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The Development of Independent Jurisdictional Significance for Civil Disabilities: The Postcustody Petition

THE DEVELOPMENT OF INDEPENDENT JURISDICTIONAL SIGNIFICANCE FOR CIVIL DISABILITIES: THE POST-CUSTODY PETITION

Post-Conviction review has become an established part of the criminal process. This development, which has occurred during the last few years, is a by-product of the changes in criteria governing criminal prosecutions wrought by the Supreme Court of the United States and, to a considerable extent, by liberal state courts. As new minimum standards have been recognized, pressures have developed for broader and more efficient systems of post-conviction remedies to deal with the transitional, and with the more lasting, ramifications of the changes.
Advisory Committee on Sentencing and Review, ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies 1 (Tent. Draft 1967).

A basic anachronism in the development of post-conviction remedies has been the erratic adherence to the jurisdictional prerequisite of "custody" or "incarceration."[1] The federal courts and a few state courts and legislatures, recognizing that the legal consequences of an unconstitutional conviction do not terminate with release of individuals from custody,[2] have permitted attacks on prior convictions after release from imprisonment. Rather than adhere to the incarceration requirement, these courts require that the petitioner demonstrate that he is under some form of civil disability resulting from the challenged conviction. Noting that the vast majority of states continue to grant post-conviction relief only to incarcerated petitioners, the American Bar Association in 1967 proposed the repeal of the custody prerequisite.[3] The state legislative response to that proposal has been less than overwhelming. The Supreme Court has yet to respond to this legislative inertia by holding that any form of post-conviction or post-custody relief from prior unconstitutional convictions is required on the

1. *Compare* Peyton v. Rowe, 390 U.S. 54 (1968) *and* Jones v. Cunningham, 294 F.2d 608 (4th Cir. 1962), *rev'd* 371 U.S. 236 (1963) (interpreting 28 U.S.C. § 2255 (1964) now contained in 28 U.S.C. § 2255 (Supp. IV 1969)), *with* People v. Davis, 39 Ill. 2d 325, 235 N.E.2d 634 (1968) (interpreting ILL. ANN. STAT. ch. 38, § 122-1 (Smith-Hurd Supp. 1969)).

2. *See, e.g.*, Peyton v. Rowe, 390 U.S. 54 (1968); United States v. Morgan, 346 U.S. 502 (1954); State v. Huffman, 207 Ore. 372, 297 P.2d 831 (1956).

3. ADVISORY COMMITTEE ON SENTENCING AND REVIEW—ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES §§ 2.3, 2.4 (Tent. Draft 1967).

state level. Nonetheless, in a line of decisions starting with *United States v. Morgan*[4] and culminating with *Sibron v. New York*,[5] the Supreme Court's recognition of civil disabilities as an independent jurisdictional basis for collateral attacks of prior convictions represents a strong foundation for the logical implication of a due process requirement. Moreover, recent decisions under section 1983 of the Civil Rights Act[6] suggest that the doctrines in the *Morgan-Sibron* evolution will also be read by the federal courts to permit construction of a federal remedy for the state post-custody petitioner.

The purpose of this Note is to consider the *Morgan-Sibron* development of civil disabilities, as contrasted with "custody," into an independent jurisdictional basis for both state and federal post-conviction relief.

I. UNITED STATES V. MORGAN: THE RECOGNITION

The development of independent significance for civil disabilities in the post-conviction context began with *St. Pierre v. United States*.[7] There, the petitioner, appealing from a federal criminal contempt conviction, was released from custody before the Supreme Court granted certiorari. After certiorari was granted, the government argued that the petitioner's constitutional claims were rendered moot by his release. The Court agreed, holding that there was ". . . no longer a subject matter . . . on which [the Court's] . . . judgment could operate."[8] It added, however, that the petitioner had not shown that he was under either penalties or disabilities which applied to him after the satisfaction of the judgment. As will be seen in *Pollard v. United States*,[9] subsequent courts have employed this caveat to circumvent entirely the custody requirement of *St. Pierre*.

