WALKER, ROWE AND CARAFAS: THE EXPANDING CONCEPT OF "IN CUSTODY"

In the October 1967 term, the Supreme Court of the United States decided three cases which extended the use of the writ of habeas corpus in the federal court system. In the three cases, *Walker v. Wainwright*,[1] *Peyton v. Rowe*,[2] and *Carafas v. LaVallee*,[3] the Court broadened the definition of the term "in custody" as used in the Federal Habeas Corpus Act.[4] It is the purpose of this paper to explore the implications of those decisions and consider the possibility of future expansion of the remedy of habeas corpus in light of the continuing evolution of the "in custody" concept.

Habeas corpus originated as a writ by which the superior courts of the common law sought to extend their jurisdiction into new areas at the expense of inferior or rival courts. Ultimately, the procedure evolved into the writ of habeas corpus *ad subjiciendum*, whereby the legality of the restraint imposed upon a person in custody could be judicially tested.[5] The Habeas Corpus Act of 1679[6] defined and regulated the use of the writ:

> The Habeas Corpus Act appears from its preamble to have been especially, although not exclusively, directed at cases in which the King's subjects were detained in custody upon a criminal charge where by law they were entitled to bail. It authorized the writ to issue, directed to any sheriff or gaoler, or other person "for any person in his or their custody." It commanded the production of the prisoner before the judicial officer to whom the writ was to be returned and directed that such officer "shall discharge" the "prisoner from his imprisonment" with provision for taking bail in his discretion, "unless it shall appear" to him that the petitioner "is detained upon a legal process, order or warrant out of some court that hath jurisdiction of criminal matters" or upon warrant for an offense "for which by law the prisoner is not bailable."[7]

Congress has conferred upon the federal district courts, judges of the courts of appeals, and the Supreme Court of the United States jurisdiction to grant the writ of habeas corpus.[8] Because of the

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1. 390 U.S. 335 (1968).
2. 391 U.S. 54 (1968).
3. 391 U.S. 234 (1968).
4. 28 U.S.C. § 2241(c) (1964).
5. *See* 9 HOLDSWORTH, HISTORY OF THE ENGLISH LAW, 108-25 (1929).
6. 31 Car. 2, c. 2.
7. McNally v. Hill, 293 U.S. 131, 137 n.1 (1934) (quoting from the Habeas Corpus Act of 1679, 31 Car. 2, c. 2).
8. 28 U.S.C. § 2241(a) (1964) reads:
   Writs of habeas corpus may be granted by the Supreme Court,

common law origin of the writ, the federal courts have often looked to the legislation and decisions of the English courts as authoritative guides in defining the principles which control the use of the writ of habeas corpus in the federal system.[9] The circumstances under which the writ may be granted are set out in 28 U.S.C. section 2241(c):

> The writ of habeas corpus shall not extend to a prisoner unless—
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> (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
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> (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
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> (3) He is *in custody* in violation of the Constitution or laws or treaties of the United States; or
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> (4) He, being a citizen of a foreign state and domiciled therein is *in custody* for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
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> (5) It is necessary to bring him into court to testify or for trial.[10]

It is important to note that the usefulness of the writ for testing the lawfulness of confinement is expressly limited in all cases by the phrase "in custody."

The case which set the traditional boundaries of the term "in custody" was *McNally v. Hill*,[11] decided in 1934, which arose out of the conviction of the petitioner, McNally, under an indictment alleging violations of two federal statutes. The petitioner was sentenced to two years on the first count for conspiracy[12] and to four years on each of two counts alleging violations of the National Motor Vehicle Act.[13] The sentence on the first count was to run

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any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

9. *See Ex Parte* Yerger, 75 U.S. (8 Wall.) 85 (1868); *Ex Parte* Watkins, 28 U.S. (3 Pet.) 191 (1830).

10. Emphasis added.

11. 293 U.S. 131 (1934).

