In the

Supreme Court of the United States

KIRBY J. HENSLEY,

Petitioner,

vs.

MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT, SANTA CLARA COUNTY, STATE OF CALIFORNIA,

Respondent.

No. 71-1428

Washington, D. C.
January 15, 1973

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Washington, D. C.

Monday, January 15, 1973

The above-entitled matter came on for argument at 1:29 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

STANLEY A. BASS, ESQ., 10 Columbus Circle, Room 2030, New York, N.Y. 10019 for the Petitioner

DENNIS ALAN LEMPERT, ESQ., Deputy District Attorney, Santa Clara County, 234 E. Gish Road, San Jose, California 95112 for the Respondent

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-1428, Hensley v. Municipal Court.

Mr. Bass, you may proceed.

ORAL ARGUMENT OF STANLEY A. BASS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BASS: Mr. Chief Justice and may it please the Court:

This case is here on certiorari to the United States Court of Appeals for the Ninth Circuit which affirmed the dismissal of a writ of habeas corpus. The District Court, in dismissing the petition, did not reach any substantive issues, but denied the petition on the sole ground that the petitioner, being enlarged on his own recognizance by the state trial judge pending the outcome of the federal habeas proceeding, was not in custody for the purposes of the federal habeas statute.

The issue presented is whether or not a federal habeas judge is without power to entertain a petition for the writ until the state criminal defendant, who is sentenced to imprisonment surrenders into jail where the defendant has exhausted his available state court remedies and has been permitted by the very judge who imposed the sentence to remain at large pending the outcome of the federal habeas proceedings.

The background facts will be briefly as follows:

Petitioner Hensley is the Chief Presiding Officer of the Universal Life Church which has awarded Honorary Doctor of Divinity degrees. He was charged with violating a California misdemeanor provision which prohibited the awarding of degrees which signify academic accomplishment without meeting accreditation requirements. The trial was held on May 19th, 1969. At the close of the state's case, the defendant moved to dismiss. The court held that it lacked jurisdiction in the state or further proceedings. Subsequently, the state moved to reopen the case.

Mr. Bienvenue, the defendant's counsel at that time, declined to appear at the reopening. He advised the prosecutor that neither he nor Hensley would appear.

However, the traverse in this case states that Hensley was never advised by Mr. Bienvenue that he had to appear or that his failure to appear would result in conviction.

One the contrary, he says he was advised that the trial was dismissed and that he need not appear further.

Q Is that still relevant to us?

MR. BASS: That may be relevant insofar as we deal with his status, at least on recognizance or whether or not there has been a deliberate bypass. I think it may not be relevant, however, it is offered in case questions do arise

with respect to that but the court held in defendant's absence that the court had jurisdiction and it found the defendant guilty in absentia and on July 1st, 1969, one-year imprisonment was imposed plus a $625 fine in course and at that time the state trial judge granted a stay and allowed the defendant to remain on his own recognizance pending appeal.

Subsequently, the conviction was affirmed. The state trial judge permitted Hensley to remain on OR pending the exhaustion of state plus conviction remedies which were habeas corpus in the district court of appeal and in the California Supreme Court.

Then, on June 16th, 1970, Hensley filed his federal habeas. On the same day, the state trial judge granted a stay, an additional stay, permitting him to remain at large pending the determination of the federal habeas application.

The federal habeas corpus judge found that -- or ruled that the -- Hensley was not in custody because he was on recognizance and he denied the petition. However, he granted a certificate of probable cause and the court of appeals affirmed. The rehearing was denied. A timely petition for cert was filed and this Court granted cert.

Q Mr. Bass, as a practical matter, is this about the only factual situation in which the federal habeas petitioner will have exhausted state remedies and still be

free on his own recognizance? I would think during the course of his appeal in state courts, for example, he can't get federal habeas because he hasn't exhausted his state remedy and that it might be a fairly limited situation in which this type of thing would occur.

MR. BASS: Well, we don't get into the question as to whether or not the state remedies are so ineffective as to protect the rights of the petitioner, but we have a question under 2254.

Here, since Hensley was permitted to remain at large by the state trial judge, he exhausted all his state remedies without the problem of his having to surrender and the sentence running and the question possibly becoming moot.

Here, the issue was preserved because at all times he was permitted to remain in his recognizance by the state trial judge.

The important factor to note is that the state trials judge permitted Hensley to remain on his recognizance may well have felt that Hensley's failure to appear at trial was not intentional and would have a bearing at such time as the federal court reaches the question of deliberate bypass.

But it would appear that by releasing him --

Q Did the state court reach the same point?

MR. BASS: The state court reach the custody question?

Q Couldn't it reach the same point as to whether he voluntarily absented himself or not?

MR. BASS: They could, but --

Q Was it litigated?

MR. BASS: The problem was that it was never --

Q Was it litigated?

MR. BASS: It was raised but the state habeas corpus petitions were denied without opinion. The opportunity to present a defense was lost by virtue --

Q Well, was there a direct appeal?

MR. BASS: There was a direct appeal.

Q What happened to that?

MR. BASS: The appeal was affirmed by the --

Q Was that point raised in the direct appeal?

MR. BASS: Which point, your Honor?

Q That he deliberately absented himself.

MR. BASS: I believe that the state court took the position that -- there was a presumption that anyone who absents themselves waives --

Q Is any of that in the record?

MR. BASS: The --

Q Or do I have to go look for it?

MR. BASS: I believe the -- no, the opinion of --

Q I mean, I don't mind doing it.

