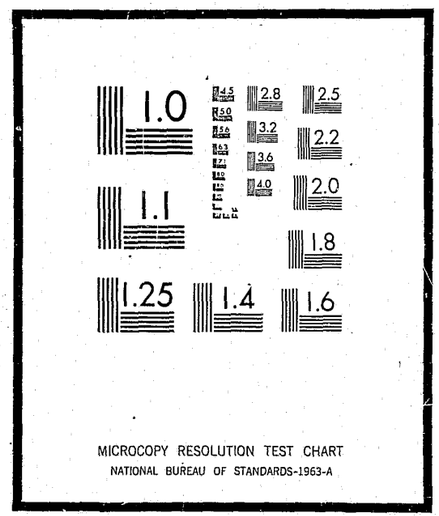

MICROCOPY RESOLUTION TEST CHART
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The Law of Detainers

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CONTENTS

PREFACE

A substantial number of inmates confined in our state and federal prisons face outstanding charges in other jurisdictions. Typically, those other jurisdictions will file "detainers" against such inmates. A detainer is a request by the demanding state that its law enforcement authorities be notified by the confining state when the inmate's sentence in the confining state is about to expire. The notification gives the demanding state sufficient time to extradite the prisoner to its jurisdiction if it chooses to prosecute him on the outstanding charge.

Prisoners subject to detainers have often had to suffer disabilities because of the detainers and have often experienced difficulty in arranging for speedy trials on their outstanding charges. Recently, there has been considerable legal activity regarding the law of detainers, and the current state of the law is elaborate and complex. The following materials discuss the legal contours of the detainer problem, and explore the way in which the legal process has responded to the difficult issues posed. Hopefully, the materials may shed some light on this murky area and may be of particular use to inmates subject to detainers and to the lawyers and law students representing them.

One final word: After the manuscript had been completed, the Supreme Court handed down its decision in Braden v. 30th Judicial Circuit Court of Kentucky, 93 S. Ct. 1123 (1973), a decision very important to the law of detainers. Braden has been inserted as an "additional case" at the end of the monograph, and the materials preceding it should accordingly be read in conjunction with the matter set forth in that case.

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CHAPTER 1. BACKGROUND

"Unconstitutional Uncertainty: A Study of the Use of Detainers"—Donald B. Shelton. University of Michigan Journal of Law Reform (Prospectus) 119 (1968) Reprinted by Permission.

When an individual has been convicted of an offense and imprisoned in one jurisdiction, other jurisdictions having outstanding charges against the prisoner often file what is known as a detainer or "hold order" with the confining institution. This detainer is defined as "a warrant filed against a person already in custody with the purpose of insuring that, after the prisoner has completed his present term, he will be available to the authority which has placed the detainer." On its face, it is no more than a request for information. The procedure for filing such a request is very simple. When the prosecutor learns that the accused is being held in another jurisdiction, he merely sends a letter of a copy of the warrant to the warden of the prison. As a matter of "courtesy", the warden will notify the requesting agency when the release of the prisoner is imminent. This procedure is used within a single state, between states, and between a state and the federal government. If the prisoner is confined within the same state, he may be arrested upon his release on the authority of the warrant alone. The filing of a detainer itself, however, does not grant any legal authority to detain. If the prisoner is confined in another state, the requesting agency must still secure a court order to obtain custody of him.

While the stated purposes and form of the detainer procedure appear to be innocent enough, it has, in practice, led to both poor penology and a denial of the prisoner's right to a speedy trial on the outstanding charges. To examine the effects of the detainer procedure, the author conducted interviews with officials at three prisons—State Prison of Southern Michigan (Jackson) at Jackson, Michigan; Indiana State Prison (Indiana) at Michigan City, Indiana; and the Federal Correctional Institution (Milan) at Milan, Michigan.

The number of prisoners with detainers filed against them is extremely high. Estimates range from twelve to twenty percent in state prisons to thirty percent in federal penitentiaries. Many of

these prisoners have more than one detainer filed against them. The outstanding charges range from traffic offenses to murder. But the number of detainers filed is a deceiving figure. Under the present system in most states, the filing of a detainer does not bind the requesting agency in any way. It may or may not prosecute the prisoner when he is released. After the prison notifies the agency of the imminent release of the prisoner, the prosecutor will decide whether he will take the man into custody or not. The prisoner will not learn if he is really free or not until the time of his release. Often the prosecutor never shows up. It is estimated that less than half of the filed detainers are ever exercised or even filed with any intention of being exercised.

The question is why a prosecutor would go through the motions of asking a warden to notify him of the availability of a prisoner that he never intends to take into custody. The first answer is that it is common practice for many prosecutors to automatically file a detainer upon learning that an accused is imprisoned elsewhere. This decision is made without any regard to their eventual decision to prosecute. But the more basic answer, and the reason why this practice of automatic filing of detainers has developed, lies in the effects a detainer has upon the prisoner.

Prison Inequities

In many states, a detainer prisoner is automatically ineligible for parole. This ineligibility is usually not statutory but rather is the result of the policy of state parole boards. The net effect is that detainer prisoners who are otherwise good parole risks may spend three or more times as long in prison as they would if a detainer had not been filed. In states where a system of indeterminate sentencing has been adopted, prisoners are normally eligible for parole at any time after the minimum term. But many state parole eligibility statutes are patterned after the federal requirement that a prisoner complete one-third of his term. In both situations, a parole board policy of disqualifying prisoners solely on the basis of a detainer stultifies the legislative scheme. Merely by the allegation of an offense the prosecutor has in effect tried, convicted, and sentenced the defendant to additional time in prison. The extreme case is not difficult to imagine. For example, John Doe was convicted in state X of armed robbery and sentenced to fifteen years in prison. Under the laws of that state, he was eligible for parole

after five years. But a prosecutor in state Y had a warrant against Doe for reckless driving and filed a detainer with the warden. Doe, who was otherwise a good parole risk, became ineligible for parole and spent an additional ten years in prison. At the end of his term, the prosecutor in state Y took Doe into custody. A court found him guilty of reckless driving and sentenced him to thirty days in jail.

Variations of parole ineligibility are equally effective. In Indiana, the policy of the parole board is to grant only "custody" paroles to detainer prisoners. This is not parole at all. If the prisoner is eligible in other respects, he is granted a parole conditioned upon the filing agency's exercise of its detainer. The agency is notified that the prisoner is about to be released on parole. But if the agency does not secure a court order and does not show up to apprehend the prisoner, he is never released. The detainer is unaffected. It continues to be in effect until the completion of the prisoner's sentence.

Other parole boards, however, allow ordinary parole to detainer prisoners. This is normal parole in the sense that it is not conditioned upon any action by the filing agency. The rationale of such a policy starts from the idea that once a man has been successfully rehabilitated, it is useless and wasteful to keep him in prison. The parole board's duty is to evaluate the progress of his rehabilitation and return him to society when he is prepared to do so. Even if the prisoner is actually prosecuted and convicted on the outstanding charges, it is better from the standpoint of rehabilitation that he be allowed to begin his second sentence as early as possible. In 1955, the United States Board of Parole finally recognized the "nuisance detainer" problem and adopted a policy of granting parole to detainer if the prisoner was considered in other respects to be a good parole risk. Since that time the Board has granted an increasing number of paroles to detainer prisoners. In fiscal year 1966-67, a total of 729 were granted. A substantial number of prisoners (at least federal prisoners) with detainers filed against them have thus been found to be good parole risks. Indeed, even if only one such parole had been granted, it points out the fallacy of a system of arbitrary denials. Unless a parole board is willing to live with the fact that it is confining some fully rehabilitated prisoners, such a system cannot withstand analysis. Michigan grants both parole to detainer and custody parole. However, even when ordinary parole is granted, the detainer prisoner is treated differently. At Jackson, prisoners ordinarily

move from the prison proper to a minimum security "parole camp" for an adjustment period prior to their actual release on parole. Paroled detainer prisoners are never allowed this adjustment measure and go directly from maximum security to the street. Such unequal treatment is certainly unjustifiable from a rehabilitative standpoint. But this denial of parole camp at Jackson is indicative of the multitude of other inequities that face a detainer prisoner.

The reason for such inequities within the prison lies in the custodial classification of the detainer prisoner. Normally, a prisoner is classified in maximum, medium, or minimum custody based upon the seriousness of the crime for which he was convicted and the prison's estimate of his mental stability. In each of the three institutions studied, the filing of a detainer places the prisoner in a maximum custody classification. The rationalization is that the prisoner then has more incentive to escape. The attitude of prison officials is that their primary duty is to confine the prisoner. Even accepting that restricted view of the objective of a correctional system, their actions are illogical. The classification of detainer prisoners is made automatically without regard to the seriousness of the alleged crime or the prisoner's possible change in mental stability. No individual evaluation is made. Such an arbitrary system is based on two fallacious assumptions. The first is either that the prisoner is guilty of the outstanding charge or that even if he is not, the charge itself provides an incentive to escape. The flaw in either alternative is obvious. Any assumption of guilt is anathema to our entire judicial system. And an assumption that the allegation of an offense provides an incentive to flee presumes such a universal distrust and lack of faith in our adversary process that individuals would rather become fugitives than stand trial on a charge of which they are innocent. The second assumption made by prison officials is that the possibility of another term in prison so discourages the prisoner that he is more likely to escape. Such reasoning may be sound if the prisoner faces the possibility of a lengthy term, but when the outstanding charge is minor, as in the reckless driving example, it is not. It is ridiculous to assume that the possibility of thirty days in jail will lead a man presently serving a fifteen year term to escape. The point is that the assumptions made by officials in classifying the detainer prisoner are not only false; they are unnecessary. Custodial classification of detainer prisoners could and should be based upon the same individual evaluation process that was used to determine the original classification.

The ramifications of this custodial classification are extremely important. In each of the prisons studied, maximum security prisoners are never allowed outside the walls. They can never become trustys. They are ineligible for the farms and work camps or, for that matter, any job which requires outside activity. At Milan and Jackson the classification also means ineligibility for both work-release and study-release programs. (Indiana does not have such programs.) Normal prisoners are occasionally allowed temporary "furloughs" in the event of a death in their immediate family. Detainer prisoners, because of their classification, are even denied this small privilege. Prior to 1967, the vocational training buildings at Milan were outside the walls so detainer prisoners could not receive any of the training that is so essential to rehabilitation. The situation still exists in some federal prisons.

Such restrictions on detainer prisoners obviously impair any rehabilitation planning by prison officials. The most they can do is use the inside facilities in an attempt to adjust the prisoner to the prison routine. Prison officials generally feel that it is useless to spend money attempting rehabilitation of a prisoner whose only future prospects may consist of being transferred from one prison to another. Even if the prison officials could effectively plan a rehabilitation program under the present system, the task of motivating detainer prisoners is almost insurmountable. Their morale is understandably very low. In each of the three institutions studied, officials felt that the filing of a detainer and the resulting ineligibilities made the prisoners uncooperative and unable to adjust to the institutional life. There is no incentive for good behavior since the prisoner's custody classification is the worst it will ever be and there is little or no prospect of an early return to society. From a rehabilitation aspect, the detainer prisoner is an outcast. The man who is charged with an additional offense is denied both normal privileges during his imprisonment and any hope of re-entering society when he is sufficiently rehabilitated to do so. He is naturally "filled with anxiety and apprehension and frequently does not respond to a training program."

The denials which cause these psychological effects are not based upon the considered judgment of a court of law with its accompanying procedural protections. Nor are they based upon an objective and individual analysis of the prisoner or the charges against him. The whole chain of events began with the some times frivolous and often

times thoughtless allegation of a single prosecutor. Indeed, in many instances the prosecutor who filed the detainer is no longer in office when the prisoner completes his discouraging and often prolonged sentence. The new prosecutor only learns of the case when he receives notification of the prisoner's imminent release. One may only speculate as to what motivated the prosecutor to file a detainer in the first place. Perhaps a motivation is not desire to cause the multitude of inequities and ineligibilities that will result from his action. Perhaps it is merely the thoughtlessness of office routine or the political ins and outs of office holders that causes the filing of detainers which are never exercised. But regardless of the motivation, the fact is that the filing of a detainer is the beginning of a process that destroys any and every effort to establish a modern correctional system.

The Denial of Speedy Trial

Upon notice[12] that a detainer has been filed against them, many prisoners correspond with the filing agency in an effort to get some disposition of the charges. In the three prisons studied, officials frequently work with the prisoner in this effort and correspond with the agency, if the prisoner so desires. Often neither the prisoner nor the officials get any response from the agency. Even if a response is received, the prisoner's chances for an immediate trial are slim. In Indiana, only two to three percent of the detainer prisoners are ever returned for trial during their present term. Transfers for trial are also a rarity at Milan. Under the present system in both prisons,[13] the prisoner remains in a state of uncertainty until it is time for his release. He can neither get a trial nor a dismissal. Only when he is released will he learn of the prosecutor's intentions.

Some defendants have challenged the validity of such a system as a denial of their right to a speedy trial as guaranteed by the state or federal constitution. Most of the earlier cases held that the failure of an agency to grant some disposition of the charges was not a violation

[12] In Jackson and Milan, formal written notice of the filing of a detainer is immediately given to the prisoner. In Indiana, oral notice is given by the case workers.

[13] Michigan has enacted legislation which deals with the return of detainer prisoners for trial. The situation at Jackson under this legislation is discussed infra.

of the defendant's right to speedy trial when he was incarcerated on another charge. The rationale of these cases rested on four grounds. The first was that the speedy trial guarantee of the Sixth Amendment to the U.S. Constitution was not made applicable to the states by the due process clause of the Fourteenth Amendment. Hence, the defendant could only rely on his rights under the state constitution. Many state constitutions refer to the right of speedy trial as arising at the time of the indictment or information. Thus when the detainer was filed on the basis of a complaint only, the defendant had no right which could be violated. This contention is now obsolete. In Klopfer v. North Carolina,[15] the Supreme Court held that the right to speedy trial is as fundamental as any of the Sixth Amendment rights and is made obligatory on the states by the Fourteenth Amendment. The right to speedy trial in criminal cases arises under the federal constitution upon a formal complaint being lodged against the defendant.[16]

In all detainer systems, the filing agency must bear the cost of returning the prisoner for trial. The agencies argued that the right to a speedy trial did not impose a duty upon them to incur such expenses. The fallacy of such an argument is obvious. First, it is certainly an axiom in our system that the prosecuting agency has the responsibility of bringing the defendant to trail [sic]. It seems too obvious to have to explain this to law enforcement officers. As one court put it, "We will not put a price tag upon constitutional rights." Secondly, if the agency seriously intends to prosecute the defendant, the question is not whether it must bear the expense but only when it must be borne. Even if the prisoner is forced to complete his sentence before the requesting agency will prosecute, the agency must still pay the expenses of returning him for trial. If the agency does not intend to prosecute the prisoner, then there is no reason for not granting a dismissal of the charges.

The third contention of the filing agencies was that the right of speedy trial was not violated since the agency could not insist as a matter of right that the prisoner be returned for trial. Under present

[15] 386 U.S. 213 (1967).

[16] Iva Ikuko Toguri D'Aguino v. United States, 192 F. 2d 338 (9th Cir. 1951) Cert. denied 343 U.S. 935 (1952). While the court has not yet decided whether this interpretation of the Sixth Amendment right is also applicable to the states, the tendency in all of the due process cases has been to carry over the federal requirements full blown to the states.

systems, the return of a prisoner for trial is a matter of comity between jurisdictions. But this does not excuse the agency's failure to attempt to secure the prisoner's return. If the confining jurisdiction refuses to grant the request, the agency may have done all it can do. It is unlikely, however, that such a request would be refused. Confining jurisdictions have commonly released prisoners for trial, and some have even established an orderly procedure for their return. In each of the three institutions studied, prison officials indicated that disposition of the detainer, either by dismissal or returning the prisoner for trial, was beneficial to the institution. The improvement in prisoner morale and the removal of maximum custody classification will enable the prison to plan meaningful rehabilitation measures. In addition, prison administrators view detainers as a burdensome clerical headache. Certainly, these officials do not object to the elimination of this "busy work".

The final argument of the agencies was that the delay was due to the prisoner's own wrongdoing in committing the crime for which he was imprisoned. The easiest answer to this contention is that normally it is not the prisoner's incarceration which has caused the delay. When it is determined that the agency could obtain the defendant's return for trial or that it has not attempted to obtain his return, it is the agency's failure to act that results in delay. This is not a situation where the defendant has purposely fled the jurisdiction to avoid trial. The agency knows where he is and knows that it may bring him back for trial whenever it so desires. But this argument suffers from more basic defects. First, it is illogical to allow other offenses to affect the defendant's constitutional rights with regard to the charged offense. It introduces a foreign and unrelated fact into the consideration. The rule limiting the introduction of evidence of prior offenses is the best example of how the courts have treated such an argument. Secondly, the agencies' argument is based upon a limited notion of the purpose of the speedy trial requirement. It is not only a determination that society has an interest in seeing an end to the litigation. The speedy trial guarantee also insures society that something is being done to redress the wrong which was committed. It is the people versus the defendant. It too has a right to a reasonably prompt judicial determination of whether the defendant committed the offense. Society's right to a speedy trial—a right which the prosecutor is obligated to preserve—is more important than quibbling over whether the defendant has, in a theoretical sense, caused the delay.

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Solutions

It is clear that the present system is unjust. Three uniform laws have been proposed to alleviate the problems caused by this system. The interstate act, for detainers between states or between a state and the federal government, is called "Agreement on Detainers"[23] and is proposed as a compact. The act requires prison officials to inform prisoners of detainers which are filed against them. A prisoner may then file a formal request for trial on the outstanding charges. The confining jurisdiction agrees to grant temporary custody to the prosecutor for the trial. If the filing jurisdiction fails to bring the defendant to trial within 180 days after the request, the charges are dismissed with prejudice in the filing state and the detainer is no longer valid. Provision is made for extension of this period upon a showing of good cause in court with the defendant or his counsel present. To date, twenty states have enacted this agreement.[24] The federal government has not become a party to it. The other two proposals deal with the disposition of intrastate detainers—those filed by local prosecutors with a prison within the same state. One is the product of the Council of State Governments[25] and the other is proposed by the National Conference of Commissioners on Uniform State Laws.[26] The provisions of both proposals are similar

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[23] Council of State Governments, Agreement on Detainers (1958). See Handbook on Interstate Crime Control. (Council of State Governments 1966), at 91.

[24] See Cal. Penal Code § 1389 (West 1963); Conn. Gen. Stat. Rev. § 54-186 (1958); Hawaii Rev. Laws § 250A-1 (Supp. 1965); Iowa Code § 759A.1 (1966); Md. Ann. Code art 27 § 616A (1965); Mass. Gen. Laws, Special Acts 1965 Ch. 892; Mich. Comp. Laws § 780.601 (Supp. 1961); Minn. Stat. § 629.294 (Supp. 1067); Mont. Rev. Codes Ann. § 94-1101-1 (1963); Ne.b Rev. Stats. § 29.759 (1963); N.H. Rev. Stat. Ann. § 606A (1959); N.J. Rev. Stat. § 2A:159A (Supp. 1958); N.Y. Code of Crim. Proc. § 669b (McKinney 1957); N.C. Gen. Stats. § 148-89 (1965); Pa. Stat. Tit. 19, § 1431 (1959); R.I. Sess. Law 1967 225A; S.C. Code Ann. § 17-221 (Supp. 1965); Utah Code Ann. § 77-65-4 (1967); Vt. Stat. Ann. Cit. 28, § 1301 (1967); Wash. Laws 1967 Ch. 34 (The reference to Rhode Island is apparently erroneous. Ed.)

[25] See note 23 supra, at 116.

[26] National Conference of Commissioners on Uniform State Laws, Uniform Mandatory Disposition of Detainers Act (1958).

to those of the interstate act except that the time in which a prisoner must be brought to trial is reduced to 90 days.[27] Acceptance of these proposals has been slow. Some states already had similar intrastate legislation before the acts were proposed and are reluctant to change.

Such legislation is undoubtedly the first step toward a solution of the detainer problem but it is not the complete answer. The Michigan experience with the interstate agreement has shown that it does not eliminate inequities within the prison. The custodial classification is still automatically made upon the filing of a detainer and remains in effect at least until trial or dismissal. If the defendant is convicted on the outstanding charge and concurrent service of sentence is not allowed, a second detainer is filed to get custody of the prisoner when he is eventually released and the same ineligibilities attach.

The Michigan experience with its own intrastate acts also casts doubt on the proposal's effectiveness in solving the speedy trial problems created by detainers. The Michigan act provides for a 180 day limitation. Under it the number of detainers on file has sharply decreased. However, local prosecutors have succeeded in circumventing the limitation simply by not filing their detainers until shortly before the prisoner is scheduled to be released. Thus, in addition to the ordinary problems caused by delay, the defendant is without any notice that charges are outstanding against him. The same type of tactic is possible under any of the proposed uniform acts.

The proposed legislation is an excellent starting point for remedying the problems caused by the indiscriminate use of detainers. But the speedy trial problem can only be effectively resolved if a further provision is enacted. To prevent prosecutors from circumventing the statute by last minute filing, the act should require jurisdictions with outstanding charges against a prisoner to file their detainers within a statutory time after they have notice of the imprisonment of the defendant. Failure to do so should be adequate grounds for dismissal. Such a requirement is not unduly harsh. It

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[27] The Council of State Governments proposal does not suggest a specific limitation but leaves it to the individual state legislature to decide what is a reasonable time. The Commissioners on Uniform State Laws' proposal also provides that if prison officials fail to notify the prisoner of a detainer within one year, the charges are dismissed with prejudice.

would only insure the defendant's right to a speedy trial and force the prosecutor to perform his obligations. Furthermore, as the Michigan experience indicates, the problem of prison inequities is not solved under the proposed legislation. The only answer to this situation seems to be reform within the prison system. Unless the rehabilitative aspect of criminal correction is to be completely abandoned, prison officials must adopt a reasonable program of parole eligibility and custodial classification based upon the objective evaluation of the prisoner and not upon the whim of a distant prosecuting attorney.

Note

Another excellent introduction to detainers may be found in Jacob & Sharma, Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process, 18 Kan. L. Rev. 493, 579-89 (1970).

Council of State Governments,

Agreement on Detainers

TEXT OF THE AGREEMENT ON DETAINERS

The contracting states solemly agree that:

Article I

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

Article II

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article III hereof or at the time that a request for custody or availability is initiated pursuant to Article IV hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article III or Article IV hereof.

Article III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner or corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions

within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V (a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request: and provided further that there shall be a period of thirty days after receipt by the appropriate authorities

before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect to any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any unnecessary or reasonable continuance.

(d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V (e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Article V

(a) In response to a request made under Article III or Article IV hereof, the appropriate authority in a sending state shall offer

to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final authority is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information of complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any charge or charges arising out of the same transactions. Except for his attendance at court and while being transported to or from any place at which his presence may be

required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

Article VI

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

Article VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation ot this agreement.

Article VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawl of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

Article IX

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

Note

According to the Council of State Governments (36 West 44th Street, New York, New York 10036), which maintains an updated list of jurisdictions that have become party to the Agreement, the following States were signatories as of June, 1971: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming. In addition, the District of Columbia and the Federal Government have recently entered into the Agreement.

CHAPTER 2. JUDICIAL RECOGNITION OF THE RIGHT TO SPEEDY TRIAL

CASE: Smith v. Hooey, 393 U.S. 374 (1969)

Mr. Justice Stewart delivered the opinion of the Court.

In Klopfer v. North Carolina, 386 U.S. 213, this Court held that, by virtue of the Fourteenth Amendment, the Sixth Amendment right to a speedy trial is enforceable against the States as "one of the most basic rights preserved by our Constitution." Id., at 226. The case before us involves the nature and extent of the obligation imposed upon a State by that constitutional guarantee, when the person under the state criminal charge is serving a prison sentence imposed by another jurisdiction.

In 1960 the petitioner was indicted in Harris County, Texas, upon a charge of theft. He was then, and still is, a prisoner in the federal penitentiary at Leavenworth, Kansas.[2] Shortly after the state charge was filed against him, the petitioner mailed a letter to the Texas trial court requesting a speedy trial. In reply, he was notified that "he would be afforded a trial within two weeks of any date [he] might specify at which he could be present." Thereafter, for the next six years, the petitioner, "by various letters, and more formal so-called 'motions,'" continued periodically to ask that he be brought to trial. Beyond the response already alluded to, the State took no steps to obtain the petitioner's appearance in the Harris County trial court. Finally, in 1967, the petitioner filed in that court a verified motion to dismiss the charge against him for want of prosecution. No action was taken on the motion.

The petitioner then brought a mandamus proceeding in the Supreme Court of Texas, asking for an order to show cause why the pending charge should not be dismissed. Mandamus was refused in an informal and unreported order of the Texas Supreme Court. The petitioner then

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[2] On May 5, 1960, the sheriff of Harris County notified the warden at Leavenworth that a warrant for the petitioner's arrest was outstanding, and asked for notice of "the minimum release date." That date is apparently January 6, 1970.

sought certiorari in this Court. After inviting and receiving a brief from the Solicitor General of the United States, 390 U.S. 937, we granted certiorari to consider the constitutional questions this case presents. 392 U.S. 925.

In refusing to issue a writ of mandamus, the Supreme Court of Texas relied upon and reaffirmed its decision of a year earlier in Cooper v. State, 400 S.W. 2d 890. In that case, as in the present one, a state criminal charge was pending against a man who was an inmate of a federal prison. He filed a petition for a writ of habeas corpus ad prosequendum in the Texas trial court, praying that he be brought before the court for trial, or that the charge against him be dismissed. Upon denial of that motion, he applied to the Supreme Court of Texas for a writ of mandamus. In denying the application, the court acknowledged that an inmate of a Texas prison would have been clearly entitled to the relief sought as a matter of constitutional right, but held that "a different rule is applicable when two separate sovereignties are involved." 400 S.W. 2d, at 891. The court viewed the difference as "one of power and authority." Id., at 892. While acknowledging that if the state authorities were "ordered to proceed with the prosecution ... and comply with certain conditions specified by the federal prison authorities, the relator would be produced for trial in the state court," id., at 891, it nonetheless denied relief, because it thought "[t]he true test should be the power and authority of the state unaided by any waiver, permission or act of grace of any other authority." Id., at 892. Four Justices dissented, expressing their belief that "where the state has the power to afford the accused a speedy trial it is under a duty to do so." Id., at 893.

There can be no doubt that if the petitioner in the present case had been at large for a six-year period following his indictment, and had repeatedly demanded that he be brought to trial, the State would have been under a constitutional duty to try him. Klopfer v. North Carolina, 386 U.S., at 219. And Texas concedes that if during that period he had been confined in a Texas prison for some other state offense, its obligation would have been no less. But the Texas Supreme Court has held that because petitioner is, in fact, confined in a federal prison, the State is totally absolved from any duty at all under the constitutional guarantee. We cannot agree.

The historic origins of the Sixth Amendment right to a speedy trial were traced in some detail by The Chief Justice in his opinion for the Court in Klopfer, 386 U.S., at 223-226, and we need not

review that history again here. Suffice it to remember that this constitutional guarantee has universally been thought essential to protect at least three basic demands of criminal justice in the Anglo-American legal system: "[1] to prevent undue and oppressive incarcertation prior to trial, [2] to minimize anxiety and concern accompanying public accusation and [3] to limit the possibilities that long delay will impair the ability of an accused to defend himself." United States v. Ewell, 383 U. S. 116, 120. These demands are both aggravated and compounded in the case of an accused who is imprisoned by another jurisdiction.

At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from "undue and oppressive incarcertation prior to trial." But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the dependency of another criminal charge outstanding against him. [8]

[8] See, e.g., Evans v. Mitchell, 200 Kan. 290, 436 P. 2d 408 (holding that Kansas had no duty to bring to trial a person serving a 15-year sentence in a Washington prison, although the pendency of the Kansas charge prevented any possibility of clemency or conditional pardon in Washington and made it impossible for the prisoner to take part in certain rehabilitation programs or to become a trusty in the Washington prison). The existence of an outstanding criminal charge no longer automatically makes a prisoner ineligible for parole in the federal prison system. 28 CFR § 2.9 (1968); see Rules of the United States Board of Parole 17-18 (1965). But as late as 1959 the Director of the Federal Bureau of Prisons wrote: "Today the prisoners with detainers are evaluated individually but there remains a tendency to consider them escape risks and to assign them accordingly. In many instances this evaluation and decision may be correct, for the detainer can aggravate the escape potentiality of a prisoner." Bennett, "The Last Full Ounce," 23 Federal Probation, No. 2, at 20, 21 (1959). See also Note, Detainers and the Correctional Process, 1966 Wash. U.L.Q. 417, 418-423.

And while it might be argued that a person already in prison would be less likely than others to be affected by "anxiety and concern accompanying public accusation," there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person who is at large. Cf. Klopfer v. North Carolina, supra, at 221-222. In the opinion of the former Director of the Federal Bureau of Prisons,

> "[I]t is in their effect upon the prisoner and our attempts to rehabilitate him that detainers are most corrosive. The strain of having to serve a sentence with the uncertain prospect of being taken into the custody of another state at the conclusion interferes with the prisoner's ability to take maximum advantage of his institutional opportunities. His anxiety and depression may leave him with little inclination towards self-improvement."