12. Conspiracy Act, 35 Stat. 1096 (1909), *as amended*, 18 U.S.C. § 371 (1964).

13. National Motor Vehicle Theft Act, 41 Stat. 324 (1919), *as amended*, 18 U.S.C. §§ 2311-13 (1964).

concurrently with that on the second, while the sentences on the second and third counts were to run consecutively. On April 6, 1933 the petitioner filed an application for a writ of habeas corpus in a federal district court in Pennsylvania, attacking only his conviction and sentence on the third count and alleging that his conviction and sentence thereunder were void, since the indictment had failed to allege facts constituting a federal offense. He claimed that habeas corpus should be available to him, because by reason of the void conviction the possibility of parole being granted him under the federal statute[14] was prejudiced, since he was

> eligible to apply for parole, to be granted, in the discretion of the Parole Board, after serving one-third of his sentence; that he had served one-third or more of the valid sentence on the first and second counts, but less than one-third of the total period of imprisonment to which he had been sentenced on the three counts; and that consideration by the Parole Board of any application for his parole was precluded by reason of the outstanding, but void, sentence on the third count.[15]

The district court denied the request for issuance of a writ of habeas corpus, sustaining the sufficiency of the indictment on the third count against the petitioner's attack.[16]

Passing over the question whether the writ could be used to test the validity of a sentence when immediate release would not result, the Court of Appeals for the Third Circuit held that McNally was properly convicted and sentenced on the third count.[17] The Supreme Court affirmed, stating that "as it appears . . . that the detention of petitioner is lawful under the sentence on the second count, there is no occasion, in a *habeas corpus* proceeding, for inquiry into the validity of his conviction under the third."[18]

Mr. Justice Stone, presenting the Court's opinion, looked to the origins of the "Great Writ,"[19] and found no justification for its use when issuance of the writ would not result in the petitioner's immediate release:

> Diligent search of the English authorities and the digests before 1789 has failed to disclose any case where the writ was sought or used, either before or after conviction, as a means of securing the judicial decision of any question

14. Parole Act, 36 Stat. 819 (1910), *as amended*, 18 U.S.C. §§ 4201-10 (1964).
15. McNally v. Hill, 293 U.S. 131, 134 (1934).
16. *See* McNally v. Hill, 69 F.2d 38, 39 (3d Cir. 1934).
17. *Id.* at 40.
18. McNally v. Hill, 293 U.S. 131, 135 (1934).
19. *Id.* at 137.

> which, even if determined in the prisoner's favor, could not have resulted in his immediate release.[20]

The doctrine of "immediate release" as set out in *McNally* was superimposed upon the concept of "in custody" and thereby became a limitation upon the usefulness of the writ of habeas corpus in the federal courts.

In a 1950 case involving a state prisoner, *Darr v. Buford*,[21] the "immediate release" rule of *McNally* was expressly reaffirmed. Although the case was disposed of on other grounds,[22] the Court noted in dictum that:

> It has long been settled that the federal courts will not consider on habeas corpus claims which have not been raised in the state tribunal; and in any event, it is *unquestioned doctrine* that only the sentence being served is subject to habeas corpus attack.[23]

The Court made its first significant departure from the stringent requirements of the *McNally* doctrine in the 1963 case of *Jones v. Cunningham*.[24] The petitioner, Jones, had been sentenced to ten years in the Virginia state penitentiary in 1953. In 1961 an application for federal habeas corpus, alleging a violation of a federal constitutional right, was filed on behalf of the petitioner. The Court of Appeals for the Fourth Circuit granted leave to appeal from an adverse decision by the district court. However, before oral argument, the petitioner was paroled and placed under the "custody and control" of the parole board and subjected to the various restrictions and regulations of the board. The court dismissed the appeal on the ground that the case had been rendered moot, since the petitioner was no longer in custody of the prison superintendent and was not in physical custody of the parole board. The Supreme Court granted certiorari to determine

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20. *Id.* at 137-38.

21. 339 U.S. 200 (1950).

