

Supreme Court of the United States

October Term, 19⁶⁹

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APR 7 1970

In the Matter of:

Docket No. 595

LOUIS S. NELSON, Warden,
Petitioner,

vs.

JOHN EDWARD GEORGE,

Respondent.

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Place Washington, D. C.
Date March 31, 1970

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October Term, 1969

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 LOUIS S. NELSON, Warden, :
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 Petitioner, :
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 vs. : No. 595
 :
 JOHN EDWARD GEORGE, :
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 Respondent. :
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Washington, D. C.
March 31, 1970

The above-entitled matter came on for argument at
10:35 a.m.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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San Francisco, California
Counsel for Petitioner

- GEORGE A. CUMMING, JR., Esq.
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San Francisco, California 94104
Counsel for Respondent

1 option when another state places a detainer on a prisoner who
2 is incarcerated in a California institution?

3 A It does, Your Honor, under the agreement of -- I
4 have to answer this question in two ways, Your Honor. If another
5 state is not a party to the agreement on detainers, then in
6 order for that prisoner to stand trial in another state requires
7 an executive agreement followed by extradition proceedings.
8 Clearly in this case the state has a reserve clause.

9 Under the agreement on detainers a prisoner, if a prison-
10 er invokes the agreement on the face of the statute, the State
11 of California is required to send that prisoner back to the
12 other state. If, however, it is the other state that initiates
13 proceedings, there is a reserve clause detained by the Governor
14 may or the prisoner may disapprove and not be willing to go to
15 the other state.

16 We believe, Your Honor, that the answer to the first
17 question we have raised is clearly in the negative. If the
18 Court should, however, decide that habeus corpus relief is
19 presently available, then there is another question which is raised
20 by this case, and that is what is the appropriate forum in which
21 to bring an action of this kind? The district of confinement or
22 the district of sentencing.

23 The facts of this case are that the petitioner below,
24 John Edward George, was in April of 1964 convicted upon his plea
25 of guilty to first degree robbery in the San Francisco Superior

1 Court. He was sentenced to state prison and under the California
2 indeterminate sentence law, that is, indeterminate to five years
3 to life sentence. Following his conviction, the petitioner was
4 confined at San Quentin Prison and detainers were placed against
5 him by three states -- the State of Kansas, the State of Nevada
6 and the State of North Carolina.

7 At this time North Carolina and California were parties
8 to the agreement on detainers which, as I have indicated, if a
9 prisoner seeks to stand trial in another party state, he may
10 invoke the procedures under the agreement, and that is what hap-
11 pened in this case.

12 Accordingly, in March of 1966, George was temporarily
13 released from custody in California to stand trial in North
14 Carolina. After one mistrial George was convicted of robbery in
15 February of 1967 in the North Carolina State Courts, A sentence
16 of 12 years to 15 years was imposed and, as George alleged below,
17 this sentence will not begin to run until he is in North Caro-
18 lina.

19 George was returned to California in February of 1967
20 and in September of 1967 the North Carolina Supreme Court affirmed
21 his conviction. In December of 1967 George filed a petition for
22 writ of habeus corpus in the U. S. District Court for the North-
23 ern District of California.

24 His first petition was captioned John Edward George
25 versus the State of North Carolina, and the District Judge

1 dismissed the petition for failure to name proper party respond-
2 ent. Thereafter, George recaptioned his petition, naming the
3 warden of San Quentin Prison as an agent for the State of North
4 Carolina and naming the warden of North Carolina Prison "name
5 unknown."

6 Ultimately the District Court for the Northern District
7 of California dismissed the petition on the basis of this Court's
8 decision in McNally v. Hill, under which the Court had held that
9 a prisoner must be confined under the sentence he is seeking to
10 challenge in order to attain habeus corpus relief.

11 Thereafter, a certificate for probably cause to appeal
12 was granted by the District Court, but prior to opening briefs
13 being filed in the Ninth Circuit Court of Appeals this Court's
14 decision in Peyton v. Rowe was decided. And in Peyton v. Rowe
15 this Court held that a Virginia prisoner could challenge the
16 constitutionality of a consecutive sentence imposed by the State
17 of Virginia.

18 On the basis of Peyton v. Rowe George filed a motion to
19 remand the proceedings to the District Court. We were given notice
20 of the motion and as our first appearance filed an opposition to
21 the motion to remand and moved to dismiss the proceedings on the
22 grounds that Peyton v. Rowe should not be extended to the inter-
23 state case, that the California warden was not a proper party
24 respondent in this habeus corpus action, that a North Carolina
25 official who might be a proper party respondent was not before

1 the Court, service of process had not been obtained and could
2 not be obtained and, accordingly, the District Court, Northern
3 District of California, was without jurisdiction to proceed.

4 Q Did you try to vouch, so to speak, or give notice
5 to the North Carolina authorities of this proceeding?

6 A Yes, Your Honor -- although it is not in the record
7 -- we have been in contact with North Carolina's Attorney General's
8 office since the inception of this case. Their position is,
9 although it is not a matter of record -- but their position is
10 that habeus corpus relief is not presently available in a case
11 of this kind.

12 Q I suppose that is based on the theory that the
13 Court in California can have no jurisdiction over the State of
14 North Carolina?

15 A That is correct, Your Honor. They have not been
16 served with process, we are not aware of any way in which they
17 could be. Nevertheless, the Court below disagreed.

18 Q Do you want anything else, though, in this case
19 than that the California authorities cease giving any effect or
20 recognition to the North Carolina judgment?

21 A Well, it is our position that while we recognize
22 there is a conviction, we give no effect to it. So that habeus
23 corpus relief is not presently available in any court. We do
24 take the position that it is only after this Court decides, which
25 we strongly urge that it not do, that there is custody within the

1 meaning of habeus corpus statute, it is only then that this
2 Court need reach the question of what is the appropriate forum.

3 If it decides that custody is existent in this case, it
4 is only then it need decide whether ---

5 Q Yes, but the threshold is the only issue between
6 California and the prisoner -- is the only issue whether Cali-
7 fornia authorities should continue to recognize the North Caro-
8 lina judgment?

9 A No, Your Honor.

10 Q Why?

11 A The prisoner is seeking to set aside the North
12 Carolina conviction.

13 Q Why? What dispute is there between him and the
14 California authorities?

15 A It is our position there is no dispute.

16 Q But he says it makes a difference in terms of his
17 parole, things like that.

18 A Your Honor, there is no showing in this record that
19 his parole is affected ---

20 Q Well, there is no showing.

21 A --- by the North Carolina conviction.

22 Q But those were his allegations, weren't they?

23 A What he said in the Court below was that the fact
24 that there was a conviction outstanding assuredly affected his
25 parole. As a matter of fact, that is not California policy and

1 we submitted a policy statement on the adult authority in the
2 Court below.

3 Where there is a conviction outstanding in another state,
4 particularly where that state happens to be the place of resi-
5 dence, primary place of residence, of the prisoner, we will
6 release -- it is our policy we will release the prisoner on parole
7 earlier than might otherwise be the case.

8 This case, Your Honor, this is our policy. It is not
9 like Peyton v. Rowe, where in Peyton v. Rowe you had consecutive
10 sentences imposed by one state and there was a statute which
11 said that the sentences should be treated as one for purposes of
12 parole eligibility. You do not have that kind of statute in this
13 case.

14 Q Was there a hearing in this case?

15 A No, Your Honor. What happened is ---

16 Q Well, if you have an allegation and a complaint in
17 a petition that the North Carolina judgment does make a differ-
18 ence in terms of the prisoner's treatment by the warden of the
19 California Penitentiary, and did the state respond to it? Did
20 they file a return?

21 A What happened, Your Honor, we were not given notice
22 of the proceedings until the Ninth Circuit. We filed an opposi-
23 tion to the motion to remand, stating that the only sentence
24 that this man was serving was a California sentence.

25 Q Yes, but let us assume for the moment that it did

1 make a difference, that his allegations were absolutely true,
2 that the detainer did make a difference in his treatment by the
3 California authorities to his harm. Wouldn't you think that that
4 would state some kind of case for controversy between him and the
5 California authorities?

6 A No, Your Honor.

7 Q Why not?

8 A Because, in order for habeus corpus relief to be
9 available, he must be in custody in violation of the sentence he
10 is seeking to challenge. The California sentence was imposed in
11 1964. Service of that sentence makes no difference whether he
12 was acquitted later in North Carolina or not. Whether or not ---

13 Q Do you think -- what if he did not bring a habeus
14 corpus action? He just sued the warden to restrain him from tak-
15 ing into account the North Carolina judgment. Do you suppose he
16 could do that?

17 A I don't think so, Your Honor.

18 Q Why not?

19 A Because -- I don't know what his theory of action
20 could be. If what he was challenging is the reasonableness of
21 prison policy in considering any charge or even a past conviction
22 in determining whether or not he is more likely as a prisoner to
23 escape, then what he would be challenging is the reasonableness
24 of prison policy.

25 But as yet there is no constitutional right to parole,

1 there is no constitutional right of level of confinement rather
2 than another.

3 In any event, what you are talking about in this case is
4 the reasonableness of prison policy. If we are going to get into
5 the questions about whether or not the California imprisoning
6 authorities can consider the fact that the man has been convicted
7 in another state in determining whether or not he is eligible for
8 minimum custody, then, Your Honor, we respectfully submit that
9 you are also going to have to face the question as to the past
10 conviction situation, because if the prison authorities consider
11 past convictions fully served in determining whether he maybe
12 is more likely to escape or whether he is eligible for minimum
13 custody, then the writ of habeus corpus, the business of the
14 Court, is going to be substantially expanded.

15 We think there is a decided difference between where you
16 have sentences lumped together by one state and where you are
17 talking about sentences imposed by another state.

18 Q So you think the only issue in this case really is
19 whether a prisoner detained in one state under a sentence by that
20 state may at any time, whether sentences of other states make any
21 difference or not in his treatment by the prison, whether that
22 prisoner is in prison in State A, may raise it, in that state
23 the validity of some convictions in State B that who has not
24 served yet, that is the issue?

25 A Yes, Your Honor.

1 I would like to make clear that this case is not like a
2 case where California has used the conviction of another state
3 as a prior conviction to increase the length of confinement or
4 to render habitual confinement of statutes available. That is
5 not this case at all.

6 Q What if it were the case? Let us assume that the
7 North Carolina conviction had been before the California convic-
8 tion and that conviction had been used by California as a basis
9 for habitual criminal conviction or to enhance sentencing and he
10 was sent to jail in California and then he brings his writ of
11 habeas corpus to have declared unconstitutional the prior convic-
12 tion of North Carolina.

13 A Well, California is itself clear, Your Honor, but
14 where this state is attempting to increase the length of statu-
15 tory service, then in California he may challenge the out-of-
16 state conviction.

17 Q Now how does this action go forward? Does it go
18 forward as to the extent evident in North Carolina is essential
19 or witnesses from there are essential? Both sides must get the
20 witnesses there, don't they?

21 A It is a burden of proof on the state, Your Honor.
22 But in this case, Your Honor, California is attempting to use
23 the conviction for their own purposes. But we are not attempting
24 to use the sentence of North Carolina for any purpose at all.

25 Q You are, in effect, saying there is no case for

1 controversy here at all between you and the prisoner?

2 A That is part of the problem, Your Honor. That is
3 part of the problem, but ---

4 Q What else are you saying?

5 A Most importantly, Your Honor, we are saying that
6 Section 2241(c)(3) of the Federal Habeus Corpus statute provides
7 that the writ of habeus corpus shall not extend to a prisoner
8 unless he is in custody in violation of the Constitution. He is
9 in custody under the California sentence. He is not challenging
10 that sentence.

11 That is why we say that custody under the habeus corpus
12 statute is lacking. We think that the lack of custody is par-
13 ticularly emphasized by the Court's holding below that we are
14 the agents for North Carolina.

15 Q Well, letting the Constitution and the law aside,
16 why didn't California turn him loose and let North Carolina feed
17 him?

18 A Well, the record does not show what the facts are.
19 But the facts are that this man was given a parole date, an
20 earlier parole date, but there was a subsequent occurrence. It
21 is a matter of dispute; the state says one thing and the prisoner
22 says another. But there was another occurrence in which his
23 parole date was canceled.

24 Q But I take it your position is that the California
25 District Court has jurisdiction over the body but not the subject

1 matter.

2 A Our position is, Your Honor, that the District
3 Court has jurisdiction over the prisoner for anything connected
4 with the California sentence. But Mr. George has never challenged
5 the constitutionality of the California sentence.

6 Q Well, he cannot challenge it in North Carolina.

7 A No. It is our position, Your Honor, that --
8 excuse me, challenge California sentence in North Carolina?

9 Q No. He cannot challenge the North Carolina sen-
10 tence in North Carolina as long as he is in jail in California.

11 A Well, he has not attempted to exhaust his state
12 remedies in North Carolina.

13 Now two of the issues he has raised in his writ of habeas
14 corpus in the California Court have already been determined by
15 the North Carolina Supreme Court.

16 Q But you don't want to rely on that, do you?

17 A No. Although we think certainly since he has never
18 made any attempt to have his third issue determined by the North
19 Carolina Supreme Court, then his petition below -- he first
20 alleged that the North Carolina sentence was imposed outside the
21 time limits provided by the agreement on detainers, so that the
22 North Carolina Court was without jurisdiction to proceed and
23 that was a deprivation of due process.

24 His second ground was also related to his right to a
25 speedy trial. These were the two issues that the North Carolina

1 Court determined.

2 It was in his petition for writ of habeus corpus in
3 the California Court that he made the determination -- raised
4 the issue of knowing use of perjured testimony. We think that
5 the practical difficulties of the Court's decision below empha-
6 size the lack of custody.

7 The Court has held that California is an agent for North
8 Carolina, but it is respectfully submitted that the agency could
9 note some sort of voluntary acceptance of authority, and we have
10 never assented to defending a North Carolina conviction. We are
11 unwilling to do so.

12 Q What do you visualize -- what is your ultimate
13 holding of the Court of Appeals, that the jurisdiction is in
14 California over this proceeding?

15 A That is correct, Your Honor.

16 Q What do you visualize happening when you come back
17 to the District Court? Let me put a specific question to you.

18 Supposing California said to North Carolina, we give
19 you an opportunity to come in to defend and if you do not choose
20 to do so, we will erase the detainer. Is that foreclosed under
21 the Court of Appeals decision?

22 A Well, the Court of Appeals has never said exactly
23 what our obligation was ---

24 Q No, but I am putting it to you. What do you think
25 about California's right to take that position vis-a-vis North

1 Carolina and say if you do not choose to come in, we have got no
2 quarrel with this man ourselves. It is your judgment that is
3 being attacked here. He is in our custody, but if you do not
4 choose to defend him, we will erase your detainer.

5 A Well, certainly honoring of a detainer is a ques-
6 tion solely of accommodation. We do not have to honor a detainer,
7 but even if we did not give effect to the detainer, there is an
8 interesting fact actually in this case, and that is that the
9 State of Kansas still has a detainer filed against this man and
10 the State of North Carolina knows that.

11 When and if this man is released, he could be released to
12 stand trial in Kansas. As far as we know, there is nothing to
13 preclude the State of North Carolina then going to Kansas.

14 We can have their detainer honored there. Or if that
15 result would be the result we did not honor the detainer, what
16 the Court actually would be asking us to do is give a greater
17 right to a detainer than we can give, or to review a conviction
18 which we can give in an extradition proceeding where an extra-
19 diction warrants, or where extradition proceedings are instituted
20 in the California Courts.

21 We cannot look at the underlying reasons for that
22 extradition warrant. It could be we disagree. But we cannot do
23 that under law. We cannot look at the underlying facts.

24 And the Court below said that we could call upon the
25 North Carolina officials, but we are not so sure that they will

1 be willing to come out. No. 1, ---

2 Q Could you just give them that opportunity and then
3 say if you don't care to come in, we are not taking the responsi-
4 bility for this? We will remove your detainer.

5 A I suggest, Your Honor, that if the man goes into
6 another state, North Carolina possibly could get ---

7 Q But as far as California is concerned, by taking
8 that procedure and refusing to become the agent for North Caro-
9 lina in your own Court to defend their conviction of this man,
10 you say, "All right, if you do not want to come in, we are not
11 going to honor your detainer." Wouldn't you have the right to
12 do that?

13 A Well, as I say, Your Honor, honoring a detainer is
14 solely a matter of commodote, but it could be North Carolina
15 would not have a detainer, All a detainer is a request to be
16 notified of the man's release.

17 Q Mrs. Renne, if you indulged in what seems to be this
18 very cavalier treatment of a sister state, you probably could
19 expect reciprocity the next time the situation were reversed,
20 could you not?

21 A We could, Your Honot.

22 Q And if so, what would be left of the doctrine of
23 commodote?

24 A Well, I think it is a very serious problem, Your
25 Honor. I think what the Court below has ask the state literally

1 to fight among themselves. And the practical problem of trans-
2 porting records and witnesses across country, even assuming you
3 could get the witnesses. For example, if a deputy district
4 attorney tried this case below and is no longer with the North
5 Carolina State Government, then we don't know how North Carolina
6 could get that deputy district attorney in a California Court,
7 if that deputy district attorney was unwilling.

8 From the prisoner's point of view this result is untena-
9 ble. He is asking a California judge to review North Carolina's
10 conviction. The California judge can't be familiar with North
11 Carolina procedure. A California counsel, no matter how compe-
12 tent, he doesn't know where to look for the records, can't know
13 what witnesses to call, can't get the witnesses even before the
14 California court.

15 We have not suggested that there is another form avail-
16 able, because this Court's decision *Ahrens v. Clark* and the
17 judicial rules of habeus corpus, you must bring your petition,
18 if at all, in the district of confinement.

19 But we think bringing the suit in the district of sen-
20 tencing has tremendous practical problems, too. You have the
21 problems of escape, you have the problems of the confining state
22 might be unwilling to have that prisoner go to the other state.
23 You have the expense problems and there are no funds we are
24 aware of to provide for the transportation of prisoner or his
25 counsel across the country.

1 MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Renne.

2 Mr. Cumming.

3 ARGUMENT OF GEORGE A. CUMMING, JR.

4 ON BEHALF OF RESPONDENT

5 MR. CUMMING: Mr. Chief Justice and may it please the
6 Court:

7 I am George Cumming of San Francisco, counsel for
8 respondent John Edward George. I think having in mind the con-
9 siderations which led this Court to its unanimous opinion in
10 Peyton v. Rowe two terms ago, we are here today to consider
11 whether or not respondent George is entitled to a timely and
12 therefore meaningful hearing on the constitutional claims that
13 he makes with respect to the North Carolina conviction.

14 Q You are not suggesting this case is on all fours
15 with the case you are referring to?

16 A No, I am not, Mr. Chief Justice. There is a dif-
17 ference obviously. Peyton v. Rowe dealt with a prisoner facing
18 consecutive sentences imposed by one state. This involves two
19 states.

20 I would say at the outset, however, that this decision
21 has been presented to four Courts of Appeal and in that number,
22 I think some 16 judges, and none of those 16 who considered the
23 heretofore had considered that to be a meaningful distinction
24 between Peyton and this case, particularly with regard to Pey-
25 ton's discussion and basis of the desirability and, indeed,

1 perhaps a necessity of an early hearing on these claims, lest
2 the records and witnesses and evidence be lost by the passage of
3 time.

4 Q It is not only the fact that these are two states'
5 convictions which distinguishes this from Peyton, but there is
6 one other distinction, and that is that in this case, unlike
7 Peyton against Rowe, the Court in which the petition for habeus
8 corpus was filed was not the Court where the person was confined,
9 which is a distinction, is it not, of some importance? Do you
10 think perhaps it seems hyper-technical, but when I went to law
11 school, it was thought in order for a court to have habeus corpus
12 jurisdiction, the prisoner had to be confined somewhere within
13 the jurisdiction of that court.

14 A And he is presently confined within the jurisdic-
15 tion of the District Court of the Northern District of California.

16 Q But it is not that confinement that he is attacking.

17 A That is correct, sir. I suppose it is a question of
18 whether or not he is presently confined along the lines of Pey-
19 ton v. Rowe.

20 Q Mr. Cumming, what is the significance of the detainer
21 in this sense, if I may clear this up in my own mind. Suppose
22 California of its own volition, not under any pressure of any
23 court or any other source, just simply said, "We no longer
24 accept detainers from anybody."

25 Does that prevent the State of North Carolina from

1 taking this fellow as soon as he is released from custody in
2 California. What is the process? What would stop them from doing
3 that independent of a detainer?

4 A I think independent of -- I think we have to go back
5 in time in a case like this. California and North Carolina are
6 parties to the detainer agreement. Pursuant to that agreement
7 North Carolina attained temporary custody of respondent in order
8 to try him.

9 The process for trying him absent, while he was serving
10 the California sentence absent this detainer agreement, I am not
11 sure. It seems to me that some of the problems in this respect
12 for Kansas by the Court's decision last year in Smith v. Huey.

13 Q But part of this arrangement is to have something
14 more flexible than extradition, isn't it?

15 A That is correct. The respondent's application
16 under this detainer agreement to be released to North Carolina
17 for trial is deemed to be a waiver of extradition by him. Both
18 to go to North Carolina to be tried and to return to North Caro-
19 line to serve any sentence there imposed, the detainer agreement
20 states that specifically. I believe it is Article III-E.

21 Q Well, suppose we would come to the day when Cali-
22 fornia's sentence is running out. You come to that last day.
23 Could California hold him in custody for even one hour after the
24 sentence had expired in order to accommodate another state?

25 A I believe that it could under the detainer agreement.

1 The agreement states that the warden of, in this case, California
2 has a lawful and mandatory duty to give over the person of any
3 prisoner whenever required by the detainer agreement.

4 Q But isn't that at the expiration of the sentence?

5 A Yes.

6 Q Are you suggesting it could be two weeks, two
7 months, six months later?

8 A I suppose if North Carolina didn't show up, having
9 previously been notified. Apparently there is an administrative
10 provision for the notification in advance of the expiration and
11 if they did not show up and inquiries failed to discover why, I
12 suppose he could with impunity at that point discharge the prison-
13 er.

14 Q Well, if he didn't discharge him, the prisoner would
15 have a pretty good habeus corpus claim, wouldn't he?

16 A He certainly would. At that point no authority,
17 I would think, would there be for the warden to hold him. I sup-
18 pose from the detainer agreement you could probably infer some sort
19 of authority for short time to accommodate the agents of North
20 Carolina to make the trip to California and pick him up.

21 Perhaps it would require that they show up on the
22 release day, so as to take him into their own custody immediately
23 as he passed through the gates of San Quentin. I am not sure,
24 but it would come perhaps to a split second.

25 In any event, this case involves a situation where at

1 on the record thus far and on the detainer agreement, the warden
2 is bound to give respondent over to North Carolina upon the com-
3 pletion of his valid sentence in California.

4 Q What about Kansas?

5 A Kansas has a detainer outstanding at this time on
6 an untried charge. That detainer may or may not be in existence
7 at the time that respondent is released from California custody.

8 As petitioner has noted, ---

9 Q But assume it is, what do you do? Draw lots?

10 A Petitioner suggests they honor it on the basis of
11 that detainer first recieved, and I guess if the Kansas detainer
12 was first received, I guess he would honor that first and release
13 the petitioner to Kansas.

14 Q Well, if the Kansas one is first, then clearly
15 your case is in trouble.

16 A I suppose it is in this sense. That if we remain
17 in the situation where it is the workings discretion as to what
18 to do about these detainers, that is, if we stay out of court,
19 as the warden urges that we ought to do, then we are in a diffi-
20 cult situation.

21 But this is one of the reasons we would like to get this
22 matter on for hearing in the District Court, to find out the
23 validity of this North Carolina sentence and then approach the
24 District Court for an appropriate order to deal with these com-
25 plicated problems.

1 Q How did the North Carolina trial come up? Was that
2 at his agreement?

3 A That was at his request under the detainer agree-
4 ment.

5 Q Under his request. He left California, went to
6 North Carolina, was tried in North Carolina, came back to Cali-
7 fornia and now he wants to attack what he brought on himself.

8 A Yes, he does. He wants to attack it, may I say,
9 at a time in which he feels that his attack can be meaningful,
10 that is, at a time when the evidence and witnesses and so forth
11 may be available to him.

12 Q In California?

13 A This obviously presents a problem to him. This
14 relates to the second question that petitioner suggests is posed
15 in this case, and that is the appropriate forum.

16 Under Ahrens against Clark, however, if there is any
17 relief available to him, it is only in the District Court he is
18 now confined.

19 Now if ---

20 Q Excuse me. Almost ten years ago it so happens I
21 wrote an opinion for the Court which you may be familiar with,
22 the North Carolina Post-Conviction Hearing Act, which I learned
23 at that time, unless it has been repealed, was an extremely
24 enlightened and progressive piece of legislation. But I don't
25 know whether it applies if a person is not incarcerated in the

1 state.

2 As I remember, however, it requires that the petitioner,
3 very much like Section 2255 of the United States Code, Title
4 XXVIII, if the petition is filed with the sentencing court, that
5 would be available to your client, wouldn't it or would it?

6 A I am not sure that that is so.

7 Q The North Carolina General Statutes, Section 15-217
8 through 222, I think. Are you familiar with that?

9 A I am not familiar with that.

10 Q It would be well for you to become familiar with
11 that. I think it would offer you a very easy way of relief in
12 this case.

13 A It might very well.

14 I am familiar, however, with the decision in Word against
15 North Carolina, which happened to involve the same state, and as
16 I recall, in that decision they suggested that post-conviction
17 relief was not available in North Carolina unless the petitioner
18 was physically incarcerated there.

19 If memory serves me correct, Chief Judge Haynesworth
20 on behalf of the Fourth Circuit invited the State of North Caro-
21 lina to reconsider this matter in light of Peyton against Rowe
22 and what it held with respect to the challenging of future sen-
23 tences.

24 Q What is your controversy with the State of Cali-
25 fornia, with the warden particularly?

1 Let's assume for the moment that he was not doing anything
2 to you now -- to your client now -- and you had no anticipation
3 that he would on account of the North Carolina judgment. Do you
4 still think you would have a dispute with him with respect to the
5 validity of the North Carolina sector?

6 A I don't really think we do have a dispute with
7 him.

8 Q You mean -- you alleged a dispute with him, didn't
9 you?

10 A We are forgetting, as I understand it, the question
11 of some immediate impact as a result of this detainer, such as
12 heavier hand and so forth.

13 Q Well, put that aside for the moment.

14 A Yes, our dispute is this much. He under the
15 detainer agreement and assuming that North Carolina is the
16 detainer first in line according to their own ways of resolving
17 this, and so forth, at the expiration of his current valid sen-
18 tence the warden proposes to release him to the custody of
19 North Carolina.

20 Q Well, whenever he releases him, the Chief Justice
21 suggested North Carolina could be at the door and the same result
22 would obtain, and there is nothing the warden could do about it.

23 A I think the answer for that is ---

24 Q You mean you want him just not give him notice?

25 A No.

1 Q Just cancel out with North Carolina?

2 A No. Ideally I would like to have the warden say
3 to North Carolina at that time, "I have been ordered by the
4 United States District Court for the Northern District of Cali-
5 fornia, after a full hearing on the validity of your conviction,
6 to refuse to give this man to you."

7 Q Well, if North Carolina stayed outside the doors,
8 the warden would keep him in. Is that it?

9 A I suppose that might be so. I think the District
10 Court has the unquestioned power to fashion an order which is
11 directed to other California officials.

12 Q Mr. Cumming, let me ask you about this unquestioned
13 power that you speak of. What would be the source of the power
14 of the California Federal Court to interfere with the State of
15 North Carolina picking up a prisoner at the end of his term in
16 California?

17 A The source of that power would be two-fold: First
18 of all, it would be under the Court's obligation to consider
19 constitutional challenges that had been raised to that North
20 Carolina conviction; and, secondly, I think it has been argued in
21 briefs that there is no jurisdiction of the District Court in
22 California over the State of North Carolina.

23 Under the facts of this case, the circumstances of this
24 detainer agreement, I find that a difficult proposition to under-
25 stand.

1 Q Have you served any piece of paper to the State
2 of North Carolina?

3 A No, we have not, except to the extent that the
4 Ninth Circuit below held that as a matter of law, Warden Nelson
5 is the agent of the State of North Carolina and actually nothing
6 has been served on Warden Nelson, because of course habeus cor-
7 pus is a little bit different than the usual plaintiff-defendant
8 case.

9 The process is an order emanating from the District
10 Court calling upon the respondent to respond and show cause with
11 respect to the conviction, and we have never gotten that far.

12 Q Well, then, no claim has been made by you, I take
13 it, from the outset that the California warden is the agent of
14 the State of North Carolina?

15 A No, we haven't. Under the detainer agreement he is
16 that state's agent for the enforcement of its rights under the
17 detainer agreement, the rights as they now stand. In part what
18 respondent wishes to challenge is violation by North Carolina
19 of the very provisions of that detainer agreement under which he
20 was tried, to wit, the fact that he was not tried within the
21 mandatory time limit of that detainer agreement. And, therefore,
22 I suppose our position on merits, if we are allowed to get to
23 that, is that North Carolina simply lost the limited jurisdiction
24 over him that it had under the detainer agreement.

25 Q Mr. Cumming, is your position that if you are denied

1 relief here and then Kansas gets in before North Carolina, then
2 you can litigate in the United States District Court in Kansas
3 the same thing over again?

4 A I suppose, Mr. Justice Marshall, that we would have
5 to. But that may be ---

6 Q That has to be your position.

7 A It has to be. The problem, of course, is that
8 that may be many years in coming, and this is why I return again
9 and again to Peyton v. Rowe. It is quite true that respondent
10 has alleged some present impact of the detainer on him while he
11 is in California now.

12 Perhaps there isn't any or perhaps it can be ameliorated,
13 but primarily he is desirous of having a hearing on the claims that
14 he makes with respect to the North Carolina judgment at a time
15 when that hearing can be meaningful and not -- he is presently
16 serving an indeterminate sentence of five years to life, and so
17 he faces the same problem with respect to his second sentence
18 that Petitioner Rowe faced in Peyton against Rowe.

19 Q Would it be unreasonable to say that the most
20 meaningful time to test that conviction was while he was still in
21 the State of North Carolina, immediately following the trial,
22 when everything was fresh in the minds of everyone?

23 A That is probably true. He did test it by way of
24 direct appeal. Now we are into the matter of collateral attack
25 upon that conviction.

1 Q What is the exact charge in the validity of the
2 North Carolina judgment?

3 A He makes three, Mr. Justice Black. The first is
4 that the detainer agreement by its terms requires that if a man
5 be taken to North Carolina to stand trial, that he must be tried
6 within, I believe, a 120-day period. And if he is not, the under-
7 lying charge shall be dismissed.

8 He was not tried within this period.

9 Q Well, was that that if he was absent, they couldn't
10 get him? Do you mean that he is insisting that he was in jail
11 and they could not get him out?

12 A No, no. Once he requests to be taken to North
13 Carolina and is physically taken there to stand trial, then the
14 State of North Carolina or any other party to this compact has a
15 limited period of time in which to try him and, indeed ---

16 Q But he wasn't taken, was he?

17 A Yes, he was. Yes, he was in San Quentin Prison.
18 North Carolina filed a detainer on an untried charge and Mr.
19 George was notified of this charge, and he has some rights under
20 the detainer agreement. The detainer agreement is essentially an
21 attempt to improve the speedy trial guaranteed in these types of
22 situations where a man is incarcerated for many reasons. You
23 dealt with some of these problems last term in Smith against
24 Huey.

25 He is entitled and did take ---

1 Q Was he taken back?

2 A Yes, he was taken to North Carolina.

3 Q At that time?

4 A At that time and tried and convicted, and immediately
5 returned to California. So the answer ---

6 Q What are you charging now? I wouldn't suppose
7 that would -- you are not charging anything unconstitutional
8 about that, are you?

9 A The fact that he was not tried within the time
10 limit that ---

11 Q How long did it take? How long was it?

12 A I am not sure. It took longer than the mandatory
13 time provision of the detainer agreement. It seems to me the
14 detainer agreement provides for 120 days after he arrived in
15 North Carolina.

16 Q That is under North Carolina law?

17 A No -- well, yes, this is North Carolina law to the
18 extent that this is represented by this detainer compact which
19 has been signed by a number of states and provision ---

20 Q Did you carry that question to the Supreme Court
21 of North Carolina?

22 A Yes, he had.

23 Q And they decided against you under their law --

24 A On their law.

25 Q What is your other question?

1 A The second question would be notwithstanding the
2 violation -- the precise violation of this time period, it may
3 be that the delay represents a denial of a speedy trial under
4 the Sixth Amendment, and his third claim is that he was convicted
5 on the basis of testimony known by the prosecution to be perjuri-
6 ous.

7 Those are his three contentions. They may all be with-
8 out merit, but we have never had a hearing on that and we would
9 like to have it.

10 I beg your pardon?

11 Q Do you want to try that question in California?

12 A Under Ahrens v. Clark at this time that is the only
13 place we can try it. And we will have some difficulty trying
14 it there, but we will have a lot more difficulty if we have to
15 go back to North Carolina and try it 10 years from now, or 20
16 years from now, or 30 years from now.

17 It will be impossible.

18 Q If he alleged that this North Carolina conviction
19 were being used some way by the California authorities as bearing
20 on his time for release under the California conviction, that
21 there is a remedy in the California State Courts for a claim like
22 that. Do you agree with that?

23 A I believe that to be the law.

24 Q Well now, if that is the law, there is an allega-
25 tion, as I understand it here, that that is what is happening,

1 that the California authorities are using this North Carolina
2 conviction with prejudice. I thought ordinarily that a Federal
3 habeus corpus proceeding could not be entertained until there
4 had been an exhaustion of state remedies.

5 A That is quite correct.

6 Q Why, then, would not this proceeding be premature
7 in the Federal Courts since I gather there has been no effort
8 to get a proceeding in the California State Court?

9 A It may very well be premature. I am not -- frankly,
10 we were associated in this case when it was in the Ninth Circuit
11 Court, and we were perhaps a little less familiar than what we
12 might be with the arguments that we would make if we had some
13 basis to get into the district.

14 Q Well, if on the record it comes to us, it would
15 appear that he has not exhausted his remedies and I don't what
16 has happened below. We just vacate everything that has happened
17 and send it back, pending his going to the California State
18 Court?

19 A I don't think so, because ---

20 Q Why not?

21 A Because we are also concerned not with ---

22 Q The statute makes it clear, does it not? The
23 Federal Courts cannot entertain a Federal habeus until then there
24 is an exhaustion and a presently available remedy in the State
25 Court. Isn't that correct?

1 A That is correct. I think that the proceeding
2 ought not be vacated for this reason. We are not only concerned
3 with present facts as there may be, that is, holding him with a
4 heavier hand, the things that I believe Mr. Justice White men-
5 tioned a few moments ago.

6 Q But doesn't that suggest ---

7 A But we are also concerned with challenging the
8 validity of the North Carolina ---

9 Q Well, doesn't that then raise another question
10 that Mr. Justice Stewart put to you? If there has to be exhaus-
11 tion of any available state remedies before any Federal Court
12 can entertain habeus, may there not be in North Carolina a post-
13 conviction remedy which has not yet been exhausted?

14 A I don't believe so.

15 Q That the state would require them to exhaust before
16 the Federal Court can entertain this application?

17 A That is correct, but I believe that there is no
18 such remedy. As I mentioned, in Word against North Carolina, as
19 I recall, the law there in North Carolina was that you had to be
20 physically in custody in North Carolina.

21 The Fourt Circuit invited North Carolina to reconsider
22 that matter, although I have trouble with that because the statute
23 speaks in terms of remedies available at the time of the peti-
24 tion.

25 Q Well, your answer to me is there is no North

1 Carolina proceeding?

2 A So far as I know, they have not modified their law
3 under the suggestion of the Fourth Circuit.

4 Q Mr. Cumming, suppose the State of California agreed
5 and says we will lift the detainer, and then sends a telegram
6 that tells him he will be released on such and such a date. What
7 can you do about that?

8 A I suppose we would have to apply to the then-
9 appropriate court to require that no one else in California
10 assist -- in other words, as I understand your question, you are
11 asking me what would we do if the warden gave us voluntarily the
12 sort of relief that we are seeking in the District Court?

13 Q My specific question was: If the warden releases
14 the detainer and sends a collect telegram, so it won't cost Cali-
15 fornia any money, to the State of North Carolina and says we
16 will release Joe Bloke 11 o'clock at the east gate, what could
17 you do about it?

18 A I suppose we would have to, as I said, apply to an
19 appropriate court to prevent anyone from California in assisting
20 North Carolina in attaining custody.

21 North Carolina ---

22 Q Wait a minute. Under what law could you prevent
23 somebody from notifying another state that they are getting ready
24 to release a prisoner?

25 A We couldn't prevent the notification.

1 Q Well, that's what I'm saying.

2 A No, we could not prevent the notification.

3 Q You couldn't do a thing about that.

4 A That's right.

5 Q They could pick him up and go through extradition
6 and there he goes.

7 A That's right.

8 Q Then what is this case all about?

9 A This case -- in extradition he at least has some
10 basis to appeal to the Executive of the State of California for
11 consideration for consideration. Extradition habeus corpus may
12 be limited, an extradition proceeding may be a very short one.
13 But he has some basis to appeal to someone to give some considera-
14 tion to his claim that the North Carolina sentence is invalid.

15 At the present time he has none, because he has waived
16 extradition. Under the detainer agreement he has waived extra-
17 dition by requesting to go there and stand trial. He has gone
18 there, he stood trial and in the interim he is asking them to
19 respond.

20 Q And in the meantime he is paying his debts to Cali-
21 fornia and not his debts to North Carolina.

22 A That's right. That is entirely right.

23 Q Let me try a little variation of Mr. Justice Mar-
24 shall's discussion.

25 Suppose not California, but North Carolina voluntarily

1 surrenders or waives it detainer agreement, where do you have
2 any jurisdiction in the State of California -- Federal Court,
3 state court or any other court?

4 A Is it waived?

5 Q It is just that we withdraw the detainer.

6 A Well, then, I suppose he does not go to North
7 Carolina to serve that sentence.

8 Q Well, he waives the detainer. That doesn't prevent
9 them from having three deputy sheriffs from North Carolina sitting
10 outside the east gate to pick him up.

11 A That's right. But they would have to go through
12 traditional extradition proceedings. But, as I say, at least
13 at that point he would have some recourse. It might not be as
14 great a recourse as in habeus corpus at the present time, but at
15 least some recourse in which he could bring to the attention of
16 the Executive or perhaps under the court under extradition habeus
17 corpus his charges.

18 Q Then it is possible we are engaged in an exercise
19 in futility here? Unless we assume that North Carolina is just
20 going to let this man walk off in the face of their conviction.

21 A I don't think that the Court is going to be exer-
22 cising a matter of futility. I think that there is an ample
23 basis based on this detainer agreement and the responsibilities
24 which the parties state undertake for each other shall hold that
25 North Carolina is within the jurisdiction of the District Court

1 in California. It has come to California once to pick him up,
2 taken him back there for trial, tried him. It will presumably
3 come there again to pick him up, take him back without extradition
4 or any judicial or executive inquiry into the propriety of that.

5 All that he is asking is that they come out here in the
6 interim and answer to his charges that the proceedings which
7 were had in North Carolina violated his constitutional rights.

8 Q But you do concede that if North Carolina surren-
9 ders its detainer, that no California Federal Court has any juris-
10 diction? Your entire jurisdictional claim rests on the agency
11 concept, doesn't it?

12 A I don't think it does. We were required to sue
13 the warden because he is the present custodian. If we sued the
14 State of North Carolina, as indeed we did in the first instance --
15 in the first petition, which incidentally is not printed in the
16 appendix because except for the caption it is identical to the
17 amendment. It was captioned John Edward George versus the State
18 of North Carolina.

19 Now if he filed that petition in the Federal Court in
20 San Francisco, it might very well be that the Court would hold
21 that it had jurisdiction over the named respondent, to wit, the
22 State of North Carolina.

23 It strikes me that it would be inappropriate at that
24 point to name the warden the traditional respondent in North
25 Carolina, because obviously he is not in jail there. But I think

1 that there would be relief available. Or naming of Louis Nelson
2 is because of his obligations under the detainer agreement. If
3 he had no obligations under the detainer agreement, I do not
4 believe that we would be without remedy in California.

5 Thank you very much.

6 MR. CHIEF JUSTICE BURGER: Mrs. Renne, you have four
7 minutes left.

8 REBUTTAL ARGUMENT OF LOUISE H. RENNE
9 ON BEHALF OF PETITIONER

10 MRS. RENNE: Your Honor, if I may briefly respond to
11 two primary points. Mr. Justice Brennan raised the question of
12 my representation to the Court. This is not a case and it is
13 our representation that this is not a case where California has
14 attempted to use North Carolina conviction to increase the length
15 of the California sentence or to classify the defendant as ---

16 Q Well, I took that position from the ---

17 A That is correct, Your Honor.

18 Q Is there an allegation here that it was relieved?

19 A No, Your Honor.

20 Q That is not alleged?

21 A No, that is not alleged. As I understand it, there
22 is some allegation that it might affect his parole consideration.
23 That kind of allegation was made below. But that is a totally
24 different question. The record doesn't support it and, in fact,
25 we don't think the record ---

1 Q Well, even though that is not true, isn't it an
2 ordinary habeus practice in the Federal District Court out your
3 way that would ask the very first question, have you exhausted the
4 state remedies?

5 A Oh, yes, that is true, Your Honor.

6 Q Well, why wasn't that done in this case?

7 A Because, Your Honor, exhaustion of state remedies
8 presupposes the applicability of present habeus corpus relief.
9 The issue raised in the Court below was, is there presently
10 available habeus corpus relief? And it is our position ---

11 Q Yes, but that is -- I thought ordinarily the posi-
12 tion was that there isn't presently available Federal habeus
13 relief until you have established that you have exhausted all
14 your state remedies that are presently available.

15 A Well, we do think in this instance, Your Honor,
16 that there hasn't been any showing of an attempt to exhaust.

17 Q But I come back, then, why shouldn't this case go
18 back to the District Court for initial determination now, whether
19 he has available state remedies, whether in California or in
20 North Carolina?

21 A Because that presupposes there is some sort of
22 habeus corpus jurisdiction in the District Court of California,
23 Your Honor, and we are unwilling -- we don't believe that that is
24 correct law. We think that it may be that this inmate has a
25 remedy in the North Carolina Court.

1 If what he is after is to challenge the North Carolina
2 conviction, he ought to attempt to seek relief in North Carolina
3 in the State Court. That is our position.

4 And we think there has been no showing that he has
5 attempted to do that. But we don't think there is presently
6 available Federal habeus corpus relief.

7 I would like to make clear, too, in response to some of
8 the other questions asked, that we will not hold a man one day
9 longer on the strength of a detainer. If a man's conviction has
10 expired, a responding state must come into California, seek and
11 obtain an extradition warrant.

12 The prisoner can waive extradition. That is a different
13 matter. But if he hasn't, we will release a man only pursuant
14 to extradition.

15 In the parole situation there are two separate ways
16 that the man might be paroled. If the adult authority, which
17 is our paroling agency in California, believes this man is totally
18 satisfied and ready for parole, we will release the man subject
19 to hold, which means that we will notify the other state and the
20 other state has to come in with an extradition warrant.

21 If we don't believe the man is ready yet for parole,
22 but nevertheless we know he has a conviction or a charge in
23 another state and it is quite clear that -- it seems to be clear
24 that the other state wishes to obtain custody, which they can
25 do under extradition, we may put it as a special condition of

1 parole, how to get parole.

2 Now if that other state does not come in with extradition
3 warrant or the prisoner does not waive extradition, then we may
4 reconsider whether the man ought to be on parole. But that is
5 reconsideration under the California sentence only.

6 We respectfully submit ---

7 Q Assuming jurisdiction here for the moment, what do
8 you think about the Court of Appeals suggestion that if it came
9 down to a question of venue witnesses, that 1404(a) transferring
10 140(a) would be available?

11 A Well, Your Honor, as I recall Section 1404(a),
12 that transfer statute says that the case may be transferred to
13 an action where it might have been brought. It is our position
14 that this case could not have been brought in another forum.

15 Now it is true that Word v. North Carolina, Fourth
16 Circuit opinion decided that the sentencing court was not an
17 appropriate forum in a case of this kind. But it is really
18 fortuitous that in both cases North Carolina conviction should
19 be involved.

20 In any other circuit this wouldn't be the case, the
21 other recent case being the Third Circuit case in Van Scoten
22 versus Pennsylvania where the Third Circuit held that New Jersey
23 prisoners couldn't challenge future Pennsylvania sentences in a
24 Pennsylvania court.

25 Q Have you looked into the North Carolina post-con-
viction

1 remedy statute?

2 A Well, I have read it, Your Honor.

3 Q It seems to be applicable only to those imprisoned
4 in North Carolina. Would you agree with that?

5 A On the face of it, Your Honor, that does seem to
6 be the case. But it might be, in view that North Carolina Legis-
7 lature would be willing to change its mind. It might be that
8 if the proper case ever arose in North Carolina, that there could
9 be some sort of reading of the North Carolina statute to encompass
10 a case of this kind.

11 There has never been that kind of an attempt that we
12 are aware of.

13 Q That brings us back to the exhaustion point that
14 Mr. Justice Brennan was raising.

15 A Well, it is a kind of ---

16 Q He has an obligation to try to see if the North
17 Carolina procedures will reach him.

18 A It is a kind of exhaustion, Your Honor. As I under-
19 stand exhaustion in the technical sense, it does presuppose some
20 sort of present habeus corpus relief. We are unwilling -- we
21 don't think the law requires that.

22 We do think that as far as equities of the situation
23 are concerned, that the prisoner ought to make an attempt in
24 North Carolina to get some sort of relief there.

25 MR. CHIEF JUSTICE BURGER: Thank you for your submission,

1 Mrs. Renne. Thank you, Mr. Cumming.

2 You were appointed by the Court. We want to thank you for
3 your assistance to the Court and the Court's assistance to the
4 petitioner.

5 The case is submitted.

6 (Whereupon, at 11:38 a.m. the argument in the above-
7 entitled matter was concluded.)

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