Finally, it is self-evident that "the possibilities that long delay will impair the ability of an accused to defend himself" are markedly increased when the accused is incarcerated in another jurisdiction. Confined in a prison, perhaps far from the place where the offense covered by the outstanding charge allegedly took place, his ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired. And, while "evidence and witnesses disappear, memories fade, and events lose their perspective," a man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time.

Despite all these considerations, the Texas Supreme Court has said that the State is under no duty even to attempt to bring a man in the petitioner's position to trial, because "[t]he question is one of power and authority and is in no way dependent upon how or in what manner the federal sovereignty may proceed in a discretionary way under the doctrine of

comity.[11] Yet Texas concedes that if it did make an effort to secure a federal prisoner's appearance, he would, in fact, "be produced for trial in the state court." This is fully confirmed by the brief that the Solicitor General has filed in the present case:

> "[T]he Bureau of Prisons would doubtless have made the prisoner available if a writ of habeas corpus ad prosequendum had been issued by the state court. It does not appear, however, that the State at any point sought to initiate that procedure in this case."[13]

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[11] Cooper v. State, 400 S.W. 2d 890, 892. The only other basis suggested by the Texas Supreme Court for its denial of relief in Cooper was the expense that would be involved in bringing a federal prisoner to trial, the court noting that a directive of the Federal Bureau of Prisons provided that "satisfactory arrangements for payment of expenses (must be) made before the prisoner is actually removed to the place of trial. "Id., at 91. But the expense involved in effectuating an occasional writ of habeas corpus ad prosequendum would hardly be comparable to what is required to implement other constitutional rights, e.g., the appointment of counsel for every indigent defendant. Gideon v. Wainwright, 372 U.S. 335. And custodial as well as transportation expenses would also be incurred if the State brought the petitioner to trial after his federal sentence had run. If the petitioner is, as the State maintains, not an indigent, there is nothing to prevent a fair assessment of necessary expenses against him. Finally, the short and perhaps the best answer to any objection based upon expense was given by the Supreme Court of Wisconsin in a case much like the present one: "We will not put a price tag upon constitutional rights. "State ex rel. Fredenberg v. Byrne, 20 Wis. 2d 504, 512, 123 N.W. 2d 305, 310.

[13] That brief also states:

"It is the policy of the United States Bureau of Prisons to encourage the expeditious disposition of prosecutions in state courts against federal prisoners. The normal procedure under which production is effected is pursuant to a writ ad prosequendum from the state court. Almost invariably, the United States has complied with such writs and extended its cooperation to the state authorities. The Bureau of Prisons informs us that removals are normally made by United States marshals, with the expenses borne by the state authorities. In some instances, to mitigate the cost to the State, the Bureau of Prisons has removed an inmate to a federal facility close to the site of prosecution. In a relatively small number of instances, prisoners have been produced pursuant to 18 U.S.C. § 4085, which provides in part:

"Whenever any federal prisoner has been indicted, informed against, or convicted of a felony in a court of record of any State or the District of Columbia, the Attorney General shall, if he finds it in the public interest to do so, upon the request of the Governor or the executive authority thereof, and upon the presentation of a certified copy of such indictment, information or judgment of conviction, cause such a person, prior to his release, to be transferred to a penal or correctional institution within such State or District."

In view of these realities, we think the Texas court was mistaken in allowing doctrinaire concepts of "power" and "authority" to submerge the practical demands of the constitutional right to a speedy trial. Indeed, the rationale upon which the Texas Supreme Court based its denial of relief in this case was wholly undercut last Term in Barber v. Page, 390 U.S. 719. In that case we dealt with another Sixth Amendment guarantee—the right of confrontation. In holding that Oklahoma could not excuse its failure to produce a prosecution witness simply because he was in a federal prison outside the State, we said:

> "We start with the fact that the State made absolutely no effort to obtain the presence of Woods at trial other than to ascertain that he was in a federal prison outside Oklahoma. It must be acknowledged that various courts and commentators have heretofore assumed that the mere absence of a witness from the jurisdiction was sufficient ground for dispensing with confrontation on the theory that 'it is impossible to compel his attendance, because the process of the trial Court is of no force without the jurisdiction, and the party desiring his testimony is therefore helpless.' 5 Wigmore, Evidence § 1404 (3d. ed 1940).
>
> "Whatever may have been the accuracy of that theory at one time, it is clear that at the present time increased cooperation between the States themselves and between the State and the Federal Government has largely deprived it of any continiung validity in the criminal law . . .
>
> "The Court of Appeals majority appears to have reasoned that because the State would have had to request an exercise of discretion on the part of federal authorities, it was under no obligation to make any such request. Yet as Judge Aldrich, sitting by designation, pointed out in dissent below, 'the possibility of a refusal is not the equivalent of asking and receiving a rebuff.' 381 F. 2d, at 481. In short, a witness if not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here, and, so far as this record reveals, the sole reason why Woods was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly." 390 U.S., at 723-725 (footnotes omitted).

By a parity of reasoning we hold today that the Sixth Amendment right to a speedy trial may not be dispensed with so lightly either. Upon the petitioner's demand, Texas had a constitutional duty to make a diligent, good-faith effort to bring him before the Harris County court for trial.

The order of the Supreme Court of Texas is set aside, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice Black concurs in the opinion and judgment of the Court, but he would make it absolutely clear to the Supreme Court of Texas that so far as the federal constitutional question is concerned its judgment is set aside only for the purpose of giving the petitioner a trial, and that if a trial is given the case should not be dismissed.

Mr. Justice White, concurring.

I join the opinion of the Court, understanding its remand of the case "for further proceedings not inconsistent with this opinion" to leave open the ultimate question whether Texas must dismiss the criminal proceedings against the petitioner. The Texas court's erroneous reliance on the fact of incarcertation elsewhere prevented it from reaching the other facets of this question, which may now be adjudicated in the manner permitted by Texas procedure.

Separate opinion of Mr. Justice Harlan.

I agree that a State may not ignore a criminal accused's request to be brought to trial, merely because he is incarcerated in another jurisdiction, but that it must make a reasonable effort to secure his presence for trial. This much is required by the Due Process Clause of the Fourteenth Amendment, and I would rest decision of this case on that ground, and not on "incorporation" of the Sixth Amendment's speedy trial provision into the Fourteenth. See my opinion concurring in the result in Klopfer v. North Carolina, 386 U.S. 213, 226 (1967).

I believe, however, that the State is entitled to more explicitness from us as to what is to be expected of it on remand that what is

conveyed merely by the requirement that further proceedings not be "inconsistent with this opinion." Must the charges against petitioner be dismissed? Or may Texas now secure his presence and proceed to try him? If petitioner contends that he has been prejudiced by the nine-year delay, how is this claim to be adjudicated?

This case is one of first impression for us, and decides a question on which the state and lower federal courts have been divided. Under these particular circumstances, I do not believe that Texas should automatically forfeit the right to try petitioner. If the State still desires to bring him to trial, it should do so forthwith. At trial, if petitioner makes a prima facie showing that he has in fact been prejudiced by the State's delay, I would then shift to the State the burden of proving the contrary.

CASE: Coleman v. United States, 442 F. 2d 150 (D.C. 1971).

PER CURIAM:

Arrested on July 1, 1966, appellant was released on bond the following day after a preliminary hearing in the Court of General Sessions. An indictment was returned on August 15. In the interim, on July 28, 1966, appellant was arrested for shoplifting in Maryland. On December 21 he was convicted of that charge and sentenced to three years in the Maryland House of Corrections, to which he was committed on December 22. His criminal jacket contains a letter, dated October 25, 1966, from the Sheriff of Prince George's County, Maryland, to the D.C. authorities, reporting appellant's detention in the county jail pursuant to his arrest. On January 18, 1967, appellant's bond was forfeited and a bench warrant was issued by the District of Columbia District Court. On January 26, the warrant was sent to the Maryland House of Corrections, and four days later a detainer was formally lodged.

Some ten months later, by a letter to the United States Attorney, dated December 2, 1967, appellant requested that he be brought to trial for the D.C. robbery charge pending against him. Several weeks thereafter, on January 19, 1968, the United States Attorney filed a writ of habeas corpus ad prosequendum which was granted by the Maryland correctional authorities. Appellant was then returned to the D.C. jail. He was arraigned on February 23; counsel

was appointed on the 26th; and a motion to dismiss for lack of a speedy trial was made on March 18. At the April 5th hearing before the District Court, the motion was denied.

The total time elapsing between arrest and the dismissal hearing was 626 days, or approximately 21 months.

Appellant alleges, and our examination confirms, that the major cause of the delay here arose from appellant's incarceration in Maryland which began only 26 days after his preliminary hearing. Although the Government knew of his presence there at least as early as October, 1966 (when the Prince George's County Sheriff informed the District authorities of appellant's whereabouts), no effort was made to secure his return for trial until January, 1968. Apparently, appellant's letter to the United States Attorney requesting trial was the impetus for the Government's eventual seeking of the appropriate writ of habeas corpus ad prosequendum. But for appellant's request, there is no indication that the Government intended to move toward prosecution until the culmination of appellant's three-year Maryland sentence.

The Supreme Court, faced with speedy trial claims in which the accused was incarcerated outside the prosecuting jurisdiction for another crime, has recently taken a dim view of governmental unwillingness to press for expeditious prosecution of such defendants. Dickey v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed. 2d 26 (1970); Smith v. Hooey, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed. 2d 607 (1969).

Despite recognition of the harmful impact that delays in prosecution may have on individuals who are imprisoned for another crime while awaiting trial, there remains some disagreement whether the burden lies with the prosecutor or the accused to mitigate the hardship by pressing for a speedy trial.[10] Those favoring the argument that the intial responsibility to demand a speedy trial lies with the accused, reason that he may well conclude that a stale Government case is to his benefit. He might even have reason to hope the Government will eventually dismiss the indictment on its own motion. For these reasons, so the argument goes, in the

[10]The following articles offer good discussions of the demand problem and analysis of the leading cases from the federal circuits: Note, The Right to a Speedy Trial, 20 Stan. L. Rev. 476, 478-480 (1968); Note, The Right to a Speedy Criminal Trial, 57 Colum. L. Rev. 846, 852-855 (1957).

absence of a demand it will be assumed that the accused consented to the delay.[11] Those who disagree with this approach contend that the responsibility to prosecute lies with the prosecutor, not the accused. The demand rule is also criticized as inconsistent with the doctrine that courts will indulge every reasonable presumption against the waiver of constitutional rights. See Dickey v. Florida, supra, 398 U.S. at 48-50, 90 S.Ct. 1564.[12]

Here, the judge presiding at the hearing on dismissal for lack of a speedy trial seemed to be of the opinion that appellant's failure to demand to be tried at an earlier date constituted a waiver of his Sixth Amendment right. Whatever the contours of the demand rule, we cannot agree on the basis of this record that appellant's inaction now robs his claim of merit. The trial judge based his decision on the premise that appellant was represented by counsel while he was in Maryland and, therefore, any decision appellant made was one arrived at intelligently with professional advice. Over appellant's strenuous assertion that he was not represented by counsel at that time, the court reasoned that, since counsel was provided at the preliminary hearing in the Court of General Sessions, that same attorney must have continued to represent him at all pertinent times thereafter. Although such continuous representation is mandated by the Criminal Justice Act, we are familiar with those shortcomings in the practical operation of the statute

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Insofar as the court's finding of waiver was based on the assumption that appellant acted upon, or with meaningful access to, the advice of counsel, it was in error. And, without counsel,

[11]See, e.g., United States ex rel Von Cseh v. Fay, 313 F.2d 620, 623 (2d Cir. 1963); Collins v. United States, 157 F. 2d 409, 410 (9th Cir. 1946).

[12]Both Smith v. Hooey and Dickey were cases in which the accused had made numerous demands to be tried and, therefore, the Court was only called on to decide what the prosecutor's obligations were upon such a demand. As pointed out by Justice Brennan in his concurring opinion in Dickey, those cases cannot be read as deciding that the defendant "is not entitled to a speedy trial unless he demands it at the time of the delay." Dickey v. Florida, supra, at 40, 90 S.Ct. at 1570.

we have no basis for assuming that appellant had either the ability or the information[15] on which to make an intelligent and voluntary waiver of his right to a speedy trial.[16] Furthermore, we think that by its failure to offer any explanation or justification for the delay, the Government has tacitly assumed full responsibility for it here.[17]

The Government rests its case on appeal solely on the issue of possible prejudice to the accused. Its single position is that the evidence of guilt is so overwhelming as to negate any inference of prejudice to appellant in the preparation of his defense. See Harling v. United States, 130 U.S.App.D.C. 327, 330-331, 401 F.2d 392, 395-396 (1968), cert. denied, 393 U.S. 1068, 89 S.Ct. 725, 21 L.Ed.2d 711 (1969) (While a "slight showing of possible prejudice * * * might have entitled defendant to relief * * *," here there was not "even a wisp of prejudice."); Taylor v. United States, 99 U.S. App.D.C. 183, 186, 238 F.2d 259, 262 (1956) (The case against

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[15]See, e.g., Pitts v. State of North Carolina, 395 F.2d 182,187 (4th Cir. 1968); United States v. Reed, 285 F.Supp. 738,741 (D.D.C.1968) ("Clearly there can be no waiver of the right to a speedy trial where * * * (the defendant is powerless to assert his right because of imprisonment, ignorance and lack of legal advice.").

[16]Johnson v. Zerbst, 304 U.S. 458,464,58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Our conclusion on this point is not a rejection of the procedure suggested by the American Bar Association in its Standards Relating to Speedy Trial. Under these standards, if the accused is serving a term of imprisonment, the prosecutor has the option either to undertake to obtain the prisoner's immediate presence for trial or to "cause a detainer to be filed with the official having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial." ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial § 3.1(a) Approved Draft, 1968). On this record, however, we have no basis for applying such a rule since the Government has failed to show that appellant was properly notified and advised of his right to demand trial.

[17]We note in passing that recently the Second Circuit has in promulgating supervisory rules regarding speedy trial, rejected altogether the demand rule. Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, Rule S (Jan. 5, 1971). These rules also reject the ABA's suggestion regarding the use of detainers (see Note 16 supra). Rule 5(f) requires the prosecutor to seek expeditious prosecution of defendants incarcerated in other jurisdictions in every case.

appellant was "weak." Had it been "overwhelming", a different result might have been reached.).

In its brief, the Government's review of the facts demonstrates that its confidence in the guilt of the accused depends almost entirely on the testimony of Mr. Valentine. It is his assertion—that appellant was the same man whom he had chased into the alley—that provides the foundation for the prosecution's case. While we are satisfied that his testimony was sufficient to send this case to the jury, we are not so sanguine as is the Government that it demonstrates guilt so unequivocally that no occasion for prejudice due to the lengthy delay could have arisen.

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CHAPTER 3. THE "FEDERAL COURT MAZE"

CASE: Lawrence v. Blackwell, 298 F. Supp. 708 (N.D. Ga. 1969)

EDENFIELD, District Judge.

This case presents important questions concerning the effect of state detainers on the right of federal prisoners to a speedy trial under the Sixth Amendment. The case is brought as a class action by several inmates at the United States Penitentiary in Atlanta, each of whom allegedly has criminal charges pending against him in one or more state courts. The state defendants have each filed detainers against these inmates pursuant to the outstanding state charges. These detainers are filed with the Sheriff of Fulton County, Georgia, and in the records office of the Atlanta federal penitentiary.

These prisoners seek to represent the class of Atlanta penitentiary inmates with state charges outstanding for at least the length of time they have been pending against the named plaintiffs. Because of previous actions in the case, Plaintiffs Lawrence, Crosby, and Martell, and those individuals representing Jefferson County and Dallas County, Texas, and Pima County, Arizona, have been stricken as parties.

Plaintiff Allen is currently serving a six-year federal sentence imposed in June, 1966. He has had Florida charges continuously pending against him for grand larceny since 1965. Plaintiff Harmon has been in continuous federal custody since a two-year sentence was imposed in April, 1967. Since May, 1963, he has had a pending Florida charge for breaking and entering and grand larceny. Plaintiff McClelland is serving a federal sentence imposed in August, 1966. In December, 1965, McClelland was charged by Florida authorities with forgery, and in July, 1966, with cheating and swindling by the State of Georgia, all of which are still pending. Plaintiff Raines is in federal custody pursuant to an eight-year sentence levied in June, 1966. In September, 1966, he was charged with escape in North Carolina, a charge still pending. Plaintiff Schwartz is serving a three and one-half year sentence, given in September, 1967, and has outstanding a fraudulent check charge by Fulton County, Georgia, as well as a charge of cheating, swindling, and unlawfully disposing

of mortgaged property, filed by Houston County, Georgia, and a charge of forgery by the State of Alabama. All of these prisoners have detainers issued against them, pursuant to state charges, except Raines, who has a "fugitive warrant" against him, and all except Plaintiff Allen allege affirmative action in seeking a speedy trial. Plaintiffs ask for declaratory and injunctive relief for themselves and their class, under 28 U.S.C. § 2201, 5 U.S.C. § 702, and 2 U.S.C. § 1983. Specifically, they ask this court to declare that the restrictions imposed upon them at the federal penitentiary because of the detainers violate their constitutional rights and ask that their enforcement be enjoined. They also ask for a declaration that the pending detainers are null and void and that an injunction be issued forbidding defendants from "filing, giving effect to, honoring, pursuing or enforcing in any manner or method the detainers now pending against plaintiffs and the criminal charges represented by said detainers." The defendants do not deny the existence of the pending state charges or the plaintiff's demands for a speedy trial.

Plaintiff's allegations are met by summary judgment motions filed by the United States and by the defendant States. The brief of the United States seeks to justify the prison restrictions imposed because of the outstanding state detainers. The States argue that the court lacks jurisdiction over them and that federal prisoners have no constitutional right to a speedy trial on state charges.

I. JURISDICTION OVER STATES

The states of Texas, Florida, Alabama, and North Carolina are beyond the jurisdiction of this court, absent a special provision. The plaintiffs urge that Rule 4(d) (7) of the Federal Rules of Civil Procedure permits service of process either in the manner prescribed by federal law or in "the manner prescribed by the law of the state in which the district court is held." Therefore, they contend that the Georgia long-arm statute, Ga. Code § 24-113.1, can be used to secure jurisdiction of the non-resident defendants. While Rule 4(d) (7) does permit the use of applicable state laws, the court holds that the Georgia long-arm statute cannot be used to secure the necessary service of process over the representatives of the states outside Georgia.

First, it overtaxes the imagination to conceive that the long-arm statute was designed to cover situations such as this one. The statute itself provides that:

> "A court of this State may exercise personal jurisdiction over any non-resident or his executor or administrator, as to cause of action arising from any of the acts, ownership, use or possession enumerated in this section, in the same manner as if he were a resident of the State, if in person or through an agent, he
>
> "(a) Transacts any business within this State; or
>
> "(b) Commits a tortious act within this State, except as to a cause of action for defamation of character arising from the act; or
>
> "(c) Owns, uses or possesses any real property situated within this State."

Plaintiffs argue that subsection (a) is satisfied because the out-of-state defendants are involved in the business of apprehending the plaintiffs and work through the Sheriff of Fulton County, who, as their agent, accepts their detainers. This interpretation of subsection (a) stretches the normal meaning of "business" out of all proportion. Plaintiffs cite not authority to support their unusual construction and the court can think of none. Plaintiffs also urge that subsection (b) of § 24-113.1 is satisfied since the defendants breached a duty by failing to bring the plaintiffs to trial. They contend that a common law tort is not necessary only a breach of a duty making defendants liable in damages—yet they have nowhere in their complaint asked for damages. Any harm to the plaintiffs here comes from the inaction of the defendants, none of which was "within this State". Moreover, the court cannot conceive that a state's failure to grant a speedy trial is a "tortious act" within the purpose and intent of the statute. Plaintiffs also argue that the Sheriff of Fulton County, who accepted the defendant's detainers, could be served as the agent of the defendants. But, the Sheriff does not become an agent for purposes of service simply by recognizing the existence of a state's intent to secure custody of a prisoner now in another jurisdiction.

Nevertheless, failure to secure jurisdiction of these defendants is not fatal to the plaintiff's action. As will become evident, the court will not compel any action by these defendants but merely declare the rights of the plaintiffs in an action in which the court clearly has jurisdiction. It will be left to other courts to effectuate these rights.

II. RIGHT TO SPEEDY TRIAL FOR FEDERAL PRISONER ON STATE CHARGE AND REMEDY TO EFFECTUATE THE RIGHT

* * *

The court has no doubt that Smith v. Hooey is controlling in the instant action. This court's problem is to effectuate a remedy which will best perfect the right granted by Smith v. Hooey. The court will first discuss the impact of that holding on the detainer system employed at the Atlanta federal penitentiary.

1. Impact of Smith v. Hooey on Use of Detainers to Limit Prisoner Privileges.

Plaintiffs contend that the detainers lodged against them pursuant to their outstanding state charges limit their eligibility for parole, remove their opportunity, if found guilty, to have their state sentences run concurrently with their federal service; require them to live in more restricted quarters than other prisoners; negate participation in pre-release work details or transfer to minimum-custody institutions; and adversely affect rehabilitative efforts.

It appears from the record that federal prisoners with detainers against them have more restricted privileges.

* * *

Plaintiffs launch a broadside at the entire detainer system, contending it amounts to cruel and unusual punishment and a deprivation of due process. In response, the United States urges that the restrictions placed on federal prisoners with outstanding detainers come within the discretionary authority of the Attorney General, under 18 U.S.C. § 4001, and the Bureau of Prisons,

under 18 U. S. C. § 4042, and are justified, since vocational training is difficult if a prisoner faces an indeterminate sentence in the future; custody must be more restrictive since a prisoner is a greater escape risk if he faces a lengthy future sentence; detainers are bad risks for work release and unescorted furlough programs; and a release program is difficult to plan because of the prospect of arrest by other authorities. However, the Government stresses that it does not deny parole consideration to detainers and will regularly grant them parole if they are otherwise good risks. The court notes that by regulation, the existence of detainers no longer automatically precludes federal parole consideration. 28 C. F. R. § 2. 9 (1968).

While the state detainers placed on these plaintiffs restrict their privileges, the court cannot declare those restrictions per se capricious. The prison authorities have made the judgment, based on experience and expertise, that prisoners with detainers warrant more restrictive treatment. Even if we might disagree, the court cannot quarrel with their judgment, for the administration of the prisons is within the purview of the Executive, not the Judicial, branch. The courts will only intervene in cases of extreme hardship. Tabor v. Hardwick, 224 F. 2d 526 (5th Cir., 1955), dismissed, 350 U. S. 890, 76 S. Ct. 148, 100 L. Ed. 784 (1955); see also, Hess v. Blackwell, 409 F. 2d 362, 5th Cir., March 21, 1969. This is not a judicial excuse for failure to act. Rather, the court's reluctance to intervene goes to the heart of the checks and balances of our federal system. Whatever the court's personal views, we would be exceeding our constitutional function were we to substitute our opinion for the considered judgment of the prison authorities. What is really in question here is the detainer system which leads to the above restrictions, and while the system has certain unsatisfactory results, it serves a useful function in a federal system. These results, however unsatisfactory from a rehabilitative standpoint, do not rise to the level of an extreme and unreasonable hardship, under ordinary circumstances.

However, certain modifications in this judgment are necessary to effectuate the right extended in Smith v. Hooey. We hold that if the states involved have not made a "diligent, good-faith effort" to bring the prisoners to trial within a reasonable time after this order, the Atlanta federal penitentiary authorities must remove the restrictions flowing from these detainers. This court cannot

permit the unreasonable delay of the defendants to continue the effectuation of restrictions on these prisoners, which would not otherwise be imposed. Of course, if certain restrictions are imposed for reasons independent of the detainers, they would be unaffected by this order. What amounts to a lack of good-faith effort to bring these prisoners to trial will vary with such circumstances as the docket load in the state courts. Therefore, it would be unwise for the court to establish a specific period of time within which trial must be held. The prison authorities should check with the defendants shortly after receipt of this order to make certain the states are taking steps to docket the cases for trial, as well as make periodic reviews of their progress thereafter. When diligence is lacking, the prison authorities must then permit these prisoners to enjoy the privileges to which they would otherwise be entitled, absent the detainers. The court does not state that the restrictions are per se unreasonable. The court only holds that if the right extended in Smith v. Hooey is to be given content, a state's continued failure to make a good-faith effort to secure prisoners a speedy trial on state charges must not result in continuance of prison restrictions flowing from these charges.

2. Impact of Smith v. Hooey on Underlying Indictments.

While Smith v. Hooey clearly establishes a right to speedy trial for federal prisoners with pending state charges, it gives precious little practical guidance to the lower courts about the effectuation of that right. The Supreme Court simply remanded the case to the Texas Supreme Court for "further proceedings not inconsistent with this opinion." The Texas Court's only duty may be to set aside its judgment denying petitioner's right to a speedy trial, "for the purpose of giving the petitioner a trial, and that if a trial is given the case should not be dismissed." This is the view taken by Mr. Justice Black in his concurring opinion in Hooey. The Court's opinion may purposely "leave open the ultimate question whether Texas must dismiss the criminal proceeding against the petitioner", as Mr. Justice White suggests in his concurrence. He felt that since the Texas courts had denied the existence of a right to speedy trial, they never reached the question of an unconstitutional delay. Yet another possible reading of the majority opinion is that the Texas courts will have to immediately release the petitioner, due to an unreasonable nine-year delay in trial. Mr. Justice Harlan's

separate opinion presents the only concrete guidance for the lower courts. He states that Texas did not automatically forfeit the right to try the petitioner, but that if Texas still wished to try him, it "should do so forthwith. At trial, if petitioner makes a prima facie showing that he has in fact been prejudiced by the State's delay, I would then shift to the State the burden of proving the contrary."

Despite the uncertainty created by the Supreme Court's opinion, we hold that the plaintiffs have the following remedies to effectuate their right to a speedy trial: The state defendants are under a constitutional obligation to make a diligent, good-faith effort to try the plaintiffs within a reasonable time. Defendants will not automatically lose the right to bring the plaintiffs to trial, if they act within a reasonable time, but at their trials, the plaintiffs may raise their prior denial of a speedy trial. It will be for the state trial courts to decide what the plaintiffs must show to merit dismissal of their indictments.[2]

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[2] Courts are split on whether actual prejudice must be shown or delay in trial is per se prejudicial. Courts have stated on numerous occasions that the mere passage of time does not amount to the denial of the Sixth Amendment's right to speedy trial. Taylor v. United States, 238 F.2d 259 (DCA, 1956). Whether the delay amounts to an unconstitutional deprivation depends upon circumstances, for ordinary expedition, not mere speed, is essential. United States v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed. 2d 627 (1966); Reece v. United States 337 F.2d 852 (5th Cir., 1964). Many courts specifically state that a delay must be prejudicial in the preparation of a defense to merit dismissal of charges. Mann v. United States, 113 U.S. App. D.C, 27, 304 F.2d 394 (1962), cert. denied, 371 U.S. 896, 83 S.Ct. 194, 9 L.Ed. 2d 127 (1962); United States v. Beard, 381 F.2d 329 (6th Cir., 1967). Several courts have enumerated factors to be used in deciding whether a denial of speedy trial has ensued, such as the length and reason for the delay, its prejudice to the defendant, and any possible waiver of the right. United States v. Owens-Corning Fiberglas Corp., 271 F. Supp. 561 (N.D.Cal., 1967); Buatte v. United States, 350 F.2d 389, 394 (9th Cir., 1965), cert. denied, 385 U.S. 856, 87 S.Ct. 104, 17 L.Ed.2d 83 (1966). Yet, there are some decisions which seem to hold that the delay in trial may be so substantial by itself that it is either prima facie prejudicial, United States v. Simmons, 338 F.2d 804 (2d Cir., 1964), cert. denied, 380 U.S. 983, 95 S.Ct. 1352, 14 L.Ed. 276 (1965), or requires no showing of prejudice at all. United States v. Lustman, 258 F.2d 475 (2d Cir., 1958), cert. denied, 358 U.S. 880, 79 S.Ct. 118, 3 L.Ed.2d 109 (1958). Also see language in Reece v. United States, supra, which indicates that cases of per se unreasonableness may arise. Application of the appropriate standard will, at least initially, however, be a question for the state trial court, and therefore this court expresses no view on the controversy.

If the defendants do not make the effort required by Smith v. Hooey to bring the plaintiffs to trial, appropriate courts in the states may grant either post-conviction relief, following belated convictions, or pre-conviction relief, after the states have permitted a reasonable time to elapse without movement toward trial. Considerations of federalism and lack of jurisdiction over the state defendants preclude recourse to this court for either pre- or post-conviction relief. Moreover, this court does not conceive that under Smith v. Hooey it can now either dismiss the state indictments or hold an independent hearing on the possible prejudice arising from the delays in trial.

