged constitutional defects in obtaining the conviction.[129] In *Hill* and other cases, the Court has clearly indicated that the only sentences reviewable under rule 35 are those which the judgment of conviction did not authorize.[130]

Mr. Justice Black, joined by Mr. Justice Douglas, Mr. Justice Brennan and the Chief Justice, vigorously opposed the Court's narrow con-

122. Hill v. United States, 368 U.S. 424, 430 (1962).
123. 368 U.S. 424 (1962).
124. See note 61 *supra* and accompanying text.
125. Rule 35 became effective in 1945 and § 2255 in 1948.
126. 358 U.S. at 422.
127. 368 U.S. at 430.
128. *Ibid.*
129. See note 115 *supra.*
130. 368 U.S. at 431-32.

struction of the rule, describing the majority view as "something less than an entirely satisfactory justification for such a begrudging interpretation of Rule 35."[131] The dissenters would liberally construe the rule:

> [The rule] simply provides for the correction of an "illegal sentence" without regard to the reasons why that sentence was illegal and contains not a single word to support the Court's conclusion that only a sentence illegal by reason of the punishment it imposes is "illegal" within the meaning of the Rule. I would have thought that a sentence imposed in an illegal manner—whether the amount or form of the punishment meted out constituted an additional violation of the law or not—would be recognized by an "illegal sentence" under any normal reading of the English language.[132]

Although the dissenting opinion may be logically sounder than the majority opinion, the apparent legislative history of rule 35 indicates that Congress did not intend it to be a panacea for all of the problems prisoners face when seeking post-conviction relief. In *Heflin* the Court noted:

> [Rule 35] was a codification of existing law and was intended to remove any doubt created by the decision in *United States v. Mayer*[133] as to the jurisdiction of a District Court to correct an illegal sentence after the expiration of the term at which it was entered.[134]

Although the language of rule 35 must have been appealing to prisoners in the *McNally* quandary, the Court held that Congress, in promulgating the rule, did not intend to create a catch-all for every form of post-conviction relief.

Prisoners and attorneys had explored every avenue[135] in search of a solution to the prematurity-parole problem. But, as noted above, all of the avenues, with the exception of coram nobis, led to dead-ends. In

131. *Id.* at 431.
132. *Id.* at 431-32.
133. 235 U.S. 55, 67 (1914).
134. 368 U.S. at 422.
135. Another possible remedy should be noted. The Court in *McNally* suggested that "the ruling sought is such as might be obtained in a proceeding brought to mandamus the Parole Board to entertain his petition for parole, if the sentence on the third count were void for want of jurisdiction of the court to pronounce it." 293 U.S. at 139. For purposes of the prematurity problem mandamus is no broader in scope than rule 35 and is subject to the same criticisms. Courts can employ mandamus to compel a parole board to disregard a sentence only when that sentence is void. Certainly no court would mandamus the board to ignore the second sentence for purposes of computing parole eligibility when the legislature commands such sentence be counted.

1965, however, there were indications that the foundations of *McNally* were beginning to crumble. The Court of Appeals for the Fourth Circuit announced a principle which would resolve the *McNally* quandary—provided it receives the Supreme Court's imprimatur, or if, in the silence of the Court, other circuits follow the principle.

THE MARTIN LEAD

In 1958 a Virginia jury convicted James Edward Martin of second-degree murder. The trial court sentenced him to a fifteen-year prison term.[136] While he was serving this term, Martin escaped from jail.[137] After his subsequent apprehension, he was brought to trial for the prison break and for grand larceny, and was convicted on both charges. The court sentenced him to terms of five and three years respectively for the prison break and grand larceny, the terms to attach and run consecutively after he served the remainder of the murder sentence.[138] Without the additional terms for escape and grand larceny, Martin would have been eligible for parole in 1963. But the parole computation, based on the aggregate time of his sentences, delayed his eligibility until 1966.[139]

Martin first sought habeas corpus relief in the state courts. He alleged that there had been numerous violations of his constitutional rights during his trial for escape and grand larceny.[140] A trial court denied the writ; the Supreme Court of Virginia subsequently affirmed.[141] Martin brought his case into the federal courts by filing a motion for a declaratory judgment.[142] The district court declined to take jurisdiction. It held that the Declaratory Judgment Act[143] is not a substitute for habeas corpus and that Martin's motion, therefore, was inappropriate to test the validity of his conviction.[144] Martin appealed.

