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Federal Habeas Corpus in the District of Columbia: A Nonexistent Remedy

Congressional concern about crime in our Nation's Capital led to the passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970.¹ This paper will examine the problems raised by just one section of that Act, and not analyze it in its entirety.²

Section 23-110, which outlines the availability of relief on a motion attacking an imposed criminal sentence, raises two related constitutional problems. First, it may violate the due process provision of the fifth amendment; and second, it may amount to an unconstitutional suspension of the writ of habeas corpus. In order to properly evaluate Section 23-110 it will be necessary to review briefly the federal remedies that are available to attack a criminal conviction.

The Federal Writ of Habeas Corpus

Title 28, Section 2241 of the United States Code provides that a writ of habeas corpus may be granted by any federal judge³ for any of the following reasons: (1) a person is in custody "under or by color of the authority of the United States";⁴ (2) a person is in custody for some act done in accordance with the authority of the United States;⁵ or (3) a person is "in custody in violation of the Constitution or laws or treaties of the United States."⁶ This last provision is most important because it allows a prisoner to challenge the constitutionality of his confinement. While the federal writ would seem to be available to all persons confined in violation of Section 2241(c)(3), Congress has created a different remedy for those confined under federal sentence.⁷ Section 2255 provides that where a federal court has exceeded its jurisdiction or authority in imposing sentence or has confined someone in violation of the laws or Constitution of the United States that person may move that the sentence be set aside. No federal writ of habeas corpus may be obtained by a prisoner entitled to relief under Section 2255; it is an exclusive remedy.

1. Pub. L. No. 91-358, 84 Stat. 473 (1970).

2. For a full discussion of the Act see Williams, *District of Columbia Court Reorganization, 1970*, 59 GEO. L.J. 477 (1971); Symposium, *The Modernization of Justice in the District of Columbia Court Reform and Criminal Procedure Act of 1970*, 20 AM. U.L. REV. 237 (1971).

3. 28 U.S.C. § 2241(a) (1964).

4. *Id.* § 2241(c)(1).

5. *Id.* § 2241(c)(2).

6. *Id.* § 2241(c)(3).

7. *Id.* § 2255.

Section 23-110

Section 23-110 of the District of Columbia Code, a carbon copy of Section 2255 of Title 28, provides that an attack on a sentence by one confined by District of Columbia officials can be made on any of four grounds: (1) that the sentence imposed was in violation of the Constitution of the United States of the District of Columbia,⁸ (2) that the court was without jurisdiction to impose the sentence,⁹ (3) that the sentence was in excess of the maximum authorized by law;¹⁰ or (4) that the sentence is otherwise subject to collateral attack.¹¹ Like Section 2255, the D.C. statute provides:

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.¹²

Due Process

It is not the substance of the Section 23-110 remedy, but the peculiar effect which its operation will have in the District of Columbia which is constitutionally deficient. In order to understand the unequal effect of this statute it is necessary to trace the history of Section 2255 since this is the predecessor of Section 23-110.

Prior to the passage of Section 2255 federal habeas corpus was available to federal prisoners under Section 2241 of Title 28 of the United States Code. Venue for a habeas petition was proper in that district in which the federal prisoner was confined.¹³ The result was that the largest number of petitions were filed in those districts where federal penitentiaries were located.¹⁴ In order to distribute this work load more equitably, Congress enacted Section 2255. This Section provided a habeas corpus type review, not in the district where the penitentiary was located, but in the court which originally imposed the

8. D.C. CODE ANN. § 23-110(a)(1) (Supp. IV, 1971).

9. *Id.* § 23-110(a)(2).

10. *Id.* § 23-110(a)(3).

11. *Id.* § 23-110(a)(4).

12. *Id.* § 23-110(g).

13. *Ahrens v. Clark*, 335 U.S. 188 (1948).

14. *United States v. Hayman*, 342 U.S. 205, 213-14 (1952). It was also thought that the trial court would be best able to dispose of frivolous claims since it has the entire record at its disposal. *Id.* at 212-13.

sentence. The statute replaces the writ for all federal prisoners' claims which can be raised under the statute.

Section 2255 is a limitation on the jurisdiction of a federal court to hear a habeas corpus petition, *i.e.*, a federal judge cannot entertain a habeas claim under Section 2241 if it appears that a claim has already been made and denied under Section 2255, or that the applicant failed to make any claim at all.¹⁵ However, Section 2255 does not amount to a suspension of the writ in violation of the Constitution¹⁶ since it replaces the habeas corpus writ with an equivalent remedy under most circumstances. In those situations not covered by Section 2255, the statute itself provides that the writ will be available to test the legality of detention.¹⁷ When examining Section 2255 the Supreme Court stated that

[t]he sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.¹⁸

The Supreme Court has held that Section 2255 in no way limits the scope of habeas corpus relief and further that any constitutional claim which may be presented on a habeas petition can be presented on a Section 2255 motion before a federal judge.¹⁹

The problems which caused the adoption of Section 2255 are not present in the District of Columbia courts. Prior to the passage of Section 23-110 the District of Columbia Superior Court and the United States District Court would hear claims only from those persons sentenced in the District of Columbia since there are no federal penitentiaries located in the District.