Several factors have influenced our decision. First, in the federal system, motions to dismiss the indictment for unnecessary delay in trial are addressed to the trial court. Rule 48(b) of the Federal Rules of Criminal Procedure; Terlikowski v. United States, 379 F.2d 501 (8th Cir., 1967), cert. denied, 389 U.S. 1008, 88 S.Ct. 569, 19 L.Ed. 2d 604 (1967); United States v. McWilliams, 82 U.S. App. D.C. 259, 163 F.2d 695 (1947).[3] Considerations of federalism and peculiar state statutes on the question of speedy trial make this rule particularly appropriate in cases, such as this one, where a state charge is pending. A state trial judge, not a federal district court, should initially decide the question of denial of the right to speedy trial. A second consideration in our decision was the common practice of federal courts, in the pre-Smith v. Hooey era, to permit prisoners to raise the speedy trial question at the state court level when they were actually tried. Henderson v. Circuit Court, supra; Bistram v. People of State of Minnesota, 330 F.2d 450 (8th Cir., 1964); State of Maryland v. Kurek, 233 F.Supp. 431 (D.Md., 1964); Evans v. County of Delaware, Commonwealth of Penn., 390 F.2d 617 (3d Cir., 1968), cert. denied, 393 U.S. 873, 89 S.Ct. 164,

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[3] Despite a dictum in Frankel v. Woodrough, 7 F.2d 796 (8th Cir., 1925), that the right to a speedy trial can only be enforced through mandamus to compel a trial, the great majority of federal cases recognized that a defendant may secure a dismissal of charges for an unreasonable delay. Petition of Provoo, 17 F.R.D. 183 (D.Md., 1955), aff'd., 350 U.S. 857, 76 S.Ct. 101, 100 L.Ed. 1 (1955). There are, of course, other motions which might be available pursuant to right to speedy trial, in addition to a motion to dismiss. Annot., 58 A.L.R., 1510 (1929); Fowler v. Hunter, 164 F.2d 668 (10th Cir., 1947), cert. denied, 333 U.S. 868, 68 S.Ct. 785, 92 L.Ed. 1146 (1948).

21 L. Ed. 2d 143 (1968). Smith v. Hooey should not change this practice.

Third, nothing in Smith v. Hooey requires a different result from our decision to require plaintiffs to raise the speedy trial issue at the state trial court level, for in that case the Supreme Court remanded the petitioner to the Texas Supreme Court, rather than make an independent judgment of whether the right to speedy trial had been violated. In our case, it would seem particularly inappropriate for this court to hear the question of dismissal of the state indictments for deprivation of the right to a speedy trial, when the defendants are not subject to this court's jurisdiction. Fourth, the Fifth Circuit's decision in May v. Georgia, 409 F. 2d 203, No. 27049, 5th Cir., March 20, 1969, is relevant. In that case the appellant was serving a 20-year sentence in the Florida penitentiary, which began in July, 1962. He was indicted by Georgia in February, 1965, on three counts of robbery. He contended that his right to a speedy trial was violated by Georgia's four-year failure to prosecute him. The Fifth Circuit found Smith v. Hooey, supra, controlling, and remanded the case to the district court to determine if the appellant had made the requisite demand upon Georgia for speedy trial. The Court stated that if sufficient demand had been made, the appellant's motion must be granted, subject to the right of Georgia to try him within a reasonable time, citing Justice Harlan's separate opinion in Smith v. Hooey, supra. This is clear evidence that in the instant case we should not, at least initially, dismiss the indictments nor hold our own hearing on the prejudice arising from the delay in trial. Rather, the states may still proceed to try the plaintiffs, if they do so within a reasonable time. At such time as a state trial is afforded, the Fifth Circuit made it clear, as have we, that:

> "Nothing said herein precludes appellant from attempting to show at a state trial on these charges that he has been prejudiced by the state's delay. But we do not in any way suggest how such issue, if raised, should be resolved, leaving that to the state trial judge for determination." May v. Georgia, supra, at 205 of 409 F. 2d.

Several further points must be resolved. Nothing the court has said in this order is applicable to plaintiff Schwartz, since his own allegations do not indicate that he has made any demand for a speedy

trial on the states involved. It is clear that the plaintiff must take affirmative action to secure a speedy trial before he can argue its denial. United States v. Gladding, 265 F. Supp. 850 (S. D. N. Y., 1966). "The requirement of a demand stresses that the right to a speedy trial is not designed as a sword for defendant's escape, but rather as a shield for his protection." Note, The Right to a Speedy Criminal Trial, 57 Col. L. Rev. 846, 853 (1957).

Additionally, it appears that plaintiff Raines has an escape warrant charge against him. According to the North Carolina defendants, a fugitive warrant rather than a detainer has been placed against Raines. However, any differences between an escape warrant and a detainer cannot permit North Carolina to avoid the diligence required by Smith v. Hooey, supra, if they intend to try Raines for his alleged escape. While this court, because of jurisdictional problems, cannot enforce Raines' right to a speedy trial even if no such diligence is used and he is later convicted by North Carolina, an appropriate court in North Carolina would be open to him. Moreover, if the State fails to make a good-faith effort to try Raines within a reasonable time, any prison restrictions stemming directly from the fugitive warrant must be terminated by Atlanta prison authorities. The court is hopeful that North Carolina, as well as the other great states named as defendants here, will be moved by the clear dictate of Smith v. Hooey to make diligent steps to afford plaintiffs a speedy trial within a reasonable time.

Plaintiffs have asked for a class action. However, it appears to the court that a class action would be improper in this case, since the obligation of the states and the penitentiary authorities is dependent upon notice to the states of the requisite need for a speedy trial. Yet, the members of the class plaintiffs seek to represent may have detainers lodged against them by states not represented in this proceeding, who would therefore have no notice of this order. They obviously could not be expected to make a diligent, good-faith effort to bring their detainers to trial. Therefore a class action is inappropriate and the relief afforded plaintiffs shall be purely personal. A class action is not necessary to the effectuation of plaintiffs' rights.

The state defendants' motions to dismiss and the Government's motion to dismiss or grant summary judgment are denied.

CASE: Kane v. Virginia, 419 F. 2d 1369 (4th Cir. 1970)

BUTZNER, Circuit Judge:

In these consolidated appeals, federal and Virginia prisoners, claiming denial of the right to speedy trials, seek writs of habeas corpus to bar prosecutions evidenced by detainers lodged against them by other states. We hold that after a prisoner has exhausted available state remedies, he may be afforded this relief.

I.

Michael G. Kane, a prisoner serving a five-year sentence at the federal penitentiary in Marion, Illinois, alleges the following facts: On October 13, 1966 a police officer of the City of Newport News, Virginia, filed a detainer at the federal prison charging Kane with grand larceny by check. Between April and December 1967, Kane wrote the officer three times requesting a speedy trial and withdrawal of the detainer. He received no reply.

Kane then turned to the Virginia courts for relief. On April 2, 1968, he filed a "Motion for a Quick and Speedy Trial" in the state trial court asking that he be returned immediately to Newport News for trial. He received no answer to this motion. On June 28, 1968, he petitioned the Supreme Court of Appeals of Virginia for dismissal of the charge against him and removal of the detainer on the ground that he had been denied a speedy trial. On October 16, 1968, the Court summarily denied relief because Kane's motion did not present a justiciable issue.

Meanwhile, on September 17, 1968, Kane wrote to the Governor of Virginia. He related his efforts to obtain a speedy trial and stated that his detainer disqualified him from participation in a study release program. The letter was forwarded to the Newport News prosecutor, who, on September 30, 1968, wrote Kane stating that he would not authorize withdrawal of the detainer and that "it is the intention of the authorities of this city to prosecute you on the charge as soon as you are available to be taken into our custody free of federal charges."

Kane then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, which denied his application on October 30, 1968.

Dale H. Sutherland is a federal prisoner in the District of Columbia Penitentiary at Lorton, Virginia. Early in 1966, officers of Anne Arundel County, Maryland, filed a detainer against him based on an indictment for storehouse breaking. Since 1966, Sutherland has mailed various papers to the Circuit Court of Anne Arundel County including requests for discovery, a speedy trial, and a writ of habeas corpus to obtain dismissal of the charges. In June 1966, the judge informed Sutherland that these motions and petitions cannot be heard until he is returned to Anne Arundel County.

Sutherland then sought dismissal of the charges in the United States District Courts for the District of Maryland and the Eastern District of Virginia. Both denied relief, and Sutherland has appealed from the judgment entered in the Eastern District of Virginia.

Clifford E. Perry, a Virginia prisoner, complains of detainers filed by authorities in Maryland and Florida. He alleges the following facts concerning the Maryland detainer: In February of 1966, Montgomery County police filed a detainer against him for housebreaking and larceny. In April 1967, Perry requested a speedy trial, but an administrative assistant of the trial court informed him that he would have to arrange for his own transportation from the Virginia prison to Maryland.

Concerning the Florida charge, Perry alleges that in 1966, officers of Pinellas County filed a detainer for automobile larceny against him. He petitioned the Circuit Court of Pinellas County for dismissal of the charge, and on December 9, 1966, the court denied his motion on the ground that he had never filed a demand for a speedy trial.

In March 1969, Perry sought dismissal of the detainers in the United States District Court for the Western District of Virginia. The court recognized that it could transfer the petition to federal courts in Florida and Maryland, but decided that it was preferable to dismiss it. .

II.

* * *

Since Smith was decided on direct appeal from the Supreme Court of Texas, the Court had no occasion to discuss application of its principles to federal habeas corpus. Thus the question of whether

a prisoner who has exhausted state remedies can assert his Sixth Amendment rights to bar pending state prosecutions or whether he must await his state court trial to present this defense was neither presented nor answered.

There can be no doubt that the writ may be issued by federal courts to release a prisoner who has been convicted in violation of his right to a speedy trial, even though the delay resulted from his detention in another state. Pitts v. North Carolina, 395 F. 2d 182 (4th Cir. 1968); Luckman v. Burke, 299 F. Supp. 488, 493 (E. D. Wis. 1969). And in May v. Georgia, 409 F. 2d 203 (5th Cir. 1969), the Fifth Circuit significantly extended the use of the writ by applying Smith's principles to a prisoner who had not yet been tried. There a Florida prisoner complained that despite his demands, Georgia had not brought him to trial upon an indictment on which a detainer had been filed. The court held that if the prisoner had made sufficient demands for trial, the writ should issue subject to the right of Georgia to attempt to obtain the prisoner from Florida. The court noted that if Florida declined to deliver the prisoner, its refusal could be tested in federal court because "it would tend to interfere with [the prisoner's] Sixth Amendment rights." [409 F. 2d at 205 n. 5].

Here, unlike the possibility that confronted Georgia, there is no doubt that Virginia could have obtained Kane, and Maryland could have obtained Sutherland for trial. Both are federal prisoners, and it is the policy of the Bureau of Prisons to comply with a writ of habeas corpus ad prosequendum issued by a state court. Moreover, the Bureau encourages "the expeditious disposition of prosecutions in state courts against federal prisoners." Smith v. Hooey, 393 U. S. 374, 381 & n. 13, 89 S. Ct. 575, 578, 21 L. Ed. 2d 607 (1969). Cf. Rees v. Commonwealth, 203 Va. 850, 127 S. E. 2d 406, 410 (1962), cert. denied, 372 U. S. 964, 83 S. Ct. 1088, 10 L. Ed. 2d 128 (1963). And there can be little doubt that Maryland and Florida could have obtained Perry from Virginia. Temporary release of a Virginia prisoner to another state for trial is expressly authorized by Va. Code Ann. § 53-303 (1967). None of the delays in these cases resulted from inability of the prosecuting states to obtain the prisoners for trial. On the contrary, the prosecutors, after demand, did not make a diligent effort to obtain the prisoners as required by Smith.

Peyton v. Rowe, 391 U. S. 54, 88 S. Ct. 1549, 20 L. Ed. 2d 426 (1968), and Word v. North Carolina, 406 F. 2d 352 (4th Cir. 1969), are persuasive authority for holding that a federal remedy is presently available. In Peyton, prisoners attacked future sentences which were consecutive to the sentences they were then serving. Overruling McNally v. Hill, 293 U. S. 131, 55 S. Ct. 24, 79 L. Ed. 238 (1934), the Supreme Court held that for the purposes of federal habeas corpus, the prisoners were in custody under both the present and future sentences. Consequently, the prisoners could attack the constitutionality of their future sentences without awaiting the expiration of their present sentences.

In Word, Virginia prisoners complained of North Carolina detainers based on convictions in that state. They claimed that the North Carolina convictions were invalid on constitutional grounds. We held that although the sentences to be served in the future were imposed by another state, the reasoning of Peyton was controlling. For the purposes of habeas corpus, the petitioners were in custody under the North Carolina detainers as well as under the Virginia sentences which they were then serving, and, therefore, habeas corpus was presently available to challenge the convictions underlying the detainers. Similarly, the prisoners here are held under both their present sentences and the detainers for their future trials. Cf. May v. Georgia, 409 F. 2d 203 (5th Cir. 1969) (by implication).

Although federal habeas corpus relief is not ordinarily available to a state prisoner before trial, the peculiar nature of the right to a speedy trial requires an exception to this rule. The detrimental consequences of delay have been repeatedly catalogued. See, e. g., Smith v. Hooey, 393 U. S. 374, 378, 89 S. Ct. 575, 21 L. Ed. 2d 607 (1969); Peyton v. Rowe, 391 U. S. 54, 62, 88 S. Ct. 1549 (1968); Word v. North Carolina, 406 F. 2d 352, 354 (4th Cir. 1969); Pitts v. North Carolina, 395 F. 2d 182, 187 (4th Cir. 1968). Denial of a speedy trial adversely affects both the prisoner's present circumstances and his ability to defend himself in the future. Only a present remedy can lift its dual oppressions. Cf. Garrett v. Womble, 299 F. Supp. 223 (E. D. N. C. 1969).

The American Bar Association's Standards Relating to Speedy Trial recommend that "the consequences of denial of a speedy trial should be outright dismissal [as] this is the only effective way to

enforce the speedy trial guarantee." The Standards prescribe that dismissal should take the form of an absolute discharge that will forever bar prosecution for the offense.[4] This, too, is the remedy provided in the Interstate Agreement on Detainers, by statute in a number of states,[6] and by well-considered cases.[7]

We believe this salutary rule should be applied in federal habeas corpus proceedings when the proof shows (1) that the prisoner demanded a speedy trial,[8] (2) that the state nevertheless failed to make a diligent effort to obtain him for trial, and (3) that he has exhausted his state remedies as required by 28 U.S.C. § 2254 by seeking dismissal of the charges against him because of unconstitutional delay. If the prisoner, having satisfied these preliminary requirements, then prevails upon the merits of his claimed denial of a speedy trial, the district court should discharge him from custody under the detainer and bar prosecution of the charges for which it was filed.

III.

We turn now to the application of these principles to the cases before us. Kane moved the Virginia trial court to require the prosecutor to file a writ of habeas corpus ad prosequendum so that he could be brought to trial or to dismiss the charges. When no action

[4] ABA Standards Relating to Speedy Trial 3 and 40 (Approved Draft, 1968).

[6] E.g., Va. Code Ann. § 19.1-191 (1960); see Annot., 50 A.L.R. 2d 943 (1956).

[7] E.g., Petition of Provoo, 17 F.R.D. 183 (D.Md.), aff'd mem., 350 U.S. 857, 76 S.Ct. 101, 100 L.Ed. 761 (1955); Barker v. Municipal Court of Salinas Jud. Dist., 64 Cal.2d 806, 51 Cal.Rptr, 921, 415 P.2d 809 (1966); see Note, "The Right to a Speedy Criminal Trial," 57 Colum. L.Rev. 846, 866 (1957).

[8] All of the petitioners (except Perry, who apparently made no demand in Florida) demanded a speedy trial. Therefore, we do not consider whether relief would be appropriate in the absence of such a demand. See ABA Standards Relating to Speedy Trial 16-18, 32-38 (Approved Draft, 1968); Note, "Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions," 77 Yale L.J. 767, 779 (1968); Note, "The Lagging Right to a Speedy Trial," 51 Va. L.Rev. 1587, 1601 (1965).

was taken on this motion, he unsuccessfully sought dismissal of the charges in the Supreme Court of Appeals of Virginia. Kane has exhausted his state remedies, and accordingly he may seek relief in a federal court. 28 U.S.C. § 2254. The district court, however, dismissed Kane's petition without reaching the merits of his claim. Therefore, his case will be remanded for further proceedings consistent with this opinion.

Sutherland failed to exhaust his state remedies, as required by 28 U.S.C. § 2254. Because of this omission, we ordinarily would deny relief. However, the Assistant Attorney General of Maryland told us in oral argument that while the state had not formally withdrawn the detainer, it does not intend to prosecute Sutherland on the charges for which it was filed. For this reason, the state does not raise any question of venue or insist upon further proceedings in its courts. The decision not to prosecute, we understand, complies with the legislative mandate, expressed in the Interstate Agreement on Detainers, for the orderly and expeditious disposition of charges on which detainers have been filed. The Agreement provides, with exceptions not pertinent here, that prosecution shall be barred if a prisoner is not tried on charges evidenced by a detainer within 180 days after the prisoner has demanded a trial. Md. Ann. Code art. 27, §§ 616D(d), 616F(c) (1967). The Agreement also obliges the state which has jailed the prisoner to release him temporarily for trial in the state that has filed the detainer. Md. Ann. Code art. 27 § 616F (a) (1967). * * *[10]

Nevertheless, the detainer remains on file against Sutherland at his federal prison. Therefore, the judgment of the district court dismissing Sutherland's petition is vacated, and this case is remanded for entry of an order directing the Warden of Lorton Reformatory to give no effect to the detainer. Word v. North Carolina, 406 F.2d 352, 357 n. 6 (4th Cir. 1969).

[10] In similar vein, the Attorney General of South Carolina has applied the policy of the Interstate Agreement on Detainers to all states regardless of whether they have adopted the Agreement. If a state which has filed a detainer against a South Carolina prisoner does not attempt to obtain the prisoner for trial within 180 days after his request, the jailer must strike the detainer from the prisoner's records and return it to the sender. Mem. Att'y Gen., March 6, 1968.

We affirm the dismissal of Perry's petition. Although he sought relief in state trial courts, he failed to exhaust his state remedies either in Florida or in Maryland by seeking appellate review.

No. 13018 (Kane) and No. 13240 (Sutherland) are vacated and remanded for proceedings consistent with this opinion.

No. 13427 (Perry) is affirmed.

CASE: United States ex rel. Meadows v. New York, 426 F. 2d 1176 (2d Cir. 1970).

IRVING R. KAUFMAN, Circuit Judge:

Meadows appeals from the denial of his application for a writ of habeas corpus by the District Court. He claims that the failure of the state prosecutor to disclose to him the evidence possessed and the role played by two grand jury witnesses deprived him of his constitutional right to confront the witnesses against him. Therefore, he contends his convictions on the charges contained in the grand jury indictment are invalid.

I. Facts

On September 11, 1958, Meadows was convicted for petit larceny, assault, and three counts of robbery in the County Court of Suffolk County, New York. These are the convictions he seeks to overturn on this appeal. He received a 10-20 year sentence on one count of robbery and suspended sentences on the other counts. His challenges to the sufficiency of the evidence and the instructions of the court were rejected on his direct appeal, see People v. Meadows, 12 A. D. 2d 943, 214 N. Y. S. 2d 264 (2d Dept. 1961), and leave to appeal to the New York Court of Appeals denied, see People v. Meadows, 13 A. D. 2d 664, 215 N. Y. S. 2d 473. (2d Dept. 1961). In 1965, having served eight years of his sentence, Meadows was paroled. But slightly more than one year later, after learning that Meadows had absconded and was wanted by federal authorities in connection with two bank robberies, the New York State Board of Parole issued a warrant declaring him delinquent and a certified copy of the warrant (known as a parole detainer) was lodged with the federal authorities. This detainer remains outstanding.

In June 1967 Meadows entered a plea of guilty to two charges of bank robbery in the District Court for the Eastern District of New York. For these crimes he received two concurrent 14-year sentences. He is now serving these sentences in the federal penitentiary in Atlanta, Georgia and does not contest the validity of his federal convictions.

In September 1966, before pleading guilty to the federal charges, Meadows moved for a writ of error coram nobis in the County Court of Suffolk County, presenting the same claim which is now before us, that he had been denied the right to confront two witnesses who had appeared before the grand jury which indicted him in 1958. The denial of this application, on the ground that Meadows' failure to request production of the witnesses at trial had resulted in a waiver of his confrontation claim, was affirmed by the Appellate Division in 1968. Later that year both the Appellate Division and the New York Court of Appeals denied Meadows leave to appeal in the Court of Appeals.

On October 22, 1968, a month after the New York Court of Appeals had denied him leave to appeal, Meadows presented his sixth amendment claims in a petition for a writ of habeas corpus brought in the District Court for the Northern District of Georgia, the district in which he is presently incarcerated. The petition was transferred to the Eastern District of New York, the district within which Meadows' state court trial took place. There, Judge Bruchhausen denied the petition on the grounds that Meadows was not "in custody" under his state court conviction and that he had failed to exhaust his state court remedies.

II. Exhaustion of State Court Remedies

We are of the view that the district court erred in deciding that Meadows' failure to present his sixth amendment claims on direct appeal in the state courts constituted either a waiver of these claims or a failure to exhaust his state court remedies. We do not believe that Meadows can be said to have made a knowing waiver of his constitutional claims by not raising them on direct appeal. First, he alleges that he did not learn of the information which forms the basis of these claims until 1965, four years after the New York Court of Appeals had denied him leave to appeal. Second, the sixth amendment right to confrontation, upon which he bases his claim, was not

made applicable to the states until 1965. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). In 1966, the year after he obtained the factual and legal bases for his constitutional arguments, Meadows exhausted all available state court remedies by presenting his constitutional claims in a motion for a writ of error coram nobis and appealing the denial of this motion to the highest court of the state of New York.[1]

III. Custody

A second threshold question raised on this appeal is whether Meadows may be said to be "in custody" under the New York state conviction which he asks us to declare invalid. It is well established that although Meadows is not presently serving a sentence imposed as a result of that conviction he is not foreclosed from challenging it in habeas corpus proceedings. The writ may be employed to contest the validity of future as well as present restraints. "[A] prisoner serving consecutive sentences is 'in custody' under any one of them for purposes of 2241(c)(3)." Peyton v. Rowe, 391 U.S. 54, 67, 88 S.Ct. 1549, 1556 (1968). Although it is true that the two consecutive sentences of the petitioner in Peyton had been imposed by the same jurisdiction and Meadows seeks to challenge a state conviction while serving a federal sentence, we cannot agree with the district judge that this is a distinction which forecloses us from applying to this case the clearly stated rule and rationale announced in Peyton. Meadows' interest in securing prompt adjudication of his constitutional claims is just as compelling as was Rowe's. Whether consecutive sentences have been imposed by the same or different jurisdictions does not affect the wisdom of a rule which requires conducting "meaningful factual [inquiries]*** before memories grow stale." Peyton v. Rowe, 391 U.S. 54, 65, 88 S.Ct. 1549, 1555 (1968).

Neither do we perceive a sound reason for refusing to apply the Peyton rule because the restraint sought to be imposed on

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[1] The state courts need not have decided the merits of the claims raised by the applicant in the state courts in order for him to be considered to have exhausted his state court remedies. See Peyton v. Rowe, 391 U.S. 54, 56 & n.2. 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968).

Meadows by the state of New York is not pursuant to a sentence to be served in the future but the result of a parole detainer already lodged but to take effect in the future. It is agreed that because of the parole detainer, Meadows will not be placed at liberty when his federal prison term is completed; instead, he will be delivered into the custody of the appropriate New York state authorities for them to make such disposition of the detainer as they deem proper. The detainer, after all, represents a present claim by New York of jurisdiction over Meadows' person and of the right to subject him to its orders and supervision in the future. As such, it constitutes sufficient "custody" to render the remedy of habeas corpus available to Meadows. E.g., Word v. North Carolina, 406 F.2d 352 (4th Cir. 1969); George v. Nelson, 410 F.2d 1179 (9th Cir.), cert. granted, 396 U.S. 955, 90 S.Ct. 433, 24 L.Ed.2d 419 (1969); United States ex rel. Van Scoten v. Pennsylvania, 404 F.2d 767 (3d Cir. 1968).

IV. Jurisdiction

Once it is established that Meadows may now attack his New York state conviction by an application for a writ of habeas corpus in the federal courts a more troublesome issue requires resolution—which district court or courts have jurisdiction to consider his petition. Meadows is presently incarcerated, pursuant to a federal sentence, in a federal penitentiary located in the Northern District of Georgia; he seeks to challenge a New York conviction and sentence imposed within the Eastern District of New York. Since our jurisdiction over this appeal rests upon the jurisdiction of the court below, the precise question before us is whether, despite Meadows' present confinement in the state of Georgia, a district court in the Eastern District of New York, the sentencing district, may properly take jurisdiction over his collateral attack on a New York conviction. The courts have been unable to reach agreement over the proper resolution of this jurisdictional nicety. Compare Word v. North Carolina, 406 F.2d 352 (4th Cir. 1969) (en banc) (sentencing district has jurisdiction), with United States ex rel. Van Scoten v. Pennsylvania, 404 F.2d 767 (3d Cir. 1968) (sentencing district does not have jurisdiction), and George v. Nelson, 410 F.2d 1179 (9th Cir.) (district of incarceration has

jurisdiction), cert. granted, 396 U.S. 955, 90 S.Ct. 433, 24 L.Ed.2d 419 (1969).[2]

The jurisdictional statute, 28 U.S.C. § 2241(a), provides that "[w]rits of habeas corpus may be granted by the * * * district courts * * * within their respective jurisdictions." In Ahrens v. Clark, 335 U.S. 188, 68 S.Ct. 1443, 92 L.Ed. 1898 (1948), a case involving the predecessor of this statute, the Supreme Court considered the question "whether the words 'within their respective jurisdictions' limit the district courts to inquiries into the causes of restraints of liberty of those confined or restrained within the territorial jurisdictions of those courts." 335 U.S. at 190, 68 S.Ct. at 1444. The petitioners in Ahrens were 120 Germans, deemed to have been threats to the national security during World War II and confined at Ellis Island, New York prior to deportation. By their petition for habeas corpus, which they filed in the district court for the District of Columbia, they sought immediate release from present physical confinement. The Court affirmed a dismissal for want of jurisdiction, observing "that the jurisdiction of the District Court to issue the writ in cases such as this is restricted to those petitioners who are confined or detained within the territorial jurisdiction of the court * * *." 335 U.S. at 192, 68 S.Ct. at 1445 (emphasis added). This result was well adapted to the relief sought. If the petitioners' claims were determined to be meritorious, a court in the state of incarceration was best situated to order their release from custody.

The Court justified its decision in Ahrens by reference to both statutory purpose and considerations of policy. As evidence of the purpose for which the phrase "within their respective jurisdictions" was inserted into the statute, Justice Douglas, writing for the majority, invoked the concern voiced on the floor of Congress that without the phrase the bill would permit "a district judge in Florida to bring before him some men convicted and sentenced and held under imprisonment in the State of Vermont or in any of the further

[2]George v. Nelson did not actually hold that the sentencing district could not assume jurisdiction over a habeas corpus application seeking the withdrawal of a parole detainer. In a footnote, see 410 F.2d at 1181, n.5, the court cited prior cases suggesting that such a rule obtained in the Ninth Circuit, but all of these cases, including Ashley v. Washington, 394 F.2d 125 (1968), relied upon by our brother Waterman, were decided before the Supreme Courts' decision in Peyton v. Rowe.

States." 335 U.S. at 192, 68 S.Ct. at 1445. A federal judge sitting in the state of Florida, the Congress evidently believed, should not ordinarily tamper with a Vermont judgment of conviction. The policy factors cited by Justice Douglas in support of the decision to restrict the habeas corpus jurisdiction of the district courts to petitioners actually physically confined within the territorial jurisdiction of the court were the "opportunities for escape afforded by travel, the cost of transportation," and the administrative burden of producing prisoners who must be transported thousands of miles to appear in court.

The Ahrens opinion speaks in general terms; its holding is not explicitly limited to habeas corpus applicants seeking release from present, physical custody, but appears to apply to all petitioners. One reason for the absence of specific limitation is clear. At the time Ahrens was decided, a petitioner could employ the writ only if a decision in his favor would result in his immediate release. McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1934). Therefore, despite the general language of the opinion, the precise holding of Ahrens applies only to the jurisdiction of the district courts in habeas corpus proceedings commenced by petitioners seeking immediate release from confinement.

Since the Supreme Court overruled McNally in Peyton v. Rowe, supra, an entirely new class of habeas corpus petitioners has appeared. These petitioners, exemplified by Meadows, do not contest the legality of their present confinement under the laws of one sovereign; rather they seek to challenge a restraint to be imposed at a later date by another jurisdiction. Their quarrel is not with their present custodian but with the officials of the jurisdiction which threatens their liberty in the future.

In determining whether the Ahrens rule should be extended to encompass this new class of petitioners, we must, of course, give due consideration to the factors which originally led the Court to promulgate the doctrine of strictly limited territorial jurisdiction. The first factor is the purpose of the statute as expressed in congressional debate. Meadows has been convicted and sentenced in the State of New York and is seeking to challenge that judgment of conviction under which, we learn from Peyton v. Rowe, he is presently "in custody." Should we hold that a district judge in the Eastern District of New York, the very district in which Meadows was sentenced, cannot entertain his petition, the fears

expressed on the floor of Congress would be realized, for then, a district judge sitting in the state of Florida would have the duty to adjudicate an application for habeas corpus presented by a petitioner who was convicted, sentenced and in custody pursuant to the laws of Vermont.