The Court of Appeals for the Fourth Circuit decided to treat Mar-

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136. Martin v. Virginia, 349 F.2d 781, 782 (1965).
137. *Ibid.*
138. *Ibid.*
139. *Ibid.*
140. Martin alleged that when he requested to write home for money to secure an attorney, prison authorities denied him this right. He could not receive visitors or mail, but guards held him incommunicado. Several minutes before the trial began, court appointed counsel, who urged Martin plead guilty, saying he would "get off real light." The attorney did not speak a word for defendant, but spent the time joking with guards. The entire proceedings, from appointment of counsel to imposition of sentence consumed ten minutes. Counsel promised to take an appeal as Martin requested, but did not. Martin wrote several letters to the attorney, but received no reply. The time for appeal expired. *Id.* at 782-83.
141. *Id.* at 783.
142. *Ibid.*
143. 28 U.S.C. § 2201 (1948).
144. 349 F.2d at 783.

tin's motion for declaratory judgment as a habeas corpus petition.[145] By a unanimous decision the court *granted* the writ. In explaining its departure from *McNally* the court said:

> [O]ver thirty years ago, the Supreme Court held that a sentence which the prisoner had not yet begun to serve did not satisfy the statutory requirement of "custody" even though a result of the challenged sentence was to thwart his eligibility for parole. If this decision stood alone, unqualified by later decisions of the Supreme Court, we as a lower court would be bound to follow it. Since then, however, the Court has relaxed the strictness of their interpretation and held that one on parole is in "custody" within the meaning of one term under 28 U.S.C. 2241.[146] Still later the Court, in broad terms equated "custody" with "restraint of liberty."[147]

These sentences from the opinion indicate that the court confronted the question which *McNally* left unanswered, that is, what is the real test for determining prematurity? If *McNally* established "total and immediate release" as the test for the availability of habeas corpus, then later Supreme Court cases did not qualify the ruling, and the Fourth Circuit, as a lower court, was bound to follow it. However, if the Court in *McNally* intended that "sufficient restraint" should be the touchstone—which appears to be the more reasonable construction[148]—the court in *Martin v. Virginia* stood on logically adequate grounds when it said the Supreme Court had "relaxed the strictness of this interpretation." *Jones v. Cunningham,*[149] a 1963 case, illustrates this point. The Supreme Court granted a writ of habeas corpus to the petitioner, a parolee. Although Jones was not physically confined his parole was subject to certain conditions.[150] The Court held that these conditions "significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of 'The Great Writ.' "[151]

If *McNally* is viewed as holding that habeas corpus is unavailable unless it produces total and immediate release, *Jones* is no solution to the

145. *Id.* at 784.
146. Jones v. Cunningham, 371 U.S. 236 (1963).
147. 349 F.2d at 783, citing Fay v. Noia, 372 U.S. 391, 427 (1963).
148. See notes 39-43 *supra* and accompanying text.
149. 371 U.S. 236 (1963).
150. He might not leave the community, change his residence, or drive an automobile without the permission of his parole officer. He had to visit his parole officer once a month, follow all of his instructions and advice, and permit the officer to see him, at home or at work, at any time.
151. 371 U.S. at 243.

quandary and ironically, as one note writer points out, "talismanic manipulation" of the *Jones* case aggravates the quandary.[152] The essence of the *Jones* holding is that the technical restraint of parole is in fact custody. Thus even if a prisoner in Martin's position were paroled, he would simply move from the custody of prison to the custody of parole. Hence, he would not gain that total and immediate release requisite to invoking habeas corpus.[153]

As pointed out earlier, a careful reading of *McNally* lends credence to the proposition that the Court espoused "sufficient restraint" rather than "total and immediate release" as the test for granting the writ.[154] Moreover, recent Supreme Court decisions suggest that the Court is applying the sufficient restraint test. In its opinion in *Jones,* the Court used such phrases as "significantly restrain" and "[S]uch restraints are enough to invoke the help of the 'Great Writ.' "[155] There is nothing in the opinion to suggest that the Court was concerned that Jones would or would not be totally released by a favorable decision, or that the Court even considered the question. The decision was grounded squarely on the fact that there was significant restraint.