In *United States v. Morgan*,[10] following a prior federal conviction which was allegedly unconstitutional, the petitioner received an increased sentence in New York courts under the state's recidivist statute. The petition, labeled an application for a writ of coram nobis, was filed in the United States district court which originally convicted

4 346 U.S. 502 (1954).
5 392 U.S. 40 (1968).
6. 42 U.S.C. § 1983 (1964).
7 319 U.S. 41 (1942).
8. St. Pierre v. United States, 319 U.S. 41, 42 (1942).
9. 352 U.S. 354 (1957).
10 346 U.S. 502 (1954).

him. The district court treated the application as a motion under section 2255,[11] the federal post-conviction statute, and denied relief because the petitioner was no longer in custody under a federal sentence. Reversing, the court of appeals held that section 2255 did not destroy the common law writ of coram nobis. Since traditionally coram nobis did not require custody, the district court had improperly dismissed for lack of jurisdiction. The Supreme Court affirmed the court of appeals, holding that a writ *in the nature of* coram nobis was the appropriate remedy. The court stated broadly that the remedy was appropriate because:

> Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected. As the power to remedy an invalid sentence exists, we think, respondent is entitled to show that this conviction was invalid.[12]

The *Morgan* decision could be read as holding only that a longer state sentence is a necessary condition precedent to federal relief in the absence of federal custody. The language of that decision, however, can be read to permit challenge whenever inequities of a longer state detention *or* civil disabilities flowing from the challenged conviction are shown. The implication would seem to be that whenever any legal disabilities are imposed based on a prior unconstitutional conviction, that conviction should be open to attack.

Subsequent appellate decisions, although less explicit in their rationale, confirm that civil disabilities, in no way equivalent to incarceration, will nonetheless support a coram nobis collateral attack of federal convictions.[13] For example, in *United States v. Cariola*,[14] the petitioner was permitted to challenge via coram nobis a conviction under the Mann Act entered and served 24 years earlier. The jurisidiction of the court to entertain the challenge was based solely on the still existing legal restrictions on the petitioner's right to vote.

Morgan, and the line of decisions following it, are incomplete in their analysis of the jurisdictional elements they require.[15] Nor do those

11. *Id.* at 504.

12. *Id.* at 512-13.

13. *See, e.g.*, United States v. Cariola, 323 F.2d 180 (3d Cir. 1963); Kyle v. United States, 288 F.2d 440 (2d Cir. 1961); Government of Virgin Islands v. Ferrei, 275 F.2d 497 (3d Cir. 1960).

14. 323 F.2d 180 (3d Cir. 1963).

15. *See, e.g.*, United States v. Sullivan, 278 F. Supp. 626 (D. Hawaii 1968). The court states: "Petitioner's choice of remedy, coram nobis, is proper, for under 28 U.S.C. § 1651(a) coram nobis lies to correct errors of the most fundamental character where the defendant has completed

decisions suggest why civil or criminal legal consequences are equivalent to custody, or why, if not equivalents, these disabilities merit federal relief. The landmark decision in *Fay. v. Noia*[16] made it clear that in habeas corpus applications, it is the unconstitutionality of the detention rather than the unconstitutionality of the conviction which confers on federal courts jurisdiction over the prior judgment. Assuming that there is some consistency in the rationale of federal post-conviction review, *Morgan* would apparently hold that any legal consequences, including incarceration, which are the direct result of an unconstitutional conviction, are themselves unconstitutional.[17] As will be discussed later, this holding does not necessarily mean that the *states* must provide collateral relief from those unconstitutional burdens.[18]

The *Morgan* line of cases, supporting federal jurisdiction for collateral attack solely on civil disabilities, must be carefully distinguished from *Pollard v. United States.*[19] There, the Supreme Court held that jurisdiction in habeas corpus, once attached, is not divested by a subsequent release from custody of the petitioner. In *Pollard*, the petitioner's writ of habeas corpus, alleging that he had been twice put in jeopardy for the same crime, was denied both in the district court and the court of appeals. Following a grant of certiorari by the Supreme Court, the petitioner was released. The Court rejected the government's argument that the case was moot following the release. It held that the "possibility of consequences collateral to the imposition of the sentence" was sufficient to sustain the already acquired jurisdiction. The Court recently reaffirmed the *Pollard* holding in *Sibron v. New York*[20] stating that, "The Court thus acknowledged [in *Pollard*] the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences. The mere 'possibility' that this will be the case is enough to preserve a criminal case from ending 'ignominiously in the limbo of mootness'. . . ."[21]