The second factor which counseled the Court to formulate the Ahrens rule of territorial jurisdiction was a broad consideration of policy—specifically, the risk and expense of transporting prisoners long distances to appear before a court. Only three years after Ahrens, however, the Supreme Court had occasion to reconsider the relative merits of the sentencing district and the district of incarceration as a form of habeas corpus proceedings. United States v. Hayman, 342 U.S. 205, 72 S.Ct. 263, 96 L.Ed. 232 (1951). Upon reconsideration, the difficulties involved in transporting prisoners did not loom as large as the Ahrens opinion had suggested. Habeas corpus proceedings, the Court recognized, do not always require the physical presence of the petitioner. And even when the petitioner is required to be produced for a hearing, coutervailing considerations nevertheless militate in favor of the sentencing state. The applicable court records and the witnesses whose presence is likely to be required at a hearing are to be found in the sentencing state. To require a prisoner seeking to challenge a restraint to be imposed in the future by a sovereign other than his present custodian to proceed without witnesses would eviscerate Peyton v. Rowe. Moreover, granting jurisdiction only to the state of confinement would prejudice not only the petitioner but also the respondent, for the officials of the sentencing state rather than the state of incarceration are chiefly interested in the validity of the challenged conviction and, consequently, in opposing or, if the public interest so dictates, advocating the grant of the writ. In fact, it would appear that every individual or body which has weighed the competing merits of the two potential forums—the Congress,[3] the Supreme

[3] The enactment of the present version of 28 U.S.C. § 2255 embodies a congressional determination that the appropriate forum for collateral attack upon a federal conviction is the sentencing district rather than the district of confinement. The same determination is inherent in the passage of 28 U.S.C. § 2241(d), a section which provides for the intrastate transfer between the sentencing district and the district of confinement of collateral attacks on state court convictions.

To some extent, these enactments were motivated by a desire to equalize the burden of adjudicating collateral attacks upon convictions among the various district courts as well as a determination as to the relative merits of the two jurisdictions. A district court should not be required to shoulder the entire load merely because fortuitous circumstances have placed a federal penitentiary or state prison within its borders. There is a similar interest present in this case. The judicial districts with federal penitentiaries within their boundaries should not be required to consider and decide all collateral attacks on out-of-state parole detainers.

Court,[4] the lower federal courts,[5] the Judicial Conference of the United States,[6] the commentators,[7] and even, if appears, our able dissenting brother Waterman—has struck the balance in favor of the sentencing district.

Our brother Waterman contends that we should not take account of these matters of policy in deciding this appeal. With this, we cannot agree. We are being asked to extend Ahrens to a class of habeas corpus petitioners who did not exist at the time the Supreme Court decided Ahrens, petitioners who demand not an immediate release from physical confinement but the withdrawal of a potential restraint on future liberty. In determining the advisability of such an extension, it is our duty to consider the applicability to the case before us of the considerations which led to the decision in Ahrens. The Supreme Court itself has not been at all reluctant to depart from the apparently uncompromising dictates of Ahrens whenever, as a result of differing circumstances, strict adherence would have thwarted the effectiveness of the writ. For example, one who is confined abroad, and thus is not physically present within the territorial jurisdiction of any of the district courts, may nevertheless bring and maintain an application for habeas corpus. Hirota v. MacArthur, 338 U.S. 197, 69 S.Ct. 197, 93 L.Ed. 1902 (1948). Similarly, the jurisdiction of a district court is not defeated when a petitioner who has commenced a proceeding while present in the district is involuntarily removed during its pendency. Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed. 2d 285 (1963).

Finally, the most convincing rationale for the Ahrens decision—the goal of ensuring that an application for a writ of habeas corpus

[4] See United States v. Hayman, 342 U.S. 205, 72 S.Ct. 263, 96 L.Ed. 232 (1951).

[5] Word v. North Carolina, 406 F.2d 352 (4th Cir. 1969).

[6] It was upon the recommendation of the Judicial Conference of the United States that the Congress enacted 28 U.S.C. § 2255, permitting collateral attacks upon federal convictions to be maintained in the sentencing district. See United States v. Hayman, 342 U.S. 205, 72 S.Ct. 263, 96 L.Ed. 232 (1951); Word v. North Carolina, 406 F.2d 352 (4th Cir. 1969).

[7] E.g., Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1160-1165 (1970); Fairman, Some New Problems of the Constitution Following the Flag, 1 Stan. L. Rev. 587, 633-640 (1949).

will be considered by the district court best situated to grant the relief sought—provides no stronger support for extension of the Ahrens rule to the facts before us than do the factors articulated by the Court in the Ahrens opinion. The crucial distinction, we emphasize, is that the petitioners in Ahrens, and all petitioners entitled to claim the protection of the Great Writ at the time of the Ahrens decision, requested immediate release from present, physical confinmeent. The district court for the district in which they were actually incarcerated was uniquely qualified to compel compliance with an order for their release. Meadows' situation is otherwise. He does not question the legality of his present detention in the state of Georgia; instead, his aim is to secure the withdrawal of a parole detainer lodged against him by the state of New York. The court best situated to grant this relief is a district court located in the State of New York.[8] In our view, consequently, neither considerations of policy, legislative purpose, nor the underlying rationale of Ahrens suggests the advisability of its extension to this case. We therefore conclude

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[8]Our holding that the sentencing district may properly assume jurisdiction over an application such as that filed by Meadows should not be taken to suggest that the district of confinement does not possess concurrent jurisdiction. In some circumstances, where the petitioner challenges a detainer not because it constitutes a threat to his future liberty but because of its present prejudicial effects within the district of confinement, for example, decreased eligibility for parole or an increased sentence imposed under a multiple offender statute, the district of confinement may actually be a preferable forum. See Word v. North Carolina, 406 F.2d 352, 357 n. 6 (4th Cir. 1969). In that situation, the district district of confinement may be the court best situated to endure compliance with the grant of the desired relief. We see no merit, therefore, in any claim that the district court in the Northern District of Georgia (Judge Edenfield), had no jurisdiction to determine the gravamen of Meadows' claim and, in the exercise of his statutory discretion, to transfer the application to the sentencing district.

that the court below properly assumed jurisdiction over the subject matter of Meadows' application.[9]

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[9]Judge Edenfield based his transfer on 28 U.S.C.§2241(d), a provision which authorizes only intrastate transfers. In our view the result Judge Edenfield reached—referral of the application to the sentencing district—was proper, but his cited authority incorrect.

The appropriate foundation for the transfer was 28 U.S.C.§1404(a), which provides for the "transfer [of] any civil action to any other district or division where it might have been brought" "for the convenience of parties and witnesses, in the interest of justice." Since habeas corpus proceedings are civil in nature, they are subsumed under the phrase "any civil action." See Webb v. Beto, 362 F.2d 105 (5th Cir.), cert. denied, 385 U.S. 940, 87 S.Ct. 307, 17 L.Ed.2d 219 (1966). We have already indicated, see note 8 supra, that Meadows' application "might have been brought" in either the Northern District of Georgia or the Eastern District of New York. In light of the apparently universally held view that both parties will be able to litigate more effectively in the sentencing district and that the witnesses are also likely to be found in that district, see notes 3-7 and accompanying text supra, we are unable to conclude that the transfer was not a valid exercise of Judge Edenfield's statutory discretion or that it was not in accordance with the statutory criteria of "convenience of parties and witnesses." Judge Edenfield's consideration of the location of Meadows' prospective witnesses within the reach of an Eastern District of New York subpoena and his finding that transfer would be "in furtherance of the ends of justice" establish the propriety of applying §1404(a) to this case.

Our brother Waterman reasons that, by allowing an interstate transfer of Meadows' petition for a writ of habeas corpus under §1404(a), we are rendering the intrastate transfer provisions of §2241(d) superfluous. We are unable to accept this contention. Our decision applies only to petitioners seeking to challenge a threatened future restraint on their liberty. Those petitioners who contest the validity of present physical confinement under a state court judgment of conviction must still resort to the transfer provisions of §2241(d) in order to have their applications transferred from the district of incarceration.

Insofar as our brother Waterman is suggesting that provision for intrastate transfers in §2241(d) indicates an intention that there should be no interstate transfers, we emphasize that this section was enacted two years before the Supreme Court's decision in Peyton v. Rowe. As we have already noted, prior to that decision, a prisoner could not employ the writ to challenge threatened future restraints under convictions entered in the courts of a far distant state. Rather, at that time a prisoner could attack only those state court convictions under which he was presently physically confined. Because each state maintains its own penal system for the incarceration of its own prisoners, the state in which a state court prisoner is presently physically confined is also the sentencing state. Since, at the time §2241(d) was enacted, the state of incarceration and the sentencing state were thus invariably one and the same, Congress could have perceived no reason to provide for interstate transfers in this section. Where Congress could perceive such a need, with respect to federal prisoners who were often transported to prisons located in states other than that of the sentencing court, it did make such a provision. See 28 U.S.C. §2255.

V. Right to Confrontation

From our conclusions that the district court properly assumed jurisdiction over Meadows' application, but erroneously dismissed for lack of custody and failure to exhaust state court remedies, it follows that Judge Bruchhausen should have reached the merits of the claims presented. However, we are of the view that if the district court had considered the merits, it could properly have denied the application. * * *

* * *

Affirmed

WATERMAN, Circuit Judge (dissenting):

I cannot agree with my brothers that the court below properly assumed jurisdiction in this case. Meadows, a federal prisoner incarcerated in the penitentiary in Atlanta, Georgia, brought his petition for habeas corpus to the federal district court for the Northern District of Georgia. His petition challenges not the federal conviction which resulted in the imposition of the sentence he is now serving, but rather a prior New York conviction which, because his federal crimes broke the conditions of his parole subsequent to that conviction, has resulted in the lodgment of a parole detainer against him in Georgia. Unless Meadows' habeas petition prevails, he will be returned to New York at the end of his present sentence to face the prospect of further imprisonment there.

Judge Edenfield in Georgia, to whom Meadows' petition was presented, transferred the case to the Eastern District of New York, the federal court having territorial jurisdiction over the place where Meadows was convicted and sentenced for his state crime. Judge Edenfield effected this transfer on his own motion

pursuant to 28 U. S. C. § 2241(d).[1] My brothers and I agree that this statute permits a transfer from the district of imprisonment to the district having jurisdiction over the place of conviction only if these two districts are located within the same state.[2] My brothers, however, feel that the Georgia court's transfer can be saved under either 28 U. S. C. § 1404(a)[3] or 28 U. S. C. § 1406(a).[4] Both of the sections

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[1] The statute, approved Sept. 19, 1966, reads as follows:

§ 2241. Power to grant writ. * * * * *

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

[2] The statute applies only to persons convicted by a state court in a "State which contains two or more Federal judicial districts ***." Were we to interpret the statute otherwise than we all do, the Georgia federal court here could transfer the petition of a prisoner challenging a New York detainer, since that state has two or more federal judicial districts, but not the petition of a prisoner challenging a Connecticut or Vermont detainer, since these states have but one federal judicial district. The statute's legislative history also makes it clear that Section 2241(d) was designed to facilitate transfers between districts of imprisonment and districts having jurisdiction over the place of conviction only when both districts are within the same state. See S. Rep. 1502, 89th Cong., 2d Sess., U.S. Code Cong. & Admin. News 89th Cong. 2d Sess., pp. 2968-2978 (1966).

[3] Section 1404 provides as follows:

§ 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

[4] Section 1406 provides:

§ 1406. Cure or waiver of defects

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

by their express terms require that the petition be transferred to a given judicial district only if the prisoner could have brought the petition in that district as an original matter. See Hoffman v. Blaski, 363 U.S. 335, 80 S.Ct. 1084, 4 L.Ed.2d 1254 (1960). I have no hesitancy in holding, contrary to the belief of my brothers, that Meadows, confined in Georgia, cannot bring a habeas corpus petition in a New York federal district court. Therefore, I do not believe that his petition can be transferred there under either §1404(a) or §1406(a). I believe that Ahrens v. Clark, 335 U.S. 188, 68 S.Ct. 1443, 92 L.Ed. 1898 (1948) continues to require that a petition for a writ of habeas corpus can be brought only in the district where the prisoner is physically incarcerated.

I share the view of the majority that it would seem that judicial and prosecutorial convenience, and frequently the convenience of the prisoner, would be served by permitting the prisoner to file his habeas corpus petition in a federal district court in the state which has imposed the sentence and detainer challenged in the petition instead of limiting him to filing it in a court in the state of his incarceration. However, I believe that stare decisis prevents us from reaching the result my brothers reach.

As the majority opinion points out, Ahrens v. Clark involved German nationals, held at Ellis Island in New York, who petitioned for habeas corpus in the District Court for the District of Columbia, where their custodian, the United States Attorney General, was to be found. The Court held that they could not do so, for two reasons. First, the Court, speaking through Justice Douglas, stated that the creators of federal habeas corpus contemplated that the petitioner should be brought physically before the judge who granted the writ, and that policy considerations militated against transporting prisoners long distances to a hearing: such a procedure would be costly and administratively burdensome and would present opportunities for escape. Second, the opinion cites the justification given in legislative debate for limiting the power of courts to the granting of writs of habeas only "within their respective jurisdiction." This justification was that otherwise a court in Florida, for example, could compel production of a prisoner from as far away as Vermont or from more distant states. To prevent this result, the Court concluded that a federal district court could grant a writ only to persons physically within its district.

The majority in the instant case conclude that the wrong policies were served by the Ahrens opinion and seek to distinguish that case from the one here in several ways, none of which I find convincing. The opinion points out that whereas the petitioners in Ahrens were challenging a present sentence, the present petitioner is challenging a future sentence. The opinion then suggests several factors which might make this difference into a viable distinction.

First, the majority suggest that were the jurisdiction of the court below in this case denied and if petitioner were therefore relegated to the district court in Georgia, the result would be analogous to the fear cited in Ahrens that a Florida court might hear the petition of a man convicted, sentenced, and imprisoned in Vermont. This suggestion mistakes the import of the Florida-Vermont reference in Ahrens. The controlling fear there was that a man imprisoned in one state (Vermont) would have to be transported to another state (Florida) for trial. To avoid this possibility, Ahrens permitted a prisoner convicted and sentenced by a federal court in one state to file for habeas corpus in the federal district court within the state of his imprisonment. This result was entirely commonplace under Ahrens, as federal prisoners brought their petitions solely in the district where their prisons were located. See United States v. Hayman, 342 U.S. 205, 213-214, 72 S.Ct. 263, 96 L.Ed. 232 (1952).

The majority opinion suggests a second reason for treating the instant petitioner differently from those in Ahrens v. Clark, namely, that the Court itself has found the Ahrens policies untenable and has compromised them. However, it is not within the province of a court of appeals to overrule a Supreme Court precedent because it believes the policies served by the precedent to be undesirable or even because it suspects that the original case would be overruled by the Court were the Court to reexamine it. Ahrens v. Clark has not been overruled. United States v. Hayman, supra at 220, 72 S.Ct. 263, expressly pointed out that Ahrens was not overruled by 28 U.S.C. § 2255, nor did Hayman itself overrule Ahrens. Nor do the other cases cited by the majority undermine Ahrens or raise any doubt that Ahrens continues to be the law. Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963), merely reiterates the rule originally set forth in Ex parte Mitsuye Endo, 323 U.S. 283, 65 S.Ct. 208, 89 L.Ed. 243 (1944), cited and rationalized by Justice Douglas in the Ahrens majority opinion. Hirota v. MacArthur, 338 U.S. 197, 69 S.Ct. 197, 93 L.Ed. 1902 (1948) which holds that a person not confined within the physical jurisdiction of any federal district court

may nonetheless bring a habeas petition, does not purport to overrule Ahrens.

Finally, the majority argues that the most convincing rationale for Ahrens is that the court best situated to grant the relief a habeas petitioner seeks should hear the petitioners' case. With deference, Ahrens does not purport to serve that goal, or if it does, it does so by holding that the identity of such a court is to be determined by the place where the petitioner is incarcerated. This final argument of the majority, once again, does not draw a meaningful distinction between the petitioner here and the petitioners in Ahrens, but is an attempt to reweigh the same considerations already weighed in that case and to reach a different result.

In sum, the distinction between the Ahrens case, and our case where petitioner challenges a state sentence to be served in the future, is a distinction without a difference. It may be true that, as the majority assert, petitioner here is "in custody" of the New York authorities pursuant to Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L. Ed. 2d 426 (1968),[5] but in Ahrens the prisoners were also found to be "in custody" of the United States Attorney General in Washington—a fact which did not prevent the denial of habeas corpus jurisdiction to the District of Columbia courts. The fact that state law and not federal law underlies the sentence Meadows seeks to set aside makes little difference. The questions of law presented to the federal courts in a federal habeas corpus proceeding are still federal questions. The policy considerations are essentially unchanged: on one hand, it is desirable not to have to transport prisoners to hearings; on the other hand it is desirable to conduct the trial where witnesses, records, and the original prosecutorial officers are to be found. Ahrens v. Clark resolved these issues conclusively; it is not the business of this court to overrule the Supreme Court.

In addition to stare decisis, one further argument militates against the result reached by the majority. 28 U.S.C. § 2241(d) (Supp. IV 1969)[6]

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[5] As has been pointed out by the majority, Peyton v. Rowe did not deal with an interstate detainer. That case only decided that a Virginia prisoner serving in Virginia the first of consecutive sentences imposed by Virginia courts was in Virginia's custody not only for a sentence being served but also for those yet to be served.

[6] See footnote 1, supra.

provides that a state prisoner confined in a state which contains more than one federal judicial district may bring his petition for a writ of habeas corpus to the district having territorial jurisdiction over the place of his confinement, or, alternatively, in the district having jurisdiction over the courtroom in which he was convicted. If we were to agree with the majority's holding, that the right of transfer exists between states, we would render meaningless that portion of Section 2241(d) which permits a choice between the district of confinement and the district of conviction only when both districts are within the same state. See footnote 2 supra. We should not interpret the law to render part of an unambiguous statute meaningless, even when the alternative is to further policies which may be undesirable policies to perpetuate.

The majority of the Courts of Appeals which have considered the question before us have resolved it as I would resolve it. In United States ex rel. Van Scoten v. Pennsylvania, 404 F. 2d 767 (3 Cir. 1968), appellant, who was "serving a prison sentence in the New Jersey State Prison at Trenton, New Jersey, imposed by a New Jersey state court, filed a petition for a writ of habeas corpus in the Eastern District of Pennsylvania, challenging the validity of a sentence imposed upon him by a Pennsylvania state court, the service of which [was] to commence upon completion of his New Jersey imprisonment." Id. at 767. The Third Circuit held that the District Court in Pennsylvania

> "* * * was without territorial jurisdiction to entertain Van Scoten's petition and should have dismissed it for that reason since at the time it was filed Van Scoten was incarcerated in a New Jersey jail which is outside the territorial jurisdiction of the Eastern District of Pennsylvania. As subsequently developed, it is settled law that a federal district court is without jurisdiction to issue a habeas corpus writ if the person detained is not within its territorial jurisdiction when his petition for the writ is filed." Id. at 768.

The Ninth Circuit in George v. Nelson, 410 F. 2d 1179 (9 Cir.), cert. granted, 396 U.S. 955, 90 S.Ct. 433, 24 L. Ed. 2d 419 (1969) held that a California prisoner serving a California-imposed sentence properly challenged the validity of a North Carolina conviction by bringing his application for the issuance of the habeas writ to the

federal district court in California having territorial jurisdiction over the San Quentin prison in which the prisoner was confined. And in Ashley v. Washington, 394 F. 2d 125 (9 Cir. 1968) that court arrived at the result the Third Circuit reached in Van Scoten and held that a Florida prisoner in Florida custody after a Florida conviction, faced with a detainer filed by the State of Washington, could not challenge the Washington conviction upon which the detainer was based, by applying for the issuance of a habeas corpus writ to a federal district court in Washington.

On the other hand, in Word v. North Carolina, 406 F. 2d 352 (1969) the Fourth Circuit, in banc, considered the applications of three Virginia prisoners against whom North Carolina detainers had been filed and who claimed constitutional infirmities in their North Carolina convictions. Two of the appellant prisoners filed applications in the District Court for the Eastern District of Virginia, the court having territorial jurisdiction over them, and one prisoner filed in the Eastern District of North Carolina, the court having jurisdiction over the attorney general of North Carolina who had filed the detainer. All three applications were dismissed by the district courts for lack of jurisdiction. Chief Judge Haynsworth, writing for the Fourth Circuit majority, held that the dismissal of the applications filed in Virginia, the state having physical custody of the petitioners, should be affirmed and the application filed in the demanding state, North Carolina, was properly filed there though the petitioner was physically present in Virginia.

In the face of this conflict within the circuits I should point out that the problems posed by these cases existed within the federal system until Congress passed the Act in 1948 which has now become 28 U. S. C. § 2255. See United States v. Hayman, 342 U. S. 205, 72 S. Ct. 263, 96 L. Ed. 232 (1952).

Pursuant to that section a federal prisoner at the Atlanta penitentiary may bring his petition attacking the federal sentence he is serving or a federal sentence consecutively to be served to the sentencing court, wherever that court may happen to be. By passing this remedial legislation Congress indicated that post-conviction review of sentences is best conducted in the sentencing court instead of in the court having jurisdiction over the place of the prisoner's confinement.

A similar amendment would clear up the problems posed here. As I have stated above, I would hold that the Northern District of Georgia had jurisdiction over the Meadows application. I would also hold that only by judicial legislation in an area where Congress has effectively legislated in the past can we support a decision that the Georgia judge properly transferred this case to the Eastern District of New York, so that jurisdiction in the New York court was created. I agree with the Third and Ninth Circuits, and with the approach of the Fourth Circuit's dissenting judge.

Of course it seems to be a hardship upon Meadows and the State of New York to require that the issues raised by the habeas corpus petition be adjudicated outside of the boundaries of New York, but we of the Second Circuit have regularly adjudicated the validity of out-of-state convictions. See, for example, U. S. ex rel. Turpin v. Snyder, 183 F. 2d 742 (2 Cir. 1950) (A. N. Hand); U. S. ex rel. Durocher v. LaVallee, 330 F. 2d 303 (2 Cir. 1964) (Kaufman, in banc).

Accordingly, I would hold that this petition filed by Meadows in the federal district court having jurisdiction of the place of his confinement is not only not transferable under 28 U. S. C. § 2241(d) to any federal district court in the State of New York but also is not transferable under 28 U. S. C. § 1404(a) or § 1406(a) to the federal district court in New York having territorial jurisdiction over the place where he was tried and sentenced.

CASE: George v. Nelson, 410 F. 2d 1179 (9th Cir. 1969)

HAMLEY, Circuit Judge:

John Edward George, in custody at California State Prison, San Quentin, appeals from a district court order denying his application for a writ of habeas corpus.

On April 27, 1964, George was convicted in a California state court, on a plea of guilty, of robbery in the first degree and began serving his sentence of five years to life at San Quentin. On July 20, 1966, George was released to North Carolina authorities to stand trial in that state upon a North Carolina robbery charge. This was done pursuant to California Penal Code, section 1389 (1963), and

North Carolina G. S. §148-89, known as the interstate "Agreement on Detainers."

George was tried in Gaston County, North Carolina, on February 8, 1967, and was convicted on the North Carolina charge. He was sentenced to imprisonment for from twelve to fifteen years. The conviction was thereafter affirmed. State v. George; 271 N.C. 438, 156 S. E. 2d 845.

However, George did not begin service of the North Carolina sentence. He was returned to San Quentin to complete service of his California sentence after which he is to serve his North Carolina sentence. On April 14, 1967, North Carolina authorities wrote to San Quentin, placing a detainer on George so that he would in due course be returned to North Carolina for this purpose.

In his habeas corpus application thereafter filed in the United States District Court for the Northern District of California, George did not attack his California conviction, but rather challenged the North Carolina conviction. He alleged, in effect, that: (1) in the North Carolina prosecution he was not tried within the period permissible under the California and North Carolina detainer statutes, and the North Carolina court was therefore without jurisdiction, this constituting a denial of due process; (2) he was denied his constitutional right to a speedy trial in North Carolina; and (3) he was convicted on testimony known by North Carolina prosecuting officials to be perjured.[1] George asserted in his application that he wanted the validity of the North Carolina conviction determined now because it, together with the North Carolina detainer, adversely affects favorable consideration of parole and reduced custodial classification by California authorities.

On March 1 and 20, 1968, the district court denied the application for a writ on the ground that McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L. Ed. 238, foreclosed habeas corpus relief on the North Carolina conviction while George was still in custody under the prior California judgment. George appealed to this court on April 3, 1968.

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[1] George alleged that he presented the first two of these grounds for relief in his direct appeal in North Carolina. He did not allege in his application that he presented the perjury ground in any North Carolina state court proceeding.

On May 20, 1968, the United States Supreme Court in Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L. Ed. 2d 426, overruled McNally v. Hill. The Supreme Court held that a prisoner serving consecutive sentences is "in custody" under any one of them for purposes of 28 U.S.C. § 2241(c)(3) (1964), and may in a federal habeas corpus proceeding thereunder, challenge the constitutionality of a sentence scheduled for future service.

George than moved in this court for an order remanding the cause to the district court for further proceedings in the light of Peyton v. Rowe. In a supplemental brief thereafter filed George in effect asserted, as an additional reason why the validity of the North Carolina conviction should be determined at this time, that a delay in making this determination will lessen the chance that substantial justice will be done with regard to the North Carolina conviction.[2]

The California warden opposed the motion to remand, arguing that he is not a proper party insofar as George is challenging the North Carolina conviction, and that an appropriate North Carolina party is an indispensable party.[3] The California warden further argued that the United States District Court for the Northern District of California did not have jurisdiction to entertain this habeas proceeding. We passed consideration of the motion to the hearing of the appeal on the merits.

In Peyton v. Rowe, the consecutive or successive sentences were imposed by the same sovereign. Here the first sentence was imposed against George by a California court, and the second was imposed by a North Carolina court. However, the rule established in Rowe that a federal habeas corpus applicant may attack the validity of a second sentence without awaiting completion of service

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[2] George thereby invoked the reasons stated in Peyton v. Rowe, 391 U.S. 54, 62, 64, 88 S.Ct. 1519, 20 L. Ed. 2d 426 (the dimming of memories, death of witnesses, and incarceration when entitled to release) why habeas applicants are entitled to attack all outstanding convictions without delay.

[3] While George named the "Warden, North Carolina State Prison (Name Unknown)" as a respondent in his amended application in this habeas corpus proceeding, there is nothing in the record before us to indicate that process has been served upon the North Carolina warden.

of the first sentence, applies even though the two sentences were imposed by different sovereigns. Word v. North Carolina, 4 Cir., 406 F. 2d 352, 355; United States ex rel. Van Scoten v. Commonwealth of Pennsylvania, 3 Cir., 404 F. 2d 767, 768.

This brings us to the question of whether, under the circumstances of this case, a habeas proceeding should be entertained in the district of confinement (California) or in the district of sentencing (North Carolina).

Since George is in state custody in the Northern District of California, we think that district court has jurisdiction to entertain the habeas application. Title 28 U. S. C. § 2241(a) provides that writs of habeas corpus may be granted by the district courts "within their respective jurisdictions." In Ahrens v. Clark, 335 U. S. 188, 68 S. Ct. 1443, 92 L. Ed. 1898, the Supreme Court held that this phrase means the district in which the petitioner is detained or confined when the petition is filed.[4] See also, Ashley v. Washington, 9 Cir., 394 F. 2d 125, 126.

It is also our view that, while the challenged judgment is that of North Carolina, the California warden is a proper respondent. He is the actual custodian of George by reason of the California conviction and also as agent of the North Carolina warden, as evidenced by the detainer. If the California warden does not wish to defend the North Carolina conviction he can call upon the authorities of North Carolina to provide that defense.

In holding that the California district court has jurisdiction, we have not overlooked the fact that the Fourth Circuit, in Word v. North Carolina, 4 Cir., 406 F. 2d 352, has reached a contrary result. The Word court affirmed the dismissal of two habeas applications filed in a Virginia district court by Virginia prisoners challenging North Carolina convictions. In doing so, however, the Fourth Circuit did not seem to announce a categorical rule that a district court in the district of custody could never assume jurisdiction.

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[4] As observed by the Fourth Circuit in Word v. North Carolina, 406 F. 2d 352, this rule of Ahrens has been departed from in the case of applicants resident outside of the United States, and perhaps in certain other exceptional circumstances.

Instead, it said " * * * the latter, where permissible [is] infrequently preferable."

We recognize that, under the law of the Fourth Circuit, as established in the Word decision, a federal district court in North Carolina could have entertained George's application. It was there held that a North Carolina district [sic] court should not have dismissed, on jurisdictional grounds, the habeas application of a Virginia prisoner who sought to set aside a North Carolina conviction.[5] But the problem before us is not whether a district court in North Carolina could have entertained George's application, but whether the district court in California, where the application was filed, had jurisdiction. We do not now pass upon the question of whether the California district court may, after this remand, transfer the cause to the North Carolina district court pursuant to 28 U. S. C. § 1404(a) (1964).