22. The *Darr* case was decided upon an interpretation of the following statute:

> 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.
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> 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.

62 Stat. 960 (1948), *as amended*, 28 U.S.C.A. § 2254 (Supp. 1967).

23. Darr v. Burford, 339 U.S. 200, 203 (1950) (emphasis added).

24. 371 U.S. 236 (1963).

whether a parolee is "in custody" under the Federal Habeas Corpus Act.[25]

As Justice Stone had done in the *McNally* case, Mr. Justice Black, writing for the majority in *Jones*, went far back into the history of habeas corpus, saying:

> To determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country.
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> In England, as in the United States, the chief use of habeas corpus has been to seek the release of persons held in actual, physical custody in prison or jail. Yet English courts have long recognized the writ as a proper remedy even though the restraint is something less than close physical confinement. . . .
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> Similarly, in the United States the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody.[26]

Accordingly, Mr. Justice Black concluded that:

> History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus.[27]

Considering the various restraints placed upon the petitioner by the terms of his parole, the Court found him to be "in custody" within the meaning of the federal statute:

> Such restraints are enough to invoke the help of the Great Writ. Of course, that writ always could and still can reach behind prison walls and iron bars. *But it can do more.* 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 restraints upon their liberty.[28]

The Court in the *Jones* decision looked at habeas corpus in a different light than it had in *McNally*. While the *McNally* Court had seemed impressed by the restrictions upon the use of the writ and, accordingly, had emphasized its limitations, the *Jones* Court was impressed with the evolutionary processes of the writ and

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25. Jones v. Cunningham, 369 U.S. 809 (1962).

26. 371 U.S. at 238-39. Mr. Justice Black pointed out that the Court has repeatedly held that aliens could use habeas corpus in seeking entry into the United States. *See* Brownell v. Tom We Shung, 352 U.S. 180 (1956).

27. 371 U.S. at 240.

28. *Id.* at 243 (emphasis added).

therefore emphasized its growth and versatility. The three decisions handed down in the October 1967 term were decided in accordance with the current of thought which was established by the majority opinion of Justice Black in the *Jones* case. The underlying premise of those decisions is that habeas corpus "can do more" than merely obtain release of a person illegally confined to prison or jail.

As of the beginning of the October 1967 term, the *McNally* doctrine of "immediate release" still enjoyed the status of being "unquestioned," which the Court had noted in 1950. The *Jones* decision, however, pointed out the rationale that was to do away with *McNally*. In its decisions in *Walker*,[29] *Rowe*,[30] and *Carafas*,[31] the Court, following the road staked out by *Jones*, wholly rejected the reasoning relied upon in the *McNally* case, and may have opened the door for more sweeping changes in the future.

The first of these cases, *Walker v. Wainwright*,[32] was decided on March 11, 1968. The petitioner, Walker, had been convicted and sentenced to life imprisonment for murder in 1960. In 1965 he was convicted of aggravated assault and sentenced to an additional term of five years, to commence when the sentence for murder was served. Having exhausted his state remedies, the petitioner sought a writ of habeas corpus in the District Court for the Southern District of Florida,[33] challenging the earlier conviction for murder on constitutional grounds.

The district court found that since a favorable decision would not result in the petitioner's immediate release, it could proceed no further, and dismissed the proceeding.[34] The Court of Appeals for the Fifth Circuit affirmed,[35] and the case went to the Supreme Court on certiorari.[36]

In a per curiam decision, the Court reversed and remanded the case,[37] finding that the decision of the district court put the prisoner in the untenable position of not being able to challenge his life sentence until after he had served it. The district court had, of course, relied on the *McNally* doctrine of "immediate release," but the Supreme Court said:

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29. Walker v. Wainwright, 390 U.S. 335 (1968).
30. Peyton v. Rowe, 391 U.S. 54 (1968).
31. Carafas v. LaVallee, 391 U.S. 234 (1968).
32. 390 U.S. 335 (1968).
33. *See id.* at 335.
34. *Id.* at 336.
35. *See id.* at 335.
36. *Id.* at 337.
37. *Id.*