MR. BASS: The opinion of the state court is not

in the record. The point here is that the record needs to be developed before the judge can make a finding that there has been an intentional relinquishment of federal constitutional right. One cannot conclude there is a bypass on this record.

Q And what is the point you raise on this federal habeas corpus?

MR. BASS: Well, the issue at this time is the custody question but the underlying constitutional questions asserted in the petition relate to freedom of religion and Fourteenth Amendment due process.

Q Freedom of religion?

MR. BASS: Fourteenth Amendment due process in that he was convicted in absentia and he is also arguing that he was engaging in constitutionally-protected activity. Because he did not have an opportunity to present a defense in the state court, no record was made of the First Amendment position.

Q Why didn't he have the opportunity to present it in the state court?

MR. BASS: That was due to a combination of factors, part of which was the alleged inadvertence or incompetence of counsel in not telling Hensley that he had to appear, otherwise he would lose his opportunity to make defense. It is -

Q That point was raised on direct appeal with competent counsel?

MR. BASS: The point was not raised in the appeal taken to the Superior Court Appellate Department.

Q Was it raised in the state habeas corpus?

MR. BASS: It was raised in the state habeas corpus.

Q By competent counsel?

MR. BASS: Yes.

Q Do I understand you to have answered to Justice Marshall that the state appeal had been affirmed?

MR. BASS: The state appeal was affirmed, yes.

Q The conviction was affirmed on appeal?

MR. BASS: Yes, your Honor.

Q Do I also understand you to intimate there is no Younger against Harris issue in this context at all? Is this your position?

MR. BASS: That is correct. This is not a situation where he seeks to abort a state prosecution. He had already been tried and sentenced and has exhausted what would be all of the available state court remedies in California.

Q But you are in federal court before that exhaustion was completed, are you not?

MR. BASS: No, he has exhausted. He has tendered to the state courts in his state habeas petitions the issues that he seeks to raise here.

Q Was this tender not made -- I may have my facts wrong -- was all this tender not made even to the

federal court while the state appeal was still pending and undecided?

MR. BASS: The timing on this is that he filed an appeal from the conviction. That appeal was affirmed. He then raised on petition for rehearing or for certification the issues of lack of adequate representation and conviction in absentia. That was denied. He then filed habeas in the district court of appeals in California. That was denied. He then filed an original habeas in the California Supreme Court. That was denied.

Q All of this after the appeal from the conviction had come down?

MR. BASS: Yes. Then, subsequently, in June of 1970 he filed a federal habeas after there were no other procedures available in the state.

Q What do you see as hopeful in dealing within the federal habeas corpus proceeding now?

MR. BASS: The first issue I would think that the federal habeas judge would entertain is the question of deliberate bypass as to whether or not the petitioner Hensley intentionally relinquished his opportunity to appear and to raise any defense and Fourteenth Amendment due process.

It would appear that the First Amendment issue might not be reached until the Fourteenth Amendment question as to whether or not Hensley deliberately absented himself

from the state trial court would be resolved.

Q Mr. Bass, I think my confusion arises from this, he was sentenced to a year in jail, was he not, in addition to a fine?

MR. BASS: Yes.

Q Has he ever served any part of that time?

MR. BASS: Not to my knowledge. I think he has not.

Q Well, this is where I am confused. Why wasn't he incarcerated when his appeal was affirmed?

MR. BASS: Because the state trial judge continually granted stays, keeping Mr. Hensley on recognizance. He granted about four stays.

Q While these petitions were pending state and federal?

MR. BASS: The state trial judge granted a stay pending appeal. He granted another stay pending state habeas applications. He granted another stay pending a federal habeas corpus. And after the federal habeas was denied, he granted a stay for about two weeks at which point Mr. Justice Black granted an eight-day stay. Mr. Justice Douglas granted a two-week stay and then a stay pending an appeal to the court of appeals for the Ninth Circuit was granted.

Q Well, he has been very generously treated, hasn't he?

MR. BASS: Except for the fact that he is going to

serve one year in jail if he does not get federal habeas corpus relief. The basis of our argument is that the term "in custody" used by Congress relates to the class of cases, not the timing as to when the petition must be filed.

The state's argument here is not based upon any legitimate needs or federal judicial administration; it is not based upon any law enforcement needs, but is based strictly upon an outmoded conceptual definition.

In this case, if the habeas petition is not committed to be filed while he is on recognizance, he will file it when he is in custody. There will be the same number of federal habeas petitions. There will not be an increase in the federal case load.

Secondly, if he is not permitted to file the habeas while he is on recognizance, and must go into jail, there will be more pressure on the district court to move more quickly to hear the case whereas if he is on recognizance granted by the state trial judge, the federal court can hear the thing in a more leisurely fashion.

As this court pointed out in Peyton versus Rowe, it is in everyone's interest to hear the habeas corpus application. It is in the state's interest. It is in the petitioner's interest. It is in the court's interest. In fact, it will cost the state money to incarcerate this person unnecessarily, perhaps, if it turns out that the federal rights

are involved, it will be irretrievably lost.

There is absolutely no reason to commend the result urged by the state in this case. In Peyton versus Rowe, this court allowed the use of anticipatory attack upon a future sentence. In Jones versus Cunningham, it was unnecessary to wait until parole was revoked before Jones could bring the habeas. In Strait versus Laird it was unnecessary to wait until the servicemen were reactivated before he could bring his conscientious objector application.

In this case, we deal not with the question of a district court's discretion but simply with a question of power. There is no need here, for example, for the federal court to determine if bail should be granted because the state trial judge has already granted the stay while he exhausts the federal habeas.