It cannot be denied that the entertaining of such proceedings in the state of confinement rather than the state where the challenged conviction was obtained presents practical problems. But, likewise, a rule requiring the prisoner to seek relief in the latter state presents practical problems. They are discussed at some length in the opinions filed in Word v. North Carolina. We do not see how a disposition of this appeal can avoid one set of problems or the other. Perhaps new judicially or legislatively-fashioned techniques are needed to meet these problems, now that Peyton v. Rowe has assured state prisoners an immediate right to attack convictions not yet being served. But all that is presented to us at this time are the questions of California district court jurisdiction and indispensability of parties.

Reversed and remanded for further proceedings.

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[5] The rule is to the contrary in the Ninth Circuit. In Ashley v. Washington, 9 Cir., 394 F. 2d 125, the court held that a state prisoner in custody under a Florida judgment, faced with a detainer filed by the State of Washington, could not challenge the Washington conviction upon which the detainer was based, in a habeas proceeding brought in a Washington district court. To like effect, see United States ex rel. Van Scoten v. Commonwealth of Pennsylvania, 3 Cir., 404 F. 2d 767.

'CASE:' Nelson v. George, 399 U.S. 224 (1970)

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ in this case to consider whether the respondent, presently confined in California under a state conviction, may utilize the federal courts in California to test the validity of a North Carolina sentence before beginning to serve that sentence and while under a detainer filed by North Carolina. Respondent claims the sentence yet to be served in North Carolina is "consecutive" under Peyton v. Rowe, 391 U.S. 54 (1968). However, since his petition challenges the present effect being given the North Carolina detainer by the California authorities, particularly with respect to granting him parole, we have concluded that as to that claim respondent failed to exhaust his state remedies and accordingly do not reach the question for which the writ was granted.

The record discloses that on April 27, 1964, John Edward George was convicted on a plea of guilty in a California court of first degree robbery. He began serving his sentence of five years to life at San Quentin. Following his conviction, detainers were filed in California by the States of Kansas, Nevada, and North Carolina, on June 4, 10, and 11, 1964, respectively.

Exercising his right under Article III (a) of the interstate "Agreement on Detainers," George requested temporary release to stand trial on the underlying robbery charge pending in North Carolina. Accordingly, on July 20, 1966, he was released to North Carolina authorities and transported there to stand trial. The North Carolina trial was held, and on February 8, 1967, George was convicted and sentenced to imprisonment from 12 to 15 years. The conviction was thereafter affirmed, State v. George, 271 N.C. 438, 156 S.E.2d 845 (1967).

Following the North Carolina trial George was returned to San Quentin to complete service of his California sentence. On April 14, 1967, the clerk of the Gaston County Superior Court addressed a letter to the Records Officer at San Quentin advising that George was "wanted at the termination of his imprisonment there for return to this jurisdiction to serve the sentence imposed in the Superior Court of Gaston County, North Carolina." The Warden of San Quentin acknowledged the detainer, indicating that it was "noted in our records."

George then brought a petition for habeas corpus in the United States District Court for the Northern District of California in which he sought to attack not his California conviction, for which he was then incarcerated, but the North Carolina conviction for which the detainer had been filed. The District Court denied the application by order dated March 1, 1968, on the ground that McNally v. Hill, 293 U.S. 131 (1934), foreclosed habeas corpus relief on the North Carolina conviction while George was still in custody under the prior California judgment.

George filed a petition for rehearing in the District Court in which he argued that even though actually serving time in a California jail and thus not technically serving his North Carolina sentence, habeas corpus was not foreclosed since the North Carolina detainer operated as a form of constructive custody. In support of his contention he drew upon the language in Arketa v. Wilson, 373 F.2d 582 (C.A. 9th Cir. 1967), to the effect that the strict rule of McNally v. Hill had been somewhat eroded by this Court's subsequent decisions in Ex parte Hull, 312 U.S. 546 (1941), and Jones v. Cunningham, 371 U.S. 236 (1963), and that "...it appears that there are situations in which the writ can be used to free a petitioner from a certain type of custody, rather than from all custody." Arketa v. Wilson, supra, at 584. George argued that the North Carolina warrant was "a form of custody" since it affected his custodial classification and probability of parole on his California sentence. On March 20, 1968, the District Court denied the petition for rehearing and George appealed to the Court of Appeals, Ninth Circuit.

Our decision in Peyton v. Rowe intervened. In that case we overruled McNally v. Hill, 293 U.S. 131 (1934), and held that a state prisoner serving consecutive sentences in the forum state is "in custody" under each sentence for purposes of jurisdiction for collateral attack under 28 U.S.C. § 2241(c)(3),[4] thus permitting a federal habeas

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[4] § 2241. Power to grant writ.

"(a) Writs of habeas corpus may be granted by the Supreme Court, 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.

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States..."

corpus action to test a future state sentence while serving an earlier sentence. In Peyton v. Rowe the consecutive sentences were imposed by the forum state, and the sentences were being served in that State's prison. Unlike the case now before us, in such a single state situation the challenge to the continuing vitality of Ahrens v. Clark, 335 U. S. 188 (1948), does not arise. See Word v. North Carolina, 406 F. 2d 352 (C.A. 4th Cir. 1969).

As we have noted, having named the warden of San Quentin as the respondent in his amended petition to the Federal District Court in California and had his petition refused, George sought rehearing. In that application George alleged that the California authorities had imposed upon him a "form of custody" because of the North Carolina detainer. Specifically, he alleged that the mere presence of the detainer adversely affected the probability of his securing parole and the degree of security in which he was detained by state authorities. California denies that the existence of the detainer has any consequences affecting his parole potential or custodial status.

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[5] In that case Chief Judge Haynsworth, expressing the views of the majority of the Court of Appeals for the Fourth Circuit sitting en banc, concluded that Ahrens v. Clark was a venue decision, and that the physical presence of the petitioner within the district was not an invariable requirement if rigid adherence to the rule would leave one in prison without an effective remedy. The legislative history of the 1966 amendments to §2241(d) suggests that Congress may have intended to endorse and preserve the territorial role of Ahrens to the extent that it was not altered by those amendments. See H.R. Rep. No. 1894, 89th Cong., 2d Sess., 1-2 (1966). See also S. Rep. No. 1502, 89th Cong. 2d Sess. (1966). Those changes were made by Congress, of course, prior to our decision in Peyton v. Rowe; necessarily Congress could not have had the multistate problem with which we are now confronted in mind. Whether, in light of the legislative history of §2241(d) and the changed circumstances brought about by Peyton v. Rowe, the rigor of our Ahrens holding may be reconsidered is an issue upon which we reserve judgment.

However, we note that prisoners under sentence of a federal court are confronted with no such dilemma since they may bring a challenge at any time in the sentencing court irrespective of where they may be incarcerated. 28 U.S.C. §2255. It is anomalous that the federal statutory scheme does not contemplate affording state prisoners that remedy. The obvious, logical and practical solution is an amendment to §2241 to remedy the shortcoming which has become apparent following the holding in Peyton v. Rowe. Sound judicial administration calls for such an amendment.

Since the Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment, Huntington v. Atrill, 146 U.S. 657 (1892); cf. Milwaukee County v. M.E. White Co., 296 U.S. 268, 279 (1935), California is free to consider what effect, if any, it will give to the North Carolina detainer in terms of George's present "custody."[6] Because the petition for rehearing raised precisely such a challenge to the California "custody," a matter which has not yet been presented to the California courts, we conclude that respondent George has not yet exhausted his California remedies. See Ex parte Royall, 117 U.S. 241 (1886).

Petitioner insists that the very presence of the North Carolina detainer has and will continue to have an adverse impact on California's consideration of his claim for parole. Therefore, the United States District Court in California should retain jurisdiction of the petition for habeas corpus relief pending petitioner's further application to the California courts for whatever relief, if any, may be available and appropriate if he establishes his claim that North Carolina's detainer interferes with relief which might, in the absence of the detainer, be granted by California. We affirm the judgment of the Court of Appeals to the extent it finds jurisdiction in the District Court to consider petitioner's claims with respect to the impact of the detainer if petitioner elects to press those claims after he exhausts his remedies in the California courts.

Affirmed.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, with whom MR. JUSTICE MARSHALL joins, concurring.

I join the Court's opinion with the following observations. First, I do not understand the Court to suggest that petitioner's failure to exhaust state remedies with respect to his claim that California

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[6] We are not here concerned with the scope of California's ultimate duty, imposed by Art. 4, §2, cl. 2, of the Constitution, to extradite persons wanted for trial or execution of sentence in a sister State. We note only that, until the obligation to extradite matures, the Full Faith and Credit Clause does not require California to enforce the North Carolina penal judgment in any way.

is giving a constitutionally impermissible effect to his North Carolina conviction, rendered it improper for the federal courts to consider his challenge to the validity of the North Carolina conviction to the extent that he had exhausted North Carolina remedies with respect thereto. Second, agreeing with the reasons given by the Court for not reaching the propriety of the Court of Appeals' resolution of petitioner's challenge to the North Carolina conviction, I would dismiss that part of the writ as improvidently granted. Third, pending the congressional action which the Court's opinion envisages, I think it not inappropriate to leave undisturbed such conflicts as exist between the decision of the Court of Appeals in the present case and decision in other circuits, see Word v. North Carolina, 406 F. 2d 352 (C.A. 4th Cir. 1969); United States ex rel. Van Scoten v. Pennsylvania, 404 F. 2d 767 (C.A. 3d Cir. 1968), respecting the proper treatment of habeas corpus claims such as those involved in petitioner's challenge in the California courts to the validity of his North Carolina conviction.

MR. JUSTICE DOUGLAS, dissenting.

This California prisoner is seeking to challenge in federal habeas corpus the constitutionality of his conviction in North Carolina, the sentence for which he must serve when he finishes his California term. The infirmities of the North Carolina judgment, which he alleges, relate to the absence of a speedy trial and to the knowing use of perjured testimony. North Carolina filed a detainer against him in California; and it is that detainer, not the North Carolina judgment, that the Court uses to avoid decision on the basic issue raised in the petition. The petition for habeas corpus stated, "It is the North Carolina Supreme Court decision that is under attack here." The only reference to a detainer made in the petition was to the detainer filed prior to his return to North Carolina for trial. The reference to the detainer filed after his North Carolina conviction was made in his petition for rehearing. The District Court had dismissed the petition before Peyton v. Rowe, 391 U. S. 54, was decided; and in his argument for a rehearing the prisoner sought to distinguish McNally v. Hill, 293 U. S. 131, which Peyton v. Rowe overruled, by arguing that his case was different because the North Carolina detainer was being used to his disadvantage in California. Both the petition for habeas corpus and the petition for rehearing were pro se products. Thus the false issue got into the case.

The Court holds that the challenge of the North Carolina judgment may not yet be made in California because the prisoner has not yet

shown under California law whether the existence of the North Carolina detainer can affect or is affecting his parole potential or custodial status and therefore that he has not exhausted his remedies under 28 U.S.C. § 2254.

The remedies with which 28 U.S.C. § 2254[1] are concerned, relate to those which would remove the infirmities in the North Carolina judgment, making unnecessary federal intervention. Plainly, California can supply no such remedies.

The remedies to which the Court adverts are of a wholly different character—they concern California procedures for correcting any improper use in California of North Carolina's judgment. They are wholly irrelevant to the reasons why we held in Peyton v. Rowe that a state prisoner serving one sentence may challenge in federal habeas corpus the constitutionality of a second state sentence scheduled for future service. We ruled that if prisoners had to wait until the first sentence was served before the constitutionality of the second could be challenged, grave injustices might be done:

> "By that time, dimmed memories or the death of witnesses is bound to render it difficult or impossible to secure crucial testimony on disputed issues of fact . . . . To name but a few examples [of prejudice resulting from the kind of delay McNally imposes], factual determinations are often dispositive of claims of coerced confession . . .; lack of competency to stand trial . . .; and denial of a fair trial . . . . Postponement of the adjudication of such issues for years can harm both the prisoner and the State and lessens the probability that final dispositions of the case will do substantial justice." 391 U. S., at 62.

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[1] "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." (Italics added.)

If the prisoner was seeking to escape the rigors of the detainer filed by North Carolina, the exhaustion of California remedies would of course be proper. But the gravamen of the petition for habeas corpus concerned the validity of North Carolina's judgment and that is "the question presented" within the meaning of 28 U. S. C. § 2254.

The Court of Appeals, 410 F. 2d 1179, did not decide that only California, not North Carolina, could pass on the merits of the petition, viz., on the validity or invalidity of the North Carolina judgment. It emphasized that there were practical difficulties whichever forum were chosen. Id., at 1182. Trying the issues in California would put a burden on North Carolina prosecutors and witnesses. Trying the issues in North Carolina would entail problems of expense and security insofar as the prisoner's appearance there was needed. The fact that the federal court in California has "jurisdiction," it ruled, does not mean that it could not transfer the cause to the federal court in North Carolina.

The Court of Appeals left open for the informed discretion of the District Court the question of how and where the prisoner may be heard on the constitutionality of the North Carolina judgment. I would affirm the Court of Appeals and reserve for another day the question whether the application could be transferred to North Carolina for hearing.

CASE: United States ex rel. Jennings v. Pennsylvania, 429 F. 2d 522 (3d Cir. 1970)

SEITZ, Circuit Judge.

This is an appeal from a judgment of the New Jersey district court dismissing for lack of jurisdiction appellant's pro se habeas corpus petition in which the State of Pennsylvania is named as respondent.

Appellant's petition fairly shows the following facts. Appellant is in a New Jersey prison serving a 7 to 20 year term imposed by a New Jersey state court. That sentence is not attacked. Shortly after he commenced serving this sentence in 1963, appellant learned that the district attorney of Pike County, Pennsylvania, had lodged a detainer against him. The detainer recited that there was an outstanding

warrant in Pike County, Pennsylvania, charging him with armed robbery and carrying a concealed weapon. Appellant almost immediately sought to be brought to trial on the Pennsylvania charges by invoking the procedures of the Pennsylvania Interstate Agreement on Detainers.[1]

It appears on this record that appellant made innumerable efforts over several years to have the Pike County prosecutor discharge his obligation under the statute. Indeed, appellant's efforts to obtain relief from the Pennsylvania authorities generally constitute a sorry narrative of official inaction or indifference. This is so whether the matter be considered from the perspective of appellant's constitutional right to a speedy trial or from the viewpoint of the rights afforded him under the provisions of Pennsylvania's Interstate Agreement on Detainers Act. Neither the prior district attorney of Pike County, Pennsylvania—Robert J. Kayton—nor the present one—William C. Gumble—though repeatedly advised of these proceedings has entered an appearance or filed a brief. Nor has the Pike County District Attorney come forward with any explanation of this shocking dereliction of prosecutorial duty, to say nothing of the lack of courtesy to this court.

The sentiments we have expressed are evidenced in a more restrained way in the language of the opinion of the district court. However, the district court ruled that it lacked jurisdiction to grant any habeas corpus relief because the only respondent, the State of Pennsylvania, was not "present" in the district. Since appellant did not name his prison custodian as respondent, although he was within the jurisdiction of the New Jersey district court, and since 28 U. S. C. A. § 2243 provides that the rule to show cause why a writ should not issue is to be "directed to the person having custody of the person detained," we agree that no remedy could have been granted as the matter stood.

On this record, therefore, we could affirm the action of the district court. But the facts here alleged concerning the deprivation of the right to a speedy trial, if true, cry out for something more from a concerned judiciary. This is particularly so because

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[1] Pa. Stat. Ann. tit. 19 §1431. New Jersey has the reciprocal statute. 2A N.J. Stat. Ann. §159A-1.

of our view that, despite a contrary implication in the district court opinion, had appellant's New Jersey custodian been made a respondent, the New Jersey district court would have had jurisdiction to issue an order to his custodian directing that appellant not be held subject to the detainer.[2] We say this because there then would have been compliance with the prerequisites to the exercise of habeas corpus jurisdiction, viz., the prisoner physically present in the district when the petition or the writ was filed and the custodian joined and served.[3]

In the foregoing circumstances we think the proper administration of justice in this pro se matter dictates that the judgment of the district court be vacated and the matter remanded to that court to afford the appellant a reasonable opportunity to amend his complaint by naming his prison custodian as a defendant and making service on him.[4] Thereafter, if the district court finds that the appellant has reasonably exhausted his Pennsylvania state remedies—as the present record seems to indicate—and if it finds that the detainer is premised on Pennsylvania charges which may not be constitutionally pursued for failure to afford appellant a speedy trial, then it will be in a position to grant appropriate relief with respect to the detainer. See Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L. Ed. 2d 1 (1967).

The judgment of the district court will be vacated and the matter remanded for proceedings consistent with this opinion. We commend to the district court the desirability of appointing counsel for the appellant.

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[2]See Word v. North Carolina, 406 F.2d 352, 357 n. 6 (4th Cir. 1969).

[3]Compare United States ex rel. Van Scoten v. Commonwealth of Pennsylvania, 404 F.2d 767 (3d Cir. 1968).

[4]Appellant should also be given an opportunity to amend his petition, if he desires, to attack the constitutionality of any consequences which New Jersey imposes solely because of the existence of the detainer. See Nelson v. George, 399 U.S. 224, 90 S.Ct. 1963, 26 L.Ed.2d 578 (1970). Of course, if he asserts such an additional claim, that matter must be held in abeyance pending exhaustion of his rights in the New Jersey courts. Nelson v. George, supra.

CASE: Williams v. Pennsylvania, 315 F. Supp. 1261 (W.D. Mo. 1970)

WILLIAM H. BECKER, Chief Judge.

ORDER GRANTING PETITIONER LEAVE TO PROCEED IN FORMA PAUPERIS AND DISMISSING PETITION FOR HABEAS CORPUS WITHOUT PREJUDICE

Petitioner, a federal convict confined in the United States Medical Center for Federal Prisoners at Springfield, Missouri, petitions this Court for a writ of federal habeas corpus directing the respondent to dismiss a charge which it has pending against him and vacate the warrant for his arrest and demand for the production of his person which it has filed with the United States Department of Justice. Petitioner also requests leave to proceed in forma pauperis. Leave to proceed in forma pauperis will be granted.

Petitioner states that "on or about October 5, 1968," he was charged with issuing a worthless check in a Justice of the Peace Court in Temple, Pennsylvania; that he has never "been tried on that charge, and to the best of my knowledge and belief no date has been set for trial"; that subsequently he was convicted on "another charge" in the United States District Court for the Southern District of Iowa and was sentenced on that conviction on November 28, 1969, to a term of three years' imprisonment; that the Commonwealth of Pennsylvania has issued a warrant for his arrest and further "has lodged, with the United States Department of Justice, Bureau of Prisons, a warrant or detainer demanding that I be delivered into the custody of the Commonwealth of Pennsylvania for the execution of the aforesaid warrant of arrest"; that "[s]aid detainer is adversely affecting my eligibility for release from Federal custody and is prejudicing me in other respects relevant to the conditions of my Federal confinement"; that on February 5, 1970, petitioner filed a motion to dismiss or for a speedy trial in the Justice of the Peace Court in Temple, Pennsylvania; and that such motion is still pending.

Petitioner contends that his right to a speedy trial has been denied as guaranteed by the Sixth Amendment to the United States Constitution and the rule of Smith v. Hooey, 393 U.S. 374, 89 S.Ct. 575, 21 L. Ed. 2d 607. Further, petitioner contends that federal habeas corpus is a proper remedy in this instance citing Smith v. Hooey, supra; Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20

L. Ed. 2d 426; Word v. North Carolina (C. A. 4) 406 F. 2d 352, 354; Pitts v. North Carolina (C. A. 4) 395 F. 2d 182; and Kane v. Virginia (C. A. 4) 419 F. 2d 1369. Petitioner quotes the Kane case to the following effect:

> "We believe this salutary rule [of enforcing a right to a speedy trial prior to trial on state charges] should be applied in federal habeas corpus proceedings when the proof shows (1) that the prisoner demanded a speedy trial, (2) that the state nevertheless failed to make a diligent effort to obtain him for trial, and (3) that he has exhausted his state remedies as required by 28 U.S.C. § 2254 by seeking dismissal of the charges against him because of the unconstitutional delay. If the prisoner, having satisfied these preliminary requirements, then prevails on the merits of his claimed denial of a speedy trial, the district court should discharge him from custody under the detainer and bar prosecution of the charge for which it was filed." 419 F. 2d at 1373.

In Kane, however, as the quoted passage indicates, the doctrine of need for exhaustion of state remedies was recognized. Further, assuming that federal habeas corpus is the correct remedy to enforce petitioner's right to a speedy trial ultimately, this Court is not the correct one in which to petition initially for such relief. Under the provisions of Section 2241(a), Title 28, United States Code, this Court may issue writs of habeas corpus "within [its] * * * jurisdiction * * *." This Court has no power, in the absence of exceptional circumstances not stated to be present here, to enforce any writ of habeas corpus against the Commonwealth of Pennsylvania, which is without the territorial jurisdiction of this Court. In Kane, the district court's dismissal of the petition of the petitioner Perry, who attacked in the United States District Court for the Western District of Virginia the "detainers" of the states of Maryland and Florida, was upheld on the exhaustion principle. Although relief from a Maryland detainer was granted to the petitioner Sutherland by ordering the Virginia district court to require the Warden of the Virginia penitentiary in Lorton, Virginia, to give no effect to the detainer, this was done in the presence of the following exceptional circumstances recited by the opinion of Kane:

> "Sutherland failed to exhaust his state remedies, as required by 28 U.S.C. § 2254. Because of the omission, we ordinarily would deny relief. However, the Assistant

> Attorney General of Maryland told us in oral argument that while the state had not formally withdrawn the detainer, it does not intend to prosecute Sutherland on the charges for which it was filed. For this reason, the state does not raise any question of venue or insist upon further proceedings in its courts." 419 F. 2d at 1374. (Emphasis added.)

Further, the case relied upon by the court in Kane in giving relief to the petitioner Sutherland, Word v. North Carolina, supra, has expressly held that, upon the exhaustion of state remedies, the federal petition for habeas corpus challenging the validity of a state detainer should preferably be brought in the federal district court in the demanding state. See 406 F. 2d at 355-356. Some cases prior to Peyton v. Rowe, supra, speculated in dicta that "detainers" placed against state prisoners by the federal government (or against federal prisoners by a state) might be attacked as a condition of confinement by a petition for habeas corpus or other extraordinary process. See, e.g. Blake v. Florida (S. D. Fla.) 272 F. Supp. 557. The possible implication of that speculation is that the detainer could be attacked in the courts sitting in the state wherein the petitioner was confined, rather than in the demanding state. But Peyton v. Rowe, supra, determined that the preferred method of attack is in the court where the conviction providing the basis of the "detainer" has been obtained. As explained in Word v. North Carolina, supra, this conclusion was a "logical extension" of the Peyton holding:

> "Now it appears, as a logical extension of Peyton v. Rowe, that when a prisoner is in custody under a detainer, there is opened another divergence between the district of confinement and a district within the sentencing state. Should we hold that the writ must be sought in the district of confinement we would be met with all of the practical problems and difficulties which § 2255 solved or avoided with respect to post-conviction review of federal sentences, save only the problem of concentration of cases in districts in which federal penal institutions are located. The record of the state trial will be readily available in the sentencing state; it may not be elsewhere. If an evidentiary hearing is necessary, the state trial judge,

> the prosecuting attorney, defense counsel and other witnesses will generally be available in the sentencing state; it may be a practical impossibility to produce them in the state of detention." 406 F. 2d at 356.

The Word case dealt with a conviction which supplied the basis of a detainer, rather than a pending charge. But the reasoning of the Word case applies equally well to the problem of the detainer based upon the pending charge. Further, the Word case noted that issuing the writ of habeas corpus in the state of detention faced the "grave jurisdictional hurdle" of Section 2241(a), supra, which might be avoided if the demanding state's Attorney General "voluntarily submitted to the jurisdiction of the district court in Virginia," as he did in Kane. In the Word case, a further factor making the federal court in the demanding state the preferable forum, was that state remedies must be exhausted in the demanding state, "not in the courts of that state in which he is now physically present." 406 F. 2d at 356. It is well settled that in cases involving detainers based on pending charges, the proper state remedies are in the state courts in which the detainer charge is pending. Vaughn v. Missouri (W.D. Mo.) 265 F. Supp. 933. Further, in this case, the petitioner seeks more than the mere order directing the Director of the Medical Center to disregard the detainer. He seeks the dismissal of the charge with prejudice and the vacation of the warrant for his arrest based thereon. Such squarely meets the "jurisdiction hurdle" of Section 2241(a) described in Word v. North Carolina, supra. Therefore, when petitioner's state remedies in the courts of Pennsylvania are exhausted within the meaning of 2254, Title 28, United States Code, he should then petition for habeas corpus in the United States District Court for the Eastern District of Pennsylvania.

It is unlikely, however, that petitioner's state remedies have been exhausted by virtue of the long pendency of his motion to dismiss in the Justice Court in which he has been charged. State remedies are not exhausted under Section 2254, Title 28, U.S.C., so long as the question may be presented to the state courts by "any available procedure." See Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837. Relief may be available in the Supreme Court of Pennsylvania to compel the action of the state trial court on petitioner's motion to dismiss or for a speedy trial. To the end of facilitating such petitions for relief by Medical Center prisoners in state supreme courts, this Court has developed a form for such a petition, one of which will be sent to petitioner with his copy of this order.

For the foregoing reasons, it is

Ordered that the petitioner be, and he is hereby granted leave to proceed in forma pauperis. It is further

Ordered that the petition herein for habeas corpus be, and it is hereby, dismissed without prejudice.[1]

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[1]After the entry of this order, Nelson v. George, 399 U.S. 224, 90 S.Ct. 1963, 26 L.Ed.2d 578, and Brown v. Arkansas (C.A.8) 426 F.2d 677, were published. Nelson v. George, supra, was decided on June 29, 1970. Therein the United States Supreme Court held that a California state prisoner challenging a North Carolina detainer should exhaust state remedies in the courts of California and that the federal district court of that state should "retain jurisdiction of the petition for habeas corpus relief pending petitioner's further application to the California courts for whatever relief, if any, may be available and appropriate if the establishes his claim that North Carolina's obtainer interferes with relief (such as parole considerations) which might, in the absence of the detainer, be granted by California." 399 U.S. at 229, 90 S.Ct. at 1967, 26 L.Ed.2d at 583. The case dealt with in this opinion was different from Nelson because in this case Williams did not request any relief relating to conditions of his confinement, but rather specifically requested the type of relief which could only be accorded in the district wherein the charge is pending—the dismissal of the charge, vacation of the warrant for arrest and vacation of the demand for production of his person filed with the Department of Justice.

Brown v. Arkansas, supra, was decided one day prior to the issuance of the opinion in this case but the slip opinion in that case was not received until May 18, 1970, five days later. In that case, it was held that a federal district court sitting in Arkansas did not have personal jurisdiction of a petitioner seeking to challenge an Arkansas conviction enhancing a sentence currently being served under a Texas conviction. The Court concluded that, "[w]hile we are generally persuaded by the reasoning in Word," (426 F.2d 678) it would not be applied in that case because "Brown does not allege that he is in any way subject to present or future detention by Arkansas authorities." Again, however, the case differs from this case, in which Williams is the subject of a Pennsylvania detainer. Attention is also invited to the fact that, in Brown, the petitioner had already served his Arkansas sentence.

CASE: United States ex rel. Pitcher v. Pennsylvania, 314 F. Supp. 1329 (E.D. Pa. 1970)

JOSEPH S. LORD, III, District Judge.

Relator seeks the writ of habeas corpus on Bills of Indictment Nos. 216 and 217, Delaware County, June Sessions 1968, because the Commonwealth has failed to provide him with a speedy trial. When he filed this petition he was incarcerated in the Indiana State Prison serving a sentence imposed for burglary. The Commonwealth of Pennsylvania lodged a detainer with his custodian in Indiana pertaining to the charges here at issue, and relator alleges that the Commonwealth has not made a "diligent, good faith effort" to bring him to trial within the meaning of Smith v. Hooey, 393 U.S. 374, 89 S.Ct. 575 21 L.Ed. 2d 607 (1969). Relator sought the writ in the United States District Court for the Northern District of Indiana but his petition was dismissed for lack of jurisdiction. Unfortunately for relator, we are obliged to do the same under the decision in United States ex rel. Van Scoten v. Commonwealth of Pennsylvania, 404 F.2d 767 (C.A. 3, 1968). While we are not very impressed with the merits of relator's claim, the obvious dilemma prisoners in his position face now that Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed. 2d 426 (1968), permits attacks on detainers can not be ignored. The Ninth Circuit Court of Appeals agrees with this Circuit that jurisdiction lies in the district of the prisoner's confinement, but has not yet passed on the corollary question whether jurisdiction lies in the sentencing state. George v. Nelson, 410 F.2d 1179, 1181-1182 (C.A. 9, 1969), aff'd, 398 U.S. 224, 90 S.Ct. 1963, 26 L.Ed. 2d 578 (1970). The Fourth Circuit has held that a prisoner seeking to attack an out-of-state detainer should file the writ in the district court having jurisdiction over the state authorities issuing the detainer, even though his present custodian is beyond the territorial jurisdiction of that district court. Word v. North Carolina, 406 F.2d 352 (C.A. 4, 1969). As the case before us illustrates, uniformity must be achieved if the Great Writ is not to be frustrated by inter-Circuit squabbles over jurisdictional interpretations of the "in custody" requirements of 28 U.S.C.A. § 2241 (c) (3).