> The *McNally* decision . . . held only that a prisoner cannot employ federal habeas corpus to attack a "sentence which [he] has not begun to serve. 293 U.S., at 138. Here the District Court has turned that doctrine inside out by telling the petitioner that he cannot attack the life sentence he *has* begun to serve—until after he has finished serving it. We need not consider the continued vitality of the *McNally* holding in this case, for neither *McNally* nor anything else in our jurisprudence can support the extraordinary predicament in which the District Court has placed this petitioner.[38]

While the Court did not overrule *McNally*, its decision in *Walker* severely eroded the "immediate release" dogma. The Court said, in the course of its opinion, "Whatever its other functions, the great and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention."[39] The effect of the *Walker* decision was to shift the emphasis from an examination of what would happen to the prisoner if the writ were granted, to an inquiry into the fact of the prisoner's detention. The immediate effect of the *Walker* decision is that a person "in custody" may seek a writ of habeas corpus under the federal statute,[40] even though the issuance of the writ would not free the petitioner from custody.

Two months after the *Walker* decision, the Court expressly overruled *McNally*.[41] In *Peyton v. Rowe*,[42] the Supreme Court, affirming a decision of the Court of Appeals for the Fourth Circuit, held that a prisoner who is serving consecutive sentences is "in custody" under any of them so far as the Federal Habeas Corpus Act is concerned, so that a federal district court can entertain the petition of a prisoner even though the sentence challenged will be served in the future.[43]

The *Rowe* case involved two prisoners, Robert Rowe and Clyde Thacker. Petitioner Rowe was convicted in 1963 on charges of rape and felonious abduction and was given sentences of 30 and 20 years respectively. The sentences were to run consecutively. Having exhausted his state remedies, Rowe petitioned a federal district court for a writ of habeas corpus, attacking the constitutionality of his detention on the felonious abduction conviction. The district

38. *Id.* at 336.
39. *Id.*
40. 28 U.S.C. § 2241(c) (1964).
41. McNally v. Hill, 293 U.S. 131 (1934). *See* Peyton v. Rowe, 391 U.S. 54, 67 (1968).
42. 391 U.S. 54 (1968).
43. *See id.* at 67.

court, following *McNally*, found that Rowe was currently "in custody" under the rape conviction, and that he could not challenge the abduction conviction in the federal courts until he began serving it in 1993.[44] Petitioner Thacker's situation was almost identical to that of Rowe. The sentence which he was attacking would not begin to run until 1994. Also following *McNally*, the district court in which Thacker had presented his request for habeas corpus denied his application.[45]

The two cases were consolidated for argument before the Court of Appeals for the Fourth Circuit. In an opinion by Chief Judge Haynsworth, the court reversed. Recent Supreme Court decisions had so eroded the *McNally* doctrine that it was no longer good authority: "Certainly, *McNally's* doctrinaire approach and its dealing with the problem in terms of the old jurisdictional concept have been thoroughly rejected by the Supreme Court in recent cases."[46] The new approach "embraced a more liberal, less technical concept of the writ."[47]

On certiorari the Supreme Court affirmed, adopting the reasoning of the court of appeals. Speaking this time through Chief Justice Warren, the Court said, "We conclude that the decision in [the *McNally*] case was compelled neither by statute nor by history and that today it represents an indefensible barrier to prompt adjudication of constitutional claims in the federal courts."[48]

As Justices Stone and Black had done before him, Chief Justice Warren reviewed the origins of the writ of habeas corpus. Prior to the decision of the Court in *McNally*, three principles governing the use of the writ of habeas corpus had emerged. First, the major use of the habeas corpus remedy in the federal courts since the time of the Civil War has been as a vehicle for postconviction review. Second, the remedy had traditionally been applied with a view toward prompt adjudication of the validity of the restraint. Finally, the court in which the petition for a writ is presented was not required to rely on a bare trial record, but may go behind the record and conduct a factual hearing.