This is the reverse situation of the case in the California Supreme Court called In Re Smiley. There, a federal court granted own recognizance release and the California Supreme Court said that they had jurisdiction to grant habeas relief. They said if they had the authority to release the person there was no reason why it would be unreasonable for them to say they lacked the authority merely because someone else had done it for them.

Q Are you suggeting the federal habeas corpus court will, in effect, have a trial de novo on all the issues,

will they not? In practical effect.

MR. BASS: Well, of course that issue is --

Q In your point of view.

MR. BASS: -- is not presented now, Mr. Chief Justice but it would appear to me that if the case is remanded back to the district court, the first question that the district court would have to answer is whether or not Hensley made a deliberate --

Q A deliberate bypass, but after you cross that?

MR. BASS: After we cross that, the question then is whether or not he was deprived of the effective assistance of counsel by losing his right to present substantial statutory as well as constitutional defenses. It is a serious question as to whether or not the California statute applies to a church granting honorary Doctor of Divinity degrees and that issue was never litigated because he did not have the opportunity to appear and timely raise it. So --

Q Under whose jurisdiction is the man now?

MR. BASS: Under the jurisdiction of the municipal court.

Q Does that last forever? I thought it is in California. Doesn't he lose jurisdiction at the end of a term or at the end of some time?

MR. BASS: Excuse me, your Honor, I thought you meant with respect to the stay that was granted.

Q Well, if he isn't under somebody's jurisdiction, how do you get habeas corpus?

MR. BASS: Well, he -- he is under the imminent control of the sheriff, who would be the person who runs the local jail to whom he would have to surrender.

Q What does he have to do for the sheriff?

MR. BASS: He has to surrender as soon as the stay expires.

Q What is he doing for the sheriff right now?

MR. BASS: Nothing, but, however, there is an interesting parallel between this situation and the situation of Jones versus Cunningham where this court pointed out that Jones could be rearrested at any time that a parole officer felt that he violated his parole. Under the California statute, the OR recognizance could be revoked, presumably without the same type of procedural due process as a trial and Hensley could be taken any day if it were not for the stay.

Q Taken by whom?

MR. BASS: By the sheriff and incarcerated in his jail.

Q Well, is it contempt not to show up?

MR. BASS: It constitutes -- well, it could constitute a contempt. It certainly constitutes a separate

crime.

Q Is it a crime not to show up?

MR. BASS: Oh, yes. In California it is a crime. It constitutes a separate offense and if he is caught outside the jurisdiction, extradition is automatically waived.

Under those circumstances it is not shared by the public.

Q Yes, it sets him off from other people fairly well.

MR. BASS: We submit that it is a very real difference.

Q He doesn't have to report to anybody. It is nothing like probation or parole, is it?

MR. BASS: It is not like parole in the sense that -- he doesn't have to report.

Q It is not like probation.

MR. BASS: On the other hand, in the sense that it can be taken away so easily, without notice, perhaps --

Q But he isn't under any custody at all.

MR. BASS: He is under the imminent incarceration, the threat of incarceration is at any time.

Q What is the difference between him and the man that is indicted?

MR. BASS: Well, the man who is indicted can't bring habeas because the man hasn't exhausted state court remedies.

Q So he --

MR. BASS: Hensley has run the string out.

Q Well, what is the difference between that? If he is on his own recognizance that can be revoked tomorrow morning, can't it?

MR. BASS: Of course.

Q But he can't get habeas.

MR. BASS: Well, because he hasn't exhausted his state court remedies. The doctrine of prematurity would take care of cases like that.

Q I suppose the restraints imposed upon him are listed fully in the first paragraph of your argument on page 6.

MR. BASS: Those are taken from the statute.

Q They are indeed, and more than fully because you talk about, in some jurisdictions territorial and supervisory restrictions are also imposed which implies that that is not true --

MR. BASS: That's true.

Q In California.

MR. BASS: That is true that it is not, but we don't think that the absence of territorial restrictions is that meaningful. If one looks at Strait versus Laird, for example --

Q Well, I thought you said the only restriction was that he could be picked up. Is that what you said?

MR. BASS: That is not the only restriction.

Q Is that what you said in response to my answer or not?

MR. BASS: That -- that is the only restriction that is present in the sense that the restriction that he has to serve a year would be termed to be in future. However, that may be just a metaphysical way of looking at it because it may be that -- maybe that's tomorrow that he has to serve that year.

Q What other restriction is he under?

MR. BASS: The restrictions are -- well, as the California statute points out, he is required to appear whenever the judge requires him to come in and that in default he waives extradition, that it is an offense if he doesn't show up.

Q Is that any different from being picked up?

MR. BASS: Well, he has got an outstanding detainer, a one-year sentence.

Q I am saying, he can be picked up and put in jail.

MR. BASS: Yes.

Q Now what other else can be done to him, other than that? Nothing.

MR. BASS: Well, he owes a fine.

Q Well, what about the turn-up on the fine?

MR. BASS: Well, I don't think he is ordered to stand committed in default of payment, but we think that the fact that he owes that one-year sentence --

Q Is your argument restricted to men who have been convicted?

MR. BASS: Yes.

Q Right?

MR. BASS: Yes, my argument is restricted to men who have been convicted and who have been sentenced to --

Q And who have exhausted their state remedies.

MR. BASS: And who have exhausted state remedies. We don't deal with the situation --

Q All I am trying to suggest is, don't load anything more on that cart.