Since this Circuit has so recently considered the issue, and since the Supreme Court does not appear disposed to resolve the inter-Circuit conflict, Nelson v. George 399 U.S. 224, 228 n. 5, 90 S.Ct. 1963, 1966, 26 F.Ed. 2d 578 (1970), there is no probable cause for appeal.

The writ will be denied for lack of territorial jurisdiction.

It is so ordered.

CHAPTER 4. SYNTHESIS

"Criminal Detainers in a Nutshell" — David B. Wexler and Robert A. Hershey. 7 Criminal Law Bulletin 753 (1971).

I.

As has been carefully documented elsewhere,[1] a prison inmate with a detainer[2] filed against him because of outstanding charges in another jurisdiction may suffer several disabilities, ranging from mandatory maximum-security classification to exclusion from vocational rehabilitation programs and even to possible ineligibility for parole.[3] To make matters worse, the filing of a detainer by a law enforcement agency by no means reflects a considered professional judgment that prosecution is warranted. Often, detainers are filed routinely, and the actual exercise of prosecutive discretion is deferred until the prosecutor is notified by the incarcerating institution of the inmate's impending release. And sometimes detainers

[1] E.G., Shelton, "Unconstitutional Uncertainty: A Study of the Use of Detainers," 1 Prospectus 119)1968) (hereinafter cited as Shelton) (empirical examination of the detainer system); Note, "Detainers and the Correctional Process," 1966 Wash. U.I.Q. 417. See also Jacob & Sharma, "Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process," 18 Kan. L. Rev. 493, 578, 579 n. 518 (1970) (hereinafter cited as Jacob & Sharma) (citing relevant sources).

[2] A detainer is simply a request, grounded in notions of comity, that the detaining institution notify the law enforcement authorities in the demanding state when the inmate's release date draws near. Upon notification, the demanding state will presumably have an ample opportunity to set in motion its extradition machinery should it decide definitely to prosecute the prisoner at the expiration of his term.

[3] Much of the differential treatment accorded detainer prisoners is assumedly attributable to their being perceived as exceptional escape risks. For that reason, they are ordinarily disallowed from participating in work or rehabilitation programs conducted beyond the prison walls. They may also be excluded from vocational programs held within the walls on the theory that they will not be "job ready"—but instead will probably be serving time elsewhere—upon their release from confinement.

are seemingly filed solely for their nuisance or harassment value.[4] In any case, of all the detainers filed, which affect from 12 to 30 percent of the prison population,[5] it is estimated that less than half ... are exercised of even filed with any intention of being exercised."[6] Finally, those detainers which are eventually exercised often raise serious speedy-trial questions.

Not surprisingly, the custodial and psychological consequences wrought by the detainer system have bred a considerable amount of legal activity, occasionally taking the form of a "broadside at the entire detainer system, contending it amounts to cruel and unusual punishment and a deprivation of due process,"[7] but more usually focusing on the speedy-trial issue.[8] While the former approach has met with the expected reluctance of courts to meddle in internal prison affairs,[9] the speedy-trial approach has generally met with favor, both at the Supreme Court level, where a convict's right to a speedy trial has been firmly recognized,[10] and at the level of many state legislatures, which have significantly tackled the speedy-trial and detainer problems by enacting the Agreement on Detainers,[11]

[4] Shelton, note 1 supra, at 120. See also Jacob & Sharma, note 1 supra, at 582.

[5] Shelton, note 1 supra, at 120.

[6] Id.

[7] Lawrence v. Blackwell, 298 F. Supp. 708, 714 (N.D. Ga. 1969).

[8] Smith v. Hooey, 393 U.S. 374 (1969).

[9] Lawrence v. Blackwell, 298 F. Supp. 708 (N.D. Ga. 1969). The reluctance has, of course, diminished considerably in recent years, Turner, "Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation," 23 Stan. L. Rev. 473 (1971), but is still very much alive. E.g., Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971).

[10] Smith v. Hooey, 393 U.S. 374 (1969): Comment. "The Convict's Right to a Speedy Trial," 61 J. Crim. L.C. & P.S. 352 (1970). See also Dickey v. Florida, 398 U.S. 30 (1970).

[11] Council of State Governments, Agreement on Detainers (1958) (hereinafter cited as Agreement). The text of the Agreement appears in the ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial 50 (1968).

legislation allowing for the rapid resolution of outstanding charges when both the demanding and detaining states are partly to the Agreement.[12]

Despite the advances, the detainer-speedy trial area remains riddled with uncertainty and with procedural as well as conceptual confusion. Though the legal literature is now beginning to provide guidance to persons engaged in prison inmate legal assistance,[13] the intricacies of seeking relief from detainers and from their underlying charges have apparently not commanded any attention. The lack of coverage is deplorable because this particular field of law, which is as conceptually complex as any lawyer is likely to encounter during his career, must typically be practiced by inmates pro se,[14] by jailhouse lawyers,[15] or at best, by law students gaining clinical experience in inmate legal assistance programs.[16] Accordingly, this article is written as a guide to all those plagued by the law of detainers.

[12] For rules regarding the disposition of intrastate detainers, local legislation must of course be studied. For a partial list of pertinent state statutes, see Comment, "The Convict's Right to a Speedy Trial," 61 J. Crim. L.C. & P.S. 352, 357 n. 56 (1970). See also State v. Brooks, 479 P.2d 893 (Kan. 1971). See generally Note, "Convicts—The Right to a Speedy Trial and the New Detainer Statutes," 18 Rutgers L. Rev. 828 (1964).

[13] E.g., Turner, "Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation," 23 Stan. L. Rev. 473 (1971); Wexler & Silverman, "Representing Prison Inmates: A Primer on an Emerging Dimension of Poverty Law Practice," 11 Ariz. L. Rev. 385 (1969). See also Wexler, "Counseling Convicts: The Lawyer's Role in Uncovering Legitimate Claims," 11 Ariz. L. Rev. 629 (1969).

[14] Larsen, "A Prisoner Looks at Writ-Writing," 56 Calif. L. Rev. 343 (1968).

[15] Wexler, "The Jailhouse Lawyer as a Paraprofessional: Problems and Prospects," 7 Crim. I. Bull. 139 (1971).

[16] Jacob & Sharma, "Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process," 18 Kan. L. Rev. 495 (1970).

II.

Until recently, a prisoner faced with a detainer and an outstanding criminal charge from another jurisdiction had no recognized right to a speedy disposition of that charge, the underlying rationale being that the demanding jurisdiction had no coercive legal power to compel the confining state to surrender the prisoner for purposes of trial. In 1969, however, Mr. Justice Stewart, speaking for the Court in Smith v. Hooey,[17] repudiated that rationale as being grounded in mechanistic notions of sovereign power rather than in practical considerations of interjurisdictional comity. Stewart, in other words, found the absence of coercive power irrelevant in light of an ongoing system where confining states, without the force of legal compulsion, would in most cases readily surrender temporary custody of an inmate to a demanding state. At the least, then, the demanding state should be expected to attempt to secure custody of a prisoner who is desirous of obtaining a speedy trial. Accordingly, the Smith v. Hooey Court, invoking Sixth Amendment speedy-trial principles, held that "upon the petitioner's demand, [the demanding state] had a constitutional duty to make a diligent, good faith effort to bring him before the [appropriate] court for trial."[18]

While Smith v. Hooey clearly broke the ice, it left many questions—including basic ones—unanswered. Since the petitioner Smith had in fact demanded a speedy trial, for example, the crucial question whether a demand is necessary to trigger the speedy-trial right in a detainer context technically remains unresolved, though most lower courts have interpreted Smith as necessitating a demand.[19]

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[17] 393 U.S. 374 (1969).

[18] Id. at 383.

[19] E.g., Pope v. Ferguson, 445 S.W.2d 950 (Tex. 1969), cert. denied, 397 U.S. 997 (1970). But see Coleman v. United States.—F.2d—, 8 Crim. L. Rep. 2483 (D.C. Cir 1971) (demand unnecessary, at least where no showing that defendant was advised of his right to speedy trial and of his right to demand the same). See also Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, Rule 8 (Jan. 5, 1971), 8 Crim. L. Rep. 2251, totally rejecting the demand rule. For a further discussion of the demand doctrine, see Justice Brennan's concurring opinion in Dickey v. Florida, 398 U.S. 30, 39 (1970). The traditional demand rule is thoroughly explored—and criticized—in Comment, "The Convict's Right to a Speedy Trial," 61 J. Crim. L.C. & P.S. 352, 360-363 (1970).

Further, the Smith Court was purposefully ambiguous concerning the appropriate remedy for a state's failure to make a good faith effort to secure an out-of-state prisoner's presence for an early trial. Instead of explicitly ordering the charges dismissed, the Court simply remanded the case "for further proceedings not inconsistent with this opinion."[20]

If the right to a speedy disposition of charges is pursued through the Agreement on Detainers rather than through Sixth Amendment channels, many of the cryptic questions left unsettled by Smith are converted by the Agreement into black-letter law. The Agreement now adopted by thirty-seven states as well as by the District of Columbia and the federal government,[21] explicitly requires that a speedy-trial demand be made both on the prosecuting official and on the appropriate court,[22] and requires that if the prisoner is not brought to trial

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[20] 393 U.S. 374, 383 (1969). The Court thus left unclear whether the charges should be dismissed without some sort of showing of prejudice. On the prejudice requirement generally, see Dickey v. Florida, 398 U.S. 30, 39 (Brennan, J., concurring); Comment: "The Convict's Right to a Speedy Trial," 61 J. Crim. L.C. & P.S. 352, 363-365 (1970).

Other points unresolved by Smith include the question of at what point in time the right to speedy trial begins. Dickey, supra, (Brennan, J. concurring): Ashore v. State, 19 Ohio St. 2d 181, 249 N.E.2d 919 (1969) (Smith comes into play even when the detainer is based upon an arrest warrant rather than an indictment), and whether a constitutional remedy lies against a jurisdiction which refuses to release an inmate to stand trial in another jurisdiction. May v. Georgia, 409 F.2d 203 (5th Cir. 1969), suggesting that such a refusal might contravene the speedy-trial provision of the Sixth Amendment): Note, "Extending the Smith v. Hooey Duty to the Holding Jurisdiction." 23 L. Mc.Rev. 201 (1971). Litigation has also revolved around whether the Smith rule teaches probation-revocation hearings. See e.g., Fariss v. Tipps, 463 S.W.2d 176 (Tex. 1971) (split decision holding that Smith extends to probation-revocation proceedings). For a further discussion of questions left open by Smith, see Jacob & Sharma, note 1 supra, at 585 n. 555.

[21] According to the Council of State Governments (36 West 44th Street, New York, New York 10036), which maintains an updated list of jurisdictoins that have become party to the Agreement, the following states were signatoreis as of June 1971: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, Massachusetts, New Hersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

[22] Agreement. Art III (a).

within 180 days of his demand,[23] "the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.[24] Technically, the advantages of the Agreement's explicit procedures and remedies[25] are available to an inmate only when his confining state and the demanding state are both party to the Compact,[26] though there is some sentiment that, after Smith v. Hooey, a party state ought to apply the Agreement's provisions to detainers lodged by that state against prisoners in other jurisdictions, regardless of whether the other jurisdictions are signatories to the Agreement.[27]

III.

Assuming that, under the Sixth Amendment or the Agreement, an inmate can receive a speedy trial if he desires one, the next inquiry is whether he in fact wants a rapid disposition of his case. Most inmates, of course, desire dismissal of the charges and the detainer, but many are not truly anxious to defend a fresh case. In numerous instances,

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[23] For good cause shown in open court, and in the presence of the prisoner or his counsel, the 180-day period can be extended. Id. See State v. Lippolis, 55 N.J. 354, 262 A.2d 203 (1970), rev'g 107 N.J. Super. 137, 258, A.2d 705 (1969).

[24] Agreement, Art. III (c).

[25] Although the Agreement has been widely applauded, it has been criticized for not going far enough in protecting the speedy-trial right. For example, its provisions come into play only when a detainer has been filed, thus leaving the door open to prosecutive circumvention by last-minute filing of detainers, a practice which has apparently been documented by at least one commentator. Shelton, note I supra, at 128-129.

[26] Agreement, Arts, I. III(a).

[27] Commonwealth v. Ditzler, 217 Pa. Super. 105, 266 A.2d 789 (1970) (dissenting opinion). Cf. Kane v. Virginia, 419 F.2d 1369, 1374 n. 10 (4th Cir. 1970):

"[T]he Attorney General of South Carolina has applied the policy of the Interstate Agreement on Detainers to all states regardless of whether they have adopted the Agreement. If a state which has filed a detainer against a South Carolina prisoner does not attempt to obtain the prisoner for trial within 180 days after his request, the jailer must strike the detainer from the prisoner's records and return it to the sender, Mem. Att'y Gen., March 6, 1968."

dismissal by the prosecutor is a viable alternative, but such a consequence is dependent on a number of factors: the seriousness of the outstanding charge, the nature and length of the current conviction and sentence, the inmate's behavior in prison (and whether any responsible prison officials will join in his request for dismissal), the distance of the detainer-filing state from the place of confinement, and the attendant expense involved in transporting the inmate and armed guards to and from the place of trial.[28]

If dismissal seems unlikely, several considerations should be analyzed in determining whether to press for a speedy trial. First of all, the inmate ought to be concerned with whether the time spent in his out-of-state trial will be credited against his present sentence. The better rule, which encourages the early disposition of detainers and does not penalize an inmate for asserting his right to a speedy trial, requires sentence credit. That is the view taken by the Agreement on Detainers[29] and by a well-reasoned judicial decision directly on point.[30]

With respect to the earning of "good time" credits during the period of temporary out-of-state custody, the Agreement provides simply that "good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow."[31] The good-time question was recently faced squarely by the Supreme Court of Arizona in Walsh v. State ex rel. Eyman,[32] which specified that an inmate being tried on a foreign charge ought to earn "ordinary" good-time credits during

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[28] The transportation factor is a substantial one. Ordinarily, if an inmate's speedy-trial request is to be honored, two deputies will go from the demanding state to the confining state to assume custody of the prisoner, will return him to the demanding state for trial, will return him after trial to the confining state, and then themselves return home. In addition, they must return once again to the confining state, at the expiration of the inmate's sentence there, to transport the prisoner to a penal institution in the demanding state. See also Jacob & Sharma, note 1 supra, at 518 n. 527.

[29] Agreement, Art. V(f).

[30] Walsh v. State ex rel. Eyman, 104 Ariz. 202, 450 P.2d 392 (1969).

[31] Agreement, Art. V(f).

[32] 104 Ariz. 202, 450 P.2d 392 (1969).

the trial period, but, since he will not be performing assignments of trust during that time span, he should not be accorded "industrial" or "trusty" time credits—which are in some states substantial—while he is out-of-state.

But perhaps the most important consideration in determining whether to seek a speedy trial on an out-of-state charge is the likelihood, if convicted, of receiving a sentence to run concurrently with the sentence presently being served. Though Michigan has held that, in the absence of statutory authority to the contrary, a Michigan sentence must be made to run concurrently with a prior sentence from a foreign jurisdiction[33] most states permit but do not require their sentences to run concurrently with sentences of other states,[34] thus leaving the matter to the discretion of the sentencing court. In Oklahoma, by contrast, if appears that a sentence imposed by that state must run consecutively to a sentence previously imposed by a foreign jurisdiction.[35]

In federal sentencing matters, unless the court specifies that the federal sentence is to run concurrently with a prior state sentence, the federal sentence runs only from the date upon which the defendant is received in a federal correctional institution.[36] Furthermore, a

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[33] In re Carey, 372 Mich. 378, 126 N.W. 2d 727 (1964). Cf. Baromich v. State, 249 N.E.2d 30 (Ind. 1969) (apparently similar rule, though legislation has authorized consecutive sentencing for certain specified offenses).

[34] E.G. State v. Rhodes, 104 Ariz. 451, 454 P.2d 993 (1969). Several state rules are noted in 24B C.J.S. "Criminal Law" § 1994, 1996(b) (1962). See also Annot., 7 A.L.R.2d 1410 (1958).

[35] Ex parte Adams, 93 Okla. Crim. 95, 225 P.2d 385 (1950). Accord, Bearden v. State, 392 P.2d 55 (Okla. Crim. 1964). Seemingly, the only possible means of avoiding a consecutive sentence in Oklahoma is through the suspension of the impossible, execution of the Oklahoma sentence, but that of course is usally discretionary with the sentencing court and, in fact, is statutorily unavailable upon one's third or subsequent felony conviction, 22 Okla. Stat. Ann. § 991a (West Supp. 1970-1971). See also 22 Okla. Stat. Ann. 991C (West Supp. 1970-1971) (deferred-judgment procedure).

[36] 18 U.S.C.A. § 3568 (1969). Blackshear v. United States, 434 F.2d 58 (5th Cir. 1970).

federal court recommendation that a federal sentence run concurrently with a state sentence then being served by a defendant in a state prison may be treated as mere surplusage and may be disregarded by the Attorney General (Federal Bureau of Prisons), who has the absolute right[37] to designate where the federal sentence shall be served.[38] Therefore, for a federal sentence to run concurrently with an existing state sentence. One would need both a federal court recommendation of concurrency and an Attorney General designation that the federal sentence be served at the specified state prison. Ordinarily, however, the Attorney General will accept a federal court recommendation.[39]

IV.

If an inmate decides to press for a speedy trial, he will often, particularly in non-Agreement jurisdictions, have to follow a procedurally perplexing route. Chronologically, the usual first step is to request the prosecutor to dismiss the charges, buttressed if possible by evidence of recent good behavior and letters of support from prison personnel. If dismissal is not forthcoming, an explicit demand[40] for a speedy trial should then be made on the prosecutor, though some jurisdictions require such a demand to be lodged with the trial court having jurisdiction over the offense or with both the prosecutor and the court.[41] Until the Supreme Court speaks definitively on

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[37] 18 U.S.C.A. 4082 (1969).

[38] United States v. Herb, 436 F.2d 566 (6th Cir. 1971): Hash v. Henderson. 385 F.2d 475 (8th Cir. 1967) (citing numerous cases in accord): Hamilton v. Salter, 361 F.2d 579 (4th Cir. 1966).

[39] Barkin, "Impact of Recent Legislation and Rule Changes Upon Sentencing" 41 F.R.D. 494, 505 (1966). (Mr. Barkin is Legal Counsel to the Bureau of Prisons.)

[40] State v. Titherington, 477 P.2d 589 (Nev. 1970) (request for dismissal not equivalent to a demand for speedy trial).

[41] The Agreement on Detainers requires that the inmate cause to be delivered "to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint." Art. III(a). Actually, the Agreement expects the warden to notify

the federal constitutional demand requirement and its contours, inmates and attorneys must be careful to preserve their speedy-trial claims by conforming to the intricacies and idosyneracies of local law.[42]

If the prosecutor does not respond[43] or does not provide the requested relief, and if the inmate does not wish simply to wait for a possible future trial to raise his speedy-trial objection,[44] a motion should typically be filed in the trial court[45] of the demanding juris-

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the prisoner of any detainer and of the prisoner's right to request a speedy trial, and expects the prisoner desiring a speedy trial to serve the appropriate written notice and request for final disposition upon the warden, who is in turn charged with communicating with the prosecutor and trial court. Art. III(b) and (c). If the warden should not live up to his responsibilities under the Agreement, it may fall upon the inmate or his legal advisor to take the appropriate action in satisfying the Agreements' demand requirements. Cf. State v. Davis, 2 Wash. App. 380. 467 P.2d § 75 (1970) (demand on prosecutor insufficient; must demand speedy trial in court having jurisdiction over offense).

[42] E.G. Pope v. Ferguson, 445 S.W.2d 950, 956 (Tex. 1969), cert. denied, 397 U.S. 997 (1970) ("The [Texas] Court of Criminal Appeals has also indicated that a defendant cannot successfully complain of the failure to give him a speedy trial in the absence of an application to (the Supreme Court of Texas) for a writ of mandamus to compel a trial of his case"): State v. Davis, 2 Wash. app. 380, 467 P.2d 875 (1970) (demand on prosecutor insufficient; must demand speedy trial in court having jurisdiction over offense). These convoluted demand procedures are especially troubling when applied to a situation of a convict imprisoned in a foreign jurisdiction.

[43] Prosecutors often fail to acknowledge or to respond to inmate speedy-trial requests. See United States ex rel. Jennings v. Pennsylvania, 429 F.2d 522 (3d Cir. 1970) (judicial chastisement of prosecutors for inaction).

[44] Dickey v. Florida, 398 U.S. 30 (1970). The speedy-trial objection can only be raised at trial, however, if the defendant has preserved his speedy-trial by previously complying with whatever demand requirements are mandated by local law.

[45] When the detainer and outstanding charge is based merely on a complaint and warrant rather than on an indictment or information, some complications, can arise because jurisdiction has technically not yet vested in the felony trial court, but seemingly remains in the magistrate court. See Jacob & Sharman, note I supra, at 586 n. 556. The Agreement on Detainers appears to be ambiguous with respect to the appropriate court of filing complaint-warrant situations. Compare Art. III (a) with Art. V(c).

diction requesting, alternatively, a speedy trial—perhaps via writ of habeas corpus ad prosequendum[46] —or dismissal of the charges.[47] If relief is denied, the appellate process can be invoked,[48] and in

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[46]See. e.g., Wilson v. District Court, 471 P.2d 939 (Okla. Crim. 1970): Thompson v. Stephens Co., 450 P.2d 853 (Okla. Crim. 1969). See also State v. Davis, 2 Wash. App. 380, 467 P.2d 875 (1970). Sometimes, the writ of habeas corpus ad prosequendum is filed in the appellate court. In re Collins, 269 A.2d 544 (R.I. 1970). With respect to federal prisoners with state detainers, the Agreement can often be invoked, since the federal government and thirty-seven states are party to it. In situations where the Agreement is inoperative, "the normal procedure under which production is effected is pursuant to a writ and prosequendum from the state court. Almost invariably, the United States has complied with such writs and extended its cooperation to the state authorities. The Bureau of Prisons informs us that removals are normally made by United States marshals, with expenses borne by the state authorities. In some instances, to mitigate the cost to a state, the Bureau of Prisons has removed an inmate to a federal facility close to the site of prosecution." Smith v. Hooey, 393 U.S. 374, 381 n. 13 (1969). See 18 U.S.C.A. 4085 (1969). For a discussion of state prisoner remedies against outstanding federal charges and detainers, see note 83 infra.

[47]In some instances, after a speedy-trial demand upon a prosecutor has been made and long ignored, it may be possible to allege those facts and to move the trial court solely to dismiss the charges, rather than to move for dismissal simply as an alternative to receiving a speedy trial. But such a route could only be followed in a jurisdiction not requiring a formal speedy-trial demand to be made on a judicial tribunal.

Under the Agreement, if a demand for final disposition has been made upon the prosecutor and the court and if the inmate has not been brought to trial within the specified time period, a motion should be made in the trial court for dismissal of the charges with prejudice. Art. V(c), Under the Agreement, incidentally, a demand for a final disposition on any one outstanding charges that happen to be outstanding in the particular state. Art. III(d). The demand also constitutes a waiver of extradition. Art. III(e). Note, however, that if one's speedy-trial claim is pursued under the Sixth Amendment rather than under the Agreement, an inmate may not have to waive his right to oppose extradition in order to preserve his constitutional right to a speedy trial. Thompson v. State, 482 P.2d 627 (Okla. Crim. 1971). On extradition generally, see Jacob & Sharma, note I supra. at 530, 563.

[48]But see Commonwealth v. Sutton, 214 Pa. Super. 148, 251, A.2d 660 (1969) (appeal from lower court denial of motion to dismiss, based on Sixth Amendment and Agreement on Detainers, quashed as interlocutory).

some jurisdictions, lower court inaction[49] or adverse action[50] can be challenged by a writ of mandamus seeking the demanded dismissal or a speedy trial.[51] The entire question of appropriate procedure in state court is, of course, a matter of local law which must be checked carefully prior to taking any action.

If relief is not obtained within the state system, attention must then be directed toward the problems of federal court relief and where to seek it. Though the question of seeking such federal court constitutional relief will presumably be most important in non-Agreement instances, Sixth Amendment federal court action may well be necessary even in situations where the Agreement is technically applicable, for, as all too many prisoners have learned from bitter experience, legitimate inmate demands for speedy trials are often ignored by state prosecutors[52] and ignored,[53] denied,[54] or

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[49]See, e.g., Rudisill v. District Court, 453 P.2d 598 (Colo. 1969), cert. denied. 395 U.S. 925 (1969) (lower court held in abeyance defendant's motion to dismiss for violation of speedy-trial right; mandamus granted to compel lower court action); People ex rel. Mathes v. Carter, 43 Ill. 2d 248, 252 N.E.2d 543 (1969) (mandamus issued to compel trial court to set hearing on motion to dismiss for want of speedy trial).

[50]See, e.g., Thompson v. State, 482 P.2d 627 (Okla. Crim. 1971) (mandamus issued to compel trial court, which had previously denied defendant's motion, to dismiss charges on speedy-trial grounds).

[51]See Smith v. Hooey, 393 U.S. 374 (1969). See also Dickey v. Circuit Court 200 So. 2d 521 (Fla. 1967) (specifying in detail the requirements of that state for seeking mandamus relief, including the necessary allegations and the proper party respondent). But see Pope v. Ferguson, 445 S.W.2d 950 (Tex. 1969), cert. denied, 397 U.S. 997 (1970) (mandamus to compel dismissal unavailable under local law).

[52]E.G., United States ex rel. Jennings v. Pennsylvania, 429 F.2d 522 (3d Cir. 1970).

[53]E.g., People ex rel. Mathes v. Carter, 43 Ill. 2d 248, 252 N.E. 543 (1969).

[54]Commonwealth v. Sutton, 214 Pa. Super. 148, 251 A.2d 660 (1969).

brusquely treated[55] by state courts, whether or not the Agreement is literally operative.

V.

Perhaps the leading decision dealing with federal court relief in the pretrial detainer context is the Fourth Circuit case of Kane v. Virginia.[56] In Kane, which was actually a consolidated appeal of several similar cases, the Fourth Circuit was faced with certain important questions not reached by the Smith v. Hooey Court.

The Kane petitioners, all under detainer and facing outstanding state criminal charges, sought federal habeas corpus relief from the detainers and charges on Sixth Amendment speedy-trial grounds. Recognizing that "federal habeas corpus relief is not ordinarily available to a state prisoner before trial,"[57] the Kane court nevertheless carved out a narrow exception to the general rule because of "the peculiar nature of the right to a speedy-trial. . . ."[58] Accordingly, Kane held that "when the proof shows (1) that the prisoner demanded a speedy trial, (2) that the state nevertheless failed to make a diligent effort to obtain him for trial, and (3) that he has exhausted his state remedies as required by 28 U.S.C. § 2254 by seeking dismissal of the charges against him because of unconstitutional delay," and "if the prisoner, having satisfied these preliminary requirements, then prevails upon the merits of his claimed denial of a speedy trial,

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[55] Thompson v. State, 482 P.2d 627, 628 (Okla. Crim. 1971) ("The district court denied the motion in an order dated October 13, 1969, noting that the petitioner was not in attendance although he had been notified. Petitioner was not represented by counsel and there is no indication how petitioner was to make himself available.").

[56] 419 F.2d 1369 (4th Cir. 1970).

[57] Id. at 1372. The ordinary judicial disinclination to accord pretrial relief via federal habeas corpus is in conformity with the pertinent statute, which technically empowers federal courts to grant habeas relief to state prisoners only when the prisoners are "in custody pursuant to the judgment of a State court . . . ." (Emphasis supplied.) 28 U.S.C.A. § 2254 (1971).

[58] 419 F.2d at 1372.

the district court should discharge him from custody under the detainer and bar prosecution of the charges for which it was filed."[59]

Though the Kane court was willing, under appropriate circumstances, to go so far as to bar a state prosecution for noncompliance with the Sixth Amendment, some other courts have been less bold in fashioning relief for violations of Smith v. Hooey. Instead of foreclosing prosecution, more timid courts, such as the Eastern District of New York in Caruth v. Mackell,[60] have simply granted relief in the form of an order requiring correctional officials to "hold for naught" the demanding state's detainer, and hence to relieve the inmate of any disabilities that might flow from the detainer. To a large extent, whether a habeas court will grant bold Kane-type relief or whether it will feel constrained to issue a milder Caruth-type order may depend, as will be demonstrated later,[61] upon whether the demanding state or the prison warden is the actual party respondent. And whether an inmate with a detainer can sue the demanding state rather than his warden in turn depends upon the resolution of complicated issues of habeas corpus jurisdiction and venue, to which we now turn.

VI.

An inmate confined in State X with a detainer from State Y because of an outstanding charge or conviction may seek, after exhausting state remedies,[62] to challenge the outstanding charge or conviction on federal habeas corpus. Such an inmate is at once confronted with the question whether to file in the federal district in the district of confinement or in the district from which the

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[59] Id. at 1373 (citations omitted)

[60] See 7 Crim. L. Rep. 2414 (E.D.N.Y., July 15, 1970). See also United States ex rel. Jennings v. Pennsylvania. 429 F.2d 522 (3d Cir. 1970); Lawrence v. Blackwell, 298 F. Supp. 708 (N.D. Ga. 1969).

[61] See discussion accompanying notes 92-98 infra.