Because of this, there is no need for a Section 2255 type statute in the District of Columbia. Despite this lack of need Congress enacted Section 23-110 and it has had profound effect on prisoners of the District of Columbia when compared to state as well as federal prisoners.

The purpose of the District of Columbia Court Reform Bill was to provide the District of Columbia with its own criminal court system. The Act has been characterized as manifesting the intent of Congress to create a judicial branch of the local government of the District of Columbia akin to the judicial branch of state governments and similarly independent of, and operating outside of, the federal judicial branch.²⁰ In its decision in *Younger v. Harris*,²¹ the Supreme

15. 28 U.S.C. § 2255 (1964).

16. U.S. CONST. art. I, § 9, cl. 2 provides:

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

17. 28 U.S.C. § 2255 (1964).

18. *United States v. Hayman*, 342 U.S. 205, 219 (1952).

19. *Id.* at 217-19; *Kaufman v. United States*, 394 U.S. 217 (1969).

Court admonished lower federal courts to allow state judicial systems to operate without interference when constitutional claims can be raised and adjudicated in those courts. In *North v. Greene*,²² a three judge panel of the United States District Court for the District of Columbia²³ found that the newly reorganized local courts of the District of Columbia appear to be such a system within the reach of the policy considerations underlying the Supreme Court's admonitions in *Younger*.²⁴

The Court Reform Act gave the Superior Court of the District of Columbia jurisdiction over felony trials formerly tried in the United States District Court for the District of Columbia.²⁵ This will reduce the role of the court to that of the normal United States District Court. The judges of the Superior Court are not federal judges; they derive their jurisdiction from article I rather than article III of the Constitution,²⁶ and unlike article III judges who sit for life, they sit for a term of 15 years.²⁷

Having distinguished the situation in the District of Columbia from that of the federal courts and the problems of habeas corpus administration, and having established that the reorganized court system in the District is more akin to a state court system, the inequity of Section 23-110 can now be made more apparent.

Section 2241 of the Title 28 of the United States Code states that the privileges granted therein are available to "prisoner(s)" and does not distinguish between federal and state prisoners. On its face it is available to all those detained by any authority in violation of its own Subsection (c). Section 2255, however, limits the availability of the writ to federal prisoners.

20. Williams, *District of Columbia Court Reorganization, 1970*, 59 GEO. L.J. 477, 490 (1971). This point was also raised in *North v. Greene*, Civil No. 413-71 (D.D.C. Mar. 18, 1971) in the motion filed on behalf of the defendant, Hon. Harold J. Greene, Chief Judge, Superior Court of the District of Columbia, to dissolve a Temporary Restraining Order issued by the U.S. District Court for the District of Columbia and the motion to dismiss the complaint. It was contended by the defendant that to allow the U.S. District Court to interfere with the procedures of the Superior Court would "subvert the very purpose for which the Superior Court was brought into being—to serve as the District of Columbia's court of general jurisdiction."

21. 401 U.S. 37 (1971).

22. See note 19 *supra*.

23. McGowan, Circuit Judge; Gasch, District Judge; Bryant, District Judge.

24. *North v. Greene*, Civil No. 413-71 (D.D.C. Mar. 18, 1971).

25. D.C. CODE ANN. § 11-502 (1970).

26. The D.C. Courts are "legislative courts," that is established under the power of Congress to legislate for the District of Columbia, granted by art. I, sec. 8, clause 17 of the Constitution. The concern is over the authority of the Congress to confer judicial power as exercised by an article III, or "Constitutional Court," under article I legislative power. See Williams, note 2, *supra* at 491-2.

27. U.S. CONST. art. III, § 1 provides that a federal judge sits during good behavior. D.C. CODE ANN. § 11-1502 requires retirement at age 70 and a 15 year term.

The writ has been available to all those in custody of a state in violation of Subsection (c) since 1867.²⁸ The major problem with procuring the writ for one held in state custody is the exhaustion of remedies rule. The writ will only lie to enforce the right of a prisoner to his liberty when a state has denied that right and no further state remedy is available.²⁹ This is not a limitation on the habeas corpus jurisdiction of the federal courts but is only an attempt to allow state courts to adjudicate the claim prior to a suit in the federal court.³⁰

It cannot be analogously argued that once a motion pursuant to Section 23-110 has been denied to him, a prisoner of the District of Columbia has a further remedy such as a state prisoner under the federal habeas corpus statute since this statute itself precludes one.³¹ This is not an exhaustion of remedies rule similar to Section 2254(b) but rather is a limitation of remedies rule; it limits the habeas jurisdiction of the District courts and courts of the states

28. 14 Stat. 385; 28 U.S.C. § 2254(a) (Supp. V, 1970) limits the scope of federal habeas relief available to state prisoners to claims that they are in custody in violation of the Constitution, laws, or treaties of the United States. [An] applicant shall establish or it shall otherwise appear, or the respondent shall admit—

- (1) that the merits of the factual dispute were not resolved in the State court hearing;
- (2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;
- (3) that the material facts were not adequately developed at the State court hearing;
- (4) that the State court lacked jurisdiction of the subject matter or over the person of the application in the State court proceeding;
- (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
- (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
- (7) that the applicant was otherwise denied due process of law in the State court proceeding;
- (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous. It is of no consequence, though, that the state court has already adjudicated the same claim. *Brown v. Allen*, 344 U.S. 443 (1953).