MR. BASS: Right. I'm not dealing with the situation of a person who is merely fined. I am not dealing with the situation of a person who has already served a sentence and who just complains about the civil disabilities that come from conviction because this situation involves the most graphic type of deprivation, namely imprisonment and the Court need not reach the other question, particularly the question raised in the United States ex rel Meyer versus Weil, which is the seventh circuit case where the Supreme Court denied cert last month.

Q And what was involved in that case?

MR. BASS: In that case, the person had filed a habeas. He had just been fined. He raised a free speech question. The seventh circuit said he was not in sufficient custody. The problem was he had posted ten percent under the Illinois statute which could have been set off against the fines, so he never would have done any time in jail. There was no anticipatory incarceration possible.

Whereas, of course, in this case that one year is staring him in the face and if he doesn't get relief from the federal habeas court, he will be in jail.

And, of course, if he was in jail, every day that he suffers in jail that may turn out to be unconstitutionally imposed will be irretrievable. He will never be able to get anything out of that.

Moreover, if we are dealing with cases involving very short sentences --

Q That is the fate of almost all habeas petitioners, isn't it? It is almost fortuitous that the state court here happened to grant bail because ordinarily a federal habeas court won't grant bail pending its own decision as to whether the state conviction is valid.

MR. BASS: Well, I don't know about probabilities. This Court in Shuttlesworth did state that the federal court had the power to do that. It is true that in this case the state court must have thought enough about the issues and

perhaps Hensley's nondangerousness to allow him to remain on a recognizance for such a long period of time and whether this be considered a charitable or just what is legally necessary, the fact of the matter is that he has not been recalled. He could be.

Q But the great majority of your habeas petitioners are in jail and serving time that might be held invalid by the federal habeas court, are they not?

MR. BASS: Yes, but the situation we deal with here is that the state judge had granted the stay. Under such circumstances we find that there would be no reason why the federal judge should deny or eschew power to hear when the very reason for the state court allowing the man to stay out is so the federal judge can hear the petition without being presented with stay applications or other types of emergency requests for immediate relief.

Q Well, couldn't it be said equally that the state judge was simply being appropriately deferential to the fact that a petition was filed, not to anything more than that?

MR. BASS: Well, I don't think, Mr. Chief Justice, that state court is required under any consideration of supremacy or federalism to grant such a stay. It would seem to be entirely a matter of discretion and if he decides not to grant the stay then the petitioner would have to ask

the district court for that stay, but that was unnecessary in this case because the state granted it.

Q Mr. Bass, does the record show affirmatively that the purpose of allowing Mr. Hensley to remain on bail was to enable him to file a petition of habeas corpus?

MR. BASS: The pertinent provisions of the record, Mr. Justice Powell, page 12-A, paragraph eight, the -- of the return to the order of the show cause, the state indicates he is at liberty on his own recognizance pending the outcome of this habeas corpus proceeding and on page 19-A of the record, it indicates that that stay was granted by Judge Nelson who is the judge of the municipal court.

Q We have a non sequitur in paragraph eight, unless I am reading too fast. The state concedes -- this is the state's return, isn't it? The warden's return.

MR. BASS: Yes.

Q Or whatever, the municipal court. He is out on his own recognizance pending the outcome of this habeas corpus proceeding. Therefore, this court is not in a position to here consider a grant, a writ of habeas corpus.

MR. BASS: I realize this.

Q What does the "therefore" mean?

MR. BASS: It sounds extremely illogical because the whol purpose of granting the stay was to allow him to do it

and now by the state judge having allowed him to do that, then the federal judge says he can't do that. There is a certain --

Q Perhaps Judge Nelson wasn't as friendly to you as you thought.

MR. BASS: Oh, I think perhaps he was. But I was going to suggest that I did have copies, actual copies of the stay order granted by the state court. If the Court would wish, I could leave copies with the Clerk of the Court.

Q I believe the statement that has application in the second sentence of paragraph is not saying any more than it is saying in this court, that, absent custody, no habeas corpus jurisdiction. Isn't that all they are saying?

MR. BASS: That is true, that is what they are saying but the juxtaposition of the two sentences, perhaps better than anything, demonstrates the illogic of their position.

Q Mr. Bass, does the court order which you mentioned shed any light on the question as to what the reason for granting the stay was?

MR. BASS: No, Mr. Justice Powell. The order granted by the state court is a one-page order. It simply says it is ordered that the sentence given to the petitioner is identified. It is hereby stayed pending determination of the petitioner's writ of habea corpus in the United States

district court, northern district of California.

We would submit that in view of the fact that the state is asking Mr. Hensley to go through a meaningless ritual that Congress could not have intended, in view of the fact that it serves no legitimate purpose, it does not serve judicial administration. It does not serve the state's interests. It certainly does not serve the petitioner's interest to be incarcerated under such circumstances before he can file where in fact, we have imprisonment, a sentence of imprisonment involved here. Under such circumstances it is clear that the federal habeas court did have authority and that Mr. Hensley was in sufficient custody to be able to invoke the writ.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Bass.

Mr. Lempert.

ORAL ARGUMENT OF DENNIS ALAN LEMPERT, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. LEMPERT: Mr. Chief Justice and may it please the Court:

The Court in its questions, I think, has struck upon the sole issue in this case as to whether or not an individual who for whatever reason is not yet in custody, is a prisoner and can petition the federal courts for habeas corpus.

The sections that are cited in my brief are very clear. The preamble says that a prisoner may petition for habeas corpus when he is in custody, under the federal Constitution and then it goes on to set forth the other areas.

Q Mr. Lempert, how long does a municipal court judge keep jurisdiction over a person in California?