In *Fay v. Noia,*[156] decided later in 1963, the Court, citing *McNally* said in dictum:

> Of course custody in the sense of restraint of liberty is a prerequisite to habeas for the only remedy that can be granted on habeas is some form of discharge from custody.[157]

The total and immediate release test and this language from *Noia* conflict. The test for availability of habeas corpus cannot be both "total discharge" and "some form of discharge." The natural construction of the Court's language in *Noia* is that "custody" and "restraint" are conceptual variables. Parolees, prisoners being considered for parole or ineligible for parole because of unattached sentences, prisoners under life sentences or in "death row" are all admittedly in custody. Yet no one suggests that their custodies are similar.

It is true that the effect of habeas corpus on the prisoner in the *McNally* quandary is limited—he is discharged from one custody to another—whereas the parolee gains total freedom. Yet the *McNally* pris-

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152. Note, 1966 DUKE L.J. 588, 594 n.26. This analysis is correct only under the assumption that *McNally* espoused a test of "complete and immediate freedom."
153. "Thus," the note writer continues, "*Jones* is hoist with its own petard." *Ibid.*
154. See notes 39-43 *supra* and accompanying text.
155. See note 151 *supra* and accompanying text.
156. 372 U.S. 391 (1963).
157. 372 U.S. at 427 n.38.

oner realizes a more complete freedom—he is released from the confines of a penitentiary. The parolee merely sheds the shackles of technical restraints. The effect of the total and immediate release test is to deny relief to the prisoner behind bars seeking parole but to grant it to a petitioner walking the streets, free but for minimal restraints. The *Martin* court seems justified in saying:

> In light of these progressively developing notions as to the scope of the writ, there is reasonable ground for thinking that were the Court faced with the issue today, it might well reconsider *McNally* and hold that a denial of eligibility for parole is a "restraint of liberty" no less substantial than the technical restraint of parole.[158]

In *McNally,* the Supreme Court ignored the realities of the computation of time for parole eligibility. Instead the Court said that the actual cause of petitioner's restraint was the first sentence.[159] The *Martin* court, however, did not indulge in such casuistry.

> Indeed we are persuaded that from a practical point of view the conviction for escape and larceny are the real, effective basis for Martin's continuing detention in a penal institution instead of his being at large, relatively free, though under parole supervision, pursuing his occupation and contributing to the economic and social well-being of his family and his community.[160]

For prisoners in the fourth circuit, *Martin* resolves the perplexing problem of *McNally,* a problem which lasted for over thirty years. If all prisoners are to be afforded a solution to the prematurity dilemma, other federal courts will have to follow the *Martin* lead until or unless the Supreme Court speaks to the contrary.

Practical Considerations

The discussion to this point has centered on legal considerations which courts must confront to overcome the prematurity problem. Yet, realities of the situation must be confronted also since an intellectually satisfying decision may produce unsatisfactory results.

In 1965 Pennsylvania became the fourth state to abandon the prematurity doctrine.[161] The Pennsylvania Supreme Court's discussion in

158. 349 F.2d at 783-84.
159. See note 4 *supra.*
160. 349 F.2d at 784.
161. California, Oregon and Maryland had already abandoned the rule. Commonwealth ex rel. Stevens v. Myers, 419 Pa. 1, 213 A.2d 613, 624 n.25 (1965).