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his sentence or is otherwise not in custody and where circumstances compel such action to achieve justice." *Id* at 630. *See also* Deckard v. United States, 381 F.2d 77 (8th Cir. 1967); McDonald v United States, 356 F.2d 980 (10th Cir.), *cert. denied,* 385 U.S. 936 (1966); Azzone v. United States, 341 F.2d 417 (8th Cir.), *cert. denied,* 381 U.S. 943 (1965); Scarponi v. United States, 313 F 2d 950 (10th Cir. 1963); United States v. Roth, 283 F.2d 765 (2d Cir. 1960).

16. 372 U S 391, 423 (1963).

17 *See* Johnson v. Zerbst, 304 U.S. 458 (1938); *cf.* 28 U.S.C. § 2241(c)(3) (1964) ("He is in custody in violation of the Constitution or laws or treaties of the United States. . . .").

18 *See* text accompanying note 22, *infra.*

19 352 U S. 354 (1957).

20. 392 U.S. 40 (1968).

21 *Id* at 55.

II. SECTION 1983 OF THE CIVIL RIGHTS ACT: A PROPOSED APPLICATION

The net result of the *Morgan-Cariola-Pollard* decisions is to guarantee that release from custody will not forfeit a defendant's right to attack an unconstitutional federal conviction. To reach this position, the Court in a series of steps has indicated (1) that civil consequences of an unconstitutional conviction are themselves unconstitutionally imposed, and (2) that it is not adverse to expansion of remedies other than habeas corpus to permit collateral attacks on unconstitutional convictions. The question remains, of course, whether the federal guarantee of post-conviction relief without regard to custody is dependent on the federal nature of the convictions before the Court or has developed under the more pervasive mandates of the due process clause.

In *Case v. Nebraska*,[22] the petitioner argued that the state was required under the due process clause to provide some form of post-conviction remedy. The Supreme Court did not respond to the due process argument, however, because the Nebraska legislature enacted a post-conviction act before the Supreme Court rendered a decision. The case was therefore remanded to the Nebraska Supreme Court to discover whether the petitioner was afforded relief under that act.

It may be that the Court will never be faced with the question of constitutionally required state post-custody relief. The 1967 tentative draft proposals of the ABA Standards Relating to Post-Conviction Remedies expressly eliminate custody as a jurisdictional prerequisite to post-conviction relief when the petitioner is under a civil disability resulting from the challenged conviction.[23] Moreover, a few far-sighted state supreme courts have eliminated custody as a requirement for their state's statutory post-conviction remedies.[24] Finally, the Court may rely on alternative federal remedies.

As pointed out earlier, the development of civil disabilities as an independent jurisdictional basis, distinct from custody, is logically premised on the rationale that those civil disabilities flowing from an unconstitutional conviction are in themselves unconstitutional. While it remains open to question whether this development of federal guarantees for post-custody collateral attack will be incorporated into

22. 381 U.S. 336 (1965).
23. *See* note 3, *supra*.
24. *See* People v. Davis, 39 Ill.2d 325, 235 N.E.2d 634 (1968).

the fourteenth amendment, it has been read recently to authorize expansion of federal relief to state petitioners under section 1983 of the Civil Rights Act.

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[25]

No custody is necessary to maintain a 1983 action, and *Sibron* makes it clear that so long as civil disabilities attach to conviction, the question of their constitutionality is not moot.[26]

The civil disabilities attached to an unconstitutional state court conviction prevent a petitioner from exercising various civil rights. The deprivation is based on actions taken under color of state law, or is caused by the state's refusal to grant a remedy. Under these circumstances, the petitioner falls squarely under the language of section 1983.

The cases state that section 1983 cannot be used to circumvent the requirements of federal habeas corpus.[27] But it is apparent that a post-custody petitioner asserting a remedy under section 1983 for relief from an unconstitutional state conviction is claiming relief not available under the habeas corpus statute. In situations in which there is no custody, and in which the petitioners have a reasonable defense to an allegation of laches, the habeas corpus statute has no relevance. Moreover, deprivation of civil rights following an unconstitutional conviction has been given independent significance. Therefore, absence of federal post-custody relief under the habeas corpus statute would not seem to destroy section 1983 as an alternative device for relief.