The Court examined the *McNally* rule in light of these three principles, and found it to be inconsistent with them. The Court thought that:

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44. *See id.* at 56.
45. *Id.* at 57.
46. Rowe v. Peyton, 383 F.2d 709, 714 (4th Cir. 1967). *Cf.* Jones v. Cunningham, 371 U.S. 236 (1963).
47. 383 F.2d at 714.
48. Peyton v. Rowe, 391 U.S. 54, 55 (1968).

> [T]he harshness of a rule which may delay determination of federal claims for decades becomes obvious when applied to the cases of Rowe and Thacker. Their cases also exemplify the manner in which the decision in *McNally* cuts against the prior and subsequent development of the writ in the federal courts.[49]

Moreover, the passage of time would work too great a hardship upon persons seeking release by habeas corpus:

> [D]immed memories or the death of witnesses is bound to render it difficult or impossible to secure crucial testimony on disputed issues of fact. . . . Postponement of the adjudication of such issues for years can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice.[50]

The Court found that the *McNally* "immediate release" rule was at odds with the principle requiring swift judicial review:

> [T]he prematurity rule of *McNally* in many instances extends without practical justification the time a prisoner entitled to release must remain in confinement. Rowe and Thacker eventually may establish that the convictions they challenge were obtained in violation of the Constitution. If they do, each day they are incarcerated under those convictions while their cases are in the courts will be time that they might properly have enjoyed as free men.[51]

Addressing itself to the scope of the term "in custody" as used in the Federal Habeas Corpus Act,[52] the Court found that "Nothing on the face of § 2241 militates against an interpretation which views Rowe and Thacker as being 'in custody' under the aggregate of the consecutive sentences imposed on them."[53]

Chief Justice Warren pointed out that the reason the Court in *McNally* could find no cases prior to 1789 in which a prisoner was allowed to attack a conviction, the sentence for which he had not yet begun to serve, was that English judges never had the power to impose cumulative punishment in felony cases, and only received power to do so in misdemeanor cases in 1796. Therefore, a case like *McNally* could never have occurred in England before 1789.[54] More important to the Chief Justice, however, the habeas corpus remedy is not static, but rather it changes and grows to achieve its goal of protecting the right of the individual against unlawful

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49. *Id.* at 61.
50. *Id.* at 62.
51. *Id.* at 64.
52. 28 U.S.C. § 2241(c) (1964).
53. 391 U.S. at 64.
54. *See id.* at 66.

restraints.[55]

Finally, the Court reaffirmed the *Walker*[56] decision, stating that habeas corpus relief was available to a prisoner even though the granting of the writ would not result in the immediate release of the prisoner.[57]

In *Carafas v. LaVallee*,[58] decided the same day as *Rowe*, the Court continued its reexamination of the "in custody" concept. Petitioner Carafas sought a writ of habeas corpus in a federal district court in June of 1963, at which time he was "in custody."[59] Petitioner was paroled on October 4, 1964, and on March 6, 1967 his sentence expired. Certiorari issued from the Supreme Court of the United States on October 16, 1967.[60] Relying upon *Parker v. Ellis*,[61] decided in 1960, the New York attorney general claimed that since the petitioner was no longer "in custody" at the time the case was heard by the Supreme Court, the case was moot and federal jurisdiction was terminated. Carafas asked that the *Parker* case be overruled, contending that his cause was not moot, since although he had served his sentence, he still remained under various social and civil disabilities as a result of his conviction.