MR. LEMPERT: Until such time as either the defendant is acquitted or until such time as the completion of the sentence, if one is imposed, is completed, including any period of probation.

Q You mean this could go on for 20 years?

MR. LEMPERT: Until such time as the execution of the sentence begins. It seems to me it is a very unusual circumstance that we are confronted with here but until such time --

Q But the law must be clear in California one way or the other that sometime a judge loses jurisdiction.

MR. LEMPERT: At the termination of the trial or the termination of the sentence.

Q Well, what happens on appeal? Does he lose jurisdiction?

MR. LEMPERT: Not if the sentence is stayed as such. If there is no stay of execution, yes, determination of the --

Q Well, could he hold a sentence over this man for 20 years?

MR. LEMPERT: No, not volitionally. The judge could not.

Q Huh? Well, I thought you said he could stay it as long as he wanted to.

MR. LEMPERT: Well, at the request of the defendant he could.

Q He could?

MR. LEMPERT: I believe he could. If the defendant requests that the court refrain from imposing sentence or from having that sentence executed at the defendant's request, the defendant has suffered no prejudice by the system but rather his own --

Q Do you know of any other state that allows that?

MR. LEMPERT: No. But here we have a situation where the defendant was sentenced and the judge in the trial court granted a stay to permit the defendant the opportunity to refrain from going into custody until such time as his appeals have been terminated. Mr. Stromer, the counsel who was representing the defendant at the time the federal habeas corpus petition was first filed, notified Judge Nelson of the fact that he was in fact filing a petition with the federal district court in San Jose with Judge Peckham and that

Judge Nelson as a result of the request made by Mr. Stromer delyaed and stayed temporarily the execution of the sentence, thereby continuing Mr. Hensley in his own recognizance. Thereafter, the judges of this court and the Ninth Circuit continued to stay the proceedings. We are now almost at the fourth anniversary of the time the alleged offense took place.

Counsel in his statement indicates that the state has no legitimate interest whether or not the defendant goes into custody at this time or at some future time and I would respectfully differ with that. The state has a very, very substantial interest. As any defendant has a right to a speedy trial, so, too, does the state have a right to a prompt and expeditious execution of sentence, otherwise the purpose of sentence doesn't do anything.

Q Mr. Lempert, the state could have vindicated that right here, couldn't it, through its own municipal court judges' refusal to grant the stay?

MR. LEMPERT: Only up till 1970. Thereafter it was the federal courts and the justices of this court and other courts in the Ninth Circuit that prevented the municipal court from acting.

And at this point in time, the defendant has been out of custody following the imposition of sentence some three and a half years. It just does not seem appropriate. The fact that the petition for writ of habeas corpus

initially was devised as a system as a means to have a prompt and expeditious examination of a detention by a defendant, generally before trial, has been expanded by the legislature, by Congress, to permit a means while after conviction, when an individual is in custody, is a prisoner, to have the courts examine that detention.

Q Mr. Lempert, if Judge Nelson had not granted this stay, is it fair to suggest that nonetheless before a determination on the merits of a federal habeas petition either the district court or the judge of the Ninth Circuit or a justice of this court would have enlarged the petition?

Q Well, that could have been done if the federal courts had wanted to do that. That is, if the defendant had gone into custody, there is machinery whereby when a petitioner files a habeas corpus in federal court he can be released by the federal courts. But here, because of the Judge Nelson wanting to do the defendant a favor, if you will, and Mr. Stromer, continued temporarily or stayed temporarily, until such time as there was a consideration of the habeas petition by the federal district court.

Thereafter, the matter was taken out of Judge Nelson's hands by the subsequent stays that were issued by the Ninth Circuit and by this Court and it reverts back to the question as to whether or not this court or the federal court can exceed the authority that is granted to it by the

legislators by the statute authorizing the issuance of habeas corpus. The statute is clear. It relates to a prisoner and it relates to someone in custody.

Now, the court has regularly defined or expanded on what is custody, What status someone has to be in in order to be in custody. In Jones it indicated that a parolee is in custody because he can't drive a car, he can't work without permission of a parole officer, he can't go places or do things. He is in custody, not necessarily with bars around him, but nonetheless, restricted. This defendant in this case, whose whereabouts are totally unknown, at least as far as the people are concerned. He can be sitting in this courtroom. He can be out of the country. He is operating his business and there is no restriction on any of his activities whatsoever, except one, that with a lawful order of court, he shall surrender back to the court and that I don't feel is the type of custody, the type of restraint, the type of interference that is of such magnitude that requires the invocation of the habeas corpus. It doesn't qualify for that custody that is required by federal habeas corpus.

One of the questions that was asked is under whose control is the defendant presently? And that, I think, similarly procedurally presents a very interesting question. Counsel responded he is under the control of the municipal court. The municipal court has no power over the defendant

at this time. It cannot lawfully order anything respecting the defendant because the court is precluded from that by a stay granted within the federal system and the sheriff has no control over the defendant. He cannot volitionally go out and seize the defendant or arrest the defendant or do anything with respect to him.

The petition for habeas corpus is addressed to the San Jose Municipal court and it is not properly any person or any entity that has the control over the defendant and I would submit that --

Q Supposing that at the moment, within one minute, theoretically, at least, after this person entered the penitentiary, he could bring this same habeas corpus?

MR. LEMPERT: That is correct. That is correct. Once he goes into custody and once he is in custody, then the right accrues to file the petition for writ of habeas corpus.

Q And could the district court release him then?