[62] On the exhaustion requirement in federal habeas corpus, see "Developments in the Law—Federal Habeas Corpus," 83 Harv. L. Rev. 1038, 1093-1103 (1970) (herein-after cited as Developments).

detainer emanates. The question is a relatively new one, brought to a head in 1968 by the Supreme Court holding in Peyton v. Rowe,[63] which for the first time permitted a prison inmate to challenge a future restraint.

Until Rowe, sentences to be served in the future—and, by implication, outstanding charges to be prosecuted in the future—were deemed premature for habeas review; under the prematurity doctrine of McNally v. Hill,[64] only challenges to present confinement were deemed appropriate for habeas review, and thus the question of the proper district court in which to challenge a future out-of-state restraint was never reached. But with the overturning of McNally and the demise of the prematurity doctrine, the issue was suddenly thrust to the surface.

In resolving the novel question brought to light by Rowe, the courts have had to struggle with the 1943 Supreme Court case of Ahrens v. Clark,[65] a much-criticized[66] decision holding that a habeas court can statutorily grant relief only when the petitioner is confined within the territorial jurisdiction of the district court.[67] Since Rowe, several courts have grappled with the applicability of Ahrens to the situtation of inmates facing out-of-state detainers.[68] Some courts, faithful to Ahrens, have held that habeas relief must be sought in the district of confinement.[69] Others, principally the

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[63] 391 U.S. 54 (1968).

[64] 293 U.S. 131 (1954).

[65] 335 U.S. 188 (1948).

[66] E.G., Developments, note 62, supra, at 1162.

[67] Ahrens involved a wartime habeas petition field in the district court of the District of Columbia by 120 Germans held pending deportation at Ellis Island, New York.

[68] Though many of those cases have for some reason arisen in the context of parole detainers and detainers based upon subsequent out-of-state convictions, their reasoning is fully applicable to the situation of detainers based upon outstanding criminal charges.

[69] E.G., United States ex rel. Van Scoten v. Pennsylvania, 404 F.2d 767 (3d Cir. 1968).

Fourth Circuit in Word v. North Carolina,[70] limiting Ahrens to its facts and exempting from its reach the issue of out-of-state detainers representing future restraints, have held that, with rare exceptions, habeas petitions in detainer situations should be filed in the appropriate district of the demanding state. Still other courts have held jurisdiction in the confining and demanding districts to be concurrent, but, because the demanding jurisdiction, which is close to needed witnesses and records, will frequently be the preferred one for conducting litigation, those courts recognize the propriety of the confining district transferring the case to the demanding district.[71]

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[70] 406 F.2d 352 (4th Cir. 1969) (en banc).

[71] United States ex rel. Meadows v. New York, 426 F.2d 1176 (2d Cir. 1970). But see George v. Nelson, 410 F.2d 1179 (9th Cir. 1969), aff'd on other grounds, 399 U.S. 224 (1970) (holding the district of confinement to be the proper place of filing, but leaving open the question of the propriety of the confining court transferring the case to the demanding district). Probably the richest doctrinal and policy discussion of the competing considerations is provided by Meadows, a split decision of the Second Circuit. Meadows, while on parole from a New York state conviction, was convicted of a federal offense and sentenced to a term in the federal penitentiary in Atlanta, Georgia. When New York, desirous of revoking Meadows' parole because of his misconduct, lodged a parole detainer against him, he sought to challenge the constitutionality of his New York conviction, first in the New York courts and then by a habeas corpus petition in a federal district court in Georgia. The district court in Georgia transferred the peition to the Eastern District of New York (the district in which Meadows' New York trial took place), which in turn dismissed the case for want of jurisdiction. On appeal to the Second Circuit the majority, reading Ahrens as inapplicable to challenges of future restraints, concluded that the Eastern District of New York did properly have jurisdiction. The Meadows majority concluded, too, that since habeas corpus is essentially a civil action, the district court in Georgia was authorized to transfer the case to the Eastern District of New York pursuant to 28 U.S.C.A. § 1404(a)—the basic civil venue provision permitting transfers of civil cases, for reasons of convenience, to any other district where the action might originally have been brought. Dissenting, Judge Waterman found Ahrens' authority relatively unimpaired, and concluded that Meadows could only sue in a Georgia federal district court. The dissent also found the general venue provisions of Section 1404(a) inapplicable to habeas corpus proceedings. In Judge Waterman's view, change of venue in habeas actions is statutorily limited by 28 U.S.C.A. § 2241(d) (1971), a provision regarding intrastate transfers of habeas corpus actions in states having more than one federal judicial district. That provision, which slightly relaxed Ahrens by recognizing concurrent jurisdiction in the district

Against the backdrop of badly split circuits, the Supreme Court, presumably to bring harmony to the area, granted certiorari in a pertinent case from the Ninth Circuit,[72] and in due course rendered a decision in Nelson v. George.[73] As will be seen however, the Supreme Court's last-minute reluctance to resolve the question has actually worked to rekindle the confusion.

While he was serving a sentence in a California state prison, a North Carolina detainer, based on an outstanding robbery charge, was lodged against petitioner George. Invoking the Agreement on Detainers, George was sent temporarily to North Carolina for trial, where he was convicted and given a sentence to run consecutively to that imposed by California. George was then returned to California to serve out the remainder of his sentence, and North Carolina placed a new detainer on George to insure his return at the completion of his California term. Having unsuccessfully appealed his North Carolina conviction in that state's highest court, George collaterally attacked its constitutionality by filing a habeas corpus action in the Northern District of California. Since his district court petition was filed prior to Peyton v. Rowe,[74] the district court denied George's petition on McNally v. Hill[75] prematurity grounds. But George, determined to avoid McNally's reach, filed a petition for rehearing in the district court. In the rehearing petition, he alleged that he was not attacking a purely future North Carolina restraint, but that North Carolina's detainer, which purportedly operated to increase his California

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of custody and in the district of sentencing so long as both districts are in the same state, was read by Judge Waterman as reaffirming Ahrens—and prohibiting transfers—when the confinement and sentencing districts are located in separate states. The majority, however, noting that Section 2241(d) was enacted prior to Rowe, held that that section should limit transfers only when an inmate challenges his present confinement, rather than when he lodges a habeas attack against a future restraint. Meadows is ably discussed in Comment, "Towards a Solution of the Jurisdictional Problem in Multi-State Federal Habeas Corpus Actions Challenging Future Restraints," 1970 Utah L. Rev. 625 (1970).

[72] George v. Nelson, 410 F.2d 1179 (9th Cir. 1969), aff'd on other grounds, 399 U.S. 224 (1970).

[73] 399 U.S. 224 (1970).

[74] 391 U.S. 54 (1968).

[75] 293 U.S. 131 (1934).

custodial classification and to decrease his chances for California parole, constituted a present form of custody subject to immediate habeas corpus challenge.

Upon the denial of his petition for rehearing, George appealed to the Ninth Circuit. By the time the case reached that court, the Supreme Court's opinion in Rowe had been announced. Accordingly, George asked the court of appeals to remand his case for a district court determination on the merits. George's request raised the question whether the district court in the confinement state would have jurisdiction in habeas corpus to consider the constitutionality of the North Carolina conviction. Relying on Ahrens v. Clark,[76] the Ninth Circuit found jurisdiction to lie in the Northern District of California.[77] The court of appeals was not terribly concerned that the North Carolina authorities were beyond the reach of the California district court; in its view, grounded in notions of agency, the California warden constituted a sufficient party respondent. "He [the California warden] is the actual custodian of George by reason of the California conviction and also as agent of the North Carolina warden, as evidenced by the detainer."[78]

At the Supreme Court level, Chief Justice Burger, speaking for the Court, unexpectedly refused to consider the jurisdictional question and the continuing vitality of Ahrens. Instead, interpreting George's case, from his district court petition for rehearing, as involving principally a challenge to the constitutionality of California's treatment of prisoners under detainer, rather than as involving a

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[76] 335 U.S. 188 (1948).

[77] 410 F.2d 1179 (9th Cir. 1969), aff'd on other grounds, 399 U.S. 224 (1970).

[78] Id. at 1181. The court continued, "If the California warden does not wish to defend the North Carolina conviction he can call upon the authorities of North Carolina to provide that defense." Id. The court closed its opinion by noting that, under the anti-Ahrens Fourth Circuit rule of Word v. North Carolina, 406 F.2d 352 (4th Cir. (1969), the district court in North Carolina would also have had jurisdiction over George's claim had he chosen to file in that court. The George court noted, but not pass upon, the question whether the California district court could, on remand, transfer the case to the district court in North Carolina under 28 U.S.C.A. § 1404(a) (1962).

challenge to the North Carolina conviction per se, The Nelson v. George[79] Court held that George had not exhausted his California state remedies with respect to his claim. Accordingly, the Court affirmed the judgment of the Ninth Circuit only "to the extent it finds [habeas corpus] jurisdiction in the District Court to consider petitioner's claims with respect to the impact of the detainer if petitioner elects to press those claims after he exhausts his remedies in the California courts."[80] Because of its disposition of the case, the Court did not reexamine Ahrens, but in a footnote,[81] it strongly recommended that Congress amend the pertinent statute[82] to permit habeas petitioners challenging future restraints to file for relief in the district court of the demanding or sentencing jurisdiction[83]

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[79] 399 U.S. 224 (1970).

[80] Id. at 230.

[81] Id. at 228 n. 5.

[82] 28 U.S.C.A. § 2241(a) (1971). The Court's reluctance to reconsider and to overrule Ahrens was again apparent in the later case of Schlanger v. Seamans, 401 U.S. 487 (1971).

[83] The Court recognized that federal prisoners, by statute, having long been permitted—in fact required—to file in the sentencing district. 28 U.S.C.A. § 2255 (1971). Moreover, now that future restraints can be challenged, it seems possible for a state prisoner to attack a federal detainer, charge, or conviction via a Section 2255 motion, just as federal prisoners can now attack state detainers via habeas corpus. See Kane v. Virginia, 419 F.2d 1369 (4th Cir. 1970). A state prisoner facing a detainer because of an outstanding federal charge should, however, first consider invoking the Agreement, which will definitely apply if he is confined in one of the thirty-seven party states. Arguably, in fact, the federal government, as a member itself, may be legally required to accord prisoners from all states the benefit of the Agreement provisions. See Commonwealth v. Ditzler, 217 Pa. Super. 105, 266 A.2d 789 (1970) (dissenting opinion). If relief pursuant to the Agreement is not forthcoming, the inmate could then seek constitutional relief in the demanding district by filing a Section 2255 motion in that court. Though Section 2255 speaks of seeking relief from a "sentence," the peculiar nature of a speedy-trial claim may be sufficient to convince a Section 2255 court to grant pretrial relief, just as Kane expressed a willingness to grant pretrial habeas relief in a speedy-trial context despite the habeas statute's technical requirement that a habeas applicant be in custody pursuant to the "judgment" of a state court. 28 U.S.C.A. § 2254(a) (1971). In any event, since it is now well settled that Section 2255 motions are identical to habeas corpus actions with respect

—a judicial invitation apparently not yet accepted by the legislature.[84]

What George has resolved, in other words, is simply that federal habeas corpus is available, after exhaustion of confining state remedies, to level constitutional challenges against the detainer system on

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to the nature of cognizable constitutional claims. Developments, note 62 supra, at 1062-1066, the existence of pretrial Sixth Amendment habeas relief in Kane should call for the similar availability of such relief under Section 2255.

In addition to the above procedures, an inmate deprived of a federal speedy trial might, under the Administrative Procedure Act, 5 U.S.C.A. § 701-706 (1967), seek judicial review of the Department of Justice's allegedly unconstitutional action, id. § 702, and might ask the court to compel the government to accord the defendant an immediate trial or to dismiss the outstanding charges. Id. § 706. There is some question, however, whether the A.P.A. provides an independent jurisdictional base, though the trend is to hold that it does. See, e.g., Delaware v. Penn Central, 323 F. Supp. 487 (D. Del. 1971) (discussing numerous cases). Finally, the Mandamus Act of 1962, 28 U.S.C.A. § 1361 (Supp. 1971), might provide appropriate relief, either as an independ-grant of jurisdiction or combined with another jurisdictional statute. Byse & Fiocca, "Section 1361 of the Mandamus and Venue Act of 1962 and 'Nonstatutory' Judicial Review of Federal Administrative Action," 81 Harv. L. Rev. 308 (1967). Conceivably, since federal criminal laws may "arise under" the commerce power of Congress, 28 U.S.C.A. 1337 (1962) may also support federal court jurisdiction. But cf. Bivens v. Six Unknown Named Narcotic Agents, 91 S.Ct. 1999 (1971). Note, however, that the standard civil rights action, 42 U.S.C.A. § 1983, in conjunction with the jurisdictional provisions of 28 U.S.C.A. § 1343, can never be employed to attack a federal detainer or charge, for that statute may only be invoked to redress illegal state deprivations of constitutional rights. On Section 1983, see notes 106-107 infra and accompanying text.

[84] Perhaps the task will be left to the Judicial Conference's advisory committee on criminal rules, which has been asked to draft procedural rules for habeas corpus proceedings. Developments, note 62 supra, at 1158.

its face or as applied.[85] As cases subsequent[86] to George clearly demonstrate, however, the decision is of no assistance to a lawyer or inmate trying to decide where to file a challenge against a future out-of-state sentence or a challenge to dismiss an out-of-state charge on speedy-trial grounds. Presumably, George has simply perpetuated the split in circuits,[87] leaving in its wake four or so differing interpretations of Ahrens[88]

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[85]That is also the interpretation given George by the Third Circuit in United States ex rel. Jennings v. Pennsylvania, 429 F2.d 522, 523 n. 4 (3d Cir. 1970). Theoretically, such challenges—grounded in due process, equal protection, or cruel and unusual punishment theory—could take the form of attacks against the detainer system in general, or as applied to a particular inmate (e.g., a constitutional challenge against prison authorities, solely because of the detainer, treating as a maximum security risk a prisoner facing a reckless driving charge). The writ of habeas corpus to review certain prison conditions had been relatively common even before George. See Developments, note 62 supra, at 1079-1087. Many consider Civil Rights Act of 1871, 42 U.S.C.A. § 1983 (1970), to be a viable alternative cause of action ("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."). E.g., Note, "Prisoners" Rights Under Section 1983," 57 Geo. L.J. 1272 (1969). Indeed, considering that exhaustion of state remedies is not a prerequisite to Section 1983 relief, that remedy may sometimes be preferable to habeas corpus. Note, "42 U.S.C.A. Section 1983: An Emerging Vehicle of Post-Conviction Relief for State Prisoners," 22 U. Fla. L. Rev. 596, 606-607 (1970). Where habeas and Section 1983 relief overlap, however, courts seem unwilling to permit the use of the latter to circumvent the exhaustion requirements of the former. E.g., Sostre v. McGinnis, 442 F.2d 178, 182, 204 n. 50 (2d Cir. 1971) (en banc). See Developments, note 62 supra, at 1087 n. 72. Section 1983 can also sometimes provide discovery advantages unavailable in habeas corpus proceedings. Turner, "Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation," 23 Stan. L. Rev. 472, 504-507 (1971).

[86]E.g., United States ex rel. Jennings v. Pennsylvania 429 F.2d 522 (3d Cir. 1970); Williams v. Pennsylvania, 315 F. Supp. 1261 (W.D. Mo. 1970); United States ex rel. Pitcher v. Pennsylvania, 314 F. Supp. 1329 (E.D. Pa. 1970).

[87]The remaining conflict among the circuits was explicitly recognized in Justice Harlan's concurring opinion in George. See 399 U.S. at 230.

[88](1) Only the district of confinement has jurisdiction. United States ex rel. Van Scoten v. Pennsylvania, 404 F.2d 767 (3d Cir. 1968). (2) With

Nevertheless, for an inmate under detainer who asserts a violation of his Sixth Amendment speedy-trial rights and seeks simply to quash the detainer—rather than to quash the charges—the road

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exceptions, only the demanding or sentencing district has jurisdiction. Word v. North Carolina, 406 F.2d 352 (4th Cir. 1969) (en banc). (3) Jurisdiction in the two districts is concurrent, but the demanding or sentencing jurisdiction is preferred. United States ex rel. Meadows v. New York, 426 F.2d 1176 (2d Cir. 1970). (4) Jurisdiction lies in the district of confinement, but if the demanding jurisdiction follows a Word-type approach, transfer of the case to that district may be appropriate. George v. Nelson, 410 F.2d 1179 (9th Cir. 1969) (question of transfer acknowledged but not resolved), aff'd on other grounds, 399 U.S. 224 (1970). Conversely, under George and Ashley v. Washington, 394 F.2d 125 (9th Cir. 1968), the Ninth Circuit would disallow transfer from any out-of-state jurisdiction to a district within the Ninth Circuit.

The Supreme Court's failure to clarify the choice-of-forum problem greatly manifests the need to select the proper habeas court, if one is available, in order to avoid dismissal of an application for want of jurisdiction. To this end, it is necessary to examine closely the case law of each particular federal circuit. In that regard, the following circuit-by-circuit compilation may be helpful. Note, however, that many of these cases are pre-Rowe interpretations of Ahrens, and may be open to reexamination in light of Rowe.

District of Columbia: Hudson v. Hardy, 424 F.2d 854, 856 n. 5 (D.C. Cir. 1970); Ginyard v. Clemmer, 357 F.2d 291 (D.C. Cir. 1966); Taylor v. United States Bd. of Parole, 194 F.2d 882 (D.C. Cir. 1952); Johnson v. Matthews, 182 F.2d 677 (D.C. Cir. 1950); Wilson v. Rodgers, 274 F. Supp. 39 (D.D.C. 1967).

First Circuit (Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island); Duncan v. State, 295 F.2d 528 (1st Cir. 1961).

Second Circuit (Connecticut, New York, Vermont): United States ex rel. Meadows v. New York, 426 F.2d 1176 (2d Cir. 1970).

Third Circuit (Delaware, New Jersey, Pennsylvania, Virgin Islands): United States ex rel. Van Scoten v. Pennsylvania, 404 F.2d 767 (3d Cir. 1968).

Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia, West Virginia): Word v. North Carolina, 406 F.2d 352 (4th Cir. 1969) (en banc).

Fifth Circuit (Alabama, Canal Zone, Florida, Georgia, Louisiana, Mississippi, Texas): Theriault v. Mississippi, 433 F.2d 990 (5th Cir. 1970); Rodgers v. Louisiana, 418 F.2d 237 (5th Cir. 1969); Varallo v. Ohio, 312 F. Supp. 45 (E.D. Tex. 1970). But see Allen v. United States, 327 F.2d 58 (5th Cir. 1964).

Sixth Circuit (Kentucky, Michigan, Ohio, Tennessee): Hart v. Ohio Bureau of Probation and Parole, 290 F.2d 550 (6th Cir. 1961).

Seventh Circuit (Illinois, Indiana, Wisconsin): United States ex rel. Quinn v. Hunter, 162 F.2d 644 (7th Cir. 1947); United States ex rel. Harrington v. Schlotfeldt, 136 F.2d 935 (7th Cir. 1943); United States ex rel. Circella v.

remains clear. As the cases make clear,[89] such an inmate can bring a habeas action in the district of confinement, naming his warden as respondent, so long as he has already made an appropriate demand for a speedy trial and exhausted his remedies in the courts of the demanding state.[90] Since such an action is directed squarely against one's warden, it lacks multistate dimensions and is unaffected by the split in circuits regarding jurisdiction in multistate habeas matters.

Neelly, 115 F. Supp. 615 (N.D. Ill. 1953). Cf. Ahrens v. Clark, 335 U.S. 188, 190 (1948).

Eighth Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota): Brown v. Arkansas, 426 F.2d 677 (8th Cir. 1970).

Ninth Circuit (Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington): George v. Nelson, 410 F.2d 1179 (9th Cir. 1969), aff'd on other grounds, 399 U.S. 224 (1970).

Tenth Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming); Ellinson v. United States, 263 F.2d 395 (10th Cir. 1959) (questionable after Rowe); Howard v. District Attorney, 246 F. Supp. 68 (D. Colo. 1965).

[89] E.g., United States ex rel. Jennings v. Pennsylvania, 429 F.2d 522 (3d Cir. 1970); Word v. North Carolina, 406 F.2d 353, 357 n. 6 (4th Cir. 1969) (en banc); Caruth v. Mackell, 7 Crim. L. Rep. 2414 (E.D.N.Y., July 15, 1970).

[90] One exhaustion, compare Caruth v. Mackell, 7 Crim. L. Rep. 2414 (E.D.N.Y., July 15, 1970), with Kane v. Virginia, 419 F.2d 1369 (4th Cir. 1970), and Williams v. Pennsylvania, 315 F. Supp. 1261 (W.D. Mo. 1970). Both Kane and Williams hold that exhaustion in a speedy-trial context should entail seeking even appellate court relief in the demanding state. Caruth, on the other hand, held the exhaustion requirement met when an indigent prisoner simply made repeated speedy trial requests to the demanding state prosecutor, and never sought judicial relief before filing in federal court. If Caruth can be squared with Williams and Kane, it is only because the requested relief in Williams and Kane was outright dismissal of the charges, whereas the relief afforded by the Caruth court was simply an order to "hold for naught" the demanding state's detainer. Cf. Lawrence v. Blackwell, 298 F. Supp. 708 (N.D. Ga. 1969) (action can be brought in federal court by a federal prisoner to be relieved of the burdens of a state detainer, so long as a demand has been made for a speedy trial and has not been acted upon by the state; no requirement of exhausting state judicial remedies). Following Lawrence the Northern District of Georgia issued a memorandum setting forth the procedures that should be followed by Atlanta Penitentiary federal prisoners seeking relief from the burdens of state detainers. The memorandum, reproduced in full in Jacob & Sharma, note 1 supra. at 587 n. 558, requires the inmates to demand a speedy trial and then to wait a reasonable time—"at least 180 days or such lesser time as a state by law may provide for speedy trial"—before petitioning

Indeed, even the Word[91] decision, the leading exponent of the view that habeas jurisdiction in multistate matters lies in the demanding or sentencing district, seems to recognize the propriety of suing one's warden in the district of confinement, provided the only relief requested in quashing the effects of the detainer rather than quashing the charge or conviction underlying the detainer.[92]

When relief is sought against the underlying charge or conviction itself, however, the considerations are far more complex. In the context of a speedy-trial denial, we have seen that the Fourth Circuit in Kane v. Virginia[93] expressed a willingness, under appropriate conditions, to grant bold relief in the form of an order barring a state prosecution. It is important to recognize, however, as other courts have,[94] that Kane was decided by a circuit which has held that "the federal petition for habeas corpus challenging the validity of a state detainer should preferably be brought in the federal district court in the demanding state."[95] In Kane, in other words, a bold order of outright dismissal would presumably be issued in a setting where the demanding state is at least an actual party to the litigation.

Understandably, then, where habeas relief is sought in the district of confinement—where the demanding state cannot without its consent be made a party to the litigation—many courts have been reluctant to go so far as to order foreign state charges dismissed.[96] Indeed, as Word has noted, such relief could be accomplished—and

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the federal court in the district of confinement to set aside the detainer. State prisoners may also consider a civil rights action under 42 U.S.C.A. 1983 (1970) as an alternative to habeas corpus in seeking to quash a detainer. On Section 1983 actions—and whether they can alleviate the need for exhaustion—see note 85 supra and references cited.

[91] Word v. North Carolina, 406 F.2d 352 (4th Cir. 1969) (en banc).

[92] Id. at 357 n. 6.

[93] 419 F.2d 1369 (4th Cir. 1970).

[94] Williams v. Pennsylvania, 315 F. Supp. 1261 (W.D. Mo. 1970).

[95] Id. at 1263.

[96] Id. But cf. George v. Nelson, 410 F.2d 1179 (9th Cir. 1969), aff'd on other grounds, 399 U.S. 224 (1970).

the demanding state bound directly or by collateral estoppel—"only on the theory that the [confining state's] warden was indeed [the demanding state's] custodian and that a valid, in personam judgment against him would bind his [demanding state] superiors and successors in subsequent proceedings brought in [the demanding state]."[97] Rather than proceed under such a contrived agency theory, however, a district court in the confining state would probably, if possible, transfer the case to an appropriate district court in the demanding state.[98]

Generally,[99] then, an inmate seeking not only to avoid the effects of the detainer, but also to set aside the underlying charge or conviction, is probably well advised, after exhausting his demanding state remedies,[100] to file for federal habeas corpus in the appropriate demanding state district court. The rub, however, is that such a course of action is only open if the demanding state happens to fall within a circuit following a Word-type "demanding district" approach to habeas jurisdiction. If it does not, a petition filed in the demanding district will be dismissed for want of jurisdiction. Should the demanding district not follow Word, the inmate may still be able to be granted broad dismissal-type relief if he files in his district of confinement, provided that that district happens to accept, as does the Ninth Circuit,[101] the "agency" approach to multistate habeas matters.

But some prisoners may not be so fortunate as to have their demanding state fall within a Word-type circuit or to have their confining state fall within an agency-approach circuit. The most drastic

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[97] Word v. North Carolina, 406 F.2d 352, 358 n. 6 (4th Cir. 1969) (en banc).

[98] Id.

[99] For a more complete discussion, see text accompaying notes 115-117 infra.

[100] E.g., Kane v. Virginia, 419 F.2d 1369 (4th Cir. 1970); Williams v. Pennsylvania, 315 F. Supp. 1261 (W.D. Mo. 1970). See also United States ex rel. Jennings v. Pennsylvania, 429 F.2d 522 (3rd Cir. 1970). For a further discussion of the contours of the exhaustion requirement, see note 90 supra.

[101] George v. Nelson, 410 F.2d 1179 (9th Cir. 1969), aff'd on other grounds, 399 U.S. 224 (1970). Cf. United States ex rel. Meadows v. New York, 426 F.2d 1176, 1181 (2d Cir. 1970) (implying that the confining court would have a duty to adjudicate the merits of an out-of-state conviction if the demanding district refused jurisdiction).

consequence of the Nelson v. George Court's colossal default in leaving unresolved the split in circuits can be graphically protrayed: An inmate confined in a Word-type jurisdiction—where relief should be sought in the demanding state—but with a detainer field against him by a state located within a strict Ahrens-type circuit will, in classic renovi terms, be snubbed by the federal court in the district of his confinement and by the federal court in the demanding district, each court contending that he ought to seek relief in the other district.[102]

The "inmate without a federal forum" problem can not only occur with state prisoners, but can also readily occur with federal prisoners facing state detainers: for federal prisoners can be assigned, for reasons relating to rehabilitation, family, or security, to any prison within the vast federal network. But because transfers from one federal prison to another can, by statute,[103] be accomplished rather easily, a federal prisoner who is without a forum may be able to request a transfer in order to facilitate his litigation.[104] A state prisoner in such a predicament is in a far worse position, for state prisoners

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[102] See United States ex rel. Pitcher v. Pennsylvania, 314 F. Supp. 1329 (E.D. Pa. 1970) (habeas petition denied for lack of territorial jurisdiction; certificate of probable cause to appeal denied). Pitcher, incarcerated in Indiana, sought relief from a Pennsylvania charge and detainer on speedy-trial grounds. "Relator sought the writ in the United States District Court for the Northern District of Indiana but his petition was dismissed for lack of jurisdiction. Unfortunately for relator, we are obliged to do the same under the decision in United States ex rel. Van Scoten v. Commonwealth of Pennsylvania, 404 F.2d 767 (C. A. 3, 1968)." Id. See also Williams v. Pennsylvania, 315 F. Supp. 1261 (W.D. Mo. 1970). In Williams, a federal prisoner in Missouri sought relief in a Missouri federal court from a Pennsylvania charge. That court denied relief for want of jurisdiction, and recommended to petitioner that he seek relief in a Pennsylvania federal district court. In light of Van Scoten, however, petitioner's chances for relief in that forum are equally slim. By contrast, if the inmate happens to be confined in an agency-approach jurisdiction with a detainer filed against him by a state located within a Word-type circuit, he will be in the fortunate position of being able to avail himself of either federal court, though his free selection might be impeded by judicial transfer of the case from his preferred district to the other district court.

[103] 18 U.S.C.A. 4082 (1969).

[104] Further, an about-to-be-transferred inmate may be able to block a proposed transfer if it would leave him without a forum. Cf. Johnson v. Avery, U.S. 483 1969) (constitutional right of access to the courts).

cannot be freely transferred across the nation to serve their sentences. In very limited instances, however, a state inmate may be able to secure a transfer to an appropriate location, provided both his confining state and the demanding state happen to be a party to an Interstate Corrections Compact which enables member states, on a contract basis, to utilize each other's correctional facilities.[105]

If an inmate without a district court habeas forum cannot bridge the litigation gap through administrative transfer, he will either have to settle for less than total relief—by suing his warden in the district of confinement to simply vitiate the effects of the detainer—or will have to grasp, perhaps in vain, for redress through relatively complicated or obscure legal and equitable channels. If he claims he has been denied a speedy trial and seeks to bar prosecution on an outstanding charge, he might, for example, consider bringing a Section 1983 civil rights action[106] in the demanding state, though he will have to clear several complex hurdles before obtaining relief.[107]

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[105] E.g., Cal. Penal Code § §11190 et seq. (West Supp. 1970) (Western Interstate Corrections Compact).