Commonwealth ex rel. Stevens v. Myers[162] presents a penetrating analysis of the practical problems involved in post-conviction relief. The majority opinion points out that in 1934 when *McNally* was decided, prisoners rarely used habeas corpus to test allegedly defective convictions.[163] The current widespread use of the writ, the court said, can be traced to recent, landmark decisions of the United States Supreme Court in constitutional areas. Looking at habeas corpus in its historical dimension, the court noted that "this phenomenal development of the writ as an instrument of post-conviction litigation was not foreseen when the common law deemed the writ competent to test only sentences under which petitioner was then serving."[164] The majority suggested that the law must adjust to this change in the writ's use if justice is to be served.[165]

Presently, many multiple offenders cannot get into court to test allegedly invalid convictions because the prematurity doctrine prevents them from invoking habeas corpus, the only route to freedom in many cases. Abolition of the doctrine would open the courts to these prisoners and could result in a proliferation problem.[166] However, as the *Myers* court points out, there is little reason to believe that multiple offenders, if denied access to federal habeas corpus while serving the first term, will not press these same claims when the second sentence attaches.[167] Even if he is paroled before his second sentence attaches, the *Jones* ruling justifies issuance of the writ. Since a multiple offender will be entitled to a hearing to test the validity of his conviction, and since the court's decision might necessitate a retrial, it is better to give the aggrieved multiple offender his day in court as soon after conviction as possible.[168] If too much time elapses between conviction and hearing, evidence may become

162. 419 Pa. 1, 213 A.2d 613 (1965).
163. 213 A.2d at 619.
164. *Ibid.*
165. *Id.* at 622.
166. Dissenting in Fay v. Noia, Mr. Justice Clark noted that habeas corpus petitions had increased tenfold between 1941 and 1963. 372 U.S. at 243.
167. 213 A.2d at 621.
168. *Ibid.* Even if this were not so, the proliferation argument is not insurmountable. Less than 2% of the prisoners in the Indiana State prison are presently serving the first of consecutive sentences. Information supplied by Mr. John L. Raschka, Institutional Parole Officer, Indiana State Prison, Michigan City, Indiana, May 10, 1966. Certainly this figure could not compare with the number of prisoners given access to federal habeas corpus because of recent landmark cases in constitutional areas.

Closely allied to the problem of proliferation is the problem of frivolous petitions. There appears to be no sound reason why premature petitions should be any more or any less frivolous than any other. One note writer points out that the prematurity rule does not discourage prisoners from pressing these same frivolous claims after they begin serving the contested term. Furthermore, he continues, the percentage of those prisoners that die or are pardoned before the second term attaches is so small that it hardly justifies postponing all premature petitions because they might be frivolous. Note, 66 COLUM. L. REV. 1164, 1176-77 (1966).

inaccessible or stale, memories may fade, and witnesses may die or disappear. The Court points out that these factors may render it difficult or impossible for the state or petitioner to gather a case.[169] The greater hardship falls on the state, which bears the burden of proof.[170]

The dissenting judge attempts to deal with this argument.

> While there is much said in the majority opinion about the novelty of today's circumstances compared to the antiquity of the rule regarding when a petition for habeas corpus is appropriate, there is nothing novel about the majority's reason for change. Staleness of evidence must have been as much of a problem when the *Hill* and *Ashe*[171] cases were decided as it is today. The only thing that is different today is the increased number of petitions for habeas corpus. While this may increase the number of cases in which staleness is a problem, it has another consequence—it greatly increases the case load pressure upon the courts and district attorneys. Why should we now increase that pressure with cases that have heretofore been considered premature? District Attorneys and courts may well find it a mixed blessing to have less time to effectively utilize fresher evidence.[172]

This statement does not refute the majority's point—that abandoning the prematurity doctrine will not, in the long run, increase case load pressure since these prisoners in all probability will gain an eventual hearing.[173]

The *Myers* court reached the same result as *Martin,* yet clearly for different reasons.