Speaking this time through Mr. Justice Fortas, the Court agreed that indeed the case was not moot so far as the petitioner was concerned:

> In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these "disabilities or burdens [which] may flow from" petitioner's conviction, he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him."[62]

Chief Justice Warren had dissented in the *Parker*[63] case on the same grounds that were the basis of his opinion in *Rowe*, that the delay involved was "intolerable." The *Carafas* Court agreed, stating that:

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55. *See id.*, where Chief Justice Warren reiterated what had been said in the *Jones* decision.
56. Walker v. Wainwright, 390 U.S. 335 (1968).
57. *See* 391 U.S. at 67.
58. 391 U.S. 234 (1968).
59. *See* United States *ex rel.* Carafas v. LaVallee, 334 F.2d 331, 332 (2d Cir. 1964).
60. Carafas v. LaVallee, 389 U.S. 896 (1967).
61. 362 U.S. 574 (1960). *See* 391 U.S. at 236-37.
62. 391 U.S. at 237.
63. Parker v. Ellis, 362 U.S. 574, 577 (1960).

> [The petitioner] should not be thwarted now and required to bear the consequences of assertedly unlawful conviction simply because the path has been so long that he has served his sentence. The federal habeas corpus statute does not require this result, and *Parker v. Ellis* must be overruled.[64]

What the Federal Habeas Corpus Act does require is that the applicant be "in custody" when the application for habeas corpus is filed. The fact that the prisoner is released before the case is heard does not contravene the statutory scheme. The pertinent time when the petitioner must be "in custody" is the time when the writ is first sought.[65]

It may be that *Carafas* has pushed the term "in custody" to its limits. It should be noted, however, that the Court in that case placed great emphasis on the restrictions upon personal liberty which flow from the fact that a person has once served a prison sentence. On the other hand, although the Court was deeply concerned with the various burdens and disabilities placed upon ex-convicts who have been wrongfully convicted, it must be remembered that the reason given by the Court for its decision in *Carafas* was that the petitioner had sought habeas corpus while he was still in custody. The Court merely held that his subsequent release while appeal was pending did not render moot the question of the validity of his conviction.

The question of the impact of *Walker*, *Rowe*, and *Carafas* upon the "in custody" limitation of the Federal Habeas Corpus Act was raised in *In re Thoreson*,[66] which involved the use of the remedy to attack a conviction, the sentence for which had already been completely served at the time the petition was filed.

The petitioner had been charged in 1959 by the State of Maine with larceny of goods having a value of over one hundred dollars, and had been given a two-year suspended sentence upon his guilty plea. In 1961 he was discharged from his probation. The Maine larceny conviction was used as the basis for a 1967 federal prosecution under 15 U.S.C. section 902(e) for transporting firearms in interstate commerce.[67] Petitioner's counsel in the federal case

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64. 391 U.S. at 240.

65. *See id.* at 238.

66. 395 F.2d 466 (1st Cir. 1968), *cert. denied*, 37 U.S.L.W. 3135 (U.S. October 15, 1968) (No. 348).

67. *See* 15 U.S.C. § 902(e) (1964) which reads:

> It shall be unlawful for any person who is under indictment or who has been convicted of a crime punishable by imprisonment for a term exceeding one year or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition.

discovered that the actual value of the goods involved in the Maine prosecution was far less than one hundred dollars, and that Thoresen should never have been allowed to plead guilty to the offense charged. Under the Maine statutes, larceny of goods having a value less than one hundred dollars carries a maximum penalty of six months' confinement,[68] and therefore a conviction of the latter offense would not support a subsequent prosecution under section 902(e). Postconviction relief was sought under the Maine statute,[69] but the petition was dismissed in the Supreme Judicial Court for want of jurisdiction.[70] The same result followed when the petitioner sought relief by habeas corpus in federal district court,[71] and the case was taken to the First Circuit.[72]

On May 13, 1968 the court of appeals affirmed the decision of the district court. Since Thoresen had long been out of the custody of any authority of the State of Maine, habeas corpus was not available to him under the federal statute:

> Petitioner's difficulty is his inability to demonstrate the "custody" required by 28 U.S.C. § 2241(c) before the writ of habeas corpus can issue, a problem pointed up by his failure to name a respondent against whom the writ is to issue.[73]

Seven days after the court of appeals had rendered its decision in *Thoresen*, the Supreme Court decided *Rowe* and *Carafas*. The problem with which the petitioner in *Thoresen* was confronted was similar to that faced by the petitioner in *Carafas*, since, although both applicants were out of custody at the time of the final decision upon their requests for relief, each had a "substantial stake" in the outcome of the habeas corpus proceeding.