MR. LEMPERT: If the district court at that time wanted to exercise discretion, yes, it could but that presents the question -G that may be a more desirable system. It may well be that it might -- the system should have a procedure whereby someone who is in immenent danger of going into custody can have access to federal habeas corpus and if the Congress so desires, then they ought to pass legislation which would permit that. But under the present status

of the law, Congress has not gone so far and they still require, in the legislation, that the person be in custody.

Q What if you are under order to show up at a time certain?

MR. LEMPERT: At the time you are -- that you appear, you are responding to a court's order but I don't believe that you are in custody of that court.

Q What about when the time passes and you don't show?

MR. LEMPERT: If it is a wilful failure to appear, you may very well be in contempt of that court. You may well be in violation of the order of the court.

Q But you don't think you are in custody?

MR. LEMPERT: Not at that time. It would be -- the defendant could be anywhere at that time.

Q You might be guilty, as indicated in the argument, of a separate offense, also.

MR. LEMPERT: A different offense. Under the --

Q As was suggested yesterday.

MR. LEMPERT: -- under the California recognizance release a defendant, in order to be released on his own recognizance, relinquishes certain rights.

Q When you are released on bail and the only restriction on you is you don't leave the jurisdiction, don't leave the county, is that custody?

MR. LEMPERT: Generally speaking, when someone is released on bail in California, there is no territorial restriction.

Q I know. I didn't ask you that. I asked you, suppose you were under territorial restriction?

MR. LEMPERT: I don't believe so.

Q But if there were such a territorial jurisdiction, did it disappear when the federal habeas proceedings were started? You have said the state courts have been powerless ever since that --

MR. LEMPERT: That is correct.

Q So whatever the restrictions were, they vanished then, did they not?

MR. LEMPERT: I would think, if the Court at this time -- the Municipal Court -- were to issue an order requiring the defendant to appear tomorrow at its court and the defendant chose not to appear, that that would violate no law, that the defendant could not be prosecuted for that because the court is -- has no jurisdiction to issue such an order.

Q Because of the federal court stay.

MR. LEMPERT: Because of the federal court stay.

Q Or the federal circuit justice stay.

MR. LEMPERT: Whichever. Because of the federal status of that case, the court could not issue a lawful order

because it was precluded from --

Q If there was federal jurisdiction, it was destroyed by the issuance of a stay by a federal judge.

MR. LEMPERT: No, I don't think that necessarily follows. There was no federal jurisdiction, I believe, because the defendant was not in custody. Notwithstanding that fact, the fact that the federal courts have stayed the execution of sentence I don't think affects one way or the other the defendant's custodial status.

If -- I believe you indicated that if the defendant were ordered to appear and did not, would he then not be in custody? Clearly not. He would be somewhere -- somewhere other than where he was supposed to be but not in anyone's custody. He could not be restrained unless he were found and placed in custody.

Q What if we -- the Court has held that a parollee released from physical custody but under certain restraints is under custody for purposes of federal law. One of those typical restraints is a territorial jurisdiction, don't leave the state or don't leave the county or something like that. Now, if the only sanction for that is you will be jumping bail if you -- or you will be violating your parole if you leave the county. You might be committing a crime or your parole might be revoked.

Now, if you are under an obligation to show up at a

certain time and you don't show up, you certainly have some obligation that other people in the community don't have.

MR. LEMPERT: Yes.

Q And you were supposed to be someplace at a certain time that you weren't.

MR. LEMPERT: Correct, but that is not, I feel, the type of custody that requires the invocation of habeas corpus. A parollee is an individual who is not only suffering from a single requirement or a single restriction on his daily existence as this Court has pointed out in Jones. He is suffering from a whole range of prohibitions with respect to job, family, his domicile, who he can associate with, where hd can go and where he can't go.

Q Mr. Lempert, a person is served with a subpoena in a civil case, an automobile accident case and he is under an obligation to appear on a day certain as soon as he receives that subpoena, is he not?

MR. LEMPERT: If it is properly served upon him, yes.

Q Assuming that. And he has been paid the fees in advance et cetera. Would habeas corpus be available to lift that sub poena?

MR. LEMPERT: Under counsel's argument, I think it would be, because if any individual is subjected to an order of court, the violation for which would result in the possible

incarceration of the person which, if an individual wilfully violates a proper sub poena or summons served upon him, could be subjected to a body attachment and be incarcerated and under counsel's argument, yes, that person would spontaneously get the right to file a petition for habeas corpus.

Q Which would you rather have to face, a habeas corpus petition or a 1983 complaint?

MR. LEMPERT: I don't know. I don't.

Q I beg your pardon.

MR. LEMPERT: I don't know.

Q Mr. Lempert, if you'll back up a minute, Judge Nelson gave his stay when they first went into federal court, right?

MR. LEMPERT: That is correct, your Honor.

Q For that stage, wouldn't we have been saved all of this if he said no, wait a minute, before I give you this stay, let me push him in.

MR. LEMPERT: That is correct. Had that occurred, then had Judge Nelson --

Q This whole point would have been gone.

MR. LEMPERT: That is correct. Had there been a remitter from the Supreme Court of the State of California, reconferring jurisdiction on the municipal court and if at that time Judge Nelson had declined to grant the stay of execution of the snetence, the defendant would have then at

that time been taken into custody and thereafter would have been eligible to file a petition for federal habeas corpus and his request for release.

Q He just revoked the one he had given.

MR. LEMPERT: That would have terminated. It had to terminate. The stay had terminated because of the decision --

Q If Judge Nelson had done nothing, this would have been a very good writ.

MR. LEMPERT: That is correct.