[106] 42 U.S.C.A. 1983 (1970).§

[107] The major stumbling blocks relate to exhaustion of state court remedies, the possible res judicata effect of a prior adverse state court determination on a later Section 1983 action brought in federal court, and the problem of overcoming marked reluctance on the part of federal courts to enjoin pending state court prosecutions.

Traditionally, as we have seen, exhaustion is not a prerequisite to Section 1983 relief. See note 85 supra. However, some courts are beginning to object to the use of Section 1983 in order to avoid the exhaustion requirements of federal habeas corpus. Id. Moreover, as a practical matter, federal court hesitance to bar a state prosecution will be enhanced if the defendant proceeds directly to federal court.

Yet, if state court remedies are availed of prior to seeking Section 1983 relief, the inmate-litigant may find his federal action dismissed, on res judicata grounds, because of his prior unsuccessful attempt to satisfy his claim through the state judicial process. While habeas corpus actions are clearly exempt from conventional res judicata notions, Sanders v. United States, 373 U.S. 1 (1963), the possible applicability of res judicata to Section 1983 actions remains a nagging problem. Note, "Federal Jurisdiction and Res Judicata: Litigation in State Courts of Federal Constitutional Questions Closing the Door to the Federal Courts," 24 U. Miami L. Rev. 835 (1970). Hopefully, Section 1983 actions will eventually find their way out from under the

And conceivably, such a claim, as well as an action to set aside a

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res judicata rubric, especially if certain Section 1983 actions by prisoners are held to be sufficiently similar to habeas corpus so as to require state court exhaustion preliminary to seeking federal court relief.

At present, however, an inmate concerned about the res judicata problem might try to file immediately for federal court relief, bypassing the state court system. In federal court, however, he will have to be prepared to argue that exhaustion requirements do not apply to his particular Section 1983 suit or, if they do, that the exhaustion requirement has been satisfied by a speedy-trial demand made on the state court prosecutor, Caruth v. Mackell, 7 Crim. L. Rep. 2414 (E.D.N.Y., July 15, 1970)—an argument which, if accepted, would avoid res judicata problems because the claim will never have been adjudicated by a state court.

But bypassing the state court system may, because of considerations of federalism, make even more difficult one's chances of convincing a federal court to dismiss state charges—the equivalent of enjoining a pending state prosecution, a remedy looked upon with exceptional disfavor by the Supreme Court. See, e.g., Younger v. Harris, 401 U.S. 37 (1971); Carey, Federal Court Intervention in State Criminal Procecutions," 56 Mass. L.Q. 11 (March 1971). When Harris was pending, most observers believed the Supreme Court would resolve the question whether the language of Section 1983, permitting a "suit in equity" to redress constitutional violations inflicted under color of state law, constituted an "express exception" to the federal "anti-injunction statute, 28 U.S.C.A. § 2283 (1965) ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments"). But the Harris Court did not reach that question, for in the case at hand, it found insufficient grounds for equitable relief, whether or not such relief could be obtained in federal court. In short, the Court refused even to consider the propriety of injunctive relief in the absence of a showing of irreparable injury, bad faith, harassment, or other unusual circumstances. Younger v. Harris, supra, at 46, 54. Further, the Court held that "the cost, anxiety, and inconvenience" of having to defend against a state prosecution could not, by themselves, constitute "irreparable injury" for purposes of securing equitable relief.

With respect to the denial of a speedy trial in a detainer situation, however, a strong case can seemingly be made for the necessity of federal court equitable intervention. First of all, the anxiety involved is far greater than in cases where an accused must simply defend a present prosecution. In a speedy-trial context, the inmate-accused must worry about whether there will be a prosecution at all—a serious impediment to rehabilitation and post-prison career planning. Moreover, if he is accorded a speedy trial and is convicted, he may be given a sentence to run concurrent with his present one, an opportunity forever lost—and thus an "irreparable injury"—if prosecution is delayed until the expiration of his present term. Finally, in light of the fact that

demanding state conviction,[108] could be pursued by originally seeking habeas relief not from a district court, but rather from a circuit judge or even possibly from the Supreme Court.[109]

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many detainers are filed for harassment purposes and with no intention of being followed up, see text accompanying notes 4-6 supra, it can be forcibly contended that the failure of a prosecutor to make a Smith v. Hooey "good faith" effort to accord a speedy trial to an inmate who has demanded one should be sufficient to satisfy the Harris-type test of a prosecution undertaken in "bad faith," for "harassment," or "with no hope of conviction" —and hence suitable for injunctive relief. See also Perez v. Ledesma, 401 U.S. 82, 85 (1971).

Of course, even if injunctive relief seems warranted, a litigant would still have to overcome the possible impediment of the anti-injunction statute. That might require a holding that Section 1983 is an exception to the anti-injunction statute, as Justice Douglas believes, see Younger v. Harris, supra, at 62 (Douglas, J., dissenting), or that the anti-injunction statute impliedly excepts from its ambit bad faith or harassing procecutions, Carey, supra, at 27, or that the "peculair nature" of the right to a speedy trial calls for the availability of pretrial federal injunctive action. Cf. Kane v. Virginia, 419 F.2d 1369 (4th Cir. 1969) (peculiar nature of speedy-trial right enables federal habeas court to bar state procecution).

[108] Although Section 1983 actions have often been used to enjoin pending procecutions, they have not been employed to seek redress against challenged convictions and sentences.

[109] Since "writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions," 28 U.S.C.A. 2241(a) (1971), a would-be habeas applicant who finds himself without a district court forum may seek relief by invoking the original; jurisdiction of a higher judge or court. Such an extraordinary application, however, should "state the reasons for not making application to the district court of the district in which the applicant is held," 28 U.S.C.A. § 2242 (1971), a task not difficult for a petitioner trapped in a jurisdictional renvoi situation. If the confining state and the demanding state are within the same judicial circuit, application should probably be made to a judge of that circuit. Cf. Sokol, A Handbook of Federal Habeas Corpus 44 (1st ed. 1965). If the petitioner and respondent are in different circuits, the application might be made at the Supreme Court level, although Sokol questions the constitutionality of Supreme Court original habeas jurisdiction in habeas matters. Id. at 46. Though original habeas jurisdiction above the district court level is not favored, see Fed. R. App. P. 22(a) (original application made to circuit judge will ordinarily be transferred to district court), its exercise ought to be encouraged in the limited instance where district court jurisdiction is unavailable. Otherwise, the situation would be the legal equivalent of denial of access to the courts. Johnson v. Avery, 393 U.S. 483 (1969), or, arguably of a

As has been alluded to above,[110] the split in circuits that has survived the George decision leaves some inmates without any district court habeas forum, but leaves others—such as those fortunate enough to be confined in an "agency approach" circuit with a detainer emanating from a state within a Word-type circuit—with two different district courts capable of assuming jurisdiction over the habeas claim.[111] For those inmates, George's circumvention of the jurisdictional question will encourage and even promote forum-shopping.

If an inmate is able to file either in the confining district or in the demanding district, his selection of the most appropriate forum will depend on many practical and strategic problems. If a factual dispute is anticipated, the demanding or sentencing state will probably be preferable, for that is the jurisdiction closest in proximity to needed witnesses and records, and it will be able to secure testimony through compulsory process.[112] If the petitioner's presence should be deemed necessary at the evidentiary hearing, his presence can presumably be secured via a writ of habeas corpus ad testificandum.[113] Moreover, if quashing the charges or conviction, rather than negation of the detainer, is the desired relief, the out-of-state forum is, as we have seen,[114] clearly preferable. If any of these instances, even if the petitioner should for some reason prefer to file in the court of the district of confinement, that court, which might be unable to subpoena witnesses and records from a foreign jurisdiction,[115] and which might be reluctant to quash the charges or the conviction, would probably transfer the case to the demanding or sentencing district.

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suspension of the writ of habeas corpus. Cf. Developments, note 62 supra at 1263-1274 (constitutional prohibition against suspension arguably extends to writs sought by state prisoners).

[110] See note 102 supra.

[111] There will, of course, be inmates in an in-between situation, with one district suitable for filing. If the confining and demanding jurisdictions both follow Word, for example, the inmate will of necessity have to file in the demanding jurisdiction. If both districts follow an agency approach, he will have to file in the incarcerating jurisdiction. Further, if the demanding jurisdiction follows Ahrens but does not go so far as to accept the "agency" doctrine, an inmate seeking total relief will have to file in the demanding district.

[112] Word v. North Carolina, 406 F.2d 352 (4th Cir. 1969) (en banc).

[113] Id. at 356 n. 5 (analyzing the availability of the writ).

[114] See text accompanying notes 92-98 supra.

[115] Developments, note 62 supra, at 1192.

In certain situations, however, a petitioner might prefer to file in the district of confinement, and the court might be disinclined to transfer the case. If the controversy does not involve a factual dispute, as is frequently true with respect to speedy trial-detainer claims, transfer might not seem warranted.[116] And if the petitioner is represented, at his place of confinement, by counsel or by an inmate legal assistance clinic, another factor militating against transfer is present. Furthermore, suing in the district of confinement may be strategically advantageous, as the attorney general of the confining state—who will be called upon to represent the respondent warden—will be unlikely to oppose vigorously a claim that another sovereign has denied the petitioner a speedy trial or has wrongfully convicted him, and that, accordingly, that sovereign's detainer, charge, or conviction ought to be set aside.[117]

VII.

In many ways, it is unfortunate that an article of this nature should have had to be written. The law of detainers is all too mystifying to lawyers, let alone to inmates and law students called upon to represent inmates. The default of the Supreme Court in George has perpetuated an intolerable jurisdictional situation, which will exist until the Court reconsiders Ahrens or until a clarification is provided by Congress or through the Supreme Court's legislative rule-making process.[118] Even then, the considerations involved in dealing with detainers will be complex. Hopefully, the present discussion will be helpful to those charged with analyzing the manifold considerations.

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[116] This would be particularly so if the petitioner sought only to set aside the detainer and not the underlying charges or conviction.

[117] Another factor which should strategically influence forum-shopping is the possible differing constitutional case law in the competing jurisdictions. If, for example, one circuit has an important far-reaching ruling relating to speedy-trial relief, filing in the district court of that circuit may well be preferable to filing in the district court of a circuit following a more restrictive construction of the speedy-trial clause.

[118] See note 84 supra.

ADDITIONAL CASE: Bladen v. 30th Judicial Circuit Court of Kentucky, 93 S.Ct. 1123 (1973)

Mr. Justice BRENNAN delivered the opinion of the Court.

Petitioner is presently serving a sentence in an Alabama prison. He applied to the District Court for the Western District of Kentucky for a writ of federal habeas corpus, alleging denial of his constitutional right to a speedy trial, Smith v. Hooey, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969), and praying that an order issue directing Kentucky to afford him an immediate trial on a then three-year-old Kentucky indictment. We are to consider whether, as petitioner was not physically present within the territorial limits of the District Court for the Western District of Kentucky, the provision of 28 U.S.C. § 2241(a) that "[w]rits of habeas corpus may be granted by the . . . district courts . . . within their respective jurisdictions" (emphasis supplied), precluded the District Court from entertaining petitioner's application. The District Court held that the section did not bar its determination of the application. The court held further that petitioner had been denied a speedy trial and ordered respondent Kentucky officials either to secure his presence in Kentucky for trial within 60 days or to dismiss the indictment. The Court of Appeals for the Sixth Circuit reversed on the ground that "the habeas corpus jurisdiction conferred on the federal courts by 28 U.S.C. § 2241(a) is "limited to petitions filed by persons physically present within the territorial limits of the District Court.' " 454 F.2d 145, 146 (1972). We granted certiorari. 407 U.S. 909, 92 S.Ct. 2451, 32 L.Ed.2d 682 (1972). We reverse.

I.

On July 31, 1967, the grand jury of the Jefferson County Circuit Court (30th Judicial Circuit of Kentucky) indicted petitioner on one count of storehouse breaking and one count of safebreaking. At the time of the indictment petitioner was in custody in California, and he was returned to Kentucky to stand trial on the indictment. But on November 13, 1967, he escaped from the custody of Kentucky officials and remained at large until his arrest in Alabama on February 24, 1968. Petitioner was convicted of certain unspecified felonies in the Alabama state courts, and was sentenced to the Alabama state prison where he was confined when he filed this action.

The validity of petitioner's conviction on the Alabama felonies is not at issue here, just as it was not at issue before the District Court for the Western District of Kentucky. Nor does petitioner challenge the "present effect being given the [Kentucky] detainer by the [Alabama] authorities . . . ." Nelson v. George, 399 U. S. 224, 225, 90 S. Ct. 1963, 1964, 26 L. Ed. 2d 578 (1970). He attacks, rather, the validity of the Kentucky indictment which underlies the detainer lodged against him by officials of that State.

In a pro se application for habeas corpus relief to the Federal District Court in the Western District of Knetucky, petitioner alleged that he had made repeated demands for a speedy trial on the Kentucky indictment, that he had been denied his right to a speedy trial, that further delay in trial would impair his ability to defend himself, and that the existence of the Kentucky indictment adversely affected his condition of confinement in Alabama by prejudicing his opportunity for parole. In response to an order to show cause, the Commonwealth of Kentucky argued that the District Court lacked jurisdiction because the petitioner was not confined within the district. Respondent added that "petitioner in the case at bar may challenge the legality of any of the adverse effects of any Kentucky detainer against him in Alabama by habeas corpus in the Alabama Federal District Court." App., at 6-7. The District Court held, citing Smith v. Hooey, 393 U. S. 374, 89 S. Ct. 575, 21 L. Ed. 2d 607 (1969) that Kentucky must "attempt to effect the return of a prisoner from a foreign jurisdiction for trial on pending state charges when such prisoner so demands . . . Since it is the State of Kentucky which must take action, it follows that jurisdiction rests in this district which has jurisdiction over the necessary state officials." App., at 9.

Under the constraint of its earlier decision, the Court of Appeals reversed but stated that it "reach[ed] this conclusion reluctantly" because of the possibility that the decision would "result in Braden's inability to find a forum in which to assert his constitutional right to a speedy trial—a right which he is legally entitled to assert at this time under Peyton v. Rowe, 391 U. S. 54, 88 S. Ct. 1549, 20 L. Ed. 2d 426 (1968). This is a possibility because the rule in the Fifth Circuit, where [Braden] is incarcerated, appears to be that a district court in the state that has filed the detainer is the proper forum in which to file the petition. See May v. Georgia, 409 F. 2d 203 (5th Cir. 1969). See also Rodgers v. Louisiana, 418 F. 2d 237 (5th Cir. 1969). Braden thus may find himself ensnared in what has aptly been termed 'Catch 2254'—unable to vindicate his constitutional rights in either of the

only two states that could possibly afford a remedy. See Tuttle, Catch 2254: Federal Jurisdiction and Interstate Detainers, 32 U. Pitt. L. Rev. 489, 502-503 (1971)." 454 F. 2d, at 146-147.

II.

We granted certiorari to resolve a sharp conflict among the federal courts on the choice of forum where a prisoner attacks an interstate detainer on federal habeas corpus. Before turning to that question we must make clear that petitioner is entitled to raise his speedy trial claim on federal habeas corpus at this time. First, he is currently "in custody" within the meaning of the federal habeas corpus statute, 28 U. S. C. 2241(c)(3). Prior to our decision in Peyton V. Rowe, 391 U. S. 54, 88 S. Ct. 1549, 20 L. Ed. 2d 426 (1968), the "prematurity doctrine" of McNally v. Hill, 293 U. S. 131, 55 S. Ct. 24, 79 L. Ed. 238 (1934), would, of course, have barred his petition for relief. But our decision in Peyton v. Rowe discarded the prematurity doctrine, which had permitted a prisoner to attack on habeas corpus only his current confinement, and not confinement that would be imposed in the future, and opened the door to this action.[4]

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[4] In Smith v. Hooey, 393 U. S. 374, 89 S. Ct. 575, 21 L. Ed. 2d 607 (1969), we considered a speedy trial claim similar to the one presented in the case before us, and we held that a State which had lodged a detainer against a petitioner in another State must, on the prisoner's demand, "make a diligent, good faith effort" to bring the prisoner to trial. Id., at 383. 89 S. Ct., at 579. But that case arose on direct review of the denial of relief by the state court, and we had no ocacsion to consider whether the same ro similar claims could have been raised on federal habeas corpus. Yet it logically follows from Peyton v. Rowe, 381 U. S. 54, 88 S. Ct. 1549, 20 L. Ed. 2d 426 (1968), that the claims can be raised on collateral attack. In this context, as opposed to the situation presented in Peyton, the "future custody" under attack will not be imposed by the same sovereign which holds the petitioner in his current confinement. Nevertheless, the considerations which were held in Peyton do not warrant a prompt resolution of the claim also apply with full force in this context. 391 U. S. at 63-64. 88 S. Ct., at 1554-1555. See United States ex rel. Meadows v. New York, 426 F. 2d 1176, 1179 (CA2 1970); Word v. North Carolina, 406 F. 2d 352, 353-355 (CA4 1969). Since the Alabama warden acts here as the gaent of the Commonwealth of Kentucky in holding the petitioner pursuant to the Kentucky detainer, we have no difficulty concluding that petitioner is "in custody" for purposes of 28 U. S. C. 2241(c)(3). On the facts of this case we need not decide whether, if no detainer had been issued against him, petitioner would be sufficiently "in custody" to attack the Kentucky indictment by an action in habeas corpus.

Second, petitioner has exhausted all available state remedies as a prelude to this action. It is true, of course, that he has not yet been tried on the Kentucky indictment, and he can assert a speedy trial defense when, and if, he is finally brought to trial. It is also true, as our Brother REHNQUIST points out in dissent, that federal habeas corpus does not lie, absent "special circumstances," to adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court. Ex parte Royall, 117 U.S. 241, 253, 6 S.Ct. 734, 741, 29 L.Ed. 868 (1886). Petitioner does not, however, seek at this time to litigate a federal defense to a criminal charge, but only to demand enforcement of the Commonwealth's affirmative constitutional obligation to bring him promptly to trial. Smith v. Hooey, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969). He has made repeated demands for trial to the courts of Kentucky, offering those courts an opportunity to consider on the merits his constitutional claim of the present denial of a speedy trial. Under these circumstances it is clear that he has exhausted all available state court remedies for consideration of that constitutional claim, even though Kentucky has not yet brought him to trial.

* * *

The fundamental interests underlying the exhaustion doctrine have been fully satisfied in petitioner's situation. He has already presented his federal constitutional claim of a present denial of a speedy trial to the courts of Kentucky. The state courts rejected the claim, apparently on the grounds that since he had once escaped from custody the Commonwealth should not be obligated to incur the risk of another escape by returning him for trial. Petitioner exhausted all available state court opportunities to establish his position that the prior escape did not obviate the Commonwealth's duty under Smith v. Hooey, supra. Moreover, petitioner made no effort to abort a state proceeding or to disrupt the orderly functioning of state judicial processes. He comes to federal court not in an effort to forestall a state prosecution, but to enforce the Commonwealth's obligation to provide him with a state court forum. He delayed his application for federal relief until the state courts had conclusively determined that his prosecution was temporarily moribund. Since petitioner began serving the second of two 10-year Alabama sentences in March of 1972, the revival of the prosecution may be delayed until as late as 1982. A federal

habeas corpus action at this time and under these circumstances does not jeopardize any legitimate interest of federalism. The Commonwealth apparently shares that view since it specifically concedes that petitioner has exhausted all available state remedies. Transcript of Oral Argument, at 41.

In the case before us the Court of Appeals held—not surprisingly, in view of the considerations discussed above—that even though petitioner had chosen the wrong forum, his speedy trial claim was one "which he is legally entitled to assert at this time under Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968)." 454 F.2d, at 146. And the District Court, which upheld on the merits petitioner's speedy trial claim, necessarily adopted that view. Indeed, the great majority of lower federal courts which have considered the question since Smith v. Hooey, supra, have reached this same, and indisputably correct, conclusion.

We emphasize that nothing we have said would permit the derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court. The contention in dissent that our decision converts federal habeas corpus into "a pretrial motion forum for state prisoners," wholly misapprehends today's holding.

III.

Accordingly, we turn to the determination of the forum in which the petition for habeas corpus should be brought. In terms of traditional venue considerations, the District Court in the Western District of Kentucky is almost surely the most desirable forum for the adjudication of the claim. It is in Kentucky, where all of the material events took place, that the records and witnesses pertinent to petitioner's claim are likely to be found. And that forum is presumably no less convenient for the respondent, the Commonwealth of Kentucky, than for the petitioner. The expense and risk of transporting the petitioner to the Western District of Kentucky, should his presence at a hearing prove necessary, would in all likelihood be outweighed by the difficulties of transporting records and witnesses from Kentucky to the district where petitioner is confined. Indeed, respondent makes clear that "on balance, it would appear simpler and less expensive for the State of Kentucky to litigate such questions [as those involved in this case] in one of its own Federal judicial districts." Brief for Respondent, at 6.

But respondent insists that however the balance of convenience might be struck with reference to the question of venue, the choice of forum is rigidly and jurisdictionally controlled by the provision of 2241(a) that [w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a) (emphasis supplied). Relying on our decision in Ahrens v. Clark, 335 U.S. 188, 68 S.Ct. 1443, 92 L.Ed. 1898 (1948), they contend—and the Court of Appeals held—that the italicized words limit a District Court's habeas corpus jurisdiction to cases where the prisoner seeking relief is confined within its territorial jurisdiction. Since that interpretation is not compelled either by the language of the statute or by the decision in Ahrens, and since it is fundamentally at odds with the purposes of the statutory scheme, we cannot agree.

The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody. Wales v. Whitney, 114 U.S. 564, 574, 5 S.Ct. 1050, 1054-1055, 29 L.Ed. 277 (1885). In the classic statement:

> "The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent." In the Matter of Jackson, 15 Mich. 417, 439-440 (1867), quoted with approval in Ex parte Endo, 323 U.S. 283, 306, 65 S.Ct. 208, 220, 89 L.Ed. 243 (1944); Ahrens v. Clark, 335 U.S. 188, 196-197, 68 S.Ct. 1443, 1447, 92 L.Ed. 1898 (1948) (Rutledge, J., dissenting).

Read literally, the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.

Nevertheless, there is language in our opinion in Ahrens v. Clark, supra, indicating that the prisoner's presence within the territorial confines of the district is an invariable prerequisite to the exercise of the District Court's habeas corpus jurisdiction. In Ahrens, 120 German nationals confined at Ellis Island, New York, pending deportation sought habeas corpus on the principal ground that the removal orders exceeded the President's statutory authority under the Alien Enemy Act of 1798. They filed their petitions in the District Court for the District of Columbia, naming as respondent the Attorney General of the United States. Construing the statutory predecessor to § 2241(a), we held that the phrase, "within their respective jurisdictions," precluded the District Court for the District of Columbia from inquiring into the validity of the prisoners' detention at Ellis Island, and we therefore affirmed the dismissal of the petitions on jurisdictional grounds.

Our decision in Ahrens rested on the view that Congress' paramount concern was the risk and expense attendant to the "production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ. The opportunities for escape afforded by travel, the cost of transportation, the administrative burden of such an undertaking negate such a purpose." 335 U.S., at 191, 68 S.Ct. at 1444. And we found support for that assumption in the legislative history of the Act. During the course of Senate debate on the habeas corpus statute of 1867, the bill was criticized on the grounds that it would permit a "district judge in Florida to bring before him some men convicted and sentenced and held under imprisonment in the state of Vermont or in any of the further states." Cong. Globe, 39th Cong., 2d Sess., 730. Senator Trumbull, sponsor of the bill, met the objection with an amendment adding the words, "within their respective jurisdictions," as a circumscription of the power of the district courts to issue the writ.

But developments since Ahrens have had a profound impact on the continuing vitality of that decision. First, in the course of overruling the application of Ahrens to the ordinary case where a prisoner attacks the conviction and sentence of a federal or state court, Congress has indicated that a number of the premises which were thought to require that decision are untenable. A 1950 amendment to the habeas corpus statute requires that a collateral attack on a federal sentence be brought in the sentencing court rather than the district where the prisoner is confined. 28 U.S.C. § 2255.

Similarly, a prisoner contesting a conviction and sentence of a state court of a State which contains two or more federal judicial districts, who is confined in a district within the State other than that in which the sentencing court is located, has the option of seeking habeas corpus either in the district where he is confined or the district where the sentencing court is located. 28 U.S.C. § 2241(d). In enacting these amendments Congress explicitly recognized the substantial advantages of having these cases resolved in the court which originally imposed the confinement or in the court located nearest the site of the underlying controversy. And Congress has further challenged the theoretical underpinnings of the decision by codifying in the habeas corpus statute a procedure we sanctioned in Walker v. Johnston, 312 U.S. 275, 284, 61 S.Ct. 574, 578, 85 L.Ed. 830 (1941), whereby a petition for habeas corpus can in many instances be resolved without requiring the presence of the petitioner before the court that adjudicates his claim. 28 U.S.C. § 2243. See also United States v. Hayman, 342 U.S. 205, 222-223, 72 S.Ct. 263, 273-274, 96 L.Ed. 232 (1952).

This court, too, has undercut some of the premises of the Ahrens decision. Where American citizens confined overseas (and thus outside the territory of any district court) have sought relief in habeas corpus, we have held, if only implicity, that the petitioners' absence from the district does not represent a jurisdictional obstacle to the consideration of the claim. Burns v. Wilson, 345 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953); 346 U.S. 844, 851-852, 74 S.Ct. 3, 7-8, 98 L.Ed. 363 (opinion of Frankfurter, J., at the denial of rehearing); cf. United States ex rel. Toth v. Quarles, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955); Hirota v. General of the Army MacArthur, 338 U.S. 197, 199, 69 S.Ct. 1238, 93 L.Ed. 1902 (1948) (Douglas, J., concurring).

[6, 7] A further, critical development since our decision in Ahrens is the emergence of new classes of prisoners who are able to petition for habeas corpus because of the adoption of a more expansive definition of the "custody" requirement of the habeas statute. See Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed. 2d 426 (1968); Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed. 2d 554 (1968); Jones v. Cunningham, 371 U.S. 236, 83 S. Ct. 373, 9 L.Ed. 2d 285 (1963). The overruling of McNally v. Hill, supra, made it possible for prisoners in custody under one sentence to attack a sentence which they had not yet begun to serve. And it

also enabled a petitioner held in one State to attack a detainer lodged against him by another State. In such a case, the State holding the prisoner in immediate confinement acts as agent for the demanding State,[15] and the custodian State is presumably indifferent to the resolution of the prisoner's attack on the detainer. Here, for example, the petitioner is confined in Alabama, but his dispute is with the Commonwealth of Kentucky, not the State of Alabama. Under these circumstances it would serve no useful purpose to apply the Ahrens rule and require that the action be brought in Alabama. In fact, a slavish application of the rule would jar with the very purpose underlying the addition of the phrase, "within their respective jurisdictions." We cannot assume that Congress intended to require the Commonwealth of Kentucky to defend its action in a distant State and to preclude the resolution of the dispute by a federal judge familiar with the laws and practices of Kentucky. See United States ex rel. Meadows v. New York, 426 F.2d 1176, 1181 (C.A. 2, 1970); Word v. North Carolina, 406 F.2d 352 (C.A. 4, 1969).

IV

In view of these developments since Ahrens v. Clark, we can no longer view that decision as establishing an inflexible, jurisdictional rule, dictating the choice of an inconvenient forum even in a class of cases which could not have been foreseen at the time of our decision. Of course, in many instances the district in which petitioners are held will be the most convenient forum for the litigation of their claims. On the facts of Ahrens itself, for example, petitioners could have challenged their detention by bringing an action in the Eastern District of New York against the federal officials who confined them in that district. No reason is apparent why the District of Columbia would have been a more convenient forum, or why the Government should have undertaken the burden of transporting 120 detainees to a hearing in the District of Columbia. Under these circumstances, traditional principles of venue would mandate

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[15] Nothing in this opinion should be taken to preclude the exercise of concurrent habeas corpus jurisdiction over the petitioner's claim by a federal district court in the district of confinement. But as we have made clear above, that forum will not in the ordinary case prove as convenient as the district court in the State which has lodged the detainer. Where a prisoner brings an action in the district of confinement attacking a detainer lodged by another State, the court can, of course, transfer the suit to a more convenient forum. 28 U.S.C. 1404(a). Hoffman v. Blaski, 363 U.S. 335, 80 S.Ct. 1084, 4 L. Ed. 2d 1254 (1960).

the bringing of the action in the Eastern District of New York, rather than the District of Columbia. Ahrens v. Clark stands for no broader proposition.

Since the petitioner's absence from the Western District of Kentucky did not deprive that court of jurisdiction, and since the respondent was properly served in that district, see Strait v. Laird, 406 U. S. 341, 92 S. Ct. 1693, 32 L. Ed. 2d 141 (1972); Schlanger v. Seamans, 401 U. S. 487, 91 S. Ct. 995, 28 L. Ed. 2d 251 (1971), the court below erred in ordering the dismissal of the petition on jurisdictional grounds. The judgment of the Court of Appeals is reversed and the case is remanded for proceedings consistent with this opinion.

Reversed and remanded.

[Omitted is the concurring opinion of Justice Blackmun, and the dissenting opinion of Justice Rehnquist, joined by Chief Justice Purger and Justice Powell]

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