In a supplementary opinion issued on May 24, 1968, the *Thoresen* court stated:

> On May 20 the Supreme Court overruled Parker v. Ellis, 1960, 362 U.S. 574, in Carafas v. LaVallee, 5/20/68, and decided Peyton v. Rowe, 5/20/68. We have reviewed those decisions and see no reason to alter ours.[74]

As indicated above there is probably no way to expand the concept of "in custody" further without destroying it altogether. There are some indications, however, that a movement to do away with the "in custody" limitation in proceedings for postconviction

68. ME. REV. STAT. ANN. tit. 17, § 2101 (1964).
69. ME. REV. STAT. ANN. tit. 14, §§ 5502-08 (Supp. 1967).
70. Thoresen v. State, 239 A.2d 654 (Me. 1968).
71. *See In re* Thoreson, 395 F.2d 466, 468 (1st Cir. 1968).
72. *In re* Thoresen, 395 F.2d 466 (1st Cir. 1968).
73. *Id.* at 468.
74. *Id.*

relief is underway. A report by the American Bar Association, published in 1967, proposes a set of model standards for statutes and rules of court providing postconviction remedies. Standard 2.3 reads as follows:

> Except for a claim under section 2.1(b) which does not affect the validity of a criminal judgment, the availability of post-conviction relief should not be dependent upon the applicant's attacking a sentence of imprisonment then being served or other present restraint. The right to seek relief from an invalid conviction and sentence ought to exist:
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> (i) even though the applicant has not yet commenced service of the challenged sentence;
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> (ii) even though the applicant has completely served the challenged sentence;
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> (iii) even though the challenged sentence did not commit the applicant to prison, but was rather a fine, probation, or suspended sentence.[75]

The Court in the *Rowe*[76] decision has accepted subsection (i), and the decisions in *Jones*,[77] *Rowe*,[78] and *Carafas*,[79] taken together appear to support subsection (iii). The problem of the *Thoresen* case,[80] however, remains. Assuming that the Court will not go beyond the boundaries which it set out in *Carafas*, the answer to that problem seems to lie in a change in the language of the federal statute. There is precedent for such a move in the Oregon Post-Conviction Act,[81] which provides that any person "convicted of a crime" may seek relief "without limit in time," and contains no language limiting relief to persons in custody.

The American Bar Association report also suggests a means of saving the courts from the burden of large numbers of applications for relief filed by ex-convicts, a problem which has been cited by opponents of an extension of the remedy:

> This will not increase the volume of foreseeable litigation, since the Advisory Committee also recommends a concomitant principle for stale claims, the applicant must have a present need for the requested relief. Simple expungement of an old judgment that has no present or potential disadvantageous consequences is probably not a sufficient basis on which to burden the courts.[82]

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75. A.B.A., REPORT ON POST-CONVICTION REMEDIES 40-41 (1967).
76. Peyton v. Rowe, 391 U.S. 54 (1968).
77. Jones v. Cunningham, 371 U.S. 236 (1963).
78. Peyton v. Rowe, 391 U.S. 54 (1968).
79. Carafas v. LaVallee, 391 U.S. 234 (1968).
80. *In re* Thoresen, 395 F.2d 466 (1st Cir. 1968).
81. ORE. REV. STAT. §§ 138.510-.680 (1967).
82. A.B.A., REPORT ON POST-CONVICTION REMEDIES 44 (1967).

While it may be true that any further expansion of the "in custody" concept is left to the vagaries of legislative initiative, it seems clear that the Supreme Court has undertaken a review of the machinery provided for collateral attack of criminal convictions, and it can be expected that, within the statutory boundaries, some further expansion of the availability of federal post-conviction remedies will result.

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