Q Well, then, doesn't it get very circular? Or am I confused? In other words, if we should affirm the court of appeals for the Ninth Circuit in this case, as you are asking us to do, then no judge in the future will ever issue a stay because he will say I have no habeas corpus jurisdiction until or unless you are incarcerated. Isn't that right? So this case would never arise again.

MR. LEMPERT: Well, it depends which judge we say would not have the jurisdiction.

Q What?

MR. LEMPERT: It would depend which judge. A federal judge --

Q I'm talking about a federal judge. In this case, as I understand it, the man was convicted in a municipal court.

MR. LEMPERT: Correct.

Q The municipal court judge released him on his own recognizance pending an appeal and --

MR. LEMPERT: Within the state.

Q Through the state system.

MR. LEMPERT: That is correct.

Q And by its own terms, that municipal judge's stay would have terminated after the affirmance of the conviction in the state system. Is that correct?

MR. LEMPERT: Correct. Well, procedurally no, because there is an automatic stay with the filing of a petition with the district court of appeals. The stay that was granted by Judge Nelson was a stay up till the time that the appellate division of the superior court either affirmed or denied the case.

Q Okay, then, after affirmance, the stay would have terminated.

MR. LEMPERT: That is correct.

Q Had it not been for the intervention of the federal district judge. Is that right?

MR. LEMPERT: Well, there was no intervention by the federal district judge in the custodial status of the defendant.

Q No, only after an application for habeas corpus. Is that right?

MR. LEMPERT: Under my theory --

Q Maybe you better tell me what happened.

MR. LEMPERT: In this case, the defendant was convicted. He appealed to the appellate department of the superior court.

Q Right.

MR. LEMPERT: Where the conviction was affirmed.

Q Right.

MR. LEMPERT: There was a request for certification in the district court of appeals which was denied. A petition for habeas corpus was filed in the state and the district court of appeals denied --

Q And the whole time, this man was out on his own recognizance.

MR. LEMPERT: That is correct.

Q Because of the original municipal court order plus the operation of law.

MR. LEMPERT: And the operation of law. That is correct. And there was a petition filed in the Supreme Court of California again for habeas corpus which was similarly denied. At that time, there would have been a remititer 30-some-odd days following the determination by the California Supreme Court.

Q And automatically the man would have gone to jail.

MR. LEMPERT: Automatically the man would have

gone to jail. The day that that would have occurred, Mr. Stromer went to Judge Nelson and indicated to him that he was in the process of --

Q Judge Nelson?

MR. LEMPERT: Was the trial judge in the municipal court.

Q Then this was still back in the state municipal court?

MR. LEMPERT: That is correct. And Mr. Stromer, the defendant's counsel at that time, went to Judge Nelson and said, we are filing now a petition for writ of habeas corpus before the federal court. Please, can we keep Mr. Hensley out until such time as the federal court decides the case and Judge Nelson, being a magnanimous individual, agreed to do that.

Q And maybe also unaware of the Ninth Circuit fule.

MR. LEMPERT: Unaware of the Ninth Circuit rule? It was never even brought up whether or not there was jurisdiction in the federal court to hear the case. The impression at that time was that the Ninth Circuit -- rather, the federal district court, Judge Peckham, would consider the petition and would be dispositive of the case. At the time for the return of the order to show cause why the petition should not be granted, I brought up the question that the court

did not have the jurisdiction to hear the case. At that time, the federal courts then, by granting stays, continued the defendant on his own recognizance. Had the federal courts not at that time, either the Ninth Circuit or justices of this court, interfered at that time, the defendant would similarly have gone into custody and at that time would have been eligible for federal habeas corpus.

It may be a circuitous route and it may be that regardless of the verdict of this court in this case, the matter is going to go back to Judge Peckham. Either the defendant will be in custody when that happens, or he will be out of custody. But whether or not --

Q And in the absence, I guess really what it boils down to is, however this case is decided, in the absence of a stay order by a federal judge, the person is going to be in prison, isn't he?

MR. LEMPERT: That's correct, in jail.

s Q In jail, starting on the serving of his sentence.

MR. LEMPERT: That is correct.

Q It takes a stay order of a federal judge --

MR. LEMPERT: To keep him out.

Q -- to keep him in the status that this man now is.

MR. LEMPERT: That is correct. And the question is --

Q As an ordinary operation of state law, this question isn't going to arise because he will begin serving his sentence at the conclusion of the state --

MR. LEMPERT: All the appeal rights the defendant has through the state board --

Q And collateral rights.

MR. LEMPERT: And collateral rights, yes. And the whole question goes back again to whether or not this court or the federal court system has been given the right by the Congress to hear a case such as this.

Q I'm sorry, Mr. Lempert, I am confused. If Judge Peckham had not issued a stay order --

MR. LEMPERT: Judge Peckham did not issue a stay order.

Q Well, who was the first federal judge to issue a stay order?

MR. LEMPERT: I believe it was Justice Black.

Q Well, now, are you suggesting that had that not issued --

MR. LEMPERT: The defendant would have been incarcerated.

Q Now, how would he have been incarcerated in the light of Judge Nelson's admitting him on his own recognizance pending decision of the habeas corpus?

MR. LEMPERT: Because the habeas corpus was

determined by Judge Peckham when he dismissed the petition for want of jurisdiction and at that time a petition was filed with Justice Black to continue the defendant on his own recognizance pending a filing in the Ninth Circuit and, thereafter, Mr. Justice --

Q I see. Well, Judge Nelson's stay expired with Judge Peckham's decision?

MR. LEMPERT: The terms of the stay were conditioned upon the determination of the case by the district court in San Jose, yes.