This is apparently the approach followed by the district court in *Pales De Mendes v. Aponte*.[28] A school teacher was convicted for

25 42 U.S.C. § 1983 (1964).

26 Sibron v. New York, 392 U.S. 40, 50-52 (1968).

27 Johnson v. Walker, 317 F.2d 418, 419-20 (5th Cir. 1963); Green v. New York, 281 F. Supp. 579, 581 (S.D.N.Y. 1967); Christman v. Pennsylvania, 272 F. Supp. 805, 806 (W.D. Pa. 1967); Davis v. Maryland, 248 F. Supp. 951, 952 (D. Md. 1965).

28 294 F. Supp. 311 (D.P.R. 1969). *See also* Esteban v. Central Missouri State College, 290 F. Supp. 622 (W.D. Mo. 1968) and Scoggin v. Lincoln University, 291 F. Supp. 161 (W.D. Mo.

disturbing the peace. Because of a curious jurisdictional problem, no appeal to the Supreme Court lay for her conviction. She was fined and brought action to enjoin the collection of the fine and to expunge the record of her conviction. The fine was paid before the case was heard, rendering the first requested relief moot. The court, however, sustained jurisdiction over the second prayer for relief reasoning that since the conviction "entails ill collateral effects on her good name and reputation in that the extant record of the criminal judgment would be an indelible blemish on her reputation and good name as a member of the teaching profession and of society at large."[29] Citing *Sibron* and *Morgan*, the court ordered the conviction removed under section 1983.

If Section 1983 is developed as a device for post-custody relief for state petitioners unjustly burdened with civil disabilities, it may well reflect a reluctance on the part of the federal courts to impose inflexible procedures of review on the states which will undeniably interfere with the states' independent administration of post-conviction remedies.[30] Moreover, the Supreme Court in *Kaufman v. United States*[31] has apparently expressed a preference for *federal* review in the context of constitutional challenges. In *Kaufman*, the Court pointed out that one of the reasons for the imposition of federal habeas corpus on the states was to give a petitioner alleging denial of constitutional rights an opportunity to be heard in a federal forum.[32] This opportunity for presumably more sympathetic federal review can be crucial in unconstitutional short-sentence convictions stemming from local prejudices toward the race or political views of the defendant. The Court in *Sibron* clearly expressed its concern in this area of "low visibility" criminal administration:

> Many deep and abiding constitutional problems are encountered primarily at a level of "low visibility" in the criminal process—in the context of prosecutions for "minor" offenses which carry only short sentences. . . . We do not believe that the Constitution contemplates that people deprived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct.[33]

1968) allowing a § 1983 challenge to determinations made by a school disciplinary committee, despite the fact that the student had been readmitted. The action was justified on the basis of the stigma attached to the disciplinary board's "conviction."

29. Pales De Mendes v. Aponte, 294 F. Supp. 311, 315 (D.P.R. 1969).

30. *See, e.g.*, State v. Brizendine, 445 S.W.2d 827 (Mo. 1969).

31. United States v. Kaufman, 394 U.S. 217 (1969).

32. *Id.; cf.* Fay v. Noia, 372 U.S. 391 (1963).

33. Sibron v. New York, 392 U.S. 40, 52 (1968).

For the post-custody petitioner, section 1983's grant of relief in suits at law, equity, or any other proper proceeding for redress would seem well-tailored to meet this constitutional demand.

CONCLUSION

The Supreme Court has not expressly held that any form of post-conviction or post-custody relief must be provided on the state level. The development through *Morgan* and *Pollard* of a federal guarantee that release from custody will not forfeit a petitioner's right to collateral relief from a prior unconstitutional federal conviction can logically be argued to represent a response to the mandates of due process. The budding development under section 1983 of a federal remedy for the state post-custody petitioner suggests that due process is satisfied if *some form* of relief is available at any level of the federal system. It may also suggest that the federal courts would prefer to construct a federal remedy rather than arbitrarily force inflexible procedures into state post-conviction systems. An analysis of the *Morgan-Pollard* line of decisions does reveal clearly, however, that the Supreme Court will not tolerate a vacuum in the post-custody context where civil disabilities are imposed on the unconstitutionally convicted.