> Old forms will not entirely suit new classes of cases, but must be moulded to suit them. Although steeped in tradition, the writ is not insensitive to change. Since the writ has developed as a means of collateral post-conviction attack, the prerequisite for permitting its use should be adjusted so that the writ may effectively perform that role. Our present judgment must be based on today's needs which the writ is capable of meeting in satisfying the present demands of justice.[174]

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169. 213 A.2d at 621.
170. *Id.* at 621-22.
171. Commonwealth ex rel. Lewis v. Ashe, 335 Pa. 575, 7 A.2d 296 (1939), *cert. denied,* 308 U.S. 596 (1939). This was the Pennsylvania case which followed the *McNally* doctrine.
172. 213 A.2d at 628.
173. *Id.* at 621.
174. *Id.* at 622.

Recent fourteenth amendment decisions cause *McNally* to loom more importantly as a road-block to effective decision-making for multiple offenders. If the Supreme Court refuses to accept the *Martin* approach, or if other courts—federal and state—do not follow it, the consequent delay precipitated by the *McNally* doctrine might deprive multiple offenders of adequate hearings. It is anomalous that landmark decisions on constitutional rights should be compromised by a failure to allow multiple offenders effectively to assert these rights by collateral attack.

The most compelling reason for abandoning *McNally* is the plight in which it places multiple offenders. Those prisoners languishing in penitentiaries beyond the limits of the fourth circuit still may have to serve years in prison, restrained by convictions which courts may ultimately hold invalid. There is no way adequately to repay an individual for years wrongly spent in prison.

CONCLUSION

In the *Martin* case, the Fourth Circuit Court of Appeals reflected an apparent change of attitude by the Supreme Court. By abandoning *McNally* the court resolved the quandary for some multiple offenders and gave hope to others. Whether the Supreme Court has relented and will permit the *Martin* doctrine to stand remains to be seen.

Since the Court handed down *McNally* in 1934, prisoners and their attorneys have searched for a solution to the problem it created. But there can be no doubt that habeas corpus is the remedy best suited to handle the problem. The Supreme Court has said:

> The writ of habeas corpus commands general recognition as the essential remedy to safeguard a citizen against imprisonment by State or Nation in violation of his constitutional rights.[175]

The "Great Writ" is a very malleable remedy and contains very few substantive limitations.

> It is not now and never has been a static, narrow formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraint upon their liberty.[176]

Respected men of the law have considered habeas corpus as being nearly sacred. Blackstone called it "the most celebrated writ in English law,"[177]

175. Darr v. Burford, 339 U.S. 200, 203-04 (1950).
176. Jones v. Cunningham, 371 U.S. 236, 243 (1963).
177. 3 BLACKSTONE, COMMENTARIES 129.

and Chief Justice Marshall believed it a "great constitutional privilege."[178] Five years after deciding *McNally,* the Supreme Court wrote in sweeping terms: "There is no higher duty than to maintain it unimpaired."[179] In 1963 the Court, in considering these statements, said:

> These are not extravagant expressions. Behind them may be discerned the unceasing contest between personal liberty and governmental oppression. It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings and today. Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraint.[180]

In view of all these statements, the *Martin* court seems wholly justified in loosing federal habeas corpus from the shackles of the prematurity principle.

At the inception of the prematurity concept, before the quandary had been created, before the prisoners and prisoners' attorneys embarked on their search along the winding, rocky path of unsuited procedures and talismans such as "custody," "restraint" or "total release," one man may have held the answers to all these questions. Blessed with an appropriate name and a talent for elegant simplicity, Mr. John S. Wise, Jr., arguing on behalf of a prisoner named Charles L. McNally, confronted the Supreme Court and said:

> The argument that the subject can not be brought up on habeas corpus is specious, for it involves the liberty of a citizen which can not be disposed of by refinements of procedure.[181]

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178. Ex Parte Bollman and Swartwout, 4 Cranch (8 U.S.) 75, 95 (1807).
179. Bowen v. Johnson, 306 U.S. 19, 26 (1939).
180. Fay v. Noia, 372 U.S. at 400 (1963).
181. McNally v. Hill, 293 U.S. 131, 132 (1934).