29. 28 U.S.C. § 2254(b) (1964).

30. *Fay v. Noia*, 372 U.S. 391 (1963); *Fay* held that a forfeiture of the right to raise a claim in a state proceeding would not preclude a consideration of that claim on a federal habeas petition. Section 23-110 would bar raising a lost claim in a federal habeas petition. *See also Bowen v. Johnston*, 306 U.S. 19 (1939).

31. D.C. CODE ANN. § 23-110(g) (Supp. IV, 1971).

by stating that they shall not under any circumstances entertain a writ³² application by a prisoner denied relief under that section.

Since the courts of the District of Columbia are like those of a state system, Section 23-110 effectively denies a prisoner incarcerated by the District of Columbia courts a federal collateral remedy available to all similarly situated state prisoners after the courts of the sentencing state have denied relief. While it may be true that a judge of the Superior Court will hear the claim under this section, and that the District prisoner will have an appeal from a denial of relief to the District of Columbia Court of Appeals,³³ the prisoner of any other "state" has this as a matter of right in the courts of the sentencing state. This places prisoners of the District of Columbia in a unique position. They are the only prisoners confined by a court system in the United States who are unable to present their constitutional claims to a federal judge. This is a denial of "equal protection of the law" guaranteed by the fourteenth amendment of the Constitution.³⁴ The amendment is not directly applicable to the District of Columbia since it applies only to the states. In *Bolling v. Sharpe*,³⁵ however, the Supreme Court held that the "due process" clause of the fifth amendment, which is applicable to the District, encompasses the narrower concept of equal protection:

[t]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" [clause] is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. Discrimination may be so unjustifiable as to be violative of due process.³⁶

Furthermore, equity dictates that there should not be one rule for prisoners in the District of Columbia and another for prisoners under the rest of the court systems in the United States. As the Supreme Court has stated:

We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States.³⁷

There should be one rule for all the courts in the United States and that rule

32. *Id.*

33. *Id.* § 23-110(f).

34. U.S. CONST. amend. XIV, § 1.

No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws.

35. 347 U.S. 497 (1954).

36. *Id.* at 499.

37. *Hurd v. Hodge*, 334 U.S. 24, 35-36 (1948).

should allow every prisoner confined by any court to present his claim of unconstitutional deprivation of freedom to a federal judge. To deny this right to a prisoner of the District of Columbia amounts to discrimination "violative of due process."

The Prohibition Against the Suspension of the Writ

The second argument against the constitutionality of Section 23-110 is that it amounts to an unconstitutional suspension of the writ of habeas corpus.

Article I, section 9, clause 2 of the United States Constitution provides that:

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

While the crime problem in the District of Columbia is unquestionably serious, it hardly amounts to a case of rebellion or invasion, such as the Civil War, which justified previous suspensions of the writ.³⁸

As mentioned above Section 23-110 is not an exhaustion of remedies rule. Subsection (g) clearly states that no federal or state judge may entertain a habeas petition on behalf of a prisoner denied relief under Section 23-110. This is a limitation on the habeas jurisdiction of all federal courts. The right to file a petition for federal habeas corpus to a prisoner denied relief under Section 23-110 is, as to that prisoner, a suspension of the privilege of applying for federal habeas corpus. This is not a time of rebellion or invasion within the terms of the Constitution and therefore this is an unconstitutional suspension of the writ.

Conclusion

The due process clause of the fifth amendment requires that all prisoners, state, federal and District, be treated equally. Logic as well as sound public policy

38. The writ has been suspended on but a few occasions since the time Congress has had the power to authorize suspension, nearly 200 years. See 12 Stat. 755 for the statute authorizing suspension during the Civil War, 1863-5. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) held that the courts would be the final arbiter of the appropriateness of suspension of the privilege of application for the writ. The "open courts" rule of *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1869) is probably the best test for determining when the public safety would require a suspension of the privilege; 17 Stat. 13 (suspension was authorized to control the Klu Klux Klan terrorism and was actually used in South Carolina, 1871), see R. SOKOL, *FEDERAL HABEAS CORPUS* 200 (2d rev. ed. 1969)). 32 Stat. 691 (Philippine Insurrection, 1905); see also *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (Hawaii after the attack on Pearl Harbor, 1941); *Korematsu v. United States*, 323 U.S. 214 (1944) (Japanese detention centers within the United States, 1942-45).

requires that those prisoners confined by the District of Columbia have the opportunity to make a collateral attack upon the constitutionality of that confinement before a judge of the United States courts, a remedy available to all prisoners confined by any other court system within the United States. The unavailability of this relief to these prisoners amounts to suspension of the writ of habeas corpus in violation of the Constitution.

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