Q By Judge Peckham.

MR. LEMPERT: That is correct.

Q So -- but in another case, this case could arise again, then, in the sense that a state judge might enlodge a man on his own recognizance pending the filing of decision on a petition of habeas corpus.

MR. LEMPERT: I don't think so because I don't think a state court or a judge of the state court can confer jurisdiction on the federal courts.

Q I didn't -- but wouldn't the state judge do it, though? He wouldn't do it for that purpose, but --

MR. LEMPERT: Well, he might do it out of ignorance. By continuing --

Q Dependingon how this case today is decided.

MR. LEMPERT: Depending, of course, how this case

is decided.

Q Right. Otherwise there would be no point in his doing it --

MR. LEMPERT: That is correct.

Q -- if you were told that the federal law will entertain it.

MR. LEMPERT: That is correct. The law would be clear at that time, because this court has not addressed itself to that question. It has considered what certain circumstances are custody and what are not but it hasn't said that an individual on bail or an individual released on his own recognizance, whether that person is or is not deemed to be in custody. The California courts recognize the doctrine of constructive custody. That is, a person out on bail on his own recognizance -- or out on his own recognizance -- is deemed to be in custody. But I analogize that to somebody being a little bit pregnant. You are not. Either you are or you are not and I think that the federal law requires that the person is in jail.

Now, it may be an antiquated doctrine. It may not be. But I feel that that is what the Congress has intended and if they intended something different, they ought to have said something different.

Q I don't think according to the federal statute in light of what we held in Jones means in every

case you have to be in jail before habeas would be entertained.

MR. LEMPERT: I think -- I think Jones, insofar --

Q The fact is, the parolee was not in jail.

MR. LEMPERT: I appreciate that. But jail can mean different things. A parolee -- and as the court has pointed out, other types of people, although maybe not henind bars, are still in custody because their lives are not their own.

Q Well, the question here is whether one, on his own recognizance, is in custody in the same way.

MR. LEMPERT: Yes, absolutely.

Q If he surrendered to the state now, voluntarily, to begin his sentence, within 30 minutes or even three minutes thereafter the federal district judge could let him out again pending determination, could he not?

MR. LEMPERT: Yes, sir.

Q And you wouldn't question that the federal court had jurisdiction then.

MR. LEMPERT: I would not, absolutely.

Q Why not?

MR. LEMPERT: Because the statute says so. 2241 then confers jurisdiction on the federal courts. Now this court obviously has the power to say an individual, at least on his own recognizance, is in custody. But I don't think

that that would be a reasonable interpretation of 2241.

Q A fellow is in custody. He files his habeas corpus petition and the district judge before any petition is filed then enlodges him on his own recognizance.

MR. LEMPERT: The critical time is at the time of the filing of the petition. If he is in at that time, the court's in jurisdiction. If he is out at that time, the court is not. At least, the federal court.

Q Even if he is just sitting in the ante room of the State Judge Nelson's office --

MR. LEMPERT: Waiting to go in. That would be my view. Again, it may be a very narrow construction of the law, of the rule with respect --

Q Well, do you suppose that Judge Peckham might have said to himself, well, I don't have jurisdiction of this petitioner's petition for habeas corpus since he is not in custody, but I'll treat this petition as a 1983 application alleging deprivation of constitutional rights and I will now, treating it that way, incident to the 1983 petition, I'll continue him on his own recognizance. Could he have done that?

MR. LEMPERT: Possibly.

I don't know. I don't know. But the petition in this case was filed uner 2241 as a habeas corpus under C-3.

Q Well, It is not uncommon, is it, to mistreat

things?

Q I appreciate that but I think what the defendant is doing in this case is attempting to have the federal courts act as a superappellate review by way of a writ in the nature of Corin and Logus to get the matter heard as an appeal rather than a habeas corpus because that has, in my view, very precise meanings and very precise requirements, which requirements have not been met by this defendant in this case.

Thank you, sir.

MR. CHIEF JUSTICE BURGER: Do you have anything further?

REBUTTAL ARGUMENT OF STANLEY A. BASS., ESQ.,

ON BEHALF OF THE PETITIONER

MR. BASS: Just this, Mr. Chief Justice, that for the record, after the federal habeas was denied, the state trial judge then granted another stay of about 12 days and that was the stay that kept him out until Mr. Justice Black acted on August the 12th. The habeas petition was denied on July 31st so that there was a dovetailing throughout of stay orders that were granted by the state trial judge before the federal judge took over.

Q Did I get the impression that you thought -- that you said before, going in in this process of surrendering himself to custody of the state, then immediately filing a

petition for habeas corpus in the federal court and asking for a stay was just a meaningless ritual. Is that --?

MR. BASS: I thought it was a meaningless ritual for the petition to have to go through. I also mentioned in the brief that I thought it would be an extremely inadequate remedy to suggest that all he has to do is surrender either into the ante room or to the institution of confinement and then he could probably be bailed by a federal judge.

Two circuits, the Fifth and the Eighth Circuit that decided the issue the other way contrary to the Ninth Circuit both involved Civil Rights cases coming out of the south and it was no accident that in those cases it was extremely important that the person who was still out on some sort of form of release be allowed to seek vindication in federal courts in a timely fashion and we submit that there really is no reason other than just a definitional one which is outmoded and we think has been superceded by Strait versus Laird and all of the previous cases, that this person can be considered in custody for purposes of 2241 C-3.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Bass and Mr. Lempert, thank you.

The case is submitted.

(Whereupon, at 2:22 o'clock p.m., the case